IN RE: INCORPORATION OF BOROUGH OF VALLEY-HI, C.P. Fulton County Branch, Q.S.D. No. 7, Page 375

Court of Quarter Sessions - Exceptions to Decree of Incorporation - Hearing

1. Whether or not lawful objections appear, a petition for incorporation of a borough should be granted only upon compliance with statutory requirements.

2. To establish the fact that a majority of the freeholders of the proposed borough has signed the petition for incorporation, a conclusory allegation of such in the petition is insufficient; rather, that allegation must be substantiated at a hearing.

3. The Court is without jurisdiction to grant a petition to amend a defective description when petitioner is a borough not yet incorporated.

Merrill W. Kerlin, Esq., Attorney for Petitioners

Jerome T. Foerster, Esq., Attorney for Exceptants

SUPPLEMENTAL OPINION AND ORDER

Heard before EPPINGER, P.J., KELLER, J.,

Opinion by EPPINGER, P.J., May 8, 1979:

On October 24, 1978, on an application of Brush Creek Township residents, the Court filed an order striking our order of December 31, 1973, which incorporated the area known as Valley-Hi, a section of Brush Creek Township in Fulton County, Pennsylvania.

Numerous exceptions to our opinion and order were taken. President Judge Eppinger, the hearing judge, is said to have erred in ruling that this court did not have jurisdiction to order the incorporation because of defects in the petition for incorporation and lack of a hearing on it; in ruling that the Commonwealth Court did not impliedly rule that this court had jurisdiction; and in ruling that the objectors had standing to challenge the incorporation decree.

These exceptions were argued before the court en banc. The exceptions are overruled and the findings and the decree of Judge Eppinger are affirmed.

Most of the issues raised by the exceptions were dealt with in Judge Eppinger's October, 1978 opinion.*

We take note, however, of a statement made on page two of the exceptant's brief:

> "After the petitioners made their offer of proof, the Court stated that the offer was to be rejected and testimony not necessary inasmuch as there were no objectors to the petition at the time."

In Judge Eppinger's October opinion, he was careful to note all of the in-court proceeidngs in footnote no. 3, page 16 of the opinion.

Nowhere does the record show that petitioners made any offer of proof or that the court rejected one. We think it inappropriate and unprofessional for counsel to distort the facts in this way. Not only is the record available to him, but he has a copy of the court's October opinion. We cannot excuse him because he was not the attorney who attended the "hearing" on the petition. He has had intimate knowledge of the circumstances of this case for a long time as an associate attorney who did appear when the matter was scheduled for hearing before the court.

Valley-Hi argues that the incorporation decree must be granted because no exceptions were filed and cites *In re: Petition of Borough of Churchill*, 111 Pa. Super 380, 170 A. 319 (1934), as authority for this position. In *Churchill*, the lower court entered a decree incorporating a borough. The only assignment of error on appeal was that the court erred in entering the decree. Since the Superior Court, by rule, required that every error be specified particularly, the court said it could have summarily dismissed the appeal. However, the court went on to consider the appellant's objection—that there was no town or village to incorporate. The court concluded that the lower court was right in characterizing the area to be incorporated as a village and affirmed the decree. The court said:

> "The request of the petitioners to incorporate should be granted, if it appears that there is no lawful objection, *Edgewood Borough*, 130 Pa. 348, 353, 18 A. 646 (1889)."

The citation to *Edgewood Borough* was apparently for the general proposition that where no valid objections are filed, a properly entered decree of incorporation will stand, because *Edgewood Borough* involved an application for incorporation brought under the Act of 1834, P.L. 163. In accordance with provisions of that statute, the petition was referred to a grand

NOTICE

The Court Administrator of Pennsylvania has announced, as follows:

District Justice Course of Instruction

The Minor Judiciary Education Board has scheduled several courses of instruction for persons desiring to qualify to become District Justices. These courses will be given on the campus of Wilson College, Chambersburg, Pa. during the following periods of time:

November 12 thru December 7, 1979
February 4 thru February 29, 1980
June 2 thru June 27, 1980

At the conclusion of each course, an examination will be given by the Board.

Any person who is interested in taking the above-mentioned course and examination may do so. All inquiries concerning the course of instruction and all requests to register for the course should be submitted to:

Mr. Robert E. Hessler
Supervisor
Minor Judiciary Education Board
1001 Philadelphia Avenue
Chambersburg, Pa. 17201
Telephone: 717-263-0691

ALEXANDER F. BARBIERI
Court Administrator of Pennsylvania

jury, who reported that the statutory requirements had been complied with and that it was expedient to grant the petition. Exceptions were filed to the grand jury's report and the lower court ruled on them in an opinion which the Supreme Court affirmed. The lower court said the grand jury, after investigation, certified to the court that it was expedient to grant the petition, said the exceptions were not well taken and entered the decree. *Churchill* cited *Edgewood Borough* for a general proposition of law which we do not find expressly stated in *Edgewood Borough.*

In *Churchill* and *Edgewood Borough* the proceedings on the petitions for incorporation were in all respects regular and in compliance with statutory requirements. Since no lawful objections appeared, these proceedings resulted in decrees of incorporation being entered. We conclude that neither case established that if no lawful objections appear, a petition for incorporation should be granted regardless of how irregular the proceedings might have been. The proceedings in Valley-Hi were not in compliance with statutory requirements and neither *Churchill* nor *Edgewood Borough* dictates that a decree be entered on a defective petition or that taking testimony to establish the desirability of creating a borough is unnecessary.

