

2012 WL 7803254 (Md.App.) (Appellate Brief)
Maryland Court of Special Appeals.

Deborah PROCTOR, Appellant,

v.

Steven P. HULSEY, Personal Representative in the Estate of Sylvia H. Sasnett, Appellee.

No. 79.

September Term, 2012.

December 10, 2012.

On Appeal from the Circuit Court for Montgomery County
(Hon. Thomas L. Craven and Hon. Marielsa A. Bernard, Judges)

Brief of Appellant

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*1 STATEMENT OF THE CASE

On April 19, 2007, Personal Representative Steven P. Hulsey (“Hulsey”) filed a Regular Estate Petition for Probate concerning the Estate of Sylvia H. Sasnett (“Estate”). (E8) On April 27, 2007, the Orphans' Court issued an Administrative Probate Order. (E1) On January 28, 2008, Hulsey filed a letter requesting a one month extension of time until February 27, 2008 to file the First Account. (E10) That same day, the Register of Wills apparently approved the request for a one month extension. (E9) On February 28, 2008, Hulsey filed a motion for another one month extension of time until March 28, 2008 to file the First Account. (E 11-13) On March 3, 2008, the Orphans' Court granted the motion. (E14)

On November 1, 2010, Hulsey and Appellant and Heir Deborah S. Proctor (“Dr. Proctor”) reached a settlement agreement concerning pending filings by Dr. Proctor. (E 86-87) On June 3, 2011, Hulsey, Dr. Proctor, Heir Audrey Worthing (Dr. Proctor's sister) (“Worthing”), and the former attorneys for Dr. Proctor, Neuberger, Quinn, Gielan, Rubin & Gibber, P.A. (“Gibber”), read into the record a contingent settlement agreement (“Settlement Agreement”) concerning pending matters. (E88-119) On December 12, 2011, Dr. Proctor filed exceptions to the Second Revised Fourth and Final Accounting. (E51-63) On December 15, 2011, Worthing filed exceptions to the Interim Revised Fourth and Final Accounting. (E *2 64-68) On December 27, 2011, Hulsey opposed these exceptions. (E69-85) On January 10, 2012, Hulsey moved to enforce the Settlement Agreement and to strike Dr. Proctor and Worthing's exceptions. (E 120-138) On February 7, 2012, the Orphans' Court granted both motions by Hulsey to enforce the Settlement Agreement and to strike the exceptions. (E176-179)

Proctor noted a timely appeal on March 8, 2012. (E182-183)

STATEMENT OF QUESTIONS PRESENTED

- 1) Did the Orphans' Court err in granting an extension of time to the Personal Representative to file the First Account where there were several irregularities?
- 2) Did the Orphans' Court err in granting the Personal Representative's motions to enforce the June 3, 2011 settlement agreement and to strike the exceptions of Dr. Proctor and Worthing to the final accounting where the Settlement Agreement was not satisfied?

STATEMENT OF FACTS

Dr. Proctor's aunt, Sylvia H. Sasnett (“Decedent”) died on April 4, 2007 (E 51). At the time of her death, the Decedent was 89 years old, legally blind, hearing and mobility impaired and totally dependent on Hulsey, who had been acting as her agent under a power of attorney, a health care proxy, and as Trustee of the Sasnett Residuary Trust (“Trust”) since the death of her husband, Edward C. Sasnett, in *3 1998. (E 51, 64) She met all the criteria of an “at risk” individual, and Hulsey exerted undue influence over her based on a relationship of trust which enabled him to abuse and **financially exploit** her without detection. (E 51, 54, 64)

The Decedent and her husband had hired Hulsey in 1989 when he was licensed as a CPA. (E 54) His CPA license expired about a year later when renewal was impossible due to a state tax lien. (E 54) He never regained licensure as a CPA and admitted that he failed to disclose the expiration of his licensure to the Decedent, who had appointed him based on his professional credentials. (E 51, 54) From January 1998 until the Decedent's death on April 4, 2007, Hulsey served as her agent under a power of attorney. (E 55) He exercised complete and exclusive control over all aspects of the Decedent's life for the last nine years of her life, including managing all of her **finances**, banking, investments and payment of bills; being responsible for hiring and

paying the household help, caregivers and medical providers; and monitoring and limiting her visitors and guests. (E 55) From June 1998 through July 1999, Hulsey served as personal representative of the estate of the Decedent's husband. (E 55) From July 1999 through December 2006, Hulsey served as Trustee of the Trust, a credit shelter/bypass trust created under the will of the Decedent's husband. (E 55, 65)

