2023 ACBA Bench-Bar Conference - Orphans' Court Presentation - June 16, 2023

Program Materials

1. **Review of Ethical Issues in Orphans' Court.**

   Pa.R.D.E. 301: Proceedings Where an Attorney is Declared to be Incapacitated or Severely Mentally Disabled.

   Pa.R.D.E. 502 and 514: Pennsylvania Lawyers Fund for Client Security.

2. **Review of Pennsylvania appellate case law involving Orphans' Court cases for 2022-2023.**

   In Re: Trust Established Under Agreement of Sarah Mellon Scaife, 276 A.3d 776 (Pa.Super. 2022); *petition for allowance of appeal denied* (January 24, 2023), 291 A.3d 862 (Pa. 2023).

   Defining the fiduciary exception to the attorney-client privilege.

   In the Interest of M.A., 284 A.3d 1202 (Pa.Super 2022).

   Can an alleged incapacitated person hire their own private legal counsel, despite court-appointed counsel?

   In the Matter of L.E.K., 289 A.3d 74 (Pa.Super. 2022).

   Personal jurisdiction: by service, waiver or consent.

3. **PA Guardianship Tracking System - Pa.R.J.A. 510.**

   A very brief overview of the system and it's positive impact.

4. **Questions for the Orphans' Court Judges from attendees.**

Purdon's Pennsylvania Statutes and Consolidated Statutes
Pennsylvania Rules of Disciplinary Enforcement (Refs & Annos)
Subchapter C. Disability and Related Matters

Pa.R.D.E., Rule 301, 42 Pa.C.S.A.

Rule 301. Proceedings Where an Attorney is Declared to be Incapacitated or Severely Mentally Disabled

Currentness

(a) The clerk of any court within this Commonwealth that declares that an attorney is incapacitated or that orders involuntary treatment of an attorney on the grounds that the attorney is severely mentally disabled or that denies a petition for review of a certification by a mental health review officer subjecting an attorney to involuntary treatment, shall within 24 hours of such disposition transmit a certificate thereof to Disciplinary Counsel, who shall file such certificate with the Supreme Court.

> *Note:* It is the responsibility of each local court to adopt any necessary procedures so that mental health officers and individual judges notify the clerk of the court that the respondent in a matter is an attorney and that a certificate must accordingly be sent to Disciplinary Counsel under this rule.

(b) Upon being advised that an attorney has been declared incapacitated or involuntarily committed to an institution on the grounds of incapacity or severe mental disability, Disciplinary Counsel shall secure and file a certificate in accordance with the provisions of subdivision (a) of this rule. If the declaration of incapacity or commitment occurred in another jurisdiction, it shall be the responsibility of Disciplinary Counsel to secure and file a certificate of such declaration or commitment.

(c) Where an attorney has been judicially declared incapacitated or involuntarily committed on the grounds of incapacity or severe mental disability, the Supreme Court, upon proper proof of the fact, shall enter an order transferring such attorney to inactive status effective immediately and for an indefinite period until the further order of the Court. A copy of such order shall be served upon such formerly admitted attorney, the guardian of such person, and/or the director of the institution to which such person has been committed in such manner as the Court may direct. Where an attorney has been transferred to inactive status by an order in accordance with the provisions of

this subdivision and, thereafter, in proceedings duly taken, the person is judicially declared to be competent, the Court upon application may dispense with further evidence that the disability has been removed and may direct reinstatement to active status upon such terms as are deemed proper and advisable.

(d) Whenever the Board shall petition the Court to determine whether an attorney is incapacitated from continuing the practice of law by reason of mental infirmity or illness or because of addiction to drugs or intoxicants, the Court may take or direct such action as it deems necessary or proper to determine whether the attorney is so incapacitated, including the examination of the attorney by such qualified medical experts as the Court shall designate. If, upon due consideration of the matter, the Court concludes that the attorney is incapacitated from continuing to practice law, it shall enter an order transferring the attorney to inactive status on the ground of such disability for an indefinite period and until the further order of the Court. If examination of a respondent-attorney by a qualified medical expert reveals that the respondent lacks the capacity to aid effectively in the preparation of a defense, the Court may order that any pending disciplinary proceeding against the respondent shall be held in abeyance except for the perpetuation of testimony and the preservation of documentary evidence. The order of abatement may provide for reexaminations of the respondent-attorney at specified intervals or upon motion by Disciplinary Counsel. The Court shall provide for such notice to the respondent-attorney of proceedings in the matter as it deems proper and advisable and may appoint an attorney to represent the respondent if the respondent is without adequate representation.

(e) If, during the course of a disciplinary proceeding, the respondent contends that the respondent is suffering from a disability by reason of mental or physical infirmity or illness, or because of addiction to drugs or intoxicants, which makes it impossible for the respondent to prepare an adequate defense, the respondent shall complete and file with the Court a certificate of admission of disability. The respondent shall serve a copy of the certificate on the Board and Disciplinary Counsel. The certificate shall:

(1) identify the precise nature of the disability and the specific or approximate date of the onset or initial diagnosis of the disabling condition;

(2) contain an explanation of the manner in which the disabling condition makes it impossible for the respondent to prepare an adequate defense;

(3) have appended thereto the opinion of at least one medical expert that the respondent is unable to prepare an adequate defense and a statement containing the basis for the medical expert's opinion; and

(4) contain a statement, signed by the respondent, that all averments of material fact contained in the certificate and attachments are true upon the respondent's knowledge or information and belief and made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

The respondent may attach to the certificate affidavits, medical records, additional medical expert reports, official records, or other documents in support of the existence of the disabling condition or the respondent's contention of lack of physical or mental capacity to prepare an adequate defense.

Upon receipt of the certificate, the Court thereupon shall enter an order immediately transferring the respondent to inactive status until a determination is made of the respondent's capacity to aid effectively in the preparation of a defense or to continue to practice law in a proceeding instituted in accordance with the provisions of subdivision (d) of this rule unless the Court finds that the certificate does not comply with the requirements of this subdivision, in which case the Court may deny the request for transfer to disability inactive status or enter any other appropriate order. Before or after the entry of the order transferring the respondent to inactive status under this subdivision, the Court may, upon application by Disciplinary Counsel and for good cause shown, take or direct such action as the Court deems necessary or proper to a determination of whether it is impossible for the respondent to prepare an adequate defense, including a direction for an examination of the respondent by such qualified medical experts as the Court shall designate. In its discretion, the Court may direct that the expense of such an examination shall be paid by the respondent.

The order transferring the attorney to disability inactive status under this subdivision shall be a matter of public record. The certificate of admission of disability and attachments to the certificate shall not be publicly disclosed or made available for use in any proceeding other than a subsequent reinstatement or disciplinary proceeding except:

(i) upon order of the Supreme Court;

(ii) pursuant to an express written waiver by the attorney; or

(iii) upon a request by the Pennsylvania Lawyers Fund for Client Security Board pursuant to Enforcement Rule 521(a) (relating to cooperation with Disciplinary Board).

If the Court shall determine at any time that the respondent is able to aid effectively in the preparation of a defense or is not incapacitated from practicing law, it shall take such action as it deems proper and advisable including a direction for the resumption of the disciplinary proceeding against the respondent.

(f) The Board shall cause a notice of transfer to inactive status to be published in the legal journal and a newspaper of general circulation in the county in which the disabled attorney practiced.

(g) The Board shall promptly transmit a certified copy of the order of transfer to inactive status to the president judge of the court of common pleas of the judicial district in which the disabled attorney practiced and shall request such action under the provisions of Enforcement Rule 321 (relating to appointment of conservator to protect interests of clients of absent attorney) as may be indicated in order to protect the interests of the disabled attorney and the clients of the disabled attorney.

(h) Except as provided in subdivision (c), a disabled attorney may not resume active status until reinstated by order of the Court upon petition for reinstatement pursuant to Rule 218 (relating to reinstatement). A disabled attorney shall be entitled to apply for reinstatement to active status once a year or at such shorter intervals as the Court may direct in the order transferring the respondent to inactive status or any modification thereof. Such application shall be granted by the Court upon a showing by clear and convincing evidence that the formerly admitted attorney's disability has been removed and such person is fit to resume the practice of law. Upon such application, the Court may take or direct such action as it deems necessary or proper to a determination of whether the formerly admitted attorney's disability has been removed including a direction for an examination of the formerly admitted attorney by such qualified medical experts as the Court shall designate. In its discretion, the Court may direct that the expense of such an examination shall be paid by the formerly admitted attorney.

(i) In a proceeding seeking a transfer to inactive status under this rule, the burden of proof shall rest with the Board. In a proceeding seeking an order of reinstatement to active status under this rule, the burden of proof shall rest with the respondent-attorney.

(j) The filing of an application for reinstatement to active status by a formerly admitted attorney transferred to inactive status because of disability shall be deemed to constitute a waiver of any doctor-patient privilege with respect to any treatment of formerly admitted attorney during the period of disability. The formerly admitted attorney shall be required to disclose the name of every psychiatrist, psychologist, physician and hospital or other institution by whom or in which the formerly admitted attorney has been examined or treated since transfer to inactive status and shall furnish to the Court written consent to each to divulge such information and records as requested by court appointed medical experts.

(k) As used in this rule, the term "disabled attorney" means an attorney transferred to inactive status under this rule.

(l) See Rule 601(a) (relating to statutes and other authorities suspended or abrogated).

Credits

Amended Sept. 22, 1980, effective 120 days after Oct. 11, 1980; Nov. 10, 1980, effective Feb. 8, 1981; March 11, 1983, effective April 2, 1983; Nov. 7, 1988, effective Nov. 26, 1988; April 9, 1998, effective May 2, 1998, governing all matters thereafter commenced and, insofar as just and practicable, matters then pending; Jan. 3, 2011, effective in 30 days [Feb. 2, 2011]; April 18, 2019, eff. in 30 days [May 18, 2019].

Pa.R.D.E., Rule 301, 42 Pa.C.S.A., PA ST DISC Rule 301

Current with amendments received through April 15, 2023. Some rules may be more current; see credits for details.

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Purdon's Pennsylvania Statutes and Consolidated Statutes
Pennsylvania Rules of Disciplinary Enforcement (Refs & Annos)
Subchapter E. Pennsylvania Lawyers Fund for Client Security

Pa.R.D.E., Rule 502, 42 Pa.C.S.A.

Rule 502. Pennsylvania Lawyers Fund for Client Security

Effective: February 24, 2021
Currentness

(a) General Rule.-- The Supreme Court shall establish a separate fund to be known as the "Pennsylvania Lawyers Fund for Client Security." The Fund shall consist of such amounts as shall be transferred to the Fund pursuant to this subchapter. The Fund is created by contributions of the members of the Bar to aid in ameliorating the losses caused to clients and others by defalcating members of the Bar acting as attorney or fiduciary. No Claimant or other person shall have any legal interest in such Fund or right to receive any portion thereof, except for discretionary disbursements therefrom directed by the Board or the Supreme Court, all payments from the Fund being a matter of grace and not of right. There shall be no appeal from a decision of the Board. A decision of the Board to grant or deny payment to a Claimant shall not be subject to judicial review by any court. The Supreme Court reserves the right to amend or repeal this subchapter.

(b) Additional fee.-- Every attorney who is required to pay an active annual fee under Rule 219 (relating to annual registration of attorneys) shall pay an additional annual fee of $50.00 for use by the Fund. Such additional fee shall be added to, and collected with and in the same manner as, the basic annual fee. All amounts received pursuant to this subdivision shall be credited to the Fund.

(c) Transfers to Fund.-- The Administrative Office and Attorney Registration Office shall transfer to the Fund all bequests and gifts hereafter made for use by the Fund. All monies or other assets of the Fund shall constitute a trust and shall be held in the name of the Fund, subject to the direction of the Board.

(d) Audit.-- The Board shall annually obtain an independent audit of the Fund by a certified public accountant, and shall file a copy of such audit with the Supreme Court.

Credits

Adopted April 30, 1982, generally effective May 15, 1982; paragraph (b) effective for assessment years beginning July 1, 1982. Amended April 14, 1983, effective July 1, 1983; Dec. 18, 1987, effective July 1, 1988; March 11, 1993, effective May 22, 1993; effective March 27, 1995; April 25, 1997 amendment effective for the 1997-1998 assessment and rescinded for the 1998-1999 assessment and thereafter; amended June 29, 2007, effective Sept. 4, 2007; amended April 1, 2008, imd. effective; amended April 16, 2009, effective upon publication in the *Pennsylvania Bulletin* [39 Pa.B. 2193, May 2, 2009]; April 8, 2011, imd. effective for the 2011-2012 assessment and continuing until further Order of the Court; April 9, 2012, imd. effective for the 2012-13 assessment and thereafter shall revert to the provisions effective for the 2011-12 assessment; June 4, 2012, effective in 30 days [July 4, 2012]; Feb. 12, 2013, imd. effective, extending the amendments made by Order of April 9, 2012 for the 2013-14 annual attorney assessment; Feb. 9, 2015, imd. effective for the 2015-2016 assessment; Feb. 15, 2017, imd. effective for the 2017-18 annual attorney assessment; Feb. 7, 2019, imd. effective for the 2019-2020 annual attorney assessment; Feb. 24, 2021, effective for the 2021-22 annual attorney assessment and continuing until further Order of the Court.

Pa.R.D.E., Rule 502, 42 Pa.C.S.A., PA ST DISC Rule 502
Current with amendments received through April 15, 2023. Some rules may be more current; see credits for details.

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Purdon's Pennsylvania Statutes and Consolidated Statutes
Pennsylvania Rules of Disciplinary Enforcement (Refs & Annos)
Subchapter E. Pennsylvania Lawyers Fund for Client Security

Pa.R.D.E., Rule 514, 42 Pa.C.S.A.

Rule 514. Reimbursable Losses

Currentness

(a) General Rule. For the purposes of this subchapter reimbursable losses consist of those losses of money, property or other things of value which meet all of the following requirements:

(1) The loss:

(i) was caused by the Dishonest Conduct of a Covered Attorney when acting:

(A) as an attorney-at-law;

(B) in a fiduciary capacity customary to the practice of law, such as administrator, executor, trustee of an express trust, guardian or conservator; or

(C) as an escrow agent or other fiduciary, having been designated as such by a client in the matter in which the loss arose or having been so selected as a result of a client-attorney relationship; or

(ii) is in the nature of unearned, unrefunded fees paid to a lawyer who, without completing the engagement, died, was transferred to inactive disability status, or cannot be located.

(2) The loss was that of money, property or other things of value which came into the hands of the Covered Attorney by reason of having acted in the capacity described in paragraph (1) of this subdivision. Consequential or incidental damages, such as lost interest, or attorney fees

or other costs incurred in seeking recovery of a loss, may not be considered in determining the Reimbursable Loss.

(3) The loss, or the reimbursable portion thereof, was not covered by any insurance or by any fidelity or similar bond or fund, whether of the Covered Attorney, or the Claimant or otherwise.

(4) The loss was not incurred by:

(i) The spouse or other close relative, partner, associate, employer or employee of the Covered Attorney, or a business entity controlled by the Covered Attorney, or any entity controlled by any of the foregoing;

(ii) An insurer, surety or bonding agency or company, or any entity controlled by any of the foregoing;

(iii) Any government unit;

(iv) Any financial institution that may recover under a "banker's blanket bond" or similar commonly available insurance or surety contract;

(v) A business organization having twenty or more employees; or

(vi) An individual or business entity suffering a loss arising from personal or business investments not arising in the course of the client-attorney relationship.

(5) In cases of extreme hardship or special and unusual circumstances, and subject to the provisions of paragraph (b), the Board may, in its discretion, and consistent with the purpose of the Fund, recognize a claim which would otherwise be excluded under this subchapter.

(6) In cases where it appears that there will be unjust enrichment, or the Claimant unreasonably or knowingly contributed to the loss, the Board may, in its discretion, deny the claim.

(7) A payment from the Fund, by way of subrogation or otherwise, will not benefit any entity specified in paragraph (4) of this subdivision.

(b) Maximum Recovery. The maximum amount which may be disbursed from the Fund to any one Claimant with respect to the Dishonest Conduct of any one Covered Attorney shall be $100,000. The maximum amount which may be disbursed from the Fund as a result of any one Covered Attorney shall be $1,000,000. The Board may request the Supreme Court of Pennsylvania to exceed the $1,000,000 maximum when the Board determines, in the exercise of its discretion, that exceeding the maximum is necessary to adequately compensate all victims of the Dishonest Conduct of the Covered Attorney and exceeding the maximum will not unduly burden the Fund.

(c) No lawyer shall accept payment for assisting a Claimant with the filing of a claim with the Fund, unless such payment has been approved by the Board.

