IN THE SUPERIOR COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 2772 EDA 2001

In re: Estate of Adelaide Briskman, Deceased
Appeal of Mark G. Resop

APPLICATION FOR REARGUMENT OR FOR REHEARING EN BANC

Application from the Order of the Superior Court
(Before: Hon. Joseph A. Del Sole, P.J.,
and Hon. Debra B. Todd and Hon. Frank J. Montemuro Jr., JJ.)
Filed September 9, 2002

On Appeal from the Decree and Opinion of the Hon. Alex Bonavitacola
Issued August 13, 2001
In the Court of Common Pleas of Philadelphia
Orphans' Court Division, O.C. No. 1487 of 1994

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Estate of Julie K. Palley

Dated: September 23, 2002

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

STATUTES

RULES

ORDER IN QUESTION

The appellee, Estate of Julie Palley, makes this application for reargument or for rehearing by the court en banc from the order of this court filed September 9, 2002 ("order"), by which a panel of this court (Del Sole, P.J., and Todd and Montemuro, JJ.) reversed the decree of the lower court for lack of jurisdiction in the lower court, the panel finding that the appellee's decedent lacked standing in the lower court.

The findings and conclusions of the order that are relevant to this application are as follows:

1. The court concluded that, although the standing of the appellee as the decedent's intestate heir to appeal under 20 Pa.C.S. §908 from the decree of the Register of Wills was never challenged by the appellant before the lower court, the issue was a jurisdictional issue that could not be waived by the appellant and could be raised by the court sua sponte. (Order, ¶13, pp. 9-10.)

2. In a footnote to the order, the court noted that, even if it were to review the lower court's opinion on the merits, the same result would obtain, finding that the appellant's counsel had stipulated that the signature on the will in question was that of the decedent and "Once Appellee stipulated to the authenticity of the decedent's signature, any question concerning the execution of the will was resolved." (Order, ¶15, n. 9, pp. 10-11.)

The order in question makes no mention of the finding of the lower court that appellant had "unclean hands," no mention of the finding of the lower court that one of the subscribing witnesses did not actually see the decedent sign the contested will (contrary to the "self-proving" affidavit that was the basis of the probate by the Register), and no mention of the issues of undue influence and fraud, both of which were raised by the appellee below and by the appellant on appeal.

A complete copy of the order in question is attached to this application as Schedule A.

Because of the multiple references in this application to the lower court decree that is the subject of the appeal, a copy of that decree is also attached to this application as Schedule B.

POINTS OF LAW OR FACT OVERLOOKED OR MISAPPREHENDED BY THE COURT

The appellee, Estate of Julie Palley, believes that the following points of law or fact were overlooked or misapprehended by this court:

I. In concluding that the standing of the appellee was a question of jurisdiction that could not be waived by the appellant and could be raised by the court sua sponte, this court overlooked decisions of the Supreme Court that require the opposite conclusion.

II. This court overlooked the findings of the lower court that the appellant had "unclean hands" and that the probate of the will was obtained by a false affidavit filed with the Register of Wills, that these findings were not effectively contested by the appellant on appeal, and that these findings require a reversal of the probate of the will regardless of whether the appellee had standing below.

III. In concluding that "all questions concerning the execution of the will" were resolved by the appellee's stipulation to the authenticity of the decedent's signature, this court overlooked two other issues raised by appellee below and by appellant on appeal, namely fraud and undue influence, both of which are sufficient to invalidate the will even if it were signed by the decedent and both of which are supported by the record and decisions of the Supreme Court.

REASONS FOR ALLOWANCE OF REARGUMENT

This court should allow reargument or a rehearing before the court en banc on the points of law or fact that were overlooked or misapprehended for the following reasons:

I. In concluding that the standing of the appellee was a question of jurisdiction that could not be waived by the appellant and could be raised by the court sua sponte, the court overlooked decisions of the Supreme Court that require the opposite conclusion.