At the time of Decedent's death, Hulsey was under criminal investigation for theft through deception. (E 51) The investigation determined that Hulsey had *4 been representing himself to the Decedent and others as a CPA. (E 51) In July 2010, the Maryland licensing authority finally certified that Hulsey's CPA license had expired in 1990. (E 51) Hulsey had handled the Decedent's IRS checks and thus had been practicing as a CPA without a license. (E 51)

Dr. Proctor did not discover, seven months after Hulsey was appointed the Personal Representative of the Estate, that Hulsey was also the Trustee of the Trust. (E 52) The Trust funds had a separate tax ID and had been taxed at a 10% basis in full in April 2000. (E 52) Hulsey, as Trustee, was responsible for keeping detailed records of all distributions of principal and interest of the Trust. (E 52) The Decedent was the income beneficiary of the Trust, and Dr. Proctor and her three siblings were the remainder beneficiaries of the Trust. (E

Hulsey failed to mention that he was Trustee in his filings in the Estate. (E 52) He also failed to reveal that he had commingled the pretaxed Trust funds exceeding \$600,000 with the Decedent's personal account without keeping these funds titled as "Trust funds". (E 52, 59, 66) These pre-taxed Trust funds were included in the Decedent's gross estate and were used to determine the Estate's gross value, tax base, and allowable commissions and fees. (E 52, 59) The initial inventory of the Estate and all subsequent accountings are thus based in part on Trust assets. (E 52) Hulsey thereby artificially inflated the gross estate value, *5 putting the Estate over the tax threshold so that it incurred more estate and inheritance taxes, caused losses to the remaindermen and increased his commissions. (E 59) Moreover, he had a conflict of interest in managing the Decedent's **finances** prior to her death and subsequently serving as her Personal Representative, making it impossible to obtain a complete and impartial accounting of his actions as a fiduciary prior to the death of the Decedent. (E 59)

Although Dr. Proctor and her siblings were entitled to an accounting by Hulsey of the Trust, none were able to request an accounting until Dr. Proctor discovered the existence of the Trust in November 2007 because Hulsey had withheld disclosure of the Trust to them. (E 52) Hulsey and his attorneys refused all of Dr. Proctor's formal requests for an accounting of the Trust. (E 52) Dr. Proctor was also able to obtain copies of the Decedent's federal tax returns from 1996-2006, which confirmed that assets had been concealed. (E 57) These returns indicated that the Decedent had an average annual earned income from investments of over \$120,000 annually and reflected the sale of an office building owned by a partnership interest of the Decedent which was never reported by Hulsey as either a probate or non-probate asset. (E 57) Hulsey had never disclosed or reported the location or value of any of these assets. (E 57)

On December 28, 2009, Dr. Proctor filed a Verified Petition for Assumption of Jurisdiction of Trust, Removal of Trustee and Breach of Trust in *Deborah S. *6 Proctor v. Steven Hulsey*, Case No. 324830-V in the Circuit Court for Montgomery County ("Trust Litigation"). (E 52, 57) In the Trust Litigation, she requested that the Court assume jurisdiction of the Trust and order Hulsey to provide an accounting from the inception of the Trust to the present. (E 57) At the initial show cause hearing, Hulsey argued that there was nothing for the Court to assume jurisdiction over because the Trust had been terminated, and it was thus unreasonable to require him to provide an accounting. (E 57)

In August 2010, the Court ordered Hulsey to render a complete accounting within 30 days. (E 52, 57) The Court was satisfied that Dr. Proctor had met the criteria under *Jacob v. Davis*, 128 Md. App. 433, 738 A.2d 904 (1999), to prove that, due to Hulsey's wrongdoing: 1) she had never been notified of her status as a remainder beneficiary of the Trust, 2) she had made many formal requests in a timely manner to Hulsey for an accounting, and 3) the tax returns provided at the show cause hearings indicated that no principal of the Trust had been distributed. (E 57-58) There was no dispute that Hulsey had repeatedly breached his fiduciary duties as Trustee by: 1) refusing to account when requested, 2) confessing to never keeping records, 3) failing to keep assets titled in the name of the Trust, 4) failing to file annual returns of the Trust, and 5) filing fraudulent tax returns. (E 53, 58)

