

PHILADELPHIA COURT OF COMMON PLEAS
ORPHANS' COURT DIVISION

Estate of Stanley J. Jonik, Deceased
O.C. No. 1218 DE of 2010
Control No. 102249
Control No. 105344

OPINION SUR APPEAL

After a hearing, Allan Nowicki (“Nowicki”) was removed by this court as co-executor of the estate of his deceased uncle Stanley Jonik (“Stanley”) based, inter alia, on evidence that he had removed a safe and financial records from the home of his uncle two days before his death and thereafter refused to return them to his co-executor or disclose them to the beneficiaries of the estate. In addition, it was established that Nowicki, who was not a beneficiary of Stanley’s estate, and his sister Mary Senior had received four checks dated shortly before Stanley’s death in the amount of \$170,000 signed by Mary Senior ostensibly under a power of attorney. These transfers were not disclosed in the tax return Nowicki filed for the estate. The removal of Nowicki as executor was in response to a petition the co-executor, Edmund Nowicki (“Edmund”), had filed seeking a return of these financial documents. A separate petition dealing with the related issue of Mary Senior’s actions as power of attorney was also filed by Edmund and a hearing shall be held on May 10, 2011 to consider its merits.

Nowicki has filed an appeal of orders dated February 7, 2011 and February 23, 2011 disposing of the exceptions he filed to orders removing him as co-executor and imposing a charge for the expenses incurred by the estate in filing the petition against him. For the reasons set forth below, these appeals should be denied.

Factual Background

Stanley Jonik died on September 25, 2009. He left a will dated June 16, 2000, with a codicil dated February 10, 2003. The will named two co-executors: Edmund Jonik and Stanley Jonik, while the codicil named Allan Nowicki as co-executor. Stanley's will made bequests of cash to individual beneficiaries, but left the residue to four family members: Edmund Jonik, his brother, Frances Nowicki, his sister, Robert Jonik, his nephew, and Lorraine Jonik Huffnagle, his niece. Letters testamentary were granted to Edmund and Nowicki on December 17, 2009 after Robert Jonik renounced his right to serve as co-executor.¹ Edmund subsequently filed a citation directed against Nowicki seeking the return of a safe and financial documents that Nowicki had taken from Stanley's home shortly before his death. A hearing was held on October 12, 2010 to consider this petition and Nowicki's response, during which Nowicki represented himself.

At the hearing, Nowicki testified that on September 23, 2009, he and his sister, Mary Senior, found their uncle Stanley on the floor in his home. They called an ambulance and had him admitted to the hospital while they remained with him. That evening, they returned to Stanley's home and removed a safe and "documents from his residence, not lifetime amount of documents, only a small amount of documents, which included the safe, the deeds of his real estate, the burial plot deeds, passports, I believe, and savings bonds, quite a few savings bonds of value of—in excess of a quarter million dollars."² Two days later on September 25, 2009, Stanley died.

Family members soon learned that financial records had been removed from Stanley's home by Nowicki. Robert Jonik ("Robert"), Stanley's oldest nephew, testified that after his uncle's death he went to Stanley's home to look for the will where he had been told by Stanley

¹ 8/12/10 Edmund Jonik Petition for Citation, ¶¶1-3 & Ex. A.

² 10/12/10 N.T. at 66, 65-66 (Nowicki).

that it could be found. Stanley had told Robert that the will named him executor. Not only was Robert unable to locate the will, but he observed that Stanley's financial records were missing for the years since 2000 up until his death.³ According to Robert, Stanley "was a very meticulous CPA of the old school" who typed out his checks and kept an annual spreadsheet mapping out each expense and source of income.⁴ Although Robert could find spreadsheets for the years between 1959 through 1999, he found none for the more recent years prior to Stanley's death. In addition, income tax returns, deeds and bank statements were missing.⁵ Nowicki subsequently told Robert that he had taken these items for safekeeping, but despite Robert's numerous requests to return these documents, Nowicki said "he would get around to it" but never did.⁶ Robert stated that he had renounced serving as co-executor because he had no information about Stanley's financial condition or his estate, but stated that he would be willing to serve if re-appointed as co-executor if Nowicki was removed.⁷

Another residuary beneficiary, Lorraine Jonik Craven, likewise testified that at some point she learned Nowicki had taken financial documents relating to her uncle Stanley's estate. At a family meeting on November 12, 2009, she asked Nowicki to return those documents to the co-executor, and he assured her they would be returned. But they were not. She was particularly concerned about the numerous savings bonds that had been taken from Stanley's home. When Nowicki confronted her with ex. R-4, a list of assets he stated he had given her, Ms. Craven pointed out that this list did not identify the particular bonds but merely gave a total amount: "\$225,000.00+/- Estimate."⁸

³ 10/12/10 N.T. at 13-14 (Robert Jonik)("a file where his tax returns had been kept was a space about a foot where folders from 1990 to date had been removed").