No testimony was taken at the "hearing" on Valley-Hi's petition for incorporation and it was not shown on the record that the requisite number of residents of the area proposed to be incorporated had signed the petition, but Valley-Hi argues that its allegation in the petition that a majority has signed the petition is sufficient. Its authority for this is *The Borough of Little Meadows,* 28 Pa. 256 (1856), where the court said:

> "To show that the Quarter Sessions had jurisdiction, it is necessary that there should appear somewhere upon the record that there was a town or village to be incorporated, and that a majority of the freeholders therein asked for it."

We conclude that the very brief opinion in *Little Meadows* is not authority for Valley-Hi's proposition. Actually, the allegation that a majority has signed would be a pure conclusion unless it was also alleged in the petition that there were so many residents of the area and of those so many had signed the petition. That is an allegation of fact. But even if this had been done, we believe that the petitioner would have been required to produce evidence to substantiate the allegation at the hearing which should have been held.

Valley-Hi cites two cases in support of its argument that merely alleging the requisite facts is sufficient: *Old Forge*

Borough Incorporation, 12 Pa. Super 359 (1900), and *Borough of Osborne*, 101 Pa. 284 (1882). Neither case is precedent for the proposition argued. In *Old Forge*, the court considered an assignment of error that signers of a petition for incorporation did not represent a majority of freeholders. The court carefully considered testimony given on this issue and labeled the matter an issue of fact upon which evidence had to be received. In *Osborne*, a petition for incorporation alleged that there were no more than a certain number of freeholders in the proposed borough. If the petition itself bore a majority of that number, there was at least an allegation of fact before the court. However, the case turned on another matter, so what the court said on this point was dicta. In *Osborne*, the hearing was considered to be necessary. The court said it was

> "the duty of the Grand Jury to make a full investigation, not only to ascertain if the conditions of the statute [were] complied with, but to determine whether it was [expedient] to incorporate the village described in the petition." 101 Pa. at 287-88.

In re Incorporation of Borough of Castle Shannon, 75 Pa. Super 162 (1920), contains language which Valley-Hi interprets as indicating that no hearing is necessary if the jurisdiction of the court is invoked by the filing of a petition and affidavit to which no exceptions are filed. Although the *Castle Shannon* petition alleged the requisite facts, we cannot determine from the report of the case whether it contained a conclusory assertion that a majority of the freeholders in the proposed borough from which it could be determined that a majority had signed.

Valley-Hi next reargues the problem of amending the defective description. That matter was fully discussed by Judge Eppinger in his October, 1978 opinion* and by Judge Keller in his June, 1975 opinion, in which the latter concluded that the record established jurisdictional defects—namely, non-compliance with Borough Code requirements. (See Opinion of Judge Keller, filed June 28, 1975, p. 27.)*

Judge Keller had ruled the decree of incorporation should be stricken on an application of the County of Fulton. Valley-Hi appealed and the Commonwealth Court held the county did not have standing to challenge the regularity of the proceedings and remanded the case to our court to grant the prayer of the petition to amend the description. Judge Keller did that. The petition to amend was the petition of the Borough of Valley-Hi, filed by an attorney claiming to be attorney for

the Borough and verified by one of the petitioners. There was nothing to indicate in the petition that the Borough had been organized or that appropriate action had been taken by the Borough to authorize the filing of the petition. How could it? The Borough at that time did not exist.

So upon reflection, we have concluded that the court was without jurisdiction to act on the petition to correct the description. Legal action by a Borough can only be taken upon authorization of the corporate authorities; borough powers are vested in them. Borough Code, Act of 1966, P.L. (1965) 1656, No. 581, Sect. 1202, 53 P.S. Sect. 46202. The petition reads as follows:

> "AND NOW COMES the Borough of Valley-Hi, by its attorney, Richard W. Cleckner, and respectfully represents:..."

We believe for the description to be amended it would be necessary for a majority of the freeholders to file the petition, that there are no others who could do it, and that the "Borough of Valley-Hi" certainly could not do it. We should not have granted the petition to amend the description. Since we have stricken the decree of incorporation, it is not necessary to strike this decree of June 7, 1978.

