Franklin County Legal Journal

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Designated by Order of the Court for the publication of court and other legal notices, the Franklin County Legal Journal (USPS 378-950), 100 Lincoln Way East, Chambersburg, Franklin County, PA 17201–2291, contains reports of cases decided by the various divisions of the Franklin County Branch of the Court of Common Pleas of the 39th Judicial District of Pennsylvania and selected cases from other counties.

Estate of John Marcoux

Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch, Orphans' Court 83-OC-2020

HOLDING: One of two co-executors of an estate petitioned the Court to enforce a testate heir's disclaimer. The Court ruled the disclaimer was invalid, null, and void as it did not comply with the requirements of 20 Pa. C.S. §6201. Additionally, the Court held the Petitioner/co-executor procured the disclaimer through acts and omissions amounting to fraud, deceit, and self-dealing. The Petitioner/co-executor also breached his fiduciary duty when he entered into a Wrongful Death and Survival Action settlement for the estate without notifying the other co-executor, estate counsel, and all of the beneficiaries under the will. Lastly, the Court issued a rule upon both executors to show cause why the Petitioner/co-executor should not be removed from the estate, and why the other co-executor did not act to protect the estate from the aforementioned fraud, deceit, and self-dealing.

HEADNOTES

1. "A disclaimer relates back for all purposes to the date of the death of the decedent." "The disclaimer shall not in any way diminish the interest of any person other than the disclaimant in such person's own right under the instrument creating the disclaimed interest or under the intestate laws nor diminish any interest to which such person becomes entitled under subsection (b) by reason of the disclaimer." 20 Pa. C.S. §6205(a). "Unless a testator or donor has provided for another disposition, the disclaimer shall, for purposes of determining the rights of other parties, be equivalent to the disclaimant's having died before the decedent in the case of a devolution by will or intestacy. 20 Pa. C.S. §6205(b).

2. If a disclaimer is valid and the disclaimant has a natural born child/heir, that child/heir is entitled to receive the disclaimant's disclaimed interest.

3. "A person to whom an interest in property would have devolved by whatever means, including a beneficiary under a will, … may disclaim it in whole or in part by a written disclaimer which shall: (1) describe the interest disclaimed; (2) declare the disclaimer and extent thereof; and (3) be signed by the disclaimant." 20 Pa. C.S. §6201.

4. There is little case law that fully describes the level of detail required for a description of a disclaimed interest. Westmoreland County's President Judge Gilfert Mihalich stated the word "interest" requires "something different than a strict and precise delineation of the property disclaimed." Kuhns Estate, 1989 WL 229392 (1989), 4 Pa. D.&C. 4th 422, 426 (C.C.P. Westmoreland 1989).

5. The disclaimer made by the father in Kuhns was valid where there was no evidence of physical or mental incapacity on his part, or any fraud, undue influence, or duress by any party involved in the execution of the disclaimer. 4 Pa. D.&C. 4th at 424.

6. Where no single party had "any particular or superior knowledge" concerning the asset values and "each party appeared to have a full opportunity to investigate that value with or without the assistance of counsel," the Kuhns disclaimer was valid. 4 Pa. D.&C. 4th at 427-428.

7. The Kuhns disclaimer, albeit imprecisely written and better construed as a family settlement agreement, met the broad disclaimer statute where "the disclaimant noted and recognized his interest in the estate of his deceased son and clearly opted to take specified property in lieu of a more generalized share." 4 Pa. D.&C. 4th at 426-427.

8. There was no breach of fiduciary duty by the administratrix (decedent's mother/the father's ex-wife) in Kuhns where there were no undisclosed, material facts, and no evidence of fraud. 4 Pa. D.&C. 4th at 428-429.

9. The disclaimer in Pedrick was valid where there was no fraud in the inducement of the signing of the disclaimer, disclaimant knew what she was relinquishing by virtue of her role as executrix, and no provision of Chapter 62 authorized revocation of the disclaimer. Pedrick Estate, 1993 WL 313179 (1993), 19 Pa. D. & C. 4th 360, 364-365 (York C.C.P 1993).

10. In Pedrick, the court ruled a mistaken belief as to who exactly would receive assets upon execution of a disclaimer did not support the revocation of an otherwise valid, binding disclaimer. "Mistake may be relevant in the law of contract, but there is nothing to suggest that a disclaimer is a contract." 19 D. & C. 4th at 365-366.

11. Wrongful Death Act beneficiaries in Pennsylvania include "the spouse, children or parents of the deceased, … and [t]he damages recovered shall be distributed to the beneficiaries in the proportion they would take the personal estate of the decedent in the case of intestacy." 42 Pa. C.S. §8301(b).