Credits

Adopted April 30, 1982, effective May 15, 1982. Amended Dec. 18, 1987, effective July 1, 1988; Feb. 24, 2000, effective July 1, 2000; June 29, 2007, effective Sept. 4, 2007; Nov. 30, 2010, effective Dec. 30, 2010; Jan. 24, 2014, effective in 30 days [Feb. 23, 2014]; Dec. 9, 2019, effective in 30 days [Jan. 8, 2020].

Pa.R.D.E., Rule 514, 42 Pa.C.S.A., PA ST DISC Rule 514
Current with amendments received through April 15, 2023. Some rules may be more current; see credits for details.

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276 A.3d 776
Superior Court of Pennsylvania.

IN RE: TRUST ESTABLISHED UNDER AGREEMENT OF SARAH MELLON SCAIFE, DECEASED DATED MAY 9, 1963
Appeal of: PNC Bank, N.A.

No. 722 WDA 2021
|
Argued March 1, 2022
|
Filed: May 23, 2022

Synopsis

Background: Corporate and individual trustees of trust filed final account and petition for adjudication asking whether trustees' failure to create separate trust for benefit of settlor's descendant, as trust beneficiary, prior to descendant's death constituted breach of fiduciary duties. Income beneficiaries and descendant's estate filed objections. Estate filed motions to compel production, including of documents relating to law firm's provision of legal services to trust. The Court of Common Pleas, Orphans' Court, granted motions. Trustees objected to estate's notice of intent to subpoena documents from firm, and estate filed third motion to compel, seeking unredacted versions of previously produced documents. The Court of Common Pleas, Allegheny County, Orphans' Court, No. 02-20-2506, Joseph K. Williams, J., granted estate's motion and certified order for immediate appeal. Corporate trustee appealed.

The Superior Court, No. 722 WDA 2021, Murray, J., held that fiduciary exception to attorney-client privilege required trustee to disclose communications with counsel regarding trust administration.

Affirmed.

Procedural Posture(s): Interlocutory Appeal; Motion to Compel Discovery.

***778** Appeal from the Order Entered May 25, 2021, In the Court of Common Pleas of Allegheny County, Orphans' Court, at No. 02-20-2506, Joseph K. Williams, J.

Attorneys and Law Firms

Hara K. Jacobs, Philadelphia, for appellant.

Anthony T. Kovalchick, Pittsburgh, for Commonwealth of Parens Patriae, appellee.

David A. Strassburger, Pittsburgh, for Groll, Gutnick, Miller, and Wendell, appellees.

Jennifer D. Gayle, King of Prussia, for Scaife, appellees.

BEFORE: MURRAY, J., SULLIVAN, J., and COLINS, J.*

Opinion

OPINION BY MURRAY, J.:

***779** In this collateral appeal pursuant to Pa.R.A.P. 313,[1] we consider whether the fiduciary exception to the attorney-client privilege and attorney work product doctrine,

first adopted by the common pleas court in *Follansbee v. Gerlach*, 56 Pa. D. & C.4th 483 (C.C.P. Allegheny 2002), is contrary to the law in Pennsylvania, following our Supreme Court's plurality decision in *In re Estate of McAleer*, —— Pa. ——, 248 A.3d 416 (2021) (*McAleer II*).

PNC Bank, N.A. (PNC or Appellant), corporate trustee of the 1963 Trust (Trust) established under the agreement of Sarah Mellon Scaife, deceased, appeals from the order granting the motion to compel discovery filed by David Zywiec (Zywiec), the personal representative of the Estate of Jennie K. Scaife (collectively, the Estate). Because we conclude a fiduciary exception is not contrary to Pennsylvania law, we affirm the orphans' court's order compelling discovery.

Factual History

On May 9, 1963, Sarah Mellon Scaife settled the Trust for the benefit of her grandchildren, their issue, their spouses, the spouses of their issue, and charitable organizations. Petition for Adjudication, 6/1/20, Rider to Item 7. From the Trust's inception through March 31, 1984 (the charitable period), the trustees were required to make annual distributions of the Trust's net income to charitable organizations. Trust, 5/9/63, Article II. Any time after the end of the charitable period, the Trust authorized the trustees to create separate trusts for any income beneficiary, any time after the end of the charitable period. Trust, 5/9/63, Article V, § 5.01. After the charitable period, the Trust authorized distribution of net income to the income beneficiaries. *Id.* § 5.02. The Trust defined income beneficiaries as the grandchildren of the donor, their spouses, the issue of grandchildren, spouses of such issue, and (in the trustees' discretion) "Charity." *Id.* §§ 1.07, 4.01.4.

In April 1984, at the end of the charitable period, the Trust began distributing net income to the only income beneficiaries at that time, Jennie K. Scaife (Jennie) and her brother, David N. Scaife (David). Estate's Objections to Account, 9/21/20, ¶ 3. Appellant became a successor corporate trustee of the Trust in 1993. *Id.* ¶ 6. David married in 1997 and had two children; David's spouse and children also became income beneficiaries. *Id.* ¶ 7. Jennie remained unmarried and childless until her death. *Id.* ¶ 6.

Over the years, the trustees issued equal distributions to David and Jennie. *Id.* ¶ 11. ***780** Jennie died from long-term ailments on November 29, 2018, at the age of fifty-five. *Id.* ¶¶ 6, 11. On March 1, 2019, the Estate, through Zywiec, requested the trustees transfer Jennie's beneficial share of the Trust to her Estate. *Id.* In February 2020, in accordance with Jennie's will, Zywiec established the Jennie K. Scaife Charitable Foundation, Inc. (Foundation). Upon learning that trustees did not create a separate trust for Jennie, Zywiec requested documentation regarding the trustees' exercise of discretion when it deemed separate trusts unnecessary. *Id.* ¶ 12.

On April 27, 2020, Zywiec and the Foundation filed a complaint against Appellant, as corporate trustee of the Trust, and Matthew A. Groll (Groll), Blaine F. Aikin (Aikin), Frederick G. Wedell, Corbin P. Miller and

Laura B. Gutnick (Gutnick) (collectively, Individual Trustees), the individual trustees of the Trust (PNC and Individual Trustees collectively referred to as Trustees). Zywiec averred Trustees had breached their fiduciary duty to Jennie by not creating a separate trust for her benefit. ***See Jennie K. Scaife Charitable Found. Inc. v. PNC Bank, N.A.***, No. 2:20-cv-617-NR-LPL, 2021 WL 837006, 2021 U.S. Dist. LEXIS 41195 (W.D. Pa. Mar. 5, 2021), The federal court ultimately abstained from exercising jurisdiction. ***See id.*** *3, 2021 U.S. Dist. LEXIS 41195 *8-9.

Trustees' First and Final Account

On June 1, 2020, Trustees filed their First and Final Account of the Trust from March 22, 1994, through December 31, 2019 (Trustees' Account). Trustees' Account, 6/1/20. Trustees additionally filed a Petition for Adjudication, presenting the following issue:

> Whether Trustees not creating a "Separate Trust" for the benefit of beneficiary Jennie K. Scaife before her death on November 29, 2018, constituted a breach of Trustees' fiduciary duties under the Trust Agreement and Pennsylvania law. The [E]state of Ms. Scaife, along with a charitable foundation the [E]state founded, contends that Trustees breached their fiduciary duties and harmed the [E]state (and the foundation) by not exercising their power to create a "Separate Trust" under Article V of the Trust instrument for the benefit of Ms. Scaife before her death. Trustees deny any such breach of fiduciary duty.

Petition for Adjudication, 6/1/20, ¶ 14.

On September 21, 2020, David and his son, David G. Scaife, both income beneficiaries, filed an objection challenging Trustees' assertion that the orphans' court could compel Trustees "to split the Trust" and the Trust could "now be divided." Scaifes' Objection, 9/21/20.

The Estate filed objections to the Account (Estate's Objections) on September 21, 2020. The Estate claimed Trustees had violated their fiduciary duty to Jennie by: (a) not exercising their discretion and determining whether separate trusts were necessary to protect the income beneficiaries' interests; (b) not acting in good faith, in violation of the Uniform Trust Act ("UTA");[2] and (c) favoring David's interests over those of Jennie. ***Id.*** ¶ 14 (a)-(c).

Individual Trustees and Appellant filed answers and new matters denying they had breached their fiduciary duty to income beneficiaries. Appellant's Answer and New Matter, 10/21/20, ¶ 1; Individual Trustees' Answer and New Matter, 10/21/20, ¶ 1. Appellant explained that in April 2017, Jennie

and David did not ask for the termination of the Trust or the creation of separate trusts. Appellant's Answer ***781** and New Matter, 10/21/20, ¶ 3. Appellant further denied breaching its fiduciary duties regarding the failure to create separate trusts. ***Id.*** ¶ 5.

Discovery

On October 26, 2020, the Estate filed its first motion to compel production of the following categories of documents:

> (1) Documents spanning the entire Accounting Period and not limited to the 30-month period in 20 Pa.C.S.A. § 7785; (2) PNC's manuals and memoranda concerning its conflict policies; (3) documents concerning the Trust's investments in its affiliates Blackrock and iShares; (4) documents concerning the legal services provided to the Trust by the law firm of Strassburger McKenna .., and the appointment of its shareholders E.J. Strassburger [(Strassburger)] and [ ] Gutnick as trustees; and (5) documents concerning the retention of a payment to Independent Fiduciary Services Consulting Services Management. As discussed herein, there is no basis for the Trustees to withhold any of these documents —which all concern the administration of the Trust —from the Estate, which is their beneficiary.

First Motion to Compel, 10/26/20, at 2 (unnumbered) (footnote omitted).

On November 5, 2020, the orphans' court entered an order directing Trustees to produce all documents related to the legal services provided by Strassburger McKenna, and the appointment of Strassburger and Gutnick as trustees. Orphans' Court Order, 11/5/20, at 1-2 (unnumbered). The orphans' court ordered production of the documents by November 17, 2020, and directed the filing of discovery motions by the close of business on November 19, 2020. ***Id.*** at 2 (unnumbered).

The Estate filed a second motion to compel on November 19, 2020. After a hearing, the orphans' court granted the Second Motion to Compel. Orphans' Court Order, 12/3/20.

On January 8, 2021, Appellant and Individual Trustees lodged objections to the Estate's notice of intent to subpoena documents from Strassburger McKenna. Appellant's objections stated, in full:

> Pursuant to Pennsylvania Rule of Civil Procedure 4009.21(c), trustee PNC Bank, N.A. ("PNC") objects

> to the proposed subpoena that is attached to these Objections as Exhibit A because it calls for the production of documents protected by the attorney-client privilege, the work product doctrine, and/or other applicable legal privilege or protection. Production of the categories of documents requested in the proposed subpoena would waive PNC's privilege without its consent.

Appellant's Objections to Notice, 1/28/21, at 2. Individual Trustees' objections included an identical general assertion of privilege and the work product doctrine. ***See*** Individual Trustees Objections, 1/28/21, at 1.

On February 23, 2021, the Estate filed its third motion to compel. Relevant to this appeal, the Estate sought production of unredacted versions of previously produced documents, in accordance with a common pleas court's decision in *Follansbee* and the Pennsylvania Superior Court's decision in *In re Estate of McAleer*, 194 A.3d 587 (Pa. Super. 2018) (*McAleer I*). Third Motion to Compel, 2/23/21, ¶ 8. According to the Estate, PNC produced its privilege log identifying 767 documents withheld and/or redacted.[3] The Estate asserted:

> ***782** The Estate raised concerns with this privilege log during the recent meet-and-confer. These issues included: logged documents that do not identify an attorney as an author or recipient; the inclusion of documents where an attorney is only one of many people copied on the transmission; not providing enough information to ascertain the subject matter of certain communications; and many of the redactions being heavy-handed and insufficiently justified. Finally, the Estate asserted that under *Follansbee*and *McAleer* [*I*], that PNC was required to produce all documents withheld on privilege grounds that are dated prior to Jennie's death on November 29, 2018.

Id.

The Orphans' Court's Decision

The orphans' court deferred ruling on the third motion to compel, pending our Supreme Court's decision in *McAleer II*.[4] May 25, 2021, following the Supreme Court's plurality decision in *McAleer II* and the submission of briefs by the parties, the orphans' court granted the Estate's third motion to compel. Orphans' Court Order,

5/25/21, at 2 (unnumbered). The orphans' court concluded "a fiduciary exception is not inconsistent with Pennsylvania law." ***Id.*** The orphans' court directed documents "which heretofore have been withheld from production based upon attorney-client privilege or work-product doctrine, involving the trustee and its beneficiaries be produced no later than 20 days from today's date." ***Id.*** The orphans' court expressly certified its order for immediate appeal pursuant to 42 Pa.C.S.A. § 702(b) (interlocutory appeals by permission). Appellant timely appealed. [5] Appellant and the orphans' court have complied with Pa.R.A.P. 1925.

Although the orphans' court certified the order for interlocutory appeal by permission, in *McAleer II*, a majority of our Supreme Court agreed that an appeal implicating the same issue constituted an appealable collateral order. ***See*** *McAleer II*, 248 A.3d at 425. We address Appellant's claims accordingly.

Appellant's Argument

Appellant presents the following issue for our review:

> Is there an "exception" to Pennsylvania's statutory attorney-client privilege and codified work product doctrine where the client of an attorney is a trustee, and trust beneficiaries demand production of privileged communications and documents?

Appellant's Brief at 4.

Appellant advances three arguments against application of the fiduciary exception to the attorney-client privilege and work product doctrines: (1) no statute recognizes a fiduciary exception, ***see id.*** at 12-13; (2) Pennsylvania law provides no basis for a fiduciary exception, ***see id.*** at 20; and (3) most jurisdictions reject a fiduciary exception, ***see id.*** at 29.

783** First, Appellant claims there is no statutory exception to the codified attorney-client privilege. ***Id. at 12. According to Appellant, the orphans' court's order "eliminated Pennsylvania's codified privileges between attorneys and their clients, which are vital to trustees carrying out their fiduciary duties." ***Id.*** (capitalization omitted). Appellant claims the attorney-client privilege, codified at 42 Pa.C.S.A. § 5928, and the attorney work product doctrine, codified at Pa.R.C.P. 4003.3, 231 Pa. Code § 4003.3, protects without exception such communications and documents from disclosure. ***Id.*** at 12-13.

Quoting ***Pittsburgh History and Landmarks Found. v. Ziegler***, 650 Pa. 406, 200 A.3d 58 (2019), Appellant argues the privilege "sweeps broader than the literal language of Section 5928: '[I]f open communication is to be facilitated[,] a broader range [of] derivative protections is implicated." Appellant's Brief at 13 (quoting *Ziegler*, 200 A.3d at 80).

> Only with full information from the client can an attorney provide relevant and sound legal advice. A client, however, will not reveal all necessary information to counsel if she fears that the information could later be disclosed. Indeed, we have observed that application of the attorney-client privilege does not actually result in the loss of evidence in the truth-determining process because the client would not have written or uttered the words absent the safeguards of the attorney-client privilege.

Id. at 15 (quoting ***Ziegler***, 200 A.3d at 80 (quotation marks omitted)).

Regarding the work product doctrine, Appellant asserts, "The same underlying concerns about ensuring that clients receive the best legal advice possible from their attorneys are embodied in the work product doctrine." ***Id.*** at 15-16. According to Appellant, "[a]llowing counsel to document legal theories without concern of disclosure encourages better representation of clients, which in turn benefits justice." ***Id.*** at 16 (citation omitted). The work product doctrine, Appellant posits, shields the mental processes of an attorney, "providing a privileged area within which he can analyze and prepare his client's case." ***Id.*** (quoting ***Gocial v. Indep. Blue Cross***, 827 A.2d 1216, 1222 (Pa. Super. 2003) (citation omitted)).

Appellant emphasizes that beneficiaries, too, benefit from consistent application of the codified attorney-client privilege. ***Id.*** "Indeed, Pennsylvania law encourages trustees to seek the advice of counsel by allowing trustees to pay for legal expenses from a trust's assets, rather than out of the trustee's own pocket." ***Id.*** n.1 (citing ***Larocca Estate***, 431 Pa. 542, 246 A.2d 337, 339 (1968), RESTATEMENT (THIRD) OF TRUSTS § 38(2) (2007), and Trust, §§ 7.02(k) and 8.10(c)). According to Appellant,

> There are instances in which co-trustees disagree on the best course of action, or a co-trustee needs advice regarding whether the conduct of another co-trustee complies with the co-trustee's fiduciary duties, perhaps rising to a level requiring removal. Concerns regarding disclosure to beneficiaries under the "fiduciary exception" to privilege, which include potentially tainting the relationship between the co-trustee and beneficiaries, might deter a trustee from seeking such advice—to the ultimate detriment of beneficiaries.