Valley-Hi next argues that the Commonwealth Court impliedly ruled that our court had jurisdiction when it referred the matter back to us to dispose of the petition to amend the description after it held that the original objectors (Fulton County) had no standing to challenge the decree of incorporation. This argument, made previously, was answered in Judge Eppinger's opinion of October, 1978.* We will note now, however, that this argument assumes the Commonwealth Court would have ruled on jurisdiction before it ruled on standing and we don't believe such a conclusion can be reached.

In addition, the issue of whether the residents of Brush Creek Township had standing to file the petition to strike is reargued. That has also been covered by Judge Eppinger's opinion of October, 1978. Regardless of whether the residents have standing or not, the court can address the question of jurisdiction on its own motion at any time, as stated in the October opinion.

As stated in 20 Am Jur 2d, Courts Sect. 90, "what is jurisdictional and what is nonjurisdictional error is not always easy to determine." Judge Eppinger concluded in his October, 1978 opinion* that the defects in Valley-Hi's petition for incorporation and the proceedings on it were jurisdictional ones and that the court en banc reaffirms that decision.

ORDER OR COURT

NOW, May 8, 1979, the exceptions to the Order of the hearing judge striking the Incorporation of the Borough of Valley-Hi dated October 24, 1978, are overruled and the Order is affirmed.

ESTATE OF CREAGER, C.P. Franklin County Branch, O.D. Doc. Vol. , Page

Charitable Trusts - Purpose Becoming Indefinite, Impossible or Impracticable of Fulfillment - Distribution for Charitable Purpose Similar to that Intended by Testamentary Settlor - Trust Devoted to Theological Education of Worthy and Needy Young Men at Lutheran Seminary - Lack of Qualifying Applicants - Trust Created When Women Not Permitted in Ministry - Change in Church Policy Permitting Women to Enter Ministry - Broadening of Scope of Trust Purpose to Include Women Applicants Appropriate

1. Sect. 6110 of the Probate, Estates and Fiduciaries Code provides for Court Ordered distribution of the estate for a charitable purpose in a manner as nearly as possible to fulfill the intention of the conveyor, whether the charitable intent was general or specific, when a charitable purpose becomes indefinite, impossible or impracticable of fulfillment.

2. In determining whether a charitable trust should be executed *cy pres*, the Court does not arbitrarily substitute its own judgment for that of the testator, but seeks to ascertain and carry out as nearly as may be the testator's true intention.

3. In so doing, the Court assumes that where a particular purpose which has failed is not an essential feature of the testator's general plan, the testator would prefer that his property be applied to a purpose as similar as possible to that stated by him rather than that the trust should fail altogether.

4. If a trust is limited to benefit qualified male ministerial student applicants, and experience shows there have been no such applicants, but the trust was created at a time when only males could enter the ministry, and the will expresses an intention to provide for human betterment, through the use of the testatrix's possessions as gifts from God, the Court will not infer a prejudicial intention in the testatrix to prefer men for the ministry, but will conclude it is more likely she would have included women in the class of beneficiaries had they been permitted to enter the ministry when she died, as they are now.

John N. Keller, Esq., Attorney for Applicant

*Editor's Note = Not reported in this Journal.

OPINION AND ORDER

EPPINGER, P.J., June 26, 1979:

Atha Creager died March 10, 1967 and in her will bequeathed Five thousand dollars to the First National Bank & Trust Company of Waynesboro in a trust, the purpose of which was to assist worthy and needy young men of Waynesboro in obtaining a theological education at Gettysburg Theological Seminary. We have been asked by the trustee to amend the provisions of the trust to include worthy and needy young women.

Since the death of the testatrix, no young man has ever applied for the funds. So the fund has remained untouched for over twelve years, growing from $5,000 to approximately $8,600.00.

Under Sect. 6110 of the Probate, Estates and Fiduciary Code, Act of June 30, 1972, P.L. 508, No. 164, 20 P.S. Sect. 6110, if a charitable purpose becomes indefinite, impossible or impracticable of fulfillment, a Court may order distribution of the estate for a charitable purpose in a manner as nearly as possible to fulfill the intention of the conveyor, whether the charitable intent was general or specific.

Experience since the trust was created teaches us that it has become impracticable and indefinite of fulfillment. There have been no qualified applicants. The chances of fulfilling the charitable purpose would at least increase if women were allowed to apply for and receive the trust benefits.

In *Wilkey's Estate*, 337 Pa. 129, 10 A.2d 425 (1940), it was stated:

> In order judicially to determine whether a charitable trust, which for some reason cannot be carried out in accordance with the prescribed plan of the testator, should be executed *cy pres*, it must be decided whether the testator's general intention was that his property should be applied to charity in any event, or only if such application can be made in the particular manner or form specified in his will. In applying the principle of *cy pres* the court does not arbitrarily substitute its own judgment for the desire of the testator, or supply a fictional testamentary intent, but, on the contrary, it seeks to ascertain and carry out as nearly as may be the testator's true intention; in so doing it assumes that where a particular purpose is apparently not an essential feature of his plan, the testator would prefer that his property should be applied to a