

**COURT OF COMMON PLEAS OF
PHILADELPHIA COUNTY, PENNSYLVANIA
ORPHANS' COURT DIVISION**

**No. 1544 AP of 2015
No. 1544 PR of 2015
Control No. 161834**

Catherine E Dunn, Appeal From Register



Estate of CATHERINE E. DUNN, Deceased

OPINION SUR DECREE

OVERTON, J.

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Date: January 23, 2017

Before the Court are Objections to Joanne Gallagher's Account of Joanne Gallagher, Agent under POA of Catherine Dunn. A two-day trial was held on January 5, 2017 and January 6, 2017 to decide the matter.

Factual Background and Procedural History schedule

Catherine E. Dunn died testate on September 15, 2014 survived by her three children Barbara Dunn, Kathleen McCloskey and Joanne Gallagher. A will dated December 16, 1985 entitled each daughter to a one-third share of the estate. Letters Testamentary were granted to Kathleen McCloskey on December 18, 2014.

On July 22, 2004, Catherine E. Dunn executed a Power of Attorney wherein she appointed Joanne Gallagher as her Agent or Attorney-in-Fact.

On November 11, 2015, Kathleen McCloskey filed a petition seeking to have Joanne Gallagher file an account of her management as attorney-in-fact of the property of Catherine E. Dunn from July 2004 until October 2014. Joanne Gallagher filed a First and Final Account on May 26, 2016. Kathleen McCloskey filed objections to said accounting on June 30, 2016.

In her objections, Ms. McCloskey contended that Joanne Gallagher misrepresented to the Court the actual date of the first exercise of control of Catherine E. Dunn's assets under the purported Power of Attorney and provided no receipts or support for any transactions in her wholly incomplete account. Ms. McCloskey further objects to transfers and disbursements from decedent's various bank accounts and the sale of decedent's home. Ms. McCloskey also claims the Power of Attorney is invalid as it does not contain notice or acknowledgment as required by *20 Pa.C.S. § 5601*.

The Court held a hearing and received testimony on January 5, 2017 and January 6, 2017. Pursuant to a pre-trial ruling, the burden of proof shifted to Respondent for purposes of trial to demonstrate the propriety of all actions taken regarding Decedent, Catherine E. Dunn's property related to Respondent's obligation to provide and record the accounting and any other unaccounted for actions, receipts and distributions taken when acting as a purported agent-in-fact.¹

At the hearing, Joanne Gallagher presented five witnesses. Joanne Gallagher's first witness was Rita Gilson. Ms. Gilson testified that she notarized the instant Power of Attorney on July 22, 2014 in the presence of two witnesses. Ms. Gilson was presented the Power of Attorney document and her notary ledger which she verified.

Ms. Gallagher called Objectant/Petitioner Kathleen McCloskey. Ms. McCloskey testified that she was estranged from her sisters. Ms. McCloskey stated that she did not pay decedent's bills nor take care of her day to day needs but rather Ms. Gallagher performed those duties. Ms. McCloskey at one time had a joint bank account with decedent.² However, decedent eventually

¹ Decree dated January 5, 2017, upon consideration of the Petition for Declaratory Judgment and responses filed thereto and after hearing from the parties bearing control number 163872.

² Citizens Bank account # 620521-421-4

closed her joint account with Objectant/Petitioner and opened an account at Citizens Bank in decedent's name payable on death to her three daughters.³

Joanne Gallagher testified on her own behalf. Ms. Gallagher stated that she has not spoken to Ms. McCloskey in twenty three years. She further stated she took care of all of her mother's needs such as doctor appointments, medication, bills and her mother's everyday needs. She also facilitated all of her movements to various rehabilitation and nursing home facilities. She stated as an adult they were best friends. Ms. Gallagher testified that, despite being named Power of Attorney in 2004, her mother remained very much in control of her own financial affairs for many years after execution of instant Power of Attorney.