The decree of the court below arose out of a will contest by Julie Palley, the decedent's niece and sole intestate heir. Although the appellant (the proponent of the will) initially questioned whether Ms. Palley was in fact the decedent's niece, the appellant conceded the issue at trial (R. 128a-129a.) and never raised any question about whether an intestate heir had standing to contest the probate of the will. The issue was therefore waived under Pa. Rule of Appellate Procedure 302(a) unless the issue is jurisdictional and cannot be waived.

This court concluded that standing to appeal to the Orphans' Court as a "party in interest who is aggrieved by a decree of the register" under 20 Pa.C.S. §908 is a jurisdictional issue that cannot be waived by the parties and can be raised by the court at any time.

This conclusion of the court is inconsistent with the opinion of the Supreme Court in *Beers v. Unemployment Compensation Board of Review*, 534 Pa. 605, 633 A.2d 1158 (Pa. 1993). In that case, the Supreme Court held that whether or not a party was a "person aggrieved by an adjudication of a Commonwealth agency" under 2 Pa.C.S. §702, which creates a right of appeal from actions of governmental agencies, was ***not*** a jurisdictional issue. 534 Pa. at 610, n. 6. Accord, *Hertzberg v. Zoning Board of Adjustment of the City of Pittsburgh*, 554 Pa. 249, 255, n. 6, 721 A.2d 43 (1998).

The statute before the Supreme Court in *Beers*, 20 Pa.C.S. §702, provides as follows:

> "Any person aggrieved by an adjudication of a Commonwealth agency who has a direct interest in such adjudication shall have the right to appeal therefrom to the court vested with jurisdiction of such appeals by or pursuant to Title 42 (relating to judiciary and judicial procedure)."

The statute before this court in this appeal, 20 Pa.C.S. §908(a), provides as follows:

> "(a) When allowed.—Any party in interest who is aggrieved by a decree of the register, or a fiduciary whose estate or trust is so aggrieved, may appeal therefrom to the court within one year of the decree; Provided, That the executor designated in an instrument shall not by virtue of such designation be deemed a party in interest who may appeal from a decree refusing probate of it. The court, upon petition of a party in interest, may limit the time for appeal to three months."

Both statutes create a right of appeal and both statutes grant that right of appeal to persons "aggrieved" by decisions of an official or agency. There is nothing in either statute to suggest any reason why standing under one statute should be a jurisdictional issue while standing under the other statute is not. Because the Supreme Court has twice ruled that the standing of a party appealing under 2 Pa.C.S. §702 is *not* a question of jurisdiction and can *not* be raised for the first time on appeal, the standing of a party appealing under 20 Pa.C.S. §908 is also *not* a jurisdictional issue and can *not* be raised for the first time on appeal to this court, or by this court sua sponte. Cf., Pa.R.A.P. 302(a)); *Hertzberg*, *supra*.

The issue of whether or not standing under 20 Pa.C.S. §908 is a jurisdictional issue was not briefed or argued by either party and is contrary to two decisions of the Supreme Court. The conflict with the decisions of the Supreme Court in *Beers* and *Hertzberg*, as well as fairness to the parties, require that the issue be reargued and reconsidered by this court, either by the panel to which the case was originally assigned or by the court en banc.

II. This court overlooked the findings of the lower court that the appellant had "unclean hands" and that the probate of the will was obtained by a false affidavit filed with the Register of Wills, that these findings were not effectively contested by the appellant on appeal, and that these findings require a reversal of the probate of the will regardless of whether the appellee had standing below.

The order of this court affirms the probate of a will even though the court below found that the proponent of the will had "unclean hands" (Decree, p. 3) and even though the factual findings of the court below show that the appellant committed a fraud upon the Register of Wills, submitting an affidavit to the Register that was false and that the appellant knew was false.