Id. at 17. Appellant explains, "the trustees' duty to carry out the intent of the trust settlor oftentimes does not coincide with one or more beneficiary's immediate preferences." ***Id.*** at 18. Under these circumstances, "[g]uidance from legal counsel can be crucial in circumstances where beneficiaries have differing rights[.]" ***Id.***

784** Second, Appellant argues, "in contrast with the law of privilege, the fiduciary exception has no basis in Pennsylvania law." ***Id. at 20 (capitalization and quotation marks omitted). Appellant asserts no Pennsylvania appellate court has adopted the "exception" pronounced by the Honorable R. Stanton Wettick in *Follansbee*. ***Id.*** Appellant criticizes *Follansbee* as allowing trust beneficiaries to invade privileged communications, without explaining the statutory or legal basis for such an exception. ***Id.*** at 21. Appellant acknowledges the Supreme Court adopted the Restatement (Second) of Trusts Section 173 in *In re Estate of Rosenblum*, 459 Pa. 201, 328 A.2d 158 (1974). ***Id.*** at 23. However, *Follansbee* relied on comment b to Section 173, which the Court did not adopt in *Rosenblum*. ***Id.*** Further, the parties in *Rosenblum* disputed access to, and disclosure of, records of the trust, not privileged documents or an attorney's work product. ***Id.*** at 24. Appellant distinguishes *Follansbee* as reflecting the common law in 1959, and not its subsequent development. ***Id.*** at 24-25.

Third, Appellant argues the basis for the *Follansbee* court's ruling is "no longer good law, and Pennsylvania would be in a very small minority were it to adopt the 'fiduciary exception.' " ***Id.*** at 29. Appellant directs our attention to various jurisdictions which have rejected the fiduciary exception to the attorney-client privilege. ***See id.*** at 30-35.

The Estate's Argument

The Estate argues four grounds for affirmance: (1) the Pennsylvania Superior Court's alternative holding in *McAleer I* became binding precedent by operation of law, ***see*** Estate's Brief at 13; (2) the fiduciary exception is established law in Pennsylvania, ***see id.*** at 21; (3) Trustees waived their claim of an exception to the fiduciary exception because it was not raised before the orphans' court, ***see id.*** at 43; and (4) Individual Trustees waived their argument for prospective application of the fiduciary exception, if recognized, ***see id.*** at 45.[6]

First, the Estate claims this Court's alternative substantive holding in *McAleer I*,[7] affirmed by operation of law, remains binding precedent. ***Id.*** at 14-16. The Estate argues, "Because the Justices [in *McAleer*] were affirming, by equal division and by operation of law, this Court's holding applying the fiduciary exception, they did not need to reach the issue of whether the trustee also failed to properly preserve the privilege." ***Id.*** at 18-19; ***see also id.*** at 19 ("Because the disclosure would nevertheless result from the competing positions set forth by a majority of the Justices, the lower court's alternative ruling is affirmed by operation of law." (quoting *McAleer II*, 248 A.3d at 419)).

The Estate directs our attention to our unpublished decision in *In re Trust Under Deed of Trust of Scaife*, 225 A.3d 1199 (Pa. Super. 2019) (unpublished memorandum)

(*Scaife Trust*). In *Scaife Trust*, this Court, although resolving the appeal on other grounds, favorably cited *Follansbee* as "germane with regard to the Trust management documents." Estate's Brief at ***785** 23 (quoting *Scaife Trust*, *supra*, (unpublished memorandum at 5)). The Estate points out Appellant's role as corporate fiduciary in *Scaife Trust*, as well. *Id.* The Estate further lists trial court decisions applying *Follansbee*. *Id.* at 24-26.

The Estate argues recognition of a fiduciary exception is consistent with Section 84 of the Restatement (Third) of the Law Governing Lawyers. *Id.* at 26. Section 84 provides that, in a proceeding in which a fiduciary of a trust is charged with breach of fiduciary duties, a communication is not privileged if it "(a) is relevant to the claimed breach; and (b) was between a trustee and a lawyer or other privileged person ... who was retained to advise the trustee concerning the administration of the trust." *Id.* at 26-27 (quoting Restatement (Third) of the Law Governing Lawyers, § 84).

Second, the Estate claims holdings from other jurisdictions do not override the fiduciary exception in Pennsylvania. *Id.* at 28. The Estate points out that the Delaware Chancery Court's decision in *Riggs National Bank of Washington, D.C. v. Zimmer*, 355 A.2d 709 (Del. Ch. 1976), remains binding authority in Delaware, contrary to the assertions of Appellant. Estate's Brief at 30. The Estate asserts, "even the United States Supreme Court has expressly recognized *Riggs* as "the leading American case" on the fiduciary exception.[8] *Id.* (quoting *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 171, 131 S.Ct. 2313, 180 L.Ed.2d 187 (2011)). The Estate references the Delaware Chancery Court's decision in *J.P. Morgan Trust Co. v. Fisher*, C.A. No. 12894-VCL, 2019 WL 6605863, 2019 Del. Ch. LEXIS 1383 (Del. Ch. Dec. 5, 2019). Estate's Brief at 34. In *Fisher*, the chancery court expressly concluded that *Riggs* was not overruled by statute. *Id.* (citing *Fisher*, 2019 WL 6605863, at *3, 2019 Del. Ch. LEXIS 1383, at *9).

The Estate also disputes the policy arguments made by Appellant as disregarding the trustees' duty to beneficiaries. *Id.* at 36.

> PNC's final hypothetical—that the trustees may make a decision that benefits some beneficiaries while harming others—is exactly why the fiduciary exception must exist. PNC rightfully points out that this problem could occur here with respect to the decision to create separate trusts. But this is precisely the situation where a beneficiary is most in need of full disclosure. A beneficiary is entitled to know that a decision to favor a different beneficiary over his or her interests satisfied the trustees' sacrosanct duties of impartiality and loyalty to each beneficiary. The Trustees should not be permitted to use the attorney-client privilege as a shield to hide the reasoning for its most important

> decisions, especially those that intentionally favor one beneficiary over another.

Id. at 38. The Estate, quoting PNC's brief, claims that in this case, "counsel advised the Trustees that if one beneficiary 'were aware that she could split the trust it's likely she would,' and, in the same breath, recommended the Trustees use their discretionary power to split the Trust as 'leverage against another beneficiary should he ask for a distribution.' " ***Id.*** at 39.

Importantly, the Estate claims trust counsel attended every formal Trustees' meeting during the 26-year accounting period, and Appellant heavily redacted ***786** several Trustees' Meeting Minutes as "privileged." ***Id.*** The Estate argues these Minutes are official records of the Trust's administration, and are the very documents deemed discoverable by our Supreme Court in *Rosenblum*. ***Id.***

The Estate relies on the Supreme Court's plurality opinion in *McAleer II*. ***Id.*** at 40. The Estate asks this Court to adopt *McAleer*'s stated basis for favoring the fiduciary privilege over that of the attorney-client privilege and the work product doctrine: the critical importance of transparency in a fiduciary relationship. ***Id.***

Third, the Estate claims Trustees waived their claim of an exclusion to the fiduciary exception for communications with litigation counsel. ***Id.*** at 43. The Estate asserts the privilege logs of Strassburger McKenna and Trustees never identified which documents were communications with litigation counsel regarding the dispute with the Estate. ***Id.*** at 44.

Fourth, the Estate claims Trustees failed to preserve their argument favoring only prospective application of the fiduciary exception. ***Id.*** at 45. Although the orphans' court requested briefs on the effect of the split decision in *McAleer II*, Trustees never requested prospective application of the exception. ***Id.***

Income Beneficiaries' Argument

David, Jennie, and David G. Scaife (as representative of David's minor children) (collectively, Income Beneficiaries) filed a joint appellate brief. Income Beneficiaries argue: (1) the fiduciary exception, as recognized in *Follansbee*, strikes the right balance between the rights of fiduciaries and beneficiaries, Income Beneficiaries' Brief at 2; (2) application of the fiduciary exception is consistent with Pennsylvania law, ***see id.*** at 21; and (3) communications between trustees and trust counsel are not "confidential" communications to which the attorney-client privilege applies, ***see id.*** at 26.

First, Income Beneficiaries claim trustees have a duty to disclose all information, relevant to trust administration, to the beneficiaries. ***Id.*** at 2. Income Beneficiaries rely on Section 173 of the Restatement (Second) of Trusts, as adopted by our Supreme Court in *Rosenblum*. ***Id.*** Income Beneficiaries assert access to these trust records is crucial, and the rationale expressed in *Follansbee* "is sound." ***Id.*** at 4.

Income Beneficiaries posit, "evaluating the propriety of a trustee's course of conduct requires consideration of the terms of the trust, the nature of the power accorded to the trustee *and all the circumstances surrounding the trust*." ***Id.*** at 8 (emphasis in original; quoting ***In re Scheidmantel***, 868 A.2d 464, 487 (Pa. Super. 2005) (citation omitted)). "To permit a trustee to withhold relevant information would allow the trustee to act in the shadows, sitting as the judge of the trustee's own conduct, without review by the beneficiaries or any court." ***Id.*** at 10.

Income Beneficiaries argue trust counsel owes derivative duties to trust beneficiaries, requiring disclosure of advice given to guide Trustees' administration of the trust. ***Id.***

> Support for these "derivative" duties rests in the fact that the fiduciary estate has been created by the settlor for the exclusive benefit of the beneficiaries, the fiduciary and the lawyer for the fiduciary are compensated by the fiduciary estate, and because the fiduciary traditionally stands in a superior position relative to the beneficiaries, who, in turn, "repose trust and confidence in the lawyer."

Id. at 12 (emphasis omitted) (quoting ***Pew Estate***, 16 Fiduc. Rep. 2d 73 (O.C. Montg. 1995) (*en banc*)). Because trust counsel owes these derivative duties to beneficiaries, ***787** "the beneficiaries are entitled to obtain communications between trust counsel and the trustee generated in the course of administering the trust." ***Id.*** at 13.

Income Beneficiaries agree with the Estate that ***Follansbee*** strikes the appropriate balance between the duty of disclosure and a trustee's right to retain counsel for the trustee's own protection. ***Id.*** Income Beneficiaries assert, "the rationale for the exception was that if the trustee 'obtained the advice [of counsel] using both the authority and the funds of the trust,' then 'the benefit of the advice regarding the administration of the trust ran to the beneficiaries.' " ***Id.*** at 15 (quoting ***Wachtel v. Health Net. Inc.***, 482 F.3d 225 (3d Cir. 2007)).

Thus, Income Beneficiaries argue for a more limited exception than that adopted by the *McAleer II* plurality. ***Id.*** at 17.

> [T]he attorney-client privilege may exist between a trustee and counsel where the interests of the trustee "differ" from or are "adverse" to the interests of the beneficiaries, when claims have been threatened against the trustees, or when litigation has been initiated. In such instances, the trustee (and counsel) are no longer acting in the best interests of the trust and its beneficiaries as to that matter, but rather are acting for the trustee's own protection, and a privilege can and should be recognized.

Id. at 18 (citations omitted).

Second, Income Beneficiaries claim the application of the fiduciary exception is consistent with Pennsylvania law. ***Id.*** at 21. In particular, Income Beneficiaries assert the attorney-client privilege does not protect "facts." ***Id.*** at 24. "[T]he privilege only protects communications from discovery[; f]acts are discoverable, even if discussed in privileged communications." ***Id.*** at 25 (quoting, *inter alia*, ***Custom Designs & Mfg. Co. v. Sherwin-Williams Co.***, 39 A.3d 372, 378 (Pa. Super. 2012)). Even if this Court rejects the fiduciary exception, Income Beneficiaries argue, the "relevant facts and circumstances" disclosed by Trustees to counsel would be discoverable. ***Id.***

Third, Income Beneficiaries argue the communications between Trustees and counsel were not "confidential"; therefore, the privilege does not apply. ***Id.*** at 26. Income Beneficiaries assert that the duty of disclosure to beneficiaries prevails over the duty of confidentiality between Trustees and trust counsel. ***Id.*** at 27.

The Commonwealth's Argument[9]

The Commonwealth supports application of the fiduciary exception on three bases: (1) the "alternative holding" of the Superior Court in *McAleer I* constitutes binding precedent recognizing the exception, ***see*** Commonwealth's Brief at 16; (2) the fiduciary exception is embedded in Pennsylvania's trust law, which requires the disclosure of information about trust administration to beneficiaries, ***see id.*** at 20; and (3) the beneficiaries are the "real clients" in cases involving the administration of a trust, ***see id.*** at 27.

First, the Commonwealth asserts the "alternative holding" expressed by this Court in *McAleer I* is precedential by operation of law. ***Id.*** at 18. The Commonwealth specifically relies on *McAleer I*'s distinction between "legal consultations and advice obtained in the trustee's fiduciary capacity concerning decisions or actions to be taken in the course of administering the trust," which should be ***788** disclosed, and opinions "from counsel retained for the trustee's personal protection," which are privileged. ***Id.*** at 18-19. Because the alternative holding was not disturbed by the Supreme Court, the Commonwealth asserts it "remains binding precedent." ***Id.*** at 20.

Second, the Commonwealth argues the fiduciary exception is embedded in Pennsylvania's trust law, which independently requires disclosure about trust administration to beneficiaries. ***Id.*** The Commonwealth relies on UTA Sections 7772(a) (requiring a trustee to administer a trust solely in the interests of beneficiaries), 7773 (requiring a trustee to act impartially in managing and distributing trust property, where there are two or more beneficiaries), and 7780.3(a) (imposing a duty to inform a beneficiary of information regarding the trust's administration). ***Id.*** at 20-21. The Commonwealth points out that a majority of the *McAleer II* Court recognized a court's authority to determine whether the fiduciary exception exists. ***Id.*** at 23.

Third, the Commonwealth argues that beneficiaries are the "real clients" in cases involving trust administration. ***Id.*** at 27.

The Commonwealth also advances the *Riggs* rationale that a trusts' beneficiaries are the "real clients" of the attorney. ***Id.*** at 28. The Commonwealth disputes Trustees' presumption that they are the "client" in the relationship. ***Id.*** at 28-29.

Standards of Review

Our scope of review in an appeal from an orphans' court's decision is limited. When reviewing the orphans' court's decision, we must determine whether the record is free from legal error and the orphan' court's factual findings are supported by the evidence. ***In re Estate of Angle***, 777 A.2d 114, 122 (Pa. Super. 2001).

The application of the attorney-client privilege and the work product doctrine are questions of law over which our standard of review is *de novo* and our scope of review is plenary. ***Bousamra v. Excela Health***, 653 Pa. 365, 210 A.3d 967, 973 (2019).

The Fiduciary Duty of a Trustee

By statute, a trustee's basic fiduciary duty is to administer the trust: "Upon acceptance of a trusteeship, the trustee shall administer the trust in good faith, in accordance with its provisions and purposes and the interests of the beneficiaries and in accordance with applicable law." 20 Pa.C.S.A. § 7771.

> If a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing and distributing the trust property, giving due regard to the beneficiaries' respective interests in light of the purposes of the trust. The duty to act impartially does not mean that the trustee must treat the beneficiaries equally. Rather, the trustee must treat the beneficiaries equitably in light of the purposes of the trust.

20 Pa.C.S.A. § 7773.

> By its nature a trust involves property transferred to one person, the trustee, to manage for the benefit of another, the beneficiary. Because the trustee stands in a fiduciary relationship to the beneficiary, the trustee is obligated to manage the property in the interests of the beneficiary, and not himself.

In re Tr. under Will of Ashton, —— Pa. ——, 260 A.3d 81, 90 (2021); ***see also*** 20 Pa.C.S.A. § 7772(a) ("A trustee shall administer the trust solely in the interests of the beneficiaries."). A fiduciary duty "is the highest duty implied by law." ***Yenchi v. Ameriprise Fin., Inc.***, 639 Pa. 618, 161 A.3d 811, 819-20 (2017). A fiduciary

duty requires a party to act with the utmost good faith in furthering and advancing the *789 other person's interests, including a duty to disclose all relevant information. *Id.*

Pertinently, our General Assembly has directed: "**A trustee shall promptly respond to a reasonable request by ... a beneficiary of an irrevocable trust for information related to the trust's administration.**" 20 Pa.C.S.A. § 7780.3(a) (emphasis added). The Comment to Section 7780.3 explains:

> [Uniform Trust Code] § 813 has been entirely rewritten in order to provide the trustee with a road map describing when and what information the trustee must communicate to the trust's beneficiaries. It is an effort to balance the settlor's likely expectation that the trust relationship will remain substantially private during the settlor's lifetime, like a will, and the reality that a beneficiary cannot protect an interest in the trust without knowledge of the trust's provisions and operations....