12. All causes of action or proceedings, real or personal, shall survive the death of the plaintiff. 42 Pa. C.S. §8302. The distribution of damages recovered in a survival action pass through the estate and are distributed pursuant to a decedent's will, or if no will exists, then the damages are distributed pursuant to Pennsylvania's intestacy statutes, 20 Pa. C.S. §2101 *et al.*

13. The Disclaimer Letter drafted by Petitioner's counsel was too vaguely drawn to meet Section 6201(1) disclaimer requirements where the letter only advised disclaimant she was not a natural heir entitled to Wrongful Death benefits and that a "portion of the proceeds from this [personal injury] case must pass through the estate … and eventually be distributed in accordance with [decedent's] will." (citing Petitioner's Exhibit 2).

14. The Court found the Disclaimer Letter invalid where the letter did not "affirmatively advise" or describe the known, Survival Action settlement benefits owed to the disclaimant and that decedent's will guaranteed disclaimant 25% of those benefits.

15. Disclaimant could not have gained knowledge of the circumstances surrounding her potential disclaimed interest before she executed the disclaimer. The Petitioner/co-executor exclusively negotiated and obtained the Wrongful Death and Survival Action settlement, and Petitioner's/co-executor's personal injury counsel requested the Court seal the settlement approval petitions and had orders filed with the Court which showed only redacted figures, in lieu of the actual dollar amount of the settlement.

16. "Fiduciary" includes personal representatives, guardians, and trustees, whether domiciliary or ancillary, individual or corporate, subject to the jurisdiction of the orphans' court division. 20 Pa. C.S. §102.

17. In Pennsylvania, an executor or administrator is a fiduciary and, "as such, primarily owes a duty of loyalty to a beneficiary of his trust. Executors, as well as other fiduciaries, are under an obligation to make full disclosure to beneficiaries respecting their rights and to deal with them with **utmost fairness**." Estate of Joseph Edward Hydock, III, 2006 WL 445937, 80 Pa. D. & C. 4th 78, 86 (Phila. C.C.P. 2006, Herron, J.)(citing Estate of Harrison, 745 A.2d 676, 679 (Pa. Super. 2000)(other citations omitted)(emphasis added)).

18. In addition to the obligation of "full disclosure, a fiduciary is also bound by a rule forbidding self-dealing both, "to shield the estate and its beneficiaries and ensure the propriety of the executor's conduct."" 80 Pa. D. & C. 4th at 86 (citing Estate of Harrison, 745 A.2d at 679).

19. The "test of forbidden self-dealing is whether the fiduciary had a personal interest in the subject transaction of such a substantial nature that it might have affected his judgment

in a material connection." 80 Pa. D. & C. 4th at 86 (citing Noonan Estate, 361 Pa. 26, 31, 63 A.2d 80, 83 (1949)).

20. "[F]raud consists of anything calculated to deceive, whether by a single act or combination, or by suppression of truth, or suggestion of what is false, whether it be by direct falsehood or by innuendo, by speech or silence, word of mouth, or look or gesture." The "concealment of a material fact can amount to a culpable misrepresentation no less than does an intentional false statement." 80 Pa. D. & C. 4th at 87 (citing Moser v. DeSetta, 527 Pa. 157, 163, 589 A.2d 679, 682 (1991)(other citations omitted)).

21. Transactions between "persons occupying a **confidential relationship** are **prima facie voidable**, and the party seeking to benefit from such a transaction must demonstrate that it was 'fair, conscientious and beyond the reach of suspicion.'" 80 Pa. D. & C. 4th at 88 (citing Young v. Kaye, 443 Pa. 335, 342, 279 A.2d 759, 763 (1971)(other citations omitted) (emphasis added)).

22. Petitioner's/co-executor's concealment of a known, substantial, Wrongful Death and Survival Action settlement from a testate heir, when co-executor mistakenly thought he and natural siblings would receive more settlement monies should he procure the testate heir's disclaimer, amounted to self-dealing and fraud.

23. Petitioner/co-executor breached his heightened fiduciary duty where he knew the exact settlement amounts allotted to the Wrongful Death and Survival actions, and failed to convey the settlement details to Estate counsel, the other co-executor, and at least one of the Estate beneficiaries.

24. The court on its own motion may order the personal representative to appear and show cause why he should not be removed, or, when necessary to protect the rights of creditors or parties in interest, may summarily remove him. 20 Pa. C.S. §3183.

Appearances:
David L. Kwass, Esquire, *Attorney for Petitioner John Marcoux, Jr.*
Michael B. Finucane, Esquire, *Counsel for Respondent Emily Bumbaugh*
John W. Frey, Esquire, *Counsel for Estate of John Marcoux, Sr.*
Janice M. Hawbaker, Esquire, *Counsel for J., minor child of Emily Bumbaugh*

OPINION

Before Meyers, P.J.