The will in question was originally probated by the Register of Wills without taking any testimony and solely on the basis of a "self-proving" affidavit of the decedent and the subscribing witnesses that

was attached to the will. See 20 Pa.C.S. §3132.1. However, "the statements in the acknowledgements must actually be true." (Decree, p. 6)

The affidavit attached to the will stated that the decedent signed the will in the presence of the subscribing witnesses and that each witness signed the will in the presence of the decedent and each other. (R. 21a) In her deposition, one of the subscribing witnesses, Linda K. John, testified that she did *not* see the decedent sign the will, but that the will appeared on her desk with a note from the appellant (the manager of the bank branch that employed her[1]) asking her to sign the document and return it to him. (Decree, pp. 6-7, 8) These facts, found by the court below based on Ms. John's testimony and largely uncontested by the appellant.[2], show that the affidavit submitted to the Register was false and the appellant knew that it was false.

In reversing the decree of the lower court, this court has overlooked *In re Estate of Pedrick*, 505 Pa. 530, 482 A.2d 215 (1984), cited and relied upon by the court below (Decree, p. 3), in which the Supreme Court held that the actions of the proponent of a will which are "unconscionable" and which "shocks the conscience of this Court" require that the probate of the will be denied. The evidence shows that the appellant obtained letters testamentary by a fraud upon the Register of Wills and the court below found that it was "obligatory" to deny the probate of the will "to prevent injustice and to protect the integrity of the system." (Decree, p. 4) This finding was overlooked by this court, and should be affirmed.

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[1] The other subscribing witness and the notary were also employees of the bank branch of which the appellant was the manager. (Decree, p. 3, n. 2)

[2] The appellant argued that the lower court "abused its discretion by determining the credibility of witnesses it did not observe" (Appellant's Brief, "Statement of Questions Presented," p. 4), but Linda John's testimony was taken by deposition and the appellant has never suggested any reasons to question her credibility. The testimony of Ms. John was contradicted by the trial testimony of the notary, Annette Tufano, but the trial testimony of Annette Tufano was contradicted by her own deposition, leading the court below to find it to be "neither credible nor worthy of belief" (Decree, p. 8). Even the appellant conceded that there were "serious conflicts" in her testimony. (Appellant's Brief, p. 16.) So, although the appellant argued that it was error to disbelieve Ms. Tufano, he never argued that it was error to believe Ms. John.

The Supreme Court stated that the doctrine of unclean hands "is derived from the unwillingness of a court to give relief to a suitor who has so conducted himself as to shock the moral sensibilities of the judge, and *it has nothing to do with the rights or liabilities of the parties*." *Pedrick*, 504 Pa. at 544, (emphasis added). It has also been held that it is within the inherent power of the Orphans' Court "to correct its own records and decrees in the interest of justice." *Gerlach Will*, 9 Fid.Rep.2d 325 (O.C. Del. Co. 1989). The court below therefore had the power to correct a fraud upon the Register of Wills even if the appellee had no standing to appeal from the decree of the Register.

Because the finding of "unclean hands" was overlooked by this court in its order, because the opinion of the lower court shows that the appellant obtained the probate of the will by a false affidavit, and because it is within the inherent power of the Orphans' Court to correct decrees in the interest of justice and to prevent frauds upon the courts and the Register of Wills, the issues of (1) whether the lower court abused its discretion in finding that the appellant had unclean hands and (2) whether the decree of the court below has a jurisdictional basis that survives any lack of standing of the appellee should both be reargued and reconsidered by this court, either by the panel to which the case was originally assigned or by the court en banc.

III. In concluding that "all questions concerning the execution of the will" were resolved by the appellee's stipulation to the authenticity of the decedent's signature, this court overlooked the two other issues raised by appellee below and by appellant on appeal, namely fraud and undue influence, both of which are sufficient to invalidate the will even if it were signed by the decedent and both of which are supported by the record and by decisions of the Supreme Court.

The authenticity of the decedent's signature is simply irrelevant to the claims of fraud and undue influence that were raised in the court below and in the appeal to this court.

There was evidence introduced in the court below that the decedent was transferring assets to the appellant (who was the manager of the bank branch where she did her banking) in the mistaken belief that it would protect her from legal actions that a hospital might take against her for an unpaid bill, and that the decedent signed a deed conveying a valuable interest in property to the appellant at the appellant's direction without understanding the true effect of the deed. (Appellee's Brief, pp. 28-29) The evidence therefore showed not only that the appellant had influence over the decedent but that he had actually used that influence to his own advantage.