Id. Comment.

In *Rosenblum*, our Supreme Court adopted Section 173 of the Restatement (Second) of Trusts (1959) as "declaratory of the common law of Pennsylvania." *Rosenblum*, 328 A.2d at 164. In that case, in support of objections to a trust account, beneficiaries requested all trust documents; the trustee refused, claiming the request was overbroad. *Id.* at 163-64. The trial court granted "limited discovery of documents to those items which appellants could demonstrate were relevant to their objections." *Id.* at 164. On appeal, our Supreme Court reversed, concluding "[t]he right of access to trust records is an essential part of a beneficiary's right to complete information concerning the administration of the trust." *Id.* As adopted by *Rosenblum*, Section 173 declares:

> The trustee is under a duty to the beneficiary to give him upon his request at reasonable times complete and accurate information as to the nature and amount of the trust property, and to permit him or a person duly authorized by him to inspect the subject matter of the trust and the accounts and vouchers and other documents relating to the trust.

Restatement (Second) of Trusts, § 173 (1959). This duty

> places *cestuis que trustent* on a different footing from other litigants who seek discovery of documents

> under our Rules of Civil Procedure. A beneficiary's right of inspection has an independent source in his property interest in the trust estate, and the right may be exercised irrespective of the pendency of an action or proceeding in court.

Rosenblum, 328 A.2d at 165 (quotation marks omitted).

The Attorney-Client Privilege

In Pennsylvania, the attorney-client privilege is codified in our Judicial Code:

> In a civil matter, counsel shall not be competent or permitted to testify to **confidential communications** made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client.

42 Pa.C.S.A. § 5928 (emphasis added). The codification of the privilege is essentially "a restatement of the common law privilege and its attendant case law interpretations." *Bousamra*, 210 A.3d at 982 (citation omitted).

We recognize "that evidentiary privileges are not favored." *Id.* at 975. "Exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *Commonwealth v. Stewart*, 547 Pa. 277, 690 A.2d 195, 197 (1997). Courts should permit assertion ***790** of an evidentiary privilege "only to the very limited extent that ... excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth." *Bousamra*, 210 A.3d at 975.

Because it "has the effect of withholding relevant information from the factfinder," courts construe the attorney-client privilege narrowly to "appl[y] only where necessary to achieve its purpose." *McAleer II*, 248 A.3d at 425-26 (quoting *Fisher v. United States*, 425 U.S. 391, 403, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976)). As the plurality in *McAleer II* explained, "Where the interests protected by the privilege conflict with weightier obligations, the former must yield to the latter." *Id.* at 426.

Courts have recognized exceptions to the codified attorney-client privilege when (1) the communication takes place in the presence of a third person or the adverse party; (2) the attorney represents both parties to the transaction -- in disputes between the parties *inter se*; and (3) the attorney is rebutting the client's attack on his integrity or professional competence. *Loutzenhiser v. Doddo*, 436 Pa. 512, 260 A.2d 745, 748 (1970).

The Work Product Doctrine

The United States Supreme Court has referred to the work product doctrine as a "qualified privilege for certain materials prepared by an attorney 'acting for his client in anticipation of litigation.' " *United States v. Nobles*, 422 U.S. 225, 237-38, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975) (citation omitted). The privilege emanating from the work product doctrine is codified in Pennsylvania Rule of Civil Procedure 4003.3:

> Subject to the provisions of Rules 4003.4 and 4003.5, a party may obtain discovery of any matter discoverable under Rule 4003.1 even though prepared in anticipation of litigation or trial by or for another party or by or for that other party's representative, including his or her attorney, consultant, surety, indemnitor, insurer or agent. **The discovery shall not include disclosure of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories.** With respect to the representative of a party other than the party's attorney, discovery shall not include disclosure of his or her mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics.

Pa.R.C.P. 4003.3 (emphasis added). The explanatory comment clarifies the scope of the Rule:

> The essential purpose of the Rule is to keep the files of counsel free from examination **by the opponent** .... Documents, otherwise subject to discovery, cannot be immunized by depositing them in the lawyer's file. The Rule is carefully drawn and means exactly what it says. It immunizes the lawyer's mental impressions, conclusions, opinions, memoranda, notes, summaries, legal research and legal theories, nothing more.

Id. (Explanatory Comment-1978) (emphasis added).

The Fiduciary Exception to the Attorney-Client Privilege And the Work Product Doctrine

In this case, we are asked to balance the attorney-client privilege, codified at 42 Pa.C.S.A. § 5928, and the work product doctrine, codified at Pa.R.C.P. 4003.3, with a trustee's duty to inform beneficiaries regarding the trust's administration, codified at 20 Pa.C.S.A. § 7780.3(a).

***791** In *Follansbee*, the Allegheny County Court of Common Pleas addressed whether there existed a fiduciary exception to the attorney-client privilege, where the trust beneficiaries (plaintiffs) filed a declaratory judgment action against counsel for a trust. *Follansbee*, 56 Pa. D. & C.4th at 485. Plaintiffs alleged counsel had interpreted the trust in prior orphans' court proceedings. *Id.* Counsel, after undertaking representation of another trust beneficiary, prepared a memorandum interpreting the trust contrary to its prior interpretations and favorable to their client beneficiary. *Id.* Plaintiffs filed a declaratory judgment action based on counsel's new interpretation of the trust. *Id.* Without disclosing their conflict of interest, counsel induced the trustee, PNC, to claim stakeholder status in the litigation. *Id.*

During discovery, plaintiffs subpoenaed communications from PNC's legal department, and a law firm representing PNC, to PNC's employees administering the trust. *Id.* 486. At the time the documents were created, no litigation was indicated or pending. *Id.* PNC claimed, "the attorney-client privilege applies to communications between a fiduciary and its counsel." *Id.* The plaintiffs countered that PNC, as fiduciary and trustee, could not claim attorney-client privilege as to matters affecting the trust. *Id.*

Ultimately, the trial court upheld the beneficiaries' right to documents related to the trust's administration. *Id.* at 491. The trial court relied on *Rosenblum*'s adoption of Restatement Section 173 as declaratory of the common law of Pennsylvania. *Id.* at 490-91. The trial court explained:

> "A beneficiary's right of inspection has an independent source in his property interest in the trust estate, and the right may be exercised irrespective of the pendency of an action or proceeding in court." [ ]
>
> In summary, the trustee cannot withhold from any beneficiary documents regarding the management of the trust, including opinions of counsel procured by the trustee to guide the trustee in the administration of the trust, because trust law imposes a duty to make these documents available to the beneficiaries.

Follansbee, 56 Pa. D. & C.4th at 491 (quoting *Rosenblum*, 328 A.2d at 165).

In *McAleer I*, this Court was asked to adopt a fiduciary exception to the attorney-client privilege and work product doctrine. *McAleer I*, 194 A.3d at 591. William McAleer (McAleer) and his step-siblings were beneficiaries of a revocable living trust established by William K. McAleer (William), their father. *Id.* at 590. After William died, issues pertaining to the trust's administration arose. *Id.* As a result, the trustee, a co-beneficiary, retained the services of two law firms. We explained:

> On March 17, 2014, [trustee] filed a first and partial account relating to the administration of the Trust. [Beneficiaries] filed objections to the first and partial account filed by [trustee]. [Beneficiaries] also sought disclosure of information pertaining to two bank accounts, and [trustee] retained K&L Gates to respond. On March 30, 2016, the trial court dismissed [beneficiaries'] objections with prejudice.
>
> On August 31, 2016, [trustee] filed a Second and Final Accounting. On November 14, 2016, [beneficiaries] filed objections claiming that [trustee] paid expenses in the administration of the Trust that were unreasonable, including excessive trustee and attorney fees. On March 2, 2017, [beneficiaries] served a request for production of documents including billing statements for all trustee ***792** fees and attorney fees. On April 12, 2017, [trustee] produced substantially redacted attorney invoices from both law firms.

Id. at 590. Beneficiaries thereafter filed a motion to compel production of unredacted copies of the invoices. *Id.* at 591. The trial court granted the motion. *Id.* The trustee produced the unredacted trustee invoices but appealed the production of counsel's invoices. *Id.*

On appeal, the *McAleer I* Court issued two rulings. First, we deemed the trial court's order interlocutory, and not appealable as a collateral order. *Id.* at 597. In an alternative holding, this Court concluded, "under the law as presented in the Restatement (Third) of Trusts and our Supreme Court's ruling in [ ] *Rosenblum*, [the trustee] has a duty to share with Appellees, as beneficiaries, complete information concerning the administration of the Trust." *Id.*

In support of our alternative holding, we relied on Restatement (Third) of Trusts Section 82, comment f, which provides: "A trustee is privileged to refrain from disclosing to beneficiaries or co-trustees opinions obtained from, and other communications with, counsel retained for the trustee's personal protection in the course, or in anticipation, of litigation (e.g., for surcharge or removal)." *Id.* (quoting Restatement (Third) of Trusts § 83, cmt. f (2012)).

> [Trustee] neither argued nor presented evidence to establish that the redacted information pertained to communications from counsel retained for [the trustees'] personal protection in the course of litigation. Accordingly, there is no evidence that the information qualifies as privileged under comment f to the Restatement (Third) of Trusts. Hence, we are left to conclude that the information contained in the attorney invoices qualifies as communications subject to the general principle entitling a beneficiary to information reasonably necessary to the prevention or redress of a breach of trust or otherwise to the enforcement of the

> beneficiary's rights under the trust. For this reason as well, [trustee] cannot invoke the protections of the attorney-client privilege.

Id.

On allowance of appeal, a majority of the Pennsylvania Supreme Court reversed our conclusion that the underlying order was interlocutory and not appealable. *McAleer II*, 248 A.3d at 425. However, only a plurality of the Supreme Court agreed on whether a fiduciary exception to the attorney-client privilege and work product doctrine existed in Pennsylvania. ***See id.*** Consequently, the Supreme Court affirmed this Court's alternative holding by operation of law. ***See id.*** at 419.

The *McAleer II* plurality, after extensively reviewing the history of the attorney-client privilege and fiduciary exception, would "reaffirm" the core holding in *Rosenblum*:

> [W]e would hold that, **where legal counsel is procured by a trustee utilizing funds originating from a trust corpus, the beneficiaries of that trust are entitled to examine the contents of communications between the trustee and counsel, including billing statements and the like.** That examination necessarily includes reviewing the contents of invoices in order to determine precisely what was procured with trust funds where the reasonableness of costs is at issue. The attorney-client privilege and work product doctrine cannot shield those disclosures in this Commonwealth. **To hold otherwise would enable fiduciaries to weaponize trust assets reserved for beneficiaries against those very beneficiaries in litigation *793 over the propriety of trust management.** Since those same beneficiaries simultaneously would be obliged to foot their own legal bills, they would, in essence, be paying for both parties' lawyers. That result is untenable, particularly in a case such as this, where Trustee also is a co-beneficiary of the trust established by his late father for the benefit of Trustee and his step-sibling.

Id. at 436 (emphasis added).

A Fiduciary Exception is Consistent with Pennsylvania Law

Consistent with *Follansbee*, *McAleer I* and *McAleer II*, we conclude a fiduciary exception to the attorney-client privilege is consistent with Pennsylvania law. Although the attorney-client privilege is codified, so too is a trustee's duty to inform beneficiaries regarding a trust's administration. ***See*** 42 Pa.C.S.A. § 5928; 20 Pa.C.S.A. § 7780.3(a). As codified by our General Assembly, interpreted by a majority of our Supreme Court in *Rosenblum*, and applied in *McAleer I*'s alternative holding and the common pleas court in *Follansbee*:

> A trustee cannot withhold from any beneficiary documents regarding the management of the trust, including opinions of counsel procured by the trustee to guide the trustee in the administration of the trust, because trust law imposes a duty to make these documents available to the beneficiaries.

Follansbee, 56 Pa. D. & C.4th at 491 (quoting *Rosenblum*, 328 A.2d at 165).

Here, unlike *McAleer II*, we find no support for conditioning the fiduciary exception on whether the trust paid counsel fees. The Pennsylvania Rules of Professional Conduct recognize that someone other than a client may pay an attorney's fee. ***See*** Pa.R.P.C. 5.4(c) ("A lawyer shall not permit a person who recommends, employs **or pays** the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." (emphasis added)). While a trust's payment of counsel fees may provide evidentiary support for the fiduciary exception, it is not dispositive. ***See*** 20 Pa.C.S.A. § 7769(a)(1) (entitling a trustee to reimbursement of expenses "properly incurred in the administration of the trust."). The trustee's duty is to disclose "any beneficiary documents **regarding the management of the trust**, including opinions of counsel procured by the trustee to guide the trustee in the administration of the trust[.]" *Follansbee*, 56 Pa. D. & C.4th at 491 (emphasis added).

Consistent with the legal authority discussed above, a trustee is privileged from disclosing to beneficiaries or co-trustees' opinions obtained from, and other communications with, counsel retained for the trustees' personal protection **in the course, or in anticipation, of litigation**. ***See*** *McAleer I*, 194 A.3d at 597. The balancing of interests affords the greatest protection to beneficiaries, trustees and counsel. In so holding, we acknowledge the requested documents in this case pertain to the accounting period from March 22, 1994, through December 31, 2019. ***See*** Trustees' Account, 6/1/20. Our review discloses no litigation pending against trustees during the accounting period.

Finally, our holding is not restricted only to prospective application. The Pennsylvania Supreme Court explained,

> the United States Constitution and the Pennsylvania Constitution

> neither mandate nor preclude a retroactive application of a new decision. Normally, we apply a new decision to cases pending on appeal at the time of the decision. However, ***794** a sweeping rule of retroactive application is not justified. Retroactive application is a matter of judicial discretion and must be exercised on a case-by-case basis.

Christy v. Cranberry Volunteer Ambulance Corps, Inc., 579 Pa. 404, 856 A.2d 43, 51 (2004) (citations omitted) (quoting *Cleveland v. Johns-Manville Corp.*, 547 Pa. 402, 690 A.2d 1146, 1151-52 (1997)). In this case, our interpretation of the fiduciary exception is consistent with Pennsylvania law, and thus a prospective only application is not warranted. *Christy*, *supra*.

In conclusion, we affirm the orphans' court's order compelling discovery based on a fiduciary exception to the attorney-client privilege. ***See*** Orphans' Court Order, 6/3/21, at 2 (unnumbered).

Order affirmed.

All Citations

276 A.3d 776, 2022 PA Super 93

Footnotes

* Retired Senior Judge assigned to the Superior Court.

1 This appeal is properly before us pursuant to the collateral order doctrine, Pa.R.A.P. 313. ***See*** ***In re Estate of McAleer***, —— Pa. ——, 248 A.3d 416, 425 (2021) (***McAleer II***, 248 A.3d at 425) (deeming a discovery order implicating the fiduciary exception to the attorney-client privilege appealable under the collateral order doctrine).

2 ***See*** 20 Pa.C.S.A. §§ 7701-7790.3.

3 The Estate claimed PNC "used a tiny font that made it nearly impossible to review." ***Id.***

4 In ***McAleer II***, the Supreme Court granted allowance of appeal "to determine whether the attorney-client privilege and the work product doctrine may be invoked by a trustee to prevent the disclosure to a beneficiary of communications between

the trustee and counsel pertaining to attorney fees expended from a trust corpus." ***McAleer II***, 248 A.3d at 418-19.

5 Strassburger McKenna filed an appeal of the orphans' court's order at 697 WDA 2021. Individual Trustees appealed at 696 WDA 2021. We address those appeals in separate decisions.

6 Individual Trustees filed an appeal of the orphans' court's order at No. 696 WDA 2022, which we address in our decision at that docket number.

7 As we discuss *infra*, in ***McAleer I***, this Court quashed the appeal, holding the order was not appealable as a collateral order. ***McAleer I***, 194 A.2d at 597. Alternatively, this Court recognized a trustee has a duty to share with beneficiaries complete information regarding administration of a trust. ***Id.*** Because a majority of our Supreme Court reversed our holding regarding the appealability of the order, the Estate refers to our merits discussion as the alternative holding in ***McAleer I***.

8 The Estate acknowledges the United States Supreme Court's ultimate conclusion that the government's relationship with a Native American tribe is not similar to a fiduciary relationship between a trustee and a beneficiary. ***Id.*** at 31 (citation omitted).

9 "The responsibility for public supervision [of charitable trusts] traditionally has been delegated to the attorney general to be performed as an exercise of his *parens patriae* powers." ***Coleman's Estate***, 456 Pa. 163, 317 A.2d 631, 634 (1974) (citation omitted).