On cross-examination, Ms. Gallaher was questioned about various transfers and disbursements from the joint Police and Fire Account she held with Decedent.⁴ Objectant/Petitioner presented many exhibits showing said transfers through copies of checks and bank statements. On re-direct, Mrs. Gallagher stated that in regard to the Police and Fire joint account she was not acting as her mother's Power of Attorney but rather a joint account holder. She further described all transfers that did not go directly to her mother's needs were gifts to decedent's grandchildren and other family members. They attended all family events together, including but not limited to Christmas, birthdays, christenings and graduations. It was common for her mother and father to give gifts to family members on special occasions. Ms. Gallagher also took the decedent on vacations and to other various social events.

Barbara Hayes, the eldest daughter, testified and indicated that she had no objections to any actions taken by Ms. Gallagher.

³ Citizens Bank account #640036668

⁴ Police and Fire Credit Union account #44289901

Thomas Tarka, Sr. Vice President of Wealth Management of Merrill Lynch, testified that he met Catherine E. Dunn through Ms. Gallagher and opened an account for decedent. On cross-examination, he testified that all transfers made were directed to the Oaks Nursing Home with the exception of two gifts made to Ms. Gallagher's daughters. The transactions were a result of Mr. Tarka speaking with decedent directly. After the initial payments to the Oaks, the remaining funds were paid directly to Oaks until the purchase of an annuity from Genworth.

Objectant/Petitioner called James Verros from Lincoln Investment as a witness. He had worked with decedent and her husband in the past. Mr. Verros managed decedent's account at Lincoln Investment and handled her tax returns. On cross-examination, Mr. Verros was presented with bills from the Oaks and account statements from Lincoln Investment. These bill amounts matched the Lincoln Investment transfer records.

Objectant/Petitioner also called Kelly Campbell, Respondent's daughter and decedent's granddaughter, as a witness. Ms. Campbell purchased 4538 Teasdale Street from decedent in 2005 for \$50,000.00. She stated that she discussed the price with decedent. Ms. Campbell took out a \$40,000.00 mortgage for the purchase. She further testified on cross-examination that she was very close with her grandmother. She saw decedent five to six days a week and decedent was present for every big event in her life including the birth of her children. Additionally regarding the sale of the home, Ms. Gallagher testified that she had no involvement with setting the house price but rather it was between Ms. Campbell and decedent. While a separate Power of Attorney was executed for the sale of the home, Ms. Gallagher testified that was at the request of the title company handling the transfer. The proceeds from the sale of the house were used to purchase a Certificate of Deposit from Police and Fire Credit union and deposited into the joint account that Respondent and decedent owned together.

Respondent moved the following exhibits into evidence: Power of Attorney; Notary Ledger; Inheritance Tax Return; Citizen Bank statements and checks; bills from the Oaks; Ms. Campbell's mortgage; Police and Fire bank statement; house settlement check; monthly Merrill Lynch statements and decedent's Last Will and Testament.

Objectant/Petitioner moved the following exhibits into evidence: Merrill Lynch transfer instructions; correspondence from respondent as Power of Attorney to Merrill Lynch; check to Mr. Verros; deed transfer from decedent to Ms. Campbell; numerous Police and Fire Credit Union account statements and checks; Power of Attorney from sale of home; Citizen's Bank account statements and checks; the Oaks admission slip and Homestead acknowledgment form.

Discussion

A. Respondent bears the burden to demonstrate the propriety of all actions taken regarding Catherine E. Dunn's property related to Respondent's obligation to provide and record the accounting as an agent-in-fact.

The party seeking to surcharge bears the burden of showing a failure to meet the required standard of care. *In Re Estate of Ellis*, 333 A.2d 728, 730 (PA. 1975). However, the burden shifts when a patent error has occurred or when a significant discrepancy appears on the face of the record. *Id.* Pa C.S. § 5601 requires a Power of Attorney to have notice and an acknowledgment executed by the agent.

Here, Respondent admits that the instant power of attorney lacks both the notice and acknowledgement as required by Pa C.S §5601. However, Respondent did act as an agent-in-fact. Therefore, the burden was on Ms. Gallagher to show the actions taken as Ms. Dunn's power of attorney were taken in Ms. Dunn's best interest. This court issued a decree to that effect pre-trial.

B. The Estate of Catherine E. Dunn has no interest in the Police and Fire Credit Union joint bank account held by Respondent and decedent.