Hulsey never really complied with the order to provide a complete accounting but rather merely provided bank statements and copies of some checks *7 for the Trust account and for one of the Decedent's personal accounts, both of which were controlled exclusively by Hulsey during the last years of the Decedents life. (E 58) The records provided by Hulsey raised issues regarding whether funds belonging to the Decedent were mismanaged by Hulsey in his capacities as the Decedent's attorney-in-fact prior to her death as Trustee of the Trust. (E 58, 66) His mismanagement of the Trust included checks payable to himself or to cash totaling almost \$200,000 and checks payable to credit card companies for unaccounted for charges totaling over \$200,000. (E 58)

ARGUMENT

I. STANDARD OF REVIEW

As to the standard of review for Orphans' Court proceedings, it is well settled that the “findings of fact of an Orphans' Court are entitled to a presumption of correctness.” *New York State Library School Association v. Atwater*, 227 Md. 155, 157, 175 S.2d 592 (1961); *Shapiro v. Marcus*, 211 Md. 83, 88, 124 A.2d 846 (1959) (the judgment of the Orphans' Court on a disputed question of fact, litigated in adversary proceedings, should not be reversed unless clearly erroneous). It is equally well settled, however, that interpretations of law by such courts are not entitled to the same “presumption of correctness on review: the appellate court must apply the law as it understands it to be.” *Comptroller of Treasury v. Gannett Co., Inc.*, 356 Md. 699, 707, 741 A.2d 1130 (1999). Thus, an appellate court must *8 determine whether the conclusions of law made by a trial court in the first instance are legally correct under a de novo standard of review. *Pfeufer v. Cyphers*, 397 Md. 643, 919 A.2d 641, 645 (2007). This standard of review applies to interpretations and conclusions of law by an Orphans' Court. *See Pfeufer v. Cypher, supra*, 919 A.2d at 645 n. 5.

The standard of review for an extension of time is the abuse of discretion standard. *See DeBusk v. Johns Hopkins Hospital*, 105 Md. App. 96, 103-104, 658 A.2d 1147 (1994). The exercise of discretion is presumed to be correct until the attacking party has overcome such presumption by clear and convincing proof of an abuse. *Frazier v. Ford*, 200 Md. App. 285, 27 A.3d 583, 594 (2011).

The standard of review for enforcement of a settlement agreement is governed by the standard of review for summary judgment as matters outside the pleadings are attached to such motions. *See Simpson v. Consolidated Construction Services*, 143 Md. App. 606, 795 A.2d 754, 762-763 (2002). The standard of review for a grant of summary judgment is whether the trial court was legally correct. *Sadler v. Dimensions Healthcare Corp.*, 378 Md. 509, 836 A.2d 655, 669 (2003). In reviewing the grant of summary judgment, the appellate court must consider the facts reflected in the pleadings, depositions, answers to interrogatories and affidavits in the light most favorable to the non-moving parties. *Id.* Even if it appears that the relevant facts are undisputed, if those facts are susceptible to *9 inferences supporting the position of the party opposing summary judgment, then a grant of summary judgment is improper. *Id.* The purpose of the summary judgment procedure is not to try the case or to decide the factual disputes, but to decide whether there is an issue of fact which is sufficiently material to be tried. *Taylor v. NationsBank*, 365 Md. 166, 173, 776 A.2d 645 (2001).

II. THE ORPHANS' COURT ERRED IN GRANTING AN EXTENSION OF TIME TO THE PERSONAL REPRESENTATIVE TO FILE A FIRST ACCOUNT WHERE THERE WERE SEVERAL IRREGULARITIES

Proctor contends that the Orphans' Court abused its discretion in granting a 30 day extension of time for Hulsey to file a First Account because: 1) Hulsey did not first request an extension until more than nine months after his appointment, 2) the granting of the first request for extension of time was never docketed, and 3) Hulsey misrepresented in his petition for an extension of time that it was his first request for an extension of time when it was actually his second request. (E 9-13)