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291 A.3d 862 (Table)
Supreme Court of Pennsylvania.

IN RE: TRUST ESTABLISHED UNDER AGREEMENT OF SARAH MELLON SCAIFE, DECEASED, DATED MAY 9, 1963
Petition of: PNC Bank, N.A.

No. 167 WAL 2022
|
January 24, 2023

Petition for Allowance of Appeal from the Order of the Superior Court

ORDER

PER CURIAM

AND NOW, this 24th day of January, 2023, the Petition for Allowance of Appeal is **DENIED**.

All Citations

291 A.3d 862 (Table)

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284 A.3d 1202
Superior Court of Pennsylvania.

In the INTEREST OF: M.A., an Alleged Incapacitated Person
Appeal of: M.A. and Jones, Gregg, Creehan & Gerace, LLP

No. 1003 WDA 2021
|
Argued August 2, 2022
|
Filed: October 17, 2022

Synopsis

Background: Daughter brought petition for appointment of permanent plenary guardian of her father and sought to be appointed as his guardian. After appointment of counsel for father, second attorney entered his appearance on behalf of father. Before proceeding to hearing on father's capacity, the Court of Common Pleas, Allegheny County, Orphans' Court, No. 022104306, Joseph K. Williams, J., granted daughter's and appointed counsel's motions to strike second attorney's appearance on behalf of father. Second attorney appealed.

The Superior Court, No. 1003 WDA 2021, Murray, J., held that remand was necessary to determine whether father was incapacitated before striking appearance of his counsel of choice.

Vacated and remanded.

Procedural Posture(s): On Appeal; Motion to Strike.

***1203** Appeal from the Order of December 10, 2021, In the Court of Common Pleas of Allegheny County, Orphans' Court, at 022104306, Joseph K. Williams, J.

Attorneys and Law Firms

Thomas J. Dempsey Jr., Pittsburgh, for appellants.

Paul A. Ellis Jr., Pittsburgh, for appellee.

James R. Baker, Pittsburgh, for A.M., participating party.

BEFORE: STABILE, J., MURRAY, J., and McLAUGHLIN, J.

Opinion

OPINION BY MURRAY, J.:

In this appeal, Attorney Thomas J. Dempsey, Jr. (Attorney Dempsey), appeals the order striking his appearance on behalf of M.A., an alleged incapacitated person (AIP). [1] Upon review, we vacate and remand for further proceedings.

Case History

Although the issues before this Court are narrow, a comprehensive recitation of the proceedings is relevant to our disposition. ***1204** On June 1, 2021, one of M.A.'s four adult daughters, Marsha Asbearry (Marsha), filed an "Emergency Petition for Appointment of Permanent Plenary Guardian of Person and Estate and Injunctive Relief," seeking

appointment as M.A.'s guardian. Petition, 6/1/21, at 1 (unnumbered).[2] Marsha averred that M.A.'s wife (Marsha's mother), Vondella, died on April 4, 2021, and M.A., who was 89 years old, suffers from dementia. ***Id.*** at 1-2 (unnumbered). Marsha claimed there was an ongoing dispute between her and her siblings regarding M.A.'s finances. ***Id.*** at 2-3 (unnumbered). She alleged:

> [Marsha] seeks guardianship, in part, to maintain continuity of the Living Will, [POA], Last Will and Testament, and clear wishes of both Vondella [ ] and [M.A.].
>
> [Marsha] has been familiar with the legal, medical and private affairs of [M.A.] for many years, through the present with primary support previously provided by Vondella [ ].
>
> [Marsha] seeks to establish successor permanent guardianship over [M.A.'s] person, and permanent plenary guardianship over the Estate of [M.A.].

Id. at 3 (unnumbered). In addition to being named guardian, Marsha sought "immediate injunctive relief via an Order of Court freezing the assets of [M.A.] pending further Order of Court and resolution of these proceedings." ***Id.*** at 4 (unnumbered).

Marsha attached to the petition copies of both parents' 2019 wills, which, in the event of their death, named Marsha as sole heir and executor. ***Id.*** at Exhibits A and B. She also included a 2019 power of attorney (POA) appointing her as M.A.'s agent in the event of Vondella's unavailability. ***Id.*** at Exhibit C. Accompanying the petition was the sworn affidavit of Michele J. Gaines, the paralegal who assisted in preparing the wills and POA. Ms. Gaines stated in her affidavit that at the time of Vondella's death, M.A. suffered from dementia and was unable to locate his and Vondella's wills, so Ms. Gaines provided copies. ***Id.*** at Exhibit D. Lastly, Marsha appended a letter from John T. Haretos, M.D., who stated he had been M.A.'s primary physician for 20 years, and

> [M.A.] has had a decline in his mental faculties over the last five years. He is now diagnosed with Dementia. He no longer can live independently and he cannot handle his own financial affairs. This is a permanent situation and will not improve.

Id. at Exhibit E.

On June 2, 2021, the orphans' court issued an emergency order freezing M.A.'s assets (the order was not entered on the orphans' court docket). On June 4, 2021, the orphans' court appointed Nicola Henry-Taylor, Esquire (Attorney Henry-Taylor), to represent M.A.[3] On June 9, 2021, attorneys Carol Sikov Gross and Lori Capone (Attorney Capone), from the law firm of Sikov and Love, entered their appearances on behalf of Adraine, Virginia, and M.A. The orphans' court issued a preliminary order scheduling a hearing for July 8, 2021. On June 10, 2021, the orphans' court issued another order scheduling a status conference for June 22, 2021.

1205** On June 22, 2021, Attorney Capone filed a petition to withdraw from her representation of M.A. (the orphans' court never ruled on the petition). Attorney Capone sought to withdraw based on the orphans' court's appointment of Attorney Henry-Taylor to represent M.A. Petition to Withdraw Appearance, 6/22/21. That same day, Attorney Capone filed on behalf of Adraine and Virginia a motion to unfreeze M.A.'s assets. Motion for Emergency Order to Unfreeze Assets, 6/22/21. The Motion included a POA executed by M.A. on April 12, 2021 (four days after Vondella's death), naming Adraine and Virginia as agents. ***Id., Exhibit B. In their motion, Adraine and Virginia disputed Marsha's allegations that (a) they had engaged in financial misconduct; and (b) Marsha had been primarily responsible for assisting her parents with financial and personal affairs. ***Id.*** 3 (unnumbered). They asserted:

> During the last few years of her life, Vondella's daughter, Adraine [ ], assisted her mother and father with their financial matters, such as paying bills, verifying that essential bills were paid, and making deposits on their behalf.
>
> * * *
>
> On April 12, 2021, [M.A.] executed a Durable Financial [POA] appointing his daughters [Adraine and Virginia], as his agents[ ]. ...
>
> At all times since the execution of the 2021 POA, [Adraine and Virginia] have properly managed their father's finances and personal affairs.

Id. at 2-3 (unnumbered). The sisters further averred:

> [O]n numerous occasions and over many years, their father, [M.A.], stated his desire to have [Adraine and Virginia] manage his financial affairs.
>
> [O]n numerous occasions and over many years, their father, [M.A.,] stated his desire and intention never to have [Marsha] manage his financial affairs.

Id. at 4 (unnumbered) (paragraph numbers omitted).

> Moreover, their motion alleged M.A.
>
> is without funds to buy food, pay for any utilities, and necessities, or even pay for his wife's gravestone that had been previously ordered.
>
> * * *
>
> In order to afford even the necessities of life, [M.A.] has been forced to borrow money from three of his daughters, [Adraine] [Virginia], and [Audrey].
>
> During the time since she obtained a Court Order to freeze the accounts, [Marsha] has provided no financial support to [M.A.].

Id. at 3-4 (paragraph numbers omitted).

Thereafter,

> [t]he June 22, 2022, status conference was attended by three (3) lawyers, various family members and, most importantly, [M.A.]. The focus of this conference was [M.A.] centric.

> The [orphans' c]ourt's "goal" was "to create some framework for [M.A.] to be taken care of, for his bills, for his welfare to be secure" and **leave the meaty issue of incapacity for the upcoming hearing.** After some back-and-forth with counsel, it was learned that [M.A.'s] daughter, [Adraine], who he was living with at the time, would take care of her father. The [orphans' c]ourt concluded that this was not "an emergency" or a "Crisis" situation. The [orphan's c]ourt then adjourned the [conference] with a reminder to all present that we will "meet on July 8th as Scheduled and we'll proceed from there."

Orphans' Court Opinion, 2/7/22, at 22 (emphasis added, citations omitted).

Attorney Henry-Taylor formally entered her appearance on behalf of M.A. on June *1206 25, 2021. Four days later, on June 29, 2021, Attorney Dempsey entered his appearance on behalf of M.A.

On July 12, 2021, Marsha filed a motion to strike Attorney Dempsey's appearance. On July 14, 2021, Attorney Henry-Taylor filed a motion to strike Attorney Dempsey's appearance. Both motions relied on correspondence in which Attorney Dempsey acknowledged Attorney Henry-Taylor's appointment as counsel for M.A. and stated that he "look[ed] forward to working with Attorney Henry-Taylor as co-counsel[.]" Letter from Attorney Dempsey, 6/29/21, at 2 (unnumbered). Neither Marsha nor Attorney Henry-Taylor requested an evidentiary hearing on their motions. On July 14, 2021, the orphans' court continued the guardianship hearing to July 26, 2021.

Adraine and Virginia filed an answer and new matter to Marsha's guardianship petition on July 23, 2021. The sisters contested the validity of the 2019 will, and alleged Marsha had a

> history of criminal behavior, drug dependency, and other inappropriate behavior, [such that Vondella and M.A.] never intended to place [Marsha] in any position from which she could access their assets and income or exercise any control over their finances.

Answer and New Matter of Adraine and Virginia, 7/23/21, at 1-2. Adraine and Virginia maintained that guardianship was unnecessary, as the recently executed durable financial POA and durable health care POA naming them as M.A.'s agents was a less restrictive alternative obviating the need for a guardianship. ***Id.*** at 5-6. However, in the event the orphans' court found M.A. to be incapacitated, Adraine and Virginia asserted they should be named co-guardians of M.A.'s person and estate. ***Id.*** at 5-6.

On July 23, 2021, Attorney Dempsey filed an answer and new matter in response to the guardianship petition. Answer and New Matter of M.A., 7/23/21. In his answer and new matter, to which he attached an unsworn verification purportedly signed by M.A., Attorney Dempsey asserted: "M.A. has at all times acted of his own volition to engage counsel for the purpose of determining and acting to preserve all of his legal rights free

of any undue influence by any of his family members." Answer and New Matter of M.A., 7/23/21, at 3 (unnumbered). Attorney Dempsey also averred:

> [Attorney Henry-Taylor] has not consulted with [M.A.] for a sufficient amount of time, she has not given him the opportunity to fully express his desire to advance a less-restrictive alternative to guardianship that will adequately promote and preserve his autonomy and independence, and she has not advocated on his behalf for the least restrictive alternative to the guardianship sought by [Marsha].

Id. at 7.

Attorney Dempsey additionally filed "A Demand for Testimony Pursuant to Pa.O.C.R. 14.3(c)(1).[4] Attorney Dempsey ***1207** sought a witness and exhibit list from Marsha and requested she provide either live expert testimony or the deposition of M.A.'s treating physician. Demand for Testimony, 7/23/21, at 1-2 (unnumbered).

Lastly, Attorney Dempsey filed nearly identical responses to the motions to strike his appearance. He did not attach a copy of his fee agreement with M.A. or signed verification from M.A. The responses provided minimal information about the circumstances under which M.A. retained Attorney Dempsey. ***See*** Reply to Motion to Strike Appearance, 7/23/21, at 1-6 (unnumbered). The responses did not request an evidentiary hearing. Notwithstanding, Attorney Dempsey requested the orphans' court "deny the motion to strike appearance[.]" ***Id.*** at 6 (unnumbered). Attorney Dempsey did not file a motion to strike Attorney Henry-Taylor's appearance.

On July 26, 2021, the orphans' court issued a ruling from the bench on the "two requests to strike appearance of a lawyer who claims to represent the incapacitated person." N.T., 7/26/21, at 3-4. Attorney Paul Ellis appeared on behalf of Marsha; both Attorney Henry-Taylor and Attorney Dempsey appeared on behalf of M.A. Attorney Capone, who had filed the outstanding petition to withdraw from representation of M.A., did not appear.

The orphans' court noted the parties had raised this Court's decision in ***Estate of Rosengarten***, 871 A.2d 1249 (Pa. Super. 2005). N.T., 7/26/21, at 4. The orphans' court distinguished ***Rosengarten***, stating:

> I read it. I see a big distinction without [*sic*] facts, and as such, the rules springing from ***Rosengarten*** will not apply here. In ***Rosengarten*** there were facts of much improved mental condition of Ms. Rosengarten. She was now taking her medicine. That should have prompted the trial court to review its previous incapacity decision. We do not have facts close to that.
>
> So here's my ruling. [Attorney] Dempsey, your appearance is hereby stricken. You are not co-counsel for [M.A.].

Id. Attorney Dempsey took exception. Attorney Dempsey did not aver M.A. was being denied the right to counsel of his choice, but argued the orphans' court "right now doesn't even have jurisdiction over my client because he hasn't been served pursuant to 5511 of the Guardianship Act." ***Id.*** at 5.

Immediately following its decision striking Attorney Dempsey's appearance, the orphans' court proceeded to a hearing on M.A.'s alleged incapacity. Attorney Henry-Taylor represented M.A.; Attorney Ellis represented Marsha; and Attorney Capone represented Adraine and Virginia. M.A. was present, despite Attorney Dempsey's claim regarding lack of service. The orphans' ***1208** court did not take any sworn testimony. [5] Instead, the court explained its "understanding" of the matter and inquired about the feud between M.A.'s daughters. N.T., 7/26/21, at 3, 9-10. The court stated, "I have some background, to sort of, what I thought this would be about. It's about who's going to get the money. [M.A.] can have all these other issues but ultimately this is about who's going to get dad's money and what proportion." ***Id.*** at 14. The court continued:

> Why are we here? ... I have a lot of cases but I don't get children feuding over the parent. I mean, this is a modest estate. There's something else here other than the traditional issues that I see that belie this type of proceeding. Maybe what would help me is, what's the feud about? Why isn't there any - - why isn't there any family congruence or harmony about giving dad the best life he can have for the balance of the life he has? ... I believe the requisite issues with respect to [M.A.] and an AIP proceeding would probably move forward, but who should be the guardian. How come there can't be some agreement? That's the part I don't understand. So we can go forward with the emergency issue and the AIP but I'm really - - I'm confused, what is it about. Where did you all go awry? What happened? I received letters from the husband of one party and it's almost like a poison pen – I mean, I do estates for multi hundreds of millions of dollars and it doesn't have the same sort of noxious poison that this modest estate has.

Id. at 9-10. As to the competing wills, the court opined:

> I understand the sisters' position that, why should [the third sister, Marsha] get everything. I don't know whether that was his intent,

> the father to give everything to one daughter when there's three who get nothing, I don't know. But if I was one of the three who didn't get nothing, I would probably be here in court. ... I believe if I had a sibling who somehow produced a document that said that if mom dies before dad, then I get everything and it didn't make sense, given the relationships that the other kids had with dad, I would probably come here and see if this will is legitimate.

Id. at 18-19; ***see also id.*** at 25-27 (orphans' court noting that should the wills be invalidated, an intestate estate would be divided evenly between heirs); ***id.*** at 30-31 ("Why do you all need a will? ... The real issue is the will. ... If I were to make a decision whether to have no will or have a will that divides things equally, I would go with the will that divides things equally[.]..."). The orphans' court discounted the issue of whether M.A. had the capacity to enter into a POA or will on April 12, 2021, as "just smoke." ***Id.*** at 24.

At the urging of the court, the parties arrived at a settlement. ***Id.*** at 21-22. They agreed to M.A. being declared incapacitated, and Marsha, Adraine, and Virginia serving as co-guardians of M.A.'s person and estate, with a corresponding order to be drafted by Attorney Henry-Taylor. ***Id.*** at 39-41.