Pursuant to *20 Pa. C.S. Section 6304(a)*, “any sum remaining on deposit at the death of party to a joint account belongs to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intent at the time the account is created.”

Here, the Police and Fire Credit Union account in Ms. Dunn and Ms. Gallagher’s name did not direct decedent’s share or any portion for that matter to fall to the estate upon the death of one of the account holders. Objectant/Petitioner presented no evidence to show the parties had a different intent. The account was opened as a joint account with right of survivorship and petitioner put forth no evidence to the contrary. Therefore, all funds in the joint Police and Fire Credit Union account belonged to Ms. Gallagher upon Ms. Dunn’s death.

Furthermore, the proceeds of the house was placed in the Police and Fire account. The sale of the house took place almost ten years prior to the death of Ms. Dunn. Therefore, the estate has no interest in a house sold in 2005 that was thereafter deposited into a joint account that said estate also has no interest in.

Therefore, petitioner’s claim is meritless as the estate has no claim on said account.

C. Respondent did not breach her fiduciary duty of care to Ms. Dunn.

An agent acting under a power of attorney has a fiduciary relationship with the principle. The fiduciary relationship required that the agent: 1) exercise the powers for the benefit of the principal; 2) keep separate the assets of the principal from those of an agent; 3) exercise

reasonable caution and prudence and 4) keep full and accurate record of all actions, receipts and disbursements on behalf of principal. *20 Pa.C.S.A. §5601(e)*.⁵

Here, Respondent did not breach said duty. Evidence shows that every transaction from Merrill Lynch, other than two gifts to decedent's grandchildren, were paid directly to decedent's nursing facilities. Mr. Tarka's testimony corroborated this. Testimony indicated that the two gifts were at the direction of decedent and that it was common practice for her to give gifts to family members for special occasions. Objectant/Petitioner put on no evidence to rebut Respondent's legitimate reason for said transfers as gifts. Transfers from Lincoln Investment matched the bills from the Oaks and the Watermark to the exact cent. Therefore, the Merrill Lynch and Lincoln Investment accounts were used for the decedent's benefit.

While Respondent admitted that she failed to maintain records of her actions as a Power of Attorney, documentation for all of Ms. Dunn's finances were presented at trial. Ms. Gallagher credibly testified as to her explanation for the transfers. Other witness's testimony and exhibits of various account statements and bills corroborated Ms. Gallagher's testimony. Furthermore, Respondent testified that, despite the fact that she was named Power of Attorney in 2004, decedent remained very much in control of her finances until her final few years. Decedent was in direct contact with the various financial institutions. Decedent discussed the sale of her property with Ms. Campbell. Lastly, the estate has no standing to challenge Respondent's actions regarding the joint Police and Fire Credit Union account. The estate has no interest in said account.

⁵ Subsection repealed in 2014 but was effective at the time of said Power of Attorney

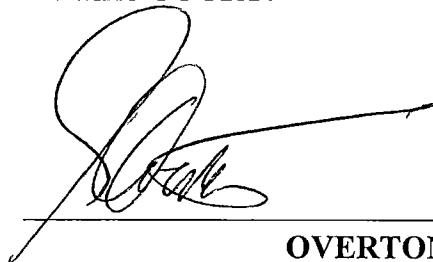
Despite Objectant/Petitioner's assertion, there was no evidence of undue influence. Moreover, Objectant/Petitioner presented no medical evidence, expert testimony or other evidence of decedent's mental capacity.

Conclusion

Based on the testimony and evidence of record, this Court hereby denies the Objectant/Petitioner's objections to the Account of Joanne Gallagher, Agent under POA, dated May 26, 2016, as it finds Respondent established by clear, convincing evidence that all actions taken regarding decedent, Catherine E. Dunn's property, related to Respondent's obligation as agent-in-fact were done in the best interest of decedent or at decedent's direction. Accordingly, this court denies Objectant/Petitioner's request to surcharge Respondent Joanne Gallagher. Inasmuch as Objectant/Petitioner failed to prevail on the request for a surcharge, demand for attorney fees also is denied. The denial of said request is set forth in a separately issued decree which will bear even date with this Opinion.

Date: 1/23/17

BY THE COURT:



OVERTON, J.