⁴ 10/12/10 N.T. at 14 (Robert Jonik). See, e.g., Ex. P-2 (representative 1997 spreadsheet for account summaries).

⁵ 10/12/10 N.T. at 15-16 (Robert Jonik).

⁶ 10/12/10 N.T. at 17, 13-16 (Robert Jonik).

⁷ 10/12/10 N.T. at 19 (Robert Jonik).

⁸ Ex. R-4. See generally 10/12/10 N.T. at 27-31(Lorraine Jonik Craven).

The testimony of Edmund, the co-executor, was strained. At the age of 92, he was visibly frail. In fact, he died shortly after the hearing on October 18, 2010.⁹ In any event, he was adamant that his co-executor had not turned over the estate financial records to him and he withstood the bullying of questions of Nowicki, who represented himself pro se.¹⁰ Most significantly, Edmund testified that he neither prepared, signed nor filed, the “Inheritance Tax Return Resident Decedent” for his brother Stanley.¹¹

Nowicki was subsequently questioned about this tax return and other relevant issues. He conceded that Robert Jonik and Lorraine Craven had requested that he return the financial documents and that he had received a request from Edmund’s attorney to return them but he had not returned any until September 22, 2010 after a citation had been issued against him.¹² Nowicki conceded that he had instructed Wachovia Bank not to give any information about the decedent’s bank account unless both executors gave their consent.¹³ Next, he was confronted with 4 checks that had been subpoenaed from Stanley’s Wachovia account: There were two checks dated September 23, 2009 in the amount of \$80,000 made out to Nowicki and his sister Mary Senior. There were also two checks in the amount of \$5,000 dated September 21, 2009 made out to Nowicki and his sister. All four checks appear to bear the signature of Mary Senior.¹⁴ Finally, Nowicki admitted that the inheritance tax return he had filed for Stanley Jonik did not acknowledge these transfers. In particular, where the tax return stated “[i]f death occurred after December 12, 1982, did decedent transfer property within one year of death without receiving adequate consideration,”¹⁵ Nowicki conceded he checked the box for “no”

⁹ See 1/18/11 Robert Jonik Brief at 8.

¹⁰ See, e.g., 10/12/10 N.T. at 44-54 & 62-63.

¹¹ 10/12/10 N.T. at 36-37 (Edmund Jonik). See also Ex. P-3.

¹² 10/12/10 N.T. at 55-56.

¹³ 10/12/10 N.T. at 59 (Nowicki).

¹⁴ See Ex. P-4. See also 10/12/10 N.T. at 59 (Nowicki).

¹⁵ Ex. P-3 at 3.

even though he had placed the \$80,000 check in his own bank account.¹⁶ The only witness Nowicki presented in his case was himself.

Based on this record, Allan Nowicki was removed as co-executor. As this court explained, there was no excuse for not having turned over the copies of the financial records at an earlier time. There was no excuse for having forced these proceedings. Moreover, the unilateral filing of the Pennsylvania inheritance tax return without the consent of the co-executor raised serious issues of conflict of interest and breach of fiduciary duty. Consequently, Nowicki was also surcharged for the attorney fees incurred in compelling this litigation.¹⁷ Petitioner's counsel was requested to submit a bill of cost for the attorney fees incurred in bringing these proceedings.¹⁸

These rulings from the bench were formalized in written orders. The order dated October 12, 2010 provided:

1. Allan J. Nowicki is forthwith removed as co-executor of the Estate for his multiple breaches of fiduciary duty, inter alia, failing to provide to the co-executor original and/or copies of decedent's records he removed from decedent's residence; acting unilaterally without the co-executor's consent and knowledge; unilaterally filing an Inheritance Tax Return that falsely omitted transfers within one year of the date of death;
2. The cost of these proceedings shall be imposed on Allan J. Nowicki as a surcharge for his breach of duty; and
3. Allan J. Nowicki shall forthwith turn over to Edmund Jonik, co-executor, any estate assets and records still in his possession.

On October 13, 2010, an amended decree was issued to add the requirement that Nowicki file an account of his actions as co-executor within 30 days and appointing Robert Jonik as co-executor since he had been so named in decedent's will. Both of these orders were placed on the official docket for this matter. On November 1, 2010, Nowicki filed exceptions through an

¹⁶ 10/12/10 N.T. at 57-59 (Nowicki).