This case emanates out of the tragic death of John Marcoux, Sr., who sadly was killed when a crane at the Manitowoc Crane Plant toppled onto a structure in which he was located on February 2, 2018. Subsequent choices and decisions of one of the co-executors of his estate, John Marcoux, Jr., have resulted in the litigation that is now before the court for decision on several issues:

1. Should a disclaimer of a testate heir, Emily Bumbaugh be declared valid or invalid? If yes, then her 25% interest in a settlement of a wrongful death

and survivor claim with Manitowoc passes to her natural son, referred to by all parties as "J." [Minor child's name redacted for privacy reason]. If no, then she will receive the 25% of the settlement.

2. Should the Petition to Determine the Validity of Emily Bumbaugh's Disclaimed Interest be denied due to acts of fraud and deceit on the part of Co-Executor, John Marcoux, Jr.?

3. Has John Marcoux, Jr. committed a breach of fiduciary duty in his actions as co-executor of the Estate of John Marcoux?

FINDINGS OF FACT:

John Marcoux, Sr. was killed on February 2, 2018, while present at the Manitowoc Crane Plant located in Shady Grove, Pennsylvania.

Prior to his death he executed a will on December 3, 2014. Under the will, his principal beneficiary was his wife, Sharion Marcoux, provided she survived him by 30 days. Sharion Marcoux predeceased John Marcoux. As a result, John Marcoux's estate was to be distributed 25% to his son, John L. Marcoux, Jr., 25% to his son, Donovan R. Marcoux, 25% to his daughter, Lee Michelle Marcoux, and 25% to his step-granddaughter, Emily G. Bumbaugh. All of the named beneficiaries were living at the time of his death. John Marcoux appointed his son John L. Marcoux, Jr. and his stepdaughter-in-law, Laura D. Bumbaugh-Miller as the co-personal representatives if his wife predeceased him. Laura D. Bumbaugh-Miller was living at the time of his death. John Marcoux's will was presented for probate to the Franklin County Register of Wills on February 28, 2018 and Letters Testamentary were granted to John L. Marcoux, Jr. and Laura D. Bumbaugh-Miller. Attorney John Frey, Esquire was the attorney hired to represent the estate of John Marcoux.

On June 26, 2020 a Petition To Settle Wrongful Death and Survival Claims was filed by, "Plaintiff, John Marcoux, Jr., as the Administrator of the Estate of John Marcoux, deceased" with the Orphans' Court. The petition contained various representations, monetary amounts and had numerous documents attached for consideration by the court. On July 17, 2020, the Court issued an order rejecting the Petition for defects related to failure to confirm if medical facility liens or claims by medical providers, Medicare, et al. had been satisfied and for discrepancies in certain financial amounts listed on the petition. A hearing was set to allow the Petitioner to provide answers to the Court.

On August 14, 2020 an Amended Petition To Settle Wrongful Death and Survival Claims was presented to the Orphans' Court which contained many of the same documents and provided answers to the Court's order.

The Amended Petition was prepared by attorney David L. Kwass, of Saltz, Mongeluzzi, Bendesky, P.C. The statements within the Amended Petition were verified by John Marcoux, Jr. as Co-Executor of the Estate of John Marcoux, subject to the penalties of 19 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

The amended petition contained various averments and documents which confirm the following findings by the court: A power of attorney/ contingent fee agreement was signed on August 27, 2018 by John Marcoux, Jr. with Saltz, Mongeluzzi, Barrett & Bendesky, P.C. for the amount of 33.33% of any gross recovery for claim of personal injuries arising on February 2, 2018. The claimant identified in the agreement is John Marcoux, Jr.

A lawsuit was filed by Saltz, Mongeluzzi, & Bendesky, P.C. on behalf of John Marcoux, Jr. and Laura D. Bumbaugh-Miller as Co-Executors of the Estate of John L. Marcoux and in their own Right, versus Manitowoc Crane Company, Inc., Manitowoc Cranes, LLC & Manitowoc Crane Companies, LLC on September 28, 2018 in the U.S. District Court for the Middle District of Pennsylvania. The verification of service was not included, so the court cannot determine if both co-executors verified the contents of the complaint, or only John Marcoux, Jr.

The decedent's 3 natural children, John L. Marcoux, Jr., Donovan Marcoux and Lee Michelle Marcoux, were entitled to benefits under the Pennsylvania Wrongful Death Act, 42 Pa.C.S. §8301.

Survival Claims were to be distributed to the decedent's heirs, by the will of John Marcoux offered for probate. Those heirs are John L. Marcoux, Jr., Donovan Marcoux, Lee Michelle Marcoux, and Emily Bumbaugh.

On February 19, 2020, as a result of mediation, a settlement was reached totaling $2,000,000.00.

On June 17, 2020, the Pennsylvania Department of Revenue approved a 60%/40% allocation of the Wrongful Death and Survival Benefits.