M.A. was present throughout the proceedings and did not object to the striking of Attorney Dempsey as counsel, his representation by Attorney Henry-Taylor, or the agreement regarding his incapacity and guardianship. Attorney Henry-Taylor advised the court that M.A. wished to settle and wanted "everyone [to] get along and share everything ... [and] would like to see the fighting stop." N.T., 7/26/21, at 23. M.A. confirmed to the court: "Everything's good." ***Id.*** at 29. ***See also*** ***1209** ***id.*** at 39-41 (orphans' court announcing parties' agreement and stating Attorney Henry-Taylor would memorialize the agreement); ***id.*** at 43-45 (Attorney Henry-Taylor affirming she personally served M.A. and explained the proceedings to him; she also noted M.A. was in the courtroom for all proceedings and participated to the extent possible). While Attorney Capone argued lack of proper service upon M.A., and thus the orphans' court's lack of personal jurisdiction, she stated, "the fact that we were working something out, I would like this matter to move forward." ***Id.*** at 42; ***see id.*** at 41-42.

On August 3, 2021, the orphans' court issued an order denying Attorney Dempsey's demand for testimony as moot. On August 13, 2021, Attorney Henry-Taylor filed a petition for compensation. Marsha filed a response to Adraine and Virginia's answer and new matter on August 17, 2021. Marsha filed a guardianship bond on August 24, 2021. On September 2, 2021, Adraine and Virginia filed a guardianship bond.

On August 26, 2021, prior to entry of a final order, Attorney Dempsey filed this appeal from the order striking his

appearance. Attorney Dempsey and the orphans' court complied with Pa.R.A.P. 1925. In the meantime, proceedings involving M.A. continued in orphans' court.

On October 26, 2021, Adraine and Virginia filed a motion to amend (the not yet memorialized) consent agreement and sought the appointment of an independent entity to serve as guardian of M.A.'s estate. Motion to Amend, 10/26/21, at 3-5. That same day, Adraine and Virginia filed a motion to unfreeze M.A.'s assets and dissolve the injunction. Motion to Unfreeze Assets, 10/26/21, at 3-5. Marsha filed a reply to both motions on November 1, 2021.

A guardianship review hearing took place on November 1, 2021, at which all parties (including M.A.) appeared, represented by counsel. Counsel indicated that because Marsha, Adraine, and Virginia were in conflict as co-guardians of the estate, the three sisters agreed to the court appointing a third party as guardian of M.A.'s estate.

M.A. spoke at the hearing. He did not object to his representation by Attorney Henry-Taylor or request representation by Attorney Dempsey. N.T., 11/1/21, at 40-41. M.A. described his current living situation: "Well, what I do is live the regular way, like I always did." ***Id.*** at 40. He referenced the conflict between his daughters stating, "This one do this and this one do that, but I don't live like that." ***Id.*** He expressed his desire that they work together, "if you want to make good of it[.]" ***Id.*** at 41.

On December 10, 2021, all parties filed consents to serve as guardians of M.A. That same day, the orphans' court filed its final order memorializing the parties' agreement (a) declaring M.A. to be incapacitated; (b) appointing Marsha, Adraine and Virginia as co-guardians of his person; and (c) appointing Ameriserv Trust and Financial Service Company as permanent plenary guardian of his estate. Order, 12/10/21, at 2.

On December 17, 2021, Adraine filed a request for $1,500.00 per month, retroactive to June 22, 2021, to defray M.A.'s living expenses. Petition for Compensation, 12/17/21, at 1-3 (unnumbered). Marsha filed a response objecting to the request, noting the orphans' court had stricken from its final order a paragraph allotting funds to Adraine. Response, 12/20/21, at 1-4 (unnumbered). Adraine filed a reply on January 6, 2022. The orphans' court granted Adraine's request by order entered January 20, 2022.

***1210 Issues**

Attorney Dempsey challenges the order striking him as M.A.'s counsel. He presents two issues for review:

> I. Did the Orphans' Court abuse its discretion and err as a matter of law in denying an alleged incapacitated person the right to counsel of his own choosing?
>
> II. Did the Orphans' Court err as a matter of law in *sua sponte* voiding a fee agreement between a client and his privately retained counsel without due process[?]

Attorney Dempsey's Brief at 4. [6]

Discussion

We begin with our standard of review:

> [T]his Court must determine whether the record is free from legal error and the court's factual findings are supported by the evidence. Because the Orphans' Court sits as the fact-finder, it determines the credibility of the witnesses and, on review, we will not reverse its credibility determinations absent an abuse of that discretion. However, we are not constrained to give the same deference to any resulting legal conclusions. Where the rules of law on which the court relied are palpably wrong or clearly inapplicable, we will reverse the court's decree.

Estate of Fuller, 87 A.3d 330, 333 (Pa. Super. 2014) (citation omitted). When appropriate, the orphans' court shall appoint counsel to represent the alleged incapacitated person in any matter for which counsel has not been retained by or on behalf of that individual. 20 Pa.C.S.A. § 5511(a). The orphans' court should abide by an incapacitated person's wishes regarding representation "to the extent possible." *Rosengarten*, 871 A.2d at 1257.

In considering Attorney Dempsey's issues, we recognize that the role of counsel in guardianship proceedings is not clearly defined in the guardianship statute. ***See*** 20 Pa.C.S.A. § 5511(a) (providing for court appointed counsel of the alleged incapacitated person if the orphans' court so chooses); ***see also Estate of Haertsch***, 415 Pa.Super. 598, 609 A.2d 1384, 1387 (1992) (declining to reach issue of whether alleged incapacitated person has constitutional right to counsel).[7] However, the following provisions of the Probate, Estates, and Fiduciaries Code (PEF Code) provide guidance. Section 5501 of the PEF Code defines an incapacitated person as:

> [A]n adult whose ability to receive and evaluate information effectively and communicate decisions in any way is impaired to such a significant extent that he is partially or totally unable to manage his financial resources or to meet essential requirements for his physical health and safety.

20 Pa.C.S.A. § 5501. Section 5502 provides:

> Recognizing that every individual has unique needs and differing abilities, **it is the purpose of this chapter to promote the general welfare of all**

> **citizens by establishing a system which permits incapacitated persons to participate as** *1211 **fully as possible in all decisions which affect them,** which assists these persons in meeting the essential requirements for their physical health and safety, protecting their rights, managing their financial resources and developing or regaining their abilities to the maximum extent possible and **which accomplishes these objectives through the use of the least restrictive alternative**; and recognizing further that when guardianship services are necessary, it is important to facilitate the finding of suitable individuals or entities willing to serve as guardians.

20 Pa.C.S.A. § 5502 (emphasis added). The PEF Code defines the powers, duties and liabilities of a guardian, and requires that the "[e]xpressed wishes and preferences of the incapacitated person shall be respected to the greatest possible extent." 20 Pa.C.S.A. § 5521(a). Accordingly, counsel appointed to represent an alleged incapacitated person must present the alleged incapacitated person's own position to the court. ***See generally***, 20 Pa.C.S.A. § 5502. However, counsel must also consider the interests of the alleged incapacitated person under 20 Pa.C.S.A. § 5501 (defining incapacitated person).

Counsel's ethical obligations are set forth in the Pennsylvania Rules of Professional Conduct. Rule 1.14, which addresses representation of a person with diminished capacity, states:

> a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
>
> b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian *ad litem*, conservator or guardian.
>
> c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Pa.R.C.R. 1.14.

The Pennsylvania Orphans' Court Rules have additional requirements:

> **(a) Retention of Counsel.** If counsel for the alleged incapacitated person has not been retained, the petitioner shall notify the court in writing at least seven days prior to the adjudicatory hearing that the alleged incapacitated person is unrepresented and also indicate whether the alleged incapacitated person has requested counsel.
>
> **(b) Private Counsel.** If the alleged incapacitated person has retained private counsel, **counsel shall prepare a comprehensive engagement letter for the alleged incapacitated person to sign,** setting forth when and how counsel was retained, the scope of counsel's services, whether those services include pursuing any appeal, if necessary, how counsel will bill for legal services and costs and the hourly rate, if applicable, who will be the party considered responsible for payment, whether any retainer is required, and if so, the amount of the retainer. **Counsel shall provide a copy *1212 of the signed engagement letter to the court upon request.**
>
> **(c) Appointed Counsel.** The court may appoint counsel if deemed appropriate in the particular case. **Any such order appointing counsel shall delineate the scope of counsel's services and whether those services include pursuing any appeal, if necessary.**

Pa.O.C.R. 14.4 (emphasis added).

Incapacity must be proven by clear and convincing evidence. ***See In re Hyman***, 811 A.2d 605, 608 (Pa. Super. 2002); ***see also*** 20 Pa.C.S.A. § 5511(a). Clear and convincing evidence "is the highest burden in our civil law and requires that the fact-finder be able to come to the clear conviction, without hesitancy, of the truth of the precise fact in issue." ***In re estate of Heske***, 436 Pa.Super. 63, 647 A.2d 243, 244 (1994) (internal citations and quotations omitted). **The court may appoint a plenary guardian only upon finding the AIP is totally incapacitated and in need of such services.** 20 Pa.C.S.A. § 5512.1(c).

Mindful of the above authority, we consider Attorney Dempsey's argument that the orphans' court "abused its discretion and erred as a matter of law by depriving [M.A.] of the right to choose his own counsel." Attorney Dempsey's Brief at 15; ***see id.*** at 15-20. Attorney Dempsey relies on this Court's decision in ***Rosengarten***.

In ***Rosengarten***, the AIP, Ms. Rosengarten, suffered from bipolar disorder and had stopped taking her medication. ***Rosengarten***, 871 A.2d at 1251. The orphans' court appointed counsel and ultimately found Ms. Rosengarten to be incompetent. ***Id.*** The court appointed a guardian of the estate and person, who filed a petition seeking to sell Ms. Rosengarten's residence. ***Id.*** Ms. Rosengarten hired her own attorney, who filed an answer and new matter objecting to the sale, seeking removal of the guardian, and asking that her father be appointed guardian of the estate. ***Id.*** The answer and new matter also raised specific allegations of financial misconduct by the current guardian and maintained that Ms.

Rosengarten's mental health had improved as a result of her taking medication, and thus a review hearing was warranted to the issue of her continued incapacity. *Id.* The orphans' court did not hold the requested hearing; instead, it held a hearing on the guardian's petition to sell the home, which it granted. *Id.* at 1252. The court did not allow Ms. Rosengarten's chosen counsel to participate. *Id.*

On appeal, this Court reversed and remanded. *Id.* at 1250. We first concluded the trial court erred in failing to conduct the requested review, particularly where there were allegations regarding the guardian's misconduct. *Id.* at 1254. We held the failure to conduct a review hearing violated 20 Pa.C.S.A. § 5512.2(a), which requires a hearing when the incapacitated person or other "interested person" alleges "a significant change in the person's capacity." 20 Pa.C.S.A. § 5512.2(a); *id.* We recognized that the failure to hold a review hearing ignored the incapacitated person's "stated preference," in violation of 20 Pa.C.S.A. § 5502. *Id.* We opined:

> The dangers of the incompetency statute have been recognized since its inception. *In re Bryden's Estate*, 211 Pa. 633, 633, 61 A. 250, 250 (1905) (statute allowing for declaration of incompetency "is a dangerous statute" and is "to be administered by the courts with the utmost caution and conservatism."). **It is basic to our jurisprudence that a person's property is theirs to dispose of as they wish, even if it results in poverty.** *Id.* As the Court stated in *Bryden*, "[T]he basic principle involved, as laid down in *Lines v. Lines*, 142 Pa. 149, 21 A. 809, [is] that a man may do what he pleases ***1213** with his personal estate during his life. He may even beggar himself and his family if he chooses to commit such an act of folly." *Id.* Recently, in *In re Hyman*, 811 A.2d 605, 608 (Pa.Super.2002) (quoting *Estate of Haertsch*, 415 Pa.Super. 598, 609 A.2d 1384, 1386 (1992)), we noted that the incompetency statute "places a great power in the court. The court has the power to place total control of a person's affairs in the hands of another. **This great power creates the opportunity for great abuse.**" The above cited and other provisions of Chapter 55 are tailored to ensure that the incapacitated person's wishes are honored to the maximum extent possible. In this case, the guardian and the orphans' court violated this mandate at nearly every conceivable opportunity.

Chapter 55 must be interpreted and the courts' actions guided by a scrupulous adherence to the principles of protecting the incapacitated person by the least restrictive means possible. This concept is embodied in our Supreme Court's decision in *In re Peery*, 556 Pa. 125, 727 A.2d 539 (1999). In that case, the alleged incapacitated person was mentally impaired, but the orphans' court concluded that a guardianship was not warranted because the person had a support system in place that met her financial and physical needs and which she preferred over a guardianship. The Supreme Court lauded the orphans' court's implementation of the incapacitated person's desire to continue with the existing support system and quoted with approval the orphans' court's statement that it would abide by the incapacitated person's wishes as long as they were rational and did not result in harm to her.

Id. at 1254-55 (emphasis added).

Regarding Ms. Rosengarten's right to counsel of her choosing, we observed:

> First, we are not presently considering the validity of any contract entered by Ms. Rosengarten and [chosen counsel], and in fact, there is no evidence that one was made. Second, a contract entered into by an incapacitated person is merely presumed to be voidable, and this presumption is subject to rebuttal by proof that the person was not incapacitated, ***see Fulkroad v. Ofak***, 317 Pa.Super. 200, 463 A.2d 1155 (1983), which was an allegation raised in this matter. **Finally, this position begs the central question, which is whether Ms. Rosengarten should have the right to appointed counsel of her choosing. As the above-cited case law and statutory language make abundantly clear, Ms. Rosengarten's stated wishes are to be honored to the extent possible.** In the absence of some indication that [chosen counsel's] representation would be harmful to Ms. Rosengarten, once Ms. Rosengarten indicated that she wanted him to represent her, [chosen counsel] should have been permitted to represent her voice.
>
> The appointment of [chosen counsel] would have been particularly appropriate herein as appointed counsel ... admitted at oral argument that she made no inquiry into and took no action on the allegation that Ms. Rosengarten no longer was incapacitated. In addition, at the hearing regarding the sale of the house, [appointed counsel] did not raise a single objection to [the guardian's] fees and failed to articulate Ms. Rosengarten's desires in this matter, including her wish that her father act as guardian to reduce costs.

Id. at 1257 (emphasis added).

In the 17 years since it was issued, there has been a dearth of published case law interpreting *Rosengarten*. Similarly, there ***1214** are few unpublished cases, and those cases only discuss *Rosengarten* briefly.

In *Estate of Crowder*, 262 A.3d 549 (Pa. Super. 2021) (unpublished memorandum),[8] the orphans' court dismissed the AIP's petition to nullify a health care POA, based on a finding that the AIP lacked standing, and the issue was rendered moot by the appointment of a guardian. *Crowder*, 262 A.3d at *1-2. This Court, after determining the orphans' court erred in deeming the POA moot, held that under *Rosengarten*, the AIP had standing to pursue nullification of the POA. *Id.* at *2-3. We noted the AIP's statement at the guardianship hearing that he did not want the person holding the POA to make healthcare decisions for him, and we concluded the AIP had "a substantial, direct, and immediate interest" in the outcome of his petition to nullify the POA. *Id.* at *3. We also acknowledged the AIP's capacity to make this decision because the orphans' court had found him incapable of making financial decisions but had not appointed a guardian of his person. *Id.*

In *Sabatino*, a dispute arose between court-appointed counsel for the AIP and counsel for his service providers, who purported to be the AIP's counsel of choice. ***Sabatino***, 2016 WL 6995384 at *1, 159 A.3d 602

(Pa. Super. 2016) (unpublished memorandum). The orphans' court distinguished *Rosengarten* based on the AIP's tendency to say what he thought the last person speaking wanted to hear, thus raising doubts about the AIP's capacity to choose counsel. *Id.* at *3, *6-8. However, the court permitted the service providers and their counsel to fully participate in proceedings as *amicus curiae*. *Id.* On appeal, this Court concluded we need not reach the service providers' argument that the orphans' court decision violated *Rosengarten*, given that the providers were permitted to participate in the proceedings. *Id.* at *9. We further rejected their argument that the allegedly erroneous disqualification of counsel of the AIP's choice in a guardianship proceeding constituted structural error. *Id.*

In *In Re Kline*, 2016 WL 102755 (Pa. Super. Jan. 8, 2016), the great-niece of the AIP appealed the order dismissing her as guardian of the person and estate, appointing a third party as guardian, and assessing a surcharge for waste and mismanagement. *Kline*, 2016 102755, at *1. In affirming the orphans' court, this Court rejected the former guardian's reliance on *Rosengarten*, finding it was distinguishable where "no issue has been raised regarding [the AIP's] continued incapacity or ability to return home." *Id.* at *7 n.13.