¹⁷ 10/12/10 N.T. at 74.

¹⁸ 10/12/10 N.T. at 74-75

attorney, but only to the October 12, 2010 order, objecting on various grounds to his removal as co-executor and to the imposition of costs.

Counsel for petitioner subsequently filed an affidavit of services requesting a reimbursement for legal fees and costs from Nowicki in the amount of \$29,877.87 which was supported by detailed time sheets covering the period 8/5/10 to 10/12/10 for the services of two attorneys and a paralegal.¹⁹ Based upon this affidavit of services, this court by decree dated November 1, 2010 surcharged Allan Nowicki for the legal fees and costs incurred by co-executor Edmund Jonik in the amount of \$29,877. On November 15, 2010, Nowicki filed exceptions to this November 1, 2010 order imposing the \$29,877.87 in costs upon him. After briefs were filed on these exceptions, an oral argument was held on January 25, 2011. Following that oral argument, counsel for Nowicki by letter dated February 4, 2011 withdrew Nowicki's exceptions as to legal fees: "Following up on the oral argument on Exceptions to your Orders, which occurred last Tuesday, January 25, 2011, please be advised that Allan Nowicki withdraws his Exceptions relevant to counsel fees."²⁰ In response to this letter, this court issued a decree dated February 7, 2011 that "upon consideration of the annexed letter by Joseph P. McDonald, Esquire, dated February 4, 2011, it is hereby ORDERED that the Exceptions of Allan Nowicki, Co-Executor, to the Court order dated November 1, 2010 filed under control number 105314 shall be marked WITHDRAWN." In an abundance of caution, Mr. McDonald's letter was entered into the record as part of the February 7, 2011 decree.

On March 7, 2011, Nowicki filed a notice of appeal. It stated, inter alia, that Nowicki is appealing the November 7, 2011 decree that marked his exceptions to the \$29,877.87 surcharge as withdrawn based on the letter from his attorney. To clarify the record for appeal, this court

¹⁹ 11/3/10 Affidavit of Services

²⁰ See 2/4/2011 letter from Joseph P. McDonald attached to the February 7, 2010 order.

ordered Nowicki pursuant Pa.R. A.P. 1925(b) to file a statement of matters he actually intends to raise on appeal. In response, Nowicki outlined the following three issues:

1. The Court erred in the removal of Allan Nowicki as co-executor
2. The Court erred in the appointment of Robert J. Jonik as Executor, after in fact he renounced in December 2009.
3. The Court erred in surcharging Allan J. Nowicki for attorney fees and costs in the amount of \$29,877.87.

Each of these issues will be addressed separately.

Legal Analysis

A. Allan Nowicki Was Properly Removed as Co-Executor Based on the Record that His Actions and Conflict of Interest Jeopardized the Interests of the Estate

Allan Nowicki is appealing his removal as co-executor of the Stanley Jonik estate.²¹

Orphans' Court has exclusive statutory authority to remove a personal representative. Estate of Lux, 480 Pa. 256, 268, 389 A.2d 1053, 1059 (1978). Under 20 Pa.C.S. § 3182, a co-executor may be removed by the court when "the interests of the estate are likely to be jeopardized by his continuance in office." 20 Pa.C.S. §3182 (5). Numerous Pennsylvania cases caution, however, that removal of an executor who has been chosen by the decedent is a drastic action "which should be undertaken only when the estate is endangered and intervention is necessary to protect the property of the estate." Estate of Westin, 2005 Pa. Super, 158, 874 A.2d 139, 143 (2005) (citations omitted). See also Estate of Frey, 693 A.2d 1349, 1352 (1997). The record presented in this case clearly met that standard.

The record established multiple breaches of fiduciary duty by Nowicki as co-executor. After arranging for the hospitalization of his uncle upon finding him on the floor in his home, Nowicki, together with his sister, went back to Stanley's home to remove a safe and other

²¹ By decree dated October 12, 2010, Allan Nowicki was removed as co-executor. This issue was preserved when Nowicki filed exceptions to that decree on November 1, 2010. Those exceptions to the October 12, 2010 order were denied by this court's decree dated February 23, 2011, which has been appealed by Nowicki. See Notice of Appeal.

financial records.²² On this date, his sister Mary Senior executed two checks each in the amount of \$80,000 in the name of Nowicki and Mary Senior pursuant to her power of attorney.²³ Nowicki conceded when as co-executor he filed the resident decedent income tax return for his uncle's estate, he failed to disclose these transfer of funds occurring two days before Stanley's death.²⁴ Since the propriety of that transfer is still in question, Nowicki is presently in the position of having to defend the interests of the Jonik estate and the actions of his sister, a profound conflict of interest.