Maryland Rule 6-417(a) requires that an initial account be filed within nine months after the date of the personal representatives appointment. In the instant case, the Orphans' Court appointed Hulsey as the personal representative on April 27, 2007. (E 1) Yet, Hulsey did not request an extension of time to file the First Account until January 28, 2008, more than nine months after he was appointed. (E 9-10) His request to the register pursuant to Maryland Rule 6-107(a) did not specify any reason. (E 10) While the Register of Wills apparently granted *10 Hulsey's first request (E 9), the document granting the request was not docketed separately from the request. (E 1) In February 27, 2008, Hulsey then petitioned the Orphans' Court pursuant to Maryland Rule 6-107(b) for an additional one month extension in which he misrepresented that it was his first request for an extension of time when it was actually his second such request. (E 11-13). This petition was granted (E 14) in spite of the fact that Hulsey had not: 1) initially requested an extension of time in a timely fashion, 2) explained his failure to do so, 3) requested permission to late file the First Account, 4) the apparent granting of the first request by the Register of Wills was not docketed separately, and 5) Hulsey blatantly misrepresented to the Orphans' Court that it was his first request for an extension of time to file the First Account.¹ In view of these numerous irregularities, Proctor asserts that the Orphans' Court abused its discretion under these circumstances.

***11 III. THE ORPHANS' COURT ERRED IN GRANTING THE PERSONAL REPRESENTATIVE'S MOTIONS TO ENFORCE THE SETTLEMENT AGREEMENT AND TO STRIKE THE EXCEPTIONS OF DR. PROCTOR AND WORTHING WHERE THE SETTLEMENT AGREEMENT WAS NOT SATISFIED**

Dr. Proctor argues that Orphans' Court erred in granting Hulsey's motions to enforce the Settlement Agreement and to strike the exceptions to the final accounting of Worthing and herself where: 1) the Settlement Agreement was of a contingent nature and never satisfied; 2) the Settlement Agreement should have been but was never reduced to writing to remove ambiguities; 3) objections she made on the record on June 3, 2011 were either recorded as unintelligible or show that her waiver of her right to file exceptions to the final accounting was conditional; 4) the terms of the Settlement Agreement were misstated as read into the record on June 3, 2011, including that the Settlement Agreement did not reflect agreement as to payment of Gibber; 5) Dr. Proctor did not delay in contesting that she had not waived her right to file exceptions to the final accounting; 6) there was not agreement on the record on June 3, 2011 as to her waiver of her right to file exceptions to the final accounting; and 7) her counsel on June 3, 2011 failed to interject when counsel for Hulsey stated on the record that she had unconditionally waived her right to file exceptions to the final accounting and failed to ensure that the Settlement Agreement was later reduced to writing. Dr. Proctor claims that enforcement of the Settlement Agreement to preclude Worthing and her from filing *12 exceptions to the final accounting was improper because the Settlement Agreement was not satisfied.

First, the Settlement Agreement was contingent upon four events occurring, three of which did not happen after June 3, 2011: 1) payment immediately of \$3,500 by Hulsey to Dr. Proctor; 2) filing of the final accounting within 30 days, i.e., by July 3, 2011 (it was filed on August 16, 2011 although Hulsey's counsel stated it should be filed within days of the June 3, 2011 hearing (E 5, 106-107)); 3) counsel for Hulsey, Mitchell I. Alkon, Esq. ("Alkon"), not be paid more than \$25,000 unless he succeeded in getting a \$41,000 tax credit for the Estate for overpayment of inheritance tax, in which case he would receive 25% of the amount of the tax credit; and 4) Alkon was to produce to Dr. Proctor the cancelled checks and receipts that the auditor had already requested from Hulsey. (E 144) Only the third event happened.

Second, Dr. Proctor asserts that the Settlement Agreement should have been reduced to writing to resolve ambiguities, particularly concerning the contingent events discussed *supra*, but never was. Her counsel on June 3, 2011, Jeffrey M. Axelson, Esq. ("Axelson"), prefaced reading the Settlement Agreement into the record by stating that the terms of the Settlement Agreement would be reduced to writing: "I'm not sure how we'll phrase this yet, but I'll give you a succinct summary." (E 98) When Dr. Proctor and Worthing filed their exceptions to the *13 final accounting, Hulsey took advantage of the lack of a written Settlement Agreement to argue persuasively to the Orphans' Court that the two heirs had unconditionally waived their right to file these exceptions. In fact, the waivers were conditional and the conditions for waiver were not satisfied.

Third, no less than seven times were Dr. Proctor's statements at the June 3, 2011 hearing recorded as unintelligible. (E 102, lines 16-17; E 103, line 5; E 107, lines 6 and 9; E 11, lines 6 and 19; E 117, line 3) While Dr. Proctor did state on the record satisfaction with Axelson's representation of her, she also made clear the contingent nature of the Settlement Agreement.