Lastly, in *Estate of Wittmaier*, this Court adopted the orphans' court's finding that *Rosengarten* did not apply, where the orphans' court had refused to allow the AIP to change from originally retained counsel to different retained counsel. ***In re Estate of Wittmaier***, 131 A.3d 81, 2015 WL 7012971 (Pa. Super. 2015) (unpublished memorandum), *Id.* at *1-2. Citing *Rosengarten*, the orphans' court recognized it, "should abide by the incapacitated person's wishes so long as they are rational and do not result in harm to the incapacitated person." *Id.* at *8. The orphans' court observed the AIP had not alleged misconduct by original counsel. *Id.* at *7. Rather, the AIP "will always be upset at anybody who disagrees with what his interests or desires are." *Id.* (citation omitted). The orphans' court found, based on hearing testimony, that the AIP would oppose any counsel who disagreed with him, even if counsel were acting in the AIP's best interests. *Id.* at *8. The court also expressed concern regarding errors in new ***1215** counsel's filings, and new counsel's lack of preparation and understanding of the seriousness of the AIP's medical condition. *Id.*

As the above cases demonstrate, the issue of the AIP's right to counsel in guardianship proceedings is imprecise. The PEF Code mandates that orphans' courts honor, to the extent possible, the wishes of the AIP. ***See*** 20 Pa.C.S.A. §§ 5502 and 5521(a). Thus, the orphans' court must balance the competing interests in the wishes of the AIP, the resources available, and the best interests of the AIP. ***See*** ***Rosengarten***, ***supra*** at 1255-57.

The facts of this case are different from *Rosengarten*. M.A. is elderly, and this is not a case where his functioning was impaired by failure to take medication and had he "started to take [his] medication properly, it would follow that a review hearing would be in order." *Id.* at 1255. This is also not a case where M.A. wrote a "cogent and practical" letter to the orphans' court expressing his preferences, including a preference for counsel of his choice.

Id. at 1252. Despite the factual distinctions, we are unable to determine whether *Rosengarten* applies given the deficiencies in the record.

As recounted above, many of the filings failed to conform with Orphans' Court Rules. Marsha's petition does not comply with Pa.O.C.R. 14.2 (detailing, *inter alia*, petition content and exhibits). For example, Marsha did not include a Pennsylvania State Police Criminal Records Check as required by Pa.O.C.R. 14.2(c)(2). In another instance, the orphans' court's order appointing Attorney Henry-Taylor as counsel does not comply with Pa.O.C.R. 14.4(c), as it does not detail the scope of her representation. While both Attorney Capone and Attorney Dempsey challenged the orphans' court's jurisdiction based on improper service, neither filed preliminary objections as provided in Pa.O.C.R. 3.6(c) and 3.9(b)(1).

In 2020, the Administrative Office of Pennsylvania Courts and The Advisory Council on Elder Justice in the Courts authored and distributed to the orphans' courts a Guardianship Bench Book. The authors stated:

> In balancing an AIP's need for protection with respect for their autonomy, **judges are required by the United States Constitution's guarantee of Due Process to protect the rights of the AIP to the greatest extent possible.** Appointment of a guardian, with the resulting loss of rights for the AIP, may not be necessary in situations where other resources are available to assist the AIP. Even where the evidence clearly demonstrates an incapacity, **judges are required to consider whether there is a less restrictive alternative to guardianship that can meet the person's needs.** Judges are required under Pennsylvania law to favor limited guardianships over plenary guardianships in appropriate cases. Where possible, limited guardianship orders should be framed to address the specific areas in which the court determines, based on the testimony and evidence, that an individual lacks the capacity to meet the essential requirements for their well-being and is in need of guardianship services.
>
> The Advisory Council on Elder Justice in the Courts and The Administrative Office of Pennsylvania Courts, Guardianship Bench Book, 5 (2020) (emphasis added).
>
> The PEF Code mandates, prior to an AIP being declared incapacitated, a petitioner must prove

> incapacity by clear and convincing evidence. To establish incapacity, the petitioner **must present testimony**, in person or by deposition from individuals qualified by training and experience in evaluating individuals with incapacities of the type alleged by the petitioner, which establishes the nature and extent of the alleged incapacities and disabilities and the person's ***1216** mental, emotional and physical condition, adaptive behavior and social skills. The petition **must also present evidence** regarding the services being utilized to meet essential requirements for the alleged incapacitated person's physical health and safety, to manage the person's financial resources or to develop or regain the person's abilities; evidence regarding the types of assistance required by the person and **as to why no less restrictive alternatives would be appropriate; and evidence regarding the probability that the extent of the person's incapacities may significantly lessen or change.**

20 Pa.C.S.A. § 5518 (emphasis added). The orphans' court must "consider and make specific findings of fact concerning"

> (1) The nature of any condition or disability which impairs the individual's capacity to make and communicate decisions.
>
> (2) The extent of the individual's capacity to make and communicate decisions.
>
> (3) The need for guardianship services, if any, in light of such factors as the availability of family, friends and other supports to assist the individual in making decisions and in light of the existence, if any, of advance directives such as durable powers of attorney or trusts.
>
> (4) The type of guardian, limited or plenary, of the person or estate needed based on the nature of any condition or disability and the capacity to make and communicate decisions.
>
> (5) The duration of the guardianship.
>
> (6) The court shall prefer limited guardianship.

20 Pa.C.S.A. § 5512.1(a).

The record indicates that this case proceeded without adherence to Orphans' Court Rules and the PEF Code. For example, the only medical evidence **of record** to support a finding of M.A.'s incapacity, consists of the letter purportedly written by M.A.'s physician, John Haretos, M.D. The orphans' court appears to have accepted Dr. Haretos' unauthenticated determination that M.A. suffers from dementia

and is incapable of caring for himself. The court did so without ruling on Attorney Capone's objection based on her lack of opportunity to question Dr. Haretos, and without making findings regarding Dr. Haretos' expertise. ***See*** N.T., 7/26/21, at 5-7, 9-10; ***see also***, Pa.C.S.A. §§ 5512.1(a), 5518; Pa.O.C.R. 14.3.

The orphans' court did not hear testimony or render findings, but focused on family acrimony, including the validity of wills, while urging the parties to settle. The court referenced the parties' allegations of wrongdoing, but did not specifically address the allegations or the suitability of the daughters to serve as M.A.'s guardians. Although the parties arrived at an agreement when they appeared before the court on July 26, 2021, they continued to disagree. Consequently, the court conducted a hearing three months later, and the agreement was amended to name a third-party, Ameriserv, as guardian of the estate. ***See*** N.T., 11/1/21, at 2-43.

Of further significance, the court did not consider a less restrictive alternative to guardianship, possibly the 2019 or 2021 POA, in violation of 20 Pa.C.S.A. § 5512.1(a)(3). With respect to Attorney Dempsey's issues, the court struck Attorney Dempsey's appearance without hearing any evidence or argument, and without considering the wishes of M.A. ***See Rosengarten***, ***supra***; 20 Pa.C.S.A. § 5512.1(a)(1) and (2). Attorney Henry-Taylor did not raise these considerations on M.A.'s behalf.

For the above reasons, we are constrained to reverse and remand for further proceedings regarding representation of M.A., including a determination of whether M.A. is incapacitated, as follows:

- Hearings shall comply with 20 Pa.C.S.A. §§ 5501, 5502, 5518, and ***1217** 5512.1(a), and all other relevant portions of the PEF Code.

- If the parties wish to submit additional written materials prior to the hearing, they must do so in compliance with the Orphans' Court Rules of Procedure.

- If Attorneys Capone and Dempsey wish to pursue claims that they were retained by M.A., they shall submit copies of their engagement letters in compliance with Pa.O.C.R. 14.4(b).

- The orphans' court shall make findings of fact pursuant to 20 Pa.C.S.A. § 5512.1(a) and shall specifically determine whether

  (1) M.A. is incapacitated as alleged in the petition; and whether

  (2) M.A. has the capacity to retain private counsel.

- If the orphans' court finds M.A. has capacity to retain counsel, the court shall determine M.A.'s preferred counsel and allow representation by that counsel.

- If M.A. lacks capacity to retain counsel, the court shall determine whether M.A.'s choice of counsel may be honored to the extent possible, and whether any fee agreements between Attorney Capone and/or Attorney Dempsey and M.A. are voidable;

- If the orphans' court finds M.A. incapacitated, the court shall determine whether guardianship is the least restrictive alternative. In so doing, the orphans' court shall rule on the validity of the 2019 and 2021 POAs.

- In light of competing allegations of the sisters' wrongdoing, the orphans' court shall make specific findings as to the suitability of M.A.'s current living situation; whether Adraine's receipt of $1,500.00 per month constitutes an appropriate charge against the estate, and, if it does not, to determine the appropriateness of a surcharge, and whether the appointment of an independent guardian is necessary.

Accordingly, we vacate the orders of July 27, 2021, December 10, 2021, and January 20, 2022, and remand for further proceedings.[9]

Orders vacated. Case remanded for further proceedings consistent with this Opinion. Jurisdiction relinquished.

All Citations

284 A.3d 1202, 2022 PA Super 180

Footnotes

1 Orders precluding counsel in civil cases are interlocutory and not immediately appealable. ***E.R. v. J.N.B.***, 129 A.3d 521, 525 (Pa. Super. 2015). However, once a final order has been entered, the precluded attorney may bring a separate appeal challenging disqualification. ***Id.*** As the orphans' court entered a final order during the pendency of this appeal, in the interest of judicial economy, we "regard as done what ought to have been done," and consider the appeal as being from the December 10, 2021, order. ***See Zitney v. Appalachian Timber Products, Inc.***, 72 A.3d 281, 285 (Pa. Super. 2013).

2 Marsha's sisters are Adraine Moreland (Adraine), Virginia Smiley (Virginia), and Audrey Patrick (Audrey). Audrey is not involved in the proceedings.

3 Having been elected in November 2021, to the Allegheny County Court of Common Pleas, Attorney Henry-Taylor is now The Honorable Henry-Taylor. Following her election, Judge Henry-Taylor moved to withdraw her appearance. On December 29, 2021, the orphans' court granted her request and appointed Jennifer Price, Esquire, as counsel for M.A.

4 Although the demand for testimony purports to be pursuant to Rule "41.3(c)(1)," this appears to be a typographical error. Rule 14.3(c) provides, in relevant part:

> **(a)** A petitioner may seek to offer into evidence an expert report for the determination of incapacity in lieu of testimony, in-person or by deposition, of an expert using the form provided in the Appendix to these rules. In an emergency guardianship proceeding, an expert report may be offered into evidence if specifically authorized by the court.
>
> **(b) Notice.**
>
> (1) If a petitioner seeks to offer an expert report permitted under paragraph (a), the petitioner shall serve a copy of the completed report upon the alleged incapacitated person's counsel and all other counsel of record pursuant to Rule 4.3 or, if unrepresented, upon the alleged incapacitated person, pursuant to Pa.R.C.R. No. 402(a) by a competent adult no later than ten days prior to the hearing on the petition.
>
> (2) If a petitioner seeks to offer an expert report, as permitted under paragraph (a), the petitioner shall serve pursuant to Rule 4.3 a notice of that fact upon those entitled to notice of the petition and hearing no later than ten days prior to the hearing on the petition.
>
> (3) The petitioner shall file a certificate of service with the court as to paragraphs (b)(1) and (b)(2).
>
> **(c) Demand.**
>
> (1) Within five days of service of the completed report provided in paragraph (b)(1), the alleged incapacitated person's counsel or, if unrepresented, the alleged incapacitated person, may file with the court and serve upon the petitioner pursuant to Rule 4.3 a demand for the testimony of the expert.
>
> Pa.O.C.R. 14.3(a), (b) and (c)(1).

5 The transcript is in the certified record, but the exhibits admitted into evidence are not.

6 Marsha did not file a brief, and Adraine and Virginia, by correspondence dated April 28, 2022, indicated they take no position in this appeal.

7 Since 2014, the Pennsylvania Supreme Court's Elder Law Task Force has recommended changes to both the Rules of Professional Conduct and the Orphans' Court Rules, to address and clarify the role of counsel in guardianship matters. ***See*** Report and Recommendations of the Elder Law Task Force, 11/2014, Guardian and Counsel Committee Report, § VIII.B.1.a.-b., at 50; § VIII.C.1.D. at 51; § VIII.1.a., at

51; § VIII.C.1.c. at 51; ***see also In re Sabatino***, 2016 WL 6995384, at *11 n.17 (Pa. Super. Nov. 30, 2016).

8 Pa.R.A.P. 126(b) provides that unpublished non-precedential decisions of the Superior Court filed after May 1, 2019, may be cited for persuasive value.

9 Given our disposition, we need not address Attorney Dempsey's second issue.

End of Document

289 A.3d 74 (Table)
Unpublished Disposition
NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37
Superior Court of Pennsylvania.

In the MATTER OF the
ESTATE OF: L.E.K.
Appeal of: L.E.K.

No. 576 WDA 2022
|
Filed November 16, 2022

Appeal from the Decree Entered April 18, 2022, In the Court of Common Pleas of Bedford County, Orphans' Court, at No(s): 2022-00008

BEFORE: DUBOW, J., MURRAY, J., and PELLEGRINI, J. *

MEMORANDUM BY DUBOW, J.:

***1** Appellant, L.E.K., appeals from the April 18, 2022 Order entered in the Bedford County Court of Common Pleas that adjudicated him incapacitated and appointed a plenary guardian of his person and estate. Appellant challenges, *inter alia*, the sufficiency of the evidence. Upon review, we affirm.

Appellant is 65 years old and has been diagnosed with Parkinson's Disease. Appellant lives by himself and, until recently, was receiving home services from the Huntington-Bedford-Fulton Area Agency on Aging ("the Agency"). In the summer of 2021, Appellant was hospitalized after several episodes where he displayed "paranoid delusional" behavior and contacted state police concerned that someone was robbing him. N.T. Hearing, 4/14/22, at 19. Appellant was admitted to Maybrook Hills Nursing Facility. On February 8, 2022, the Agency filed a Petition for Adjudication of Incapacity and Appointment of Plenary Guardian after receiving information from in-home service providers that it was not safe to send Appellant home, as well as a written statement on January 5, 2022, from Appellant's treating physician, Dr. Carl Werne, stating that he would testify to Appellant's incompetence. In the petition, the Agency alleged that Appellant suffers from Parkinson's Disease and altered mental status, which cause him to need significant support in his daily living, including twenty-four-hour care and supervision. The Agency also attached Dr. Werne's written statement. On February 9, 2022, the trial court appointed Karen S. Hendershot, Esquire, to represent Appellant. On March 29, 2022, and March 30, 2022, Catherine S. Spayd, Ph.D., P.C., conducted a psychological evaluation of Appellant.

On April 14, 2022, the trial court held a guardianship hearing. Appellant was present at the hearing with Attorney Hendershot. The trial court heard testimony from Dr. Spayd and Jim Rose, co-manager of the Agency.

In sum, Dr. Spayd testified as an expert in ascertaining a patient's current level of cognitive functioning. She explained that she meets with patients for two separate sessions to get a better clinical sample of behavior, and to account for instances where a patient is simply having a bad day. Dr. Spayd explained that she conducted a clinical interview, obtained background information from the Agency,

and reviewed Appellant's medications and diagnoses.

Dr. Spayd also conducted various tests to measure Appellant's cognitive functioning, including the Folstein Mini Mental State Examination; Mattis Dementia Rating Scare; Trail Making Test that measures attention and mental flexibility and sequencing; California Verbal Learning Test that measures verbal recall and learning; Boston Naming Test that measures naming abilities; F-A-S Verbal Fluency Test; Boston Diagnostic Aphasia Evaluation Complex Ideation sub-test; Wechsler Adult Cognitive Scale; and a Clock Drawing Test that measures non-verbal problem-solving skills.

Dr. Spayd testified that Appellant demonstrated average functioning in various areas but had average to severely impaired attention; mildly clinically impaired non-verbal problem solving and verbal initiation skills; moderate impairment in the areas of receptive language; and moderate to severely impaired abstraction and mental flexibility and sequencing ability. Dr. Spayd testified that she diagnosed Appellant with dementia secondary to his Parkinson's Disease and concluded:

> ***2** [Appellant] is unable to make effective life decisions on his own due to cognitive deficits. And, therefore, because he had not established power of attorney [ ] previously, a plenary guardianship would be clinically indicated ... Due to his cognitive deficits, I recommend twenty-four-hour supervision and assistance with his daily care.

N.T. Hearing at 12. Finally, Dr. Spayd explained that "a Parkinson's based dementia presents differently than, for example, Alzheimer's based dementia, which tends to be more apparent to the casual observer.... So on a basic level to [a] observer, yes, I think he would appear mostly intact." ***Id.*** at 15.