Another element of this breach of fiduciary duty was Nowicki's stealth in keeping the financial records away from the co-executor and beneficiaries by his instructions to Wachovia Bank not to give access to details about the estate account without his consent. This directive served to hide from the estate beneficiaries the pre-death transfers of funds from Stanley's account to Mary Senior and Nowicki—neither of whom are beneficiaries named in Stanley Jonik's will.²⁵

Finally, Nowicki's failure to respond to the reasonable requests that he turn over the financial records by his co-executor, Edmund Jonik, forced the co-executor to bring a citation against him. This refusal to share financial records with his co-executor was symptomatic of Nowicki's unilateral control of the estate administration despite the requirement in the will for co-executors. He admitted, for instance, that he unilaterally filed the inheritance tax return²⁶ that omitted the transfer of \$180,000 from Stanley days before his death.

These actions combined created a conflict of interest that required the removal of Allan Nowicki as co-executor. See, e.g., Estate of Lux, 480 Pa. 256, 271, 389 A.2d 1053, 1060 (1978)

²² 10/12/10 N.T at 65-66 (Nowicki).

²³ Ex. P-4; 10/12/10 N.T. 58-59 (Nowicki).

²⁴ 10/12/10 N.T. at 57-58 (Nowicki).

²⁵ See 8/12/10 Edmund Jonik Petition for Citation, Ex. A (2/10/03 Stanley Jonik Will); 10/12/10 N.T. at 59-60 (Nowicki).

²⁶ 10/12/10 N.T. at 57-58 (Nowicki).

(removal of executrix justified where record “instantly demonstrates clear conflicts of interests” between the executrix and the estate regarding “disputed cash and other personal assets of the estate”); Estate of Westin, 2005 Pa. Super. 158, 874 A.2d 139, 143 (2005) (executor properly removed where his law firm embezzled funds from estate causing a conflict of interest between pursuing the interests of the estate and defending his firm); Estate of Marcella, 24 Phila. 63 (Phila. O.C. 1992), aff’d, 428 Pa. Super. 623, 626 A.2d 651 (1993) (removal of executor/trustee authorized where he has a conflict of interest as a remainderman of a trust who fails to make distributions to the income beneficiary).

B. Nowicki’s Appeal of the Order Charging Him for Attorney Fees and Costs in the Amount of \$29,877.87 Should Be Denied Because His Attorney by Letter Withdrew the Exceptions to Those Charges and The Charges Were Supported by the Record

In his statement of matters complained of Nowicki asserts that the court erred in charging him \$29,877.87 in the attorney costs and fees that the petitioner incurred in seeking a citation against him and then proceeding with the ensuing litigation. After presentation of the evidence at the October 12, 2010 hearing, this court concluded that the attorney fees the petitioner incurred in compelling production of the estate’s financial documents were properly surcharged to Nowicki. This court therefore requested that petitioner submit a proposed bill of costs for attorney fees incurred in these proceedings.²⁷ Counsel for the petitioner subsequently filed an affidavit outlining the legal services provided to the petitioners. Detailed time sheets were attached to the affidavit setting forth with particularity the work performed by two attorneys and a paralegal. According to the affidavit by petitioner’s attorney, the following services were provided in seeking access to the estate financial documents and the removal of Allan Nowicki:

- (a) Drafting and filing a petition for citation directed to Allan J. Nowicki to show cause why he should not return estate records that he removed from the decedent’s home;

²⁷ 10/12/10 N.T. at 74-75.

- (b) Preparation for and attendance at a hearing held on September 22, 2010 before this Court;
- (c) Drafting and filing a Reply to New Matter raised by Allen J. Nowicki;
- (d) Preparation for and attendance at a second hearing held on October 12, 2010 before this Court;
- (e) Acquiring and analyzing missing documents from Wachovia Bank, N.A. regarding the decedent's checking account, and subpoenaing Wachovia Bank, N.A. custodian of records for testimony.²⁸

Based on this affidavit and attached timesheet, this court by decree dated November 1, 2010 surcharged Allan Nowicki for the legal fees and costs incurred by co-executor Edmund Jonik in the amount of \$29,877.87 since Nowicki's actions in thwarting the administration of the estate constituted "dilatatory, obdurate and vexatious conduct during the pendency of a matter" that could be sanctioned pursuant to 42 Pa.C.S. § 2503(7).