THE COURT: Anything we can do now is - I would like to ask each of the ladies, though, to tell me on the record, that, is this your agreement, ma'am, on this - I'm sorry - Ms. Proctor?

MS. PROCTOR: If it happens, Judge Craven.

THE COURT: Well -

MS. PROCTOR: If it happens.

THE COURT: -- I think all of you, counsel and parties, should be congratulated, and I know it wasn't easy for a lot of good reasons.

MS. PROCTOR: (Unintelligible)

MS. PROCTOR: I do, though, want you to know that if, I want to know that if five years down the line I find that Mr. Hulsey has done something, am I allowed to (unintelligible) (E 110-111)

***14** Proctor asserts that a fair and objective reading of the June 3, 2011 hearing transcript and the surrounding circumstances demonstrate that the Settlement Agreement was contingent upon the occurrence of several events and that Dr. Proctor's waiver of her right to file exceptions to the final accounting was also conditional.

Fourth, several of the terms of the Settlement Agreement were either misstated in or omitted from what was read into the record on June 3, 2011. For example, nowhere in the June 3, 2011 hearing transcript does it appear that Gibber would release his claim against Dr. Proctor for attorney's fees owed in consideration of the two payments to Gibber set forth as terms of the Settlement Agreement. This was a crucial term for Dr. Proctor as Gibber claimed she owed six figures for attorney's fees. Thus, the Settlement Agreement was not accurately and completely set forth on the record on June 3, 2011.

Fifth, Dr. Proctor contends that she in fact did not delay in contesting that she had not waived her right to file exceptions to the final accounting. On June 9, 2011, Gibber petitioned to enforce the Settlement Agreement as to payment of his attorney's fees, and his claim was resolved by June 20, 2011. (E 5) At that point, it was premature for Dr. Proctor to claim that the Settlement Agreement had been breached or that the contingencies had not occurred. For example, the final accounting was not due under the Settlement Agreement until July 3, 2011. Next, ***15** Dr. Proctor did file exceptions to the final accounting on October 26, 2011 after the Orphans' Court approved the Revised Fourth and Final Accounting on October 6, 2011. (E 5-6) These exceptions were rejected as moot because the Orphans' Court vacated its earlier approval of the Revised Fourth and Final Accounting on October 25, 2011 so that Hulsey could include documentation with the final accounting as to the inheritance tax issue raised in the Settlement Agreement. (E 5) Under these circumstances, Proctor claims that she did timely contest waiver of her right to file exceptions to the final accounting.

Sixth, there was not agreement in what was read in the record on June 3, 2011 as to waiver by Dr. Proctor and Worthing of their right to file exceptions to the final accounting. Specifically, Axelson and Alkon provided inconsistent statements to the Orphans' Court on waiver of that right. (E 104-105) This inconsistency is indicative of the fact that the terms of the Settlement Agreement were not accurately and completely read into the record.

Seventh, Axelson failed to interject when Alkon told the Court that Axelson had inaccurately stated the waiver by Dr. Proctor and Worthing to waive their rights to file exceptions to the final accounting. He also failed to ensure that the Settlement Agreement

was reduced to writing. These deficiencies in his performance have contributed to the Orphans' Court orders to enforce the Settlement Agreement to preclude Dr. Proctor and Worthing's exceptions.

*16 Proctor argues that the June 3, 2011 hearing transcript and the surrounding circumstances set forth by Proctor in her pleadings in opposition to the motion to enforce the Settlement Agreement demonstrate that, at a minimum, there was a genuine dispute as to whether Worthing and she conditionally waived their rights to file exceptions to the final accounting and whether those conditions were met. Therefore, the motions to enforce the Settlement Agreement should not have been granted and the exceptions of Dr. Proctor and Worthing should not have been struck.

CONCLUSION

For the above stated reasons, the orders in the instant case should be vacated and the case remanded for proceedings as to the late filed first account and hearing of the exceptions to the Second Interim Revised Fourth and Final Account and the Second Revised Fourth and Final Account.

Appendix not available.

Footnotes

- 1 Proctor notes that Hulsey ironically and vigorously opposed her second request for an extension of time to file Appellant's Brief in the instant appeal, in spite of his untimely request for an extension of time to file the First Account, misrepresentation to the Orphans' Court about not previously filing a request for an extension of time, and ensuing frequent requests for extensions of time in the Orphans' Court proceeding.