In her expert report, which the Agency entered into evidence, Dr. Spayd made the following relevant treatment recommendations:

> 2. Given his currently identified moderate level of neuro-cognitive disorder, [Appellant] is assessed to currently be incapable of making good life decisions. Specifically, test results suggest he is currently unable to consistently attend to, to recall, or to effectively comprehend information needed to make important life decisions, to effectively problem solve or to think abstractly regarding such decisions, nor to initiate action upon them. Because the patient has not previously established [Power of Attorney] documents, plenary guardianship of both person and estate is thus clinically indicated at this time.
>
> 3. Given the current severity level of [Appellant]'s identified cognitive deficits, 24-hour supervision of and assistance with his daily activities are clinically indicated at this time, to assure he accurately takes medications, completes medical appointments and procedures,

> receives consistent nutrition, safely manages appliances, is protected financially from potential designing persons, and can be assisted in possible emergency situations. This level of care could be provided by 24-hour caregivers in his home, or by continued placement in a long-term residential setting.

Petitioner's Ex. 1, Psychological Evaluation, at 6.

Mr. Rose, who has been employed by the Agency for six years and working with Appellant since August 2021, testified to the above events. Additionally, Mr. Rose testified that Appellant "needs maximum assistance for his medications" and the assistance of one or two individuals to perform daily activities. N.T. Hearing at 22. Mr. Rose stated that Appellant is "taking care of his own finances" and "deals with a credit union in California." ***Id.*** at 23. Finally, Mr. Rose testified that he has helped Appellant with some minor financial issues, but Appellant has "tried to stay diligent in trying to pay taxes. He even called at the beginning of the year to get certified checks to try to pay his local taxes." ***Id.*** at 24. Mr. Rose was unaware if the taxes were actually paid.

At the conclusion of the hearing, the trial court adjudicated Appellant incapacitated and appointed a plenary guardian of his person and estate.

Appellant timely appealed. Both Appellant and the trial court complied with Pa.R.A.P. 1925.

Appellant raises the following issues for our review:

> 1. Did the lower court have jurisdiction of the person of the alleged incapacitated person?
>
> 2. Was there presentation of clear and convincing evidence sufficient for a finding that the ability of the alleged incapacitated person to receive and evaluate information effectively and communicate decisions in any way was impaired to such a significant extent that he was totally unable to manage his financial resources or to meet essential requirements for his physical health and safety?
>
> ***3** 3. Did various shortcomings in the proceedings deny the alleged incapacitated person his basic rights to due process of law?

Appellant's Br. at 5.

A.

It is well-settled that "[t]he findings of a judge of the orphans' court division, sitting without a jury, must be accorded the same weight and effect as the verdict of a jury, and will not be reversed by an appellate court in the absence of an abuse of discretion or a lack of evidentiary support." ***In re Jackson***, 174 A.3d 14, 23 (Pa. Super. 2017) (citation omitted). "This rule is particularly applicable to findings of fact which are predicated upon the credibility of the witnesses, whom the judge has had the opportunity to hear and observe, and upon the weight given to their testimony." ***Id.*** (citation omitted). This Court's "task is to

ensure that the record is free from legal error and to determine if the [o]rphans' [c]ourt's findings are supported by competent and adequate evidence and are not predicated upon capricious disbelief of competent and credible evidence." ***Id.*** (citation omitted)

Consequently, "[o]ur review of the trial court's determination in a competency case is based on an abuse of discretion standard, recognizing, of course, that the trial court had the opportunity to observe all of the witnesses, including, as here, the allegedly incapacitated person." ***In re Hyman***, 811 A.2d 605, 608 (Pa. Super. 2002). "An abuse of discretion exists when the trial court has rendered a judgment that is manifestly unreasonable, arbitrary, or capricious, has failed to apply the law, or was motivated by partiality, prejudice, bias, or ill will." ***Harman ex rel. Harman v. Borah***, 756 A.2d 1116, 1123 (Pa. 2000). Notably, for an appellant to establish an abuse of discretion, it "is not sufficient to persuade the appellate court that it might have reached a different conclusion under the same factual situation." ***Fancsali v. Univ. Health Ctr. of Pittsburgh***, 761 A.2d 1159, 1162 (Pa. 2000).

Under Pennsylvania law, an incapacitated person is "an adult whose ability to receive and evaluate information effectively and communicate decisions in any way is impaired to such a significant extent that he is partially or totally unable to manage his financial resources or to meet essential requirements for his physical health and safety." 20 Pa.C.S. § 5501. "The court, upon petition and hearing and upon the presentation of clear and convincing evidence, may find a person domiciled in the Commonwealth to be incapacitated and appoint a guardian or guardians of his person or estate." 20 Pa.C.S. § 5511(a). A person is presumed to be mentally competent, and the burden is on the petitioner to prove incapacity by clear and convincing evidence. ***In Re Myers' Estate***, 150 A.2d 525, 526 (Pa. 1959). We have explained that "[t]he standard of clear and convincing evidence is defined as testimony that is so clear, direct, weighty and convincing as to enable the trier of fact to come to a clear conviction, without hesitance, of the truth of the precise facts in issue." ***In re R.N.J.***, 985 A.2d 273, 276 (Pa. Super. 2009) (citation and internal quotation marks omitted).

Further, when making a determination of incapacity, the court shall consider and make specific findings of fact concerning:

> ***4** (1) The nature of any condition or disability which impairs the individual's capacity to make and communicate decisions.
>
> (2) The extent of the individual's capacity to make and communicate decisions.
>
> (3) The need for guardianship services, if any, in light of such factors as the availability of family, friends and other supports to assist the individual in making decisions and in light of the existence, if any, of advance directives such as durable powers of attorney or trusts.
>
> (4) The type of guardian, limited or plenary, of the person or estate needed based on the nature of any condition or disability and the capacity to make and communicate decisions.

(5) The duration of the guardianship.

(6) The court shall prefer limited guardianship.

20 Pa.C.S. § 5512.1(a).

B.

In his first issue, Appellant avers, for the first time on appeal, that the trial court did not have personal jurisdiction over him. Appellant's Br. at 10. Appellant argues that the record is devoid of evidence that the Agency personally served the adjudication of incapacity petition on Appellant as required by 20 Pa.C.S. § 5511(a) and Pa.O.C. Rule 14.2(f), which both require written notice of the petition and hearing to be personally served on the alleged incapacitated person at least 20 days before the hearing. ***Id.*** Appellant also argues that the Agency failed to present the citation and proof of service at the hearing as required by Pa.O.C. Rule 14.6(a). ***Id.*** Therefore, Appellant contends, the trial court never had jurisdiction of his person and the final decree is void for lack of jurisdiction. Upon review, Appellant has waived these challenges.

"Personal jurisdiction is a court's power to bring a person into its adjudicative process." ***Grimm v. Grimm***, 149 A.3d 77, 83 (Pa. Super. 2016) (internal quotation marks and citation omitted). "Jurisdiction of the person may be obtained through consent, waiver or proper service of process." ***Fleehr v. Mummert***, 857 A.2d 683, 685 (Pa. Super. 2004). One can waive service of process by various means, including a voluntary appearance in court. ***Id.*** ***See also Hicks' Estate***, 199 A.2d 283, 285 (Pa. 1964) (explaining that a court cannot establish personal jurisdiction "[u]nless the court has the parties before it, by appearance or service of process"). A party demonstrates an intent to submit to the court's jurisdiction when the party takes some action pertaining to the merits of the case, thus evidencing an intent to forego objection to any defective service. ***Fleehr***, 857 A.2d at 685.

Furthermore, it is axiomatic that issues which are not raised in the trial court are waived and cannot be raised for the first time on appeal to this Court. Pa.R.A.P. 302(a). The failure to challenge personal jurisdiction constitutes waiver of that defense. ***Wagner v. Wagner***, 768 A.2d 1112, 1119 (Pa. 2001). "This Court has long held that questions of personal jurisdiction must be raised at the first reasonable opportunity or they are lost." ***Manack v. Sandlin***, 812 A.2d 676, 683 (Pa. Super. 2002)

Instantly, Appellant appeared in court and participated in the hearing, thereby waiving any objection to personal jurisdiction. Additionally, Appellant failed to raise any challenge regarding personal jurisdiction, service of process, or compliance with Section 5511 or Rules 14.2 and 14.6 at the trial court level. Accordingly, Appellant has failed to preserve these challenges for our review. [1]

C.

***5** In his second issue, Appellant avers that the Agency did not present clear and convincing evidence that Appellant was totally

incapacitated and that the appointment of a plenary guardian of his person and estate was the least restrictive alternative. Appellant's Br. at 19. Appellant argues that Dr. Spayd's testimony "leaps from a factual predicate of findings of moderate to severe impairment in **some** cognitive domains to a conclusion that plenary guardianship of both person and estate is the only clinically indicated result." ***Id.*** at 23 (emphasis added). Additionally, Appellant argues that the trial court should have considered Mr. Rose's testimony that Appellant was able to take care of his own finances. ***Id.*** at 21. Essentially, Appellant is challenging the weight of the evidence.

Instantly, the trial court placed little weight on Mr. Rose's testimony that Appellant was able to contact his credit union and had tried to pay his taxes, emphasizing that "it is unknown whether those taxes were paid," and placed greater weight on Dr. Spayd's uncontradicted expert testimony and report. Trial Ct. Op., filed 6/13/22, at 18-19. The trial court emphasized Dr. Spayd's conclusions in her expert report that Appellant is "currently unable to consistently attend to, to recall, or to effectively comprehend information needed to make important life decisions [or] to initiate action upon them." ***Id.*** at 19 (quoting Petitioner's Ex. 1, Psychological Report, at 6.)

Moreover, the trial court credited Dr. Spayd's uncontradicted expert testimony that Appellant is suffering from dementia secondary to Parkinson's Disease and her expert opinion that Appellant needs a plenary guardian of his person and estate. The trial court opined:

> Based upon the expert testimony of Dr. Spayd, as well as the written report entered as evidence at the hearing, this [c]ourt found by clear and convincing evidence, that [Appellant] suffers from a condition that totally impairs his capacity to receive and evaluate information effectively and to make and communicate decisions concerning his management of financial affairs or to meet essential requirements for his physical health and safety. As there were no family members or friends who were willing to serve as plenary guardian of the person and estate of [Appellant].

Id. at 18. The trial court's findings are supported in the record. We decline to usurp the trial court's credibility determinations or reweigh the evidence. Accordingly, we find no abuse of discretion.

D.

In his third and final issue, Appellant avers that various shortcomings in the proceedings amounted to a denial of his right to due process of law, which is guaranteed to him by the 14th Amendment to the Constitution. Appellant's Br.

at 24. Appellant avers, "in essence, this claim is that this poor guy got the bum's rush." ***Id.*** at 25.

To support his claim, Appellant reiterates his arguments that the Agency failed to comply with Pa.O.C. Rule 14.2, that the Agency failed to perfect proper service on Appellant, and that Attorney Hendershot served as a GAL rather than an attorney. As explained above, all of these challenges are waived. Essentially, Appellant attempts to resurrect several waived claims of error into an overarching due process claim of error. Appellant fails to provide this Court with any relevant legal authority to support this broad claim. Accordingly, Appellant is not entitled to relief on this issue.

E.

In conclusion, Appellant's personal jurisdiction and due process claims of errors are waived. The record supports the trial court's conclusion that Appellant is incapacitated and in need of a plenary guardian of his person and estate. Accordingly, we find no abuse of discretion.

Order affirmed.

All Citations

289 A.3d 74 (Table), 2022 WL 16956531

Footnotes

* Retired Senior Judge assigned to the Superior Court.

1 Appellant also argues, for the first time in his brief, that the Agency failed to comply with the jurisdictional procedural provisions of the Probate, Estates, and Fiduciaries Code, specifically 20 Pa.C.S. §§ 764-766, which, *inter alia*, require a party in interest to obtain personal jurisdiction by serving a citation. Appellant's Br. at 14. Appellant failed to include this challenge in his Rule 1925(b) statement and, thus, failed to preserve this issue for our review. ***See*** Pa.R.A.P. 1925(b)(4)(vii) ("Issues not included in the Statement ... are waived"). Moreover, as discussed above, Appellant waived any challenge to personal jurisdiction when he appeared in court and participated in the hearing.

Appellant further argues, for the first time in his brief, that it is unclear whether the trial court appointed Attorney Hendershot to serve as a guardian *ad litem* ("GAL"), an attorney, or both. Appellant's Br. at 15-18. Appellant likewise failed to include this issue in his Rule 1925(b) statement and the issue is, thus, waived. ***See*** Pa.R.A.P. 1925(b)(4)(vii).

Rule 510. Guardianship Tracking System.

(a) *Definitions.* The words and phrases used in this rule shall have the following meanings:

Clerk—The Clerk of the Orphans' Court.

The System—The Guardianship Tracking System, or GTS, developed and administered by the Administrative Office as the electronic filing system to be used for filing reports and inventories required for guardianships of the person and guardianships of the estate, and for tracking data related to all statewide guardianship cases of adult incapacitated persons.

(b) *Participation and fees.* The System is the exclusive method for electronically filing required reports and inventories for guardianships of the person, and for guardianships of the estate, and for tracking data related to statewide guardianship cases of adult incapacitated persons. Court-appointed guardians may file reports and inventories in either an electronic format or a physical paper format. Guardians who elect to file in an electronic format shall use the System to file reports and inventories with the Clerk of the court where the matter was adjudicated.

(1) In order to participate in the System, a court-appointed guardian shall establish a UJS web portal account at http://ujsportal.pacourts.us and register for access by procedures established by the Administrative Office.

(2) After access to the System is obtained, the guardian bears the responsibility for all actions associated with the guardian's user account.

(3) Establishment of an account by a guardian shall constitute consent to participate in electronic filing, including acceptance of electronic notices sent through the System. Use of the System by a guardian shall constitute certification that the submission is authorized.

(4) Any applicable filing fees, as required by statute, court rule or order, shall be paid electronically through the System at the time of submitting a filing. In addition to any applicable filing fees, an online payment convenience fee for use of the System may be imposed.

(c) *Filing.*

(1) When a report or inventory is filed electronically, the filing shall be submitted to the System at the UJS web portal at http://ujsportal.pacourts.us, in accordance with this rule and any filing instructions as may otherwise be provided at the web portal site.

(2) Electronic filing may be submitted at any time (with the exception of times of periodic maintenance). The electronic filing must be completed by 11:59:59 p.m. EST/EDT to be considered filed on that day.

(3) The guardian shall be responsible for any delay, disruption, and interruption of the electronic signals, except when caused by the failure of the System's website.

(4) The date and time on which the filing was submitted to the System shall be recorded by the System. The System shall provide an electronic notification to the guardian when the filing has been submitted.

(5) The date and time on which the filing was accepted by the Clerk shall also be recorded by the System. The System shall provide an electronic notification to the guardian when the filing has been

accepted by the Clerk.

(6) The submission and acceptance of an electronic filing shall satisfy the reporting requirements of Pa. O.C. Rule 14.8. An electronic filing shall be considered filed with the Clerk upon the date and time of the filer's electronic submission, if the Clerk determines the requirements for filing are met. If the Clerk determines the requirements for filing are not met, the Clerk may take any action as permitted by law, including, but not limited to, returning the submission for correction.

(7) Each Clerk shall determine whether physical paper copies, or electronic PDF/A copies of electronically filed reports and inventories must be maintained in order to comply with applicable record retention schedules. Consult the County Records Manual and Rule 507(a) for further information.

(8) When a report or inventory is submitted in a physical paper format, the Clerk shall ensure the information contained within the report or inventory is manually entered into the System in order to ensure maximum data collection.

(d) *Signature.*

(1) The electronic signature of the guardian, as required on the reports and inventories, shall be in the following form: /s/ Chris L. Smith.

(2) The use of an electronic signature on electronically filed reports and inventories shall constitute the guardian's acknowledgement of, and agreement with, the verification statements contained therein.

(e) *Notice of filing.* Effective June 1, 2019, if required by Pa. O.C. Rule 14.8(b), the guardian shall be responsible for serving a notice of filing within ten days after filing a report. Service shall be in accordance with Pa. O.C. Rule 4.3.

Official Note

The Guardianship Tracking System (GTS) will provide all court-appointed guardians of adult incapacitated persons the convenience of filing inventories and annual reports online. Use of the System will alleviate the need for traditional paper filings. The System will also assist the Unified Judicial System with tracking and monitoring of statewide practices related to guardianship cases, as was recommended by the Supreme Court's Elder Law Task Force, and the Advisory Council on Elder Justice in the Courts. The applicable rules of court continue to apply to all filings in guardianship cases.

Source

The provisions of this Rule 510 adopted August 31, 2018, effective immediately, 48 Pa.B. 5714.