As shown above, there was also evidence (and a finding of the court below) that the appellant controlled the execution of the will and that at least one of the subscribing witnesses did not see the decedent sign the will in question, but signed the will at the request of the appellant. (Decree, p. 8)

Despite this evidence and the findings of the court below, this court noted in a footnote to its order that, even if it were to review the lower court's opinion on the merits, the same result would obtain because the appellee's counsel had stipulated that the signature on the will in question was that of the decedent and "Once Appellee stipulated to the authenticity of the decedent's signature, any question concerning the execution of the will was resolved." (Order, ¶15, n. 9, pp. 10-11)

In reaching that conclusion, this court has overlooked the issues of fraud and undue influence (both of which were raised by appellee below and by appellant in his appeal) and the decisions of the Supreme Court in *Blume v. Hartman*, 115 Pa. 32, 8 A. 219 (1886), and *Estate of Clark*, 461 Pa. 52, 334 A.2d 628 (1975).

In *Blume v. Hartman*, 115 Pa. 32, 8 A. 219 (1886), the son of the decedent (who was the principal beneficiary of the will) arranged for his mother to sign the will before witnesses, but there was no evidence that the decedent had ever read the will or knew its contents. The Supreme Court stated:

> "[T]he plaintiff, unfortunately perhaps for himself, chose to conduct his proceedings in the procurement and the preparation of the will and in the inducements to his mother to sign it, secretly and by himself alone. ... He is directly responsible, therefore, for every inference which may fairly be made against him as the means he employed to obtain the assent of his mother to the execution of the will in question." 115 Pa. at 39-40, quoted with approval and followed in *Estate of Clark*, 461 Pa. 52, 66, 334 A.2d 628 (1975), (the court even adding emphasis to the last sentence of the above quote).

In both *Blume v. Hartman* and *Estate of Clark*, there was no question but that the decedents had signed the wills in question. In each of those cases, the issue was *not* the authenticity of the decedent's signature but whether the (admittedly authentic) signature was obtained by the primary beneficiary of the will through fraud or undue influence.

In this case, the court below found that the appellant (who is the primary beneficiary under the will in question) arranged for the employees under his control to sign the will and the affidavit. (Decree, p. 8) The record below is also void of any evidence that the decedent ever read or understood the will, or that she ever wished to give the appellant anything. The appellee is therefore entitled to every

inference which may be drawn from the circumstances surrounding the execution of the will, and those inferences support findings of fraud and undue influence. See *Blume v. Hartman, supra*, and *Estate of Clark, supra*.

Because the issues of fraud and undue influence were *not* resolved by the stipulation as to the authenticity of the decedent's signature, the issues of (1) whether or not there was sufficient evidence to sustain the decree of the lower court on the grounds of undue influence or fraud or (2) whether the decree should be remanded to the lower court for reconsideration in light of the order of this court should be reargued and reconsidered by this court, either by the panel to which the case was originally assigned or by the court en banc.

CONCLUSION

For the reasons stated above, the appellee respectfully requests that this court grant reargument, either by the panel to which the case was originally assigned or by the court en banc, on the following issues:

1. Whether or not standing under 20 Pa.C.S. §908 is a jurisdictional issue that cannot be waived by the parties and can be raised by the court sua sponte.

2. Whether the lower court abused its discretion in finding that the appellant had unclean hands and whether that finding has a jurisdictional basis that survives any lack of standing of the appellee.

3. Whether or not there was sufficient evidence to sustain the decree of the lower court on the grounds of undue influence or fraud, or whether the decree should be remanded to the lower court for reconsideration in light of the order of this court.

Respectfully submitted,

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CERTIFICATION OF SERVICE

I hereby certify that on September 23, 2002, two true and correct copies of the foregoing Application for Reargument or for Rehearing En Banc were sent by United States first class mail, postage prepaid, to:

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