On November 15, 2010, Nowicki, by his attorney Joseph McDonald, filed exceptions to the surcharge in the amount of \$29,877.87 on the grounds that Nowicki did not breach his fiduciary duty and that the costs were unreasonable.²⁹ After oral argument on the exceptions, Nowicki's attorney sent the following letter dated February 4, 2011 to the court:

Following up on the oral argument on Exceptions to your Orders, which occurred last Tuesday, January 25, 2011, please be advised that Allan Nowicki withdraws his Exceptions relevant to counsel fees. We communicated our intent to withdraw those Exceptions to Attorney Gage and he indicated that he has no objections to this request.³⁰

In response to this letter, this court issued the following order dated February 7, 2011:

And Now, this 7th day of February, 2011, upon consideration of the annexed letter by Joseph P. McDonald, Esquire, dated February 4, 2011, it is hereby ORDERED that the Exceptions of Allan Nowicki, Co-Executor, to the Court Order Dated November 1, 2010 filed under control number 105344 shall be marked WITHDRAWN.

A copy of the letter from Mr. McDonald was attached to this order and entered into the record as an official docket entry. Despite this letter from his attorney withdrawing his

²⁸ 11/3/10 Affidavit by Ryan Gager, Esquire, ¶ 3.

²⁹ See 11/10/10 Allan Nowicki Exceptions.

³⁰ See 2/4/11 Letter by Joseph McDonald, Esquire attached to February 7, 2011 Order.

exceptions “relevant to counsel fees” and the February 7, 2011 order in response marking those exceptions as withdrawn, Nowicki’s Notice of Appeal challenges this February 7, 2011 order. In addition, Nowicki’s Statement of Matters asserts that the “Court erred in surcharging Allan J. Nowicki for attorney fees and costs in the amount of \$29,877.87.” Both of these documents—the Notice of Appeal and Concise Statement of Matters—were filed by Allan Nowicki, acting pro se. In light of the letter from his attorney to this court that this issue had been withdrawn, Nowicki should be estopped from raising this issue on appeal. See generally Estate of Eva Marcella, 24 Phila. 63, 69-71 (Phila. O.C. 1993) (hearing judge “had every right to assume the controversies on the within estate were resolved” as set forth in representations by counsel as to a settlement of claims). If this court had not been advised that the exceptions had been withdrawn, a hearing on that matter would have been scheduled. Yet even without that hearing, the imposition of costs is supported by the affidavit of counsel and the time sheets filed of record.

C. Nowicki’s Challenge to the Appointment of Robert J. Jonik as Executor Is Without Merit

As a third matter on appeal, Nowicki asserts that the “court erred in the appointment of Robert Jonik as Executor, after in fact he renounced in December 2009.” Robert Jonik had been named as a co-executor in Stanley Jonik’s will. At the hearing, Robert Jonik described his various efforts to locate the financial records of the estate and his numerous requests to Nowicki to return those documents. He stated that he had renounced serving as co-executor because he lacked information concerning the financial status of the estate. Nonetheless, he would agree to serve as co-executor.³¹ By order dated October 13, 2010, this court appointed Robert Jonik as co-

³¹ 10/12/10 N.T. at 19, 13-19 (Robert Jonik).

executor. Nowicki filed neither exceptions nor an appeal of this October 13th order.³² This issue thus was not formally preserved for appeal.

As a practical matter, however, it is undisputed that the Register of Wills has the statutory authority to grant letters testamentary “to the executor designated in the will, whether or not he has declined a trust under the will.” 20 Pa.C.S. § 3155(a). In this case, according to the petitioner, the Register granted letters to Robert Jonik on November 10, 2010.³³ Any challenge to that appointment should therefore be directed to the Register.

Conclusion

For all these reasons, the appeal by Allan Nowicki is without merit and should be denied.

BY THE COURT:

Date: April 4, 2011

John W. Herron, J.

³² See 3/7/11 Notice of Appeal by Allan Nowicki (appealing the Orders dated 2/7/11 and 2/23/11). The February 7, 2011 order marked as withdrawn Nowicki’s exceptions to the November 1, 2010 order imposing a surcharge on Nowicki in the amount of \$29,877.87. The February 23, 2011 order denied Nowicki’s exceptions to the October 12, 2010 decree which made no mention of the appointment of Robert Jonik. Hence, Nowicki did not preserve this issue for appeal.

³³ 1/18/11 Robert Jonik Brief at 8-9.