Attorney David L. Kwass asserted the settlement was fair and reasonable.

John Marcoux, Jr. as Co-Executor of the Estate of John Marcoux asserted the settlement was fair and reasonable.

The allocation of the net settlement proceeds in the amended petition was:

Wrongful Death Claim: $254, 926.03 to John Marcoux, Jr.; $254, 926.03 to Donovan Marcoux; $254, 926.03 to Lee Michelle Marcoux;

Survival Claim: $509,852. 05.

By the court's calculation by dividing the Survival Claim among the 4 heirs, each was entitled to receive $127,463.01, subject to any Pennsylvania Inheritance Taxes, commissions and fees which was an estimate net amount of $114,924.78.

On August 16, 2020, at the request of all counsel to the settlement, the Court executed an order approving the proposed distribution of monies with a redacted version being available for public view that excluded the monetary sums, but allowed all other terms to be read by the public.

The following facts were gleaned from the testimony at the hearing held on October 11, 2021.

Following John Marcoux's death, John Marcoux, Jr. and his son desired to take possession of John Marcoux's home located at 6357 Rockhill Road, Chambersburg, Pennsylvania. They desired to secure a home for John Marcoux, Jr.'s son. In exchange for John Marcoux, Jr. assuming the mortgage, taxes, and utilities, on the property, Emily Bumbaugh entered into a written agreement to forego any right to receive any benefit or interest in the described real estate, which she acknowledged by written agreement executed by her and her mother Laura Bumbaugh-Miller as co-executor and John Marcoux, Jr. in his capacity as co-executor. A deed was issued from the estate in April, 2018 conveying the decedent's real estate to John Marcoux, Jr. The deed was recorded with the Franklin County Recorder of Deeds on May 16, 2018.

An Estate Inventory and Final Inheritance Tax Return was filed by the co-executors on October, 30, 2018. There was no indication or statement made with the return that the estate was the party to litigation and that there may be additional assets on which taxes would have to be paid. The estate account was closed after a "final" distribution of the estate was made by the co-executors with the assistance of Mr. Frey. The estate account was not open when the settlement proceeds were secured.

John Marcoux, Jr. stated he and his siblings decided to go after Grove, a/k/a Manitowoc for the death of their father. He considered that the benefits would be for the siblings only. He handled all negotiations with the personal injury firm, Saltz, Mongeluzzi & Bendesky, P.C. John Marcoux, Jr. did not advise the co-executor or Emily Bumbaugh of his actions in pursuing a lawsuit and settlement with Manitowoc Cranes. He never advised estate counsel of the initiation of litigation or the results of the settlement until the monies to be distributed for the survival action were placed in the estate escrow account. John Marcoux, Jr. has little regard for Emily Bumbaugh. John Marcoux, Jr., used the services of the personal

injury attorneys, with whom he exclusively negotiated the settlement, and directed the law firm to prepare a letter to present to Emily Bumbaugh to secure her disclaimer of her share of the Survival Action proceeds. He personally took the letter to Emily Bumbaugh at her house on the evening of September 28, 2020. He stated she read over it and then asked him to explain it to her. He advised her that she was not a beneficiary on Grove's insurance or any of his father's insurance policies, he asked her to sign off on the settlement. He made no mention of the amount of the settlement or the amount she was being asked to disclaim. He claimed she stated it was never about the money for her and she signed it. John Marcoux, Jr. did nothing to arouse suspicions in Emily Bumbaugh that he was asking her to give away a settlement of money that exceeded $100,000.00. He took the approach that if she didn't ask anything about the settlement, he wasn't going to tell her. After some time while he was still there, Emily Bumbaugh asked what was the settlement amount and he told her he had signed a paper telling her couldn't discuss the matter. He avoided disclosing the amount of the settlement to Emily Bumbaugh when he obtained her signature on the letter with the disclaimer.

Unlike the document used to obtain Emily Bumbaugh's waiver of her interest in her step-grandfather's real estate, the letter did not contain a place for execution by co-executor Laura Bumbaugh-Miller, as she had no knowledge of the results of the settlement of the litigation even though she was co-executor of the estate. John Marcoux, Jr. approached Emily Bumbaugh at her home while she was alone. He presented her the letter and asked that she sign it. He agreed he failed to tell her what amount of money she was likely giving up. He asserted that he and his brother and sister went after Grove so it was clear he felt they should only be the ones to benefit from the settlement of the lawsuit. A copy of the letter is attached.

Notably the letter emphasizes the following, "*The Department of Revenue has determined that a portion of the proceeds of this case must pass through the estate of John Marcoux Sr. and eventually be distributed in accordance with Mr. Marcoux's will . . . You were not a blood relation of Mr. Marcoux, nor were you financially dependent on him during his life. Under Pennsylvania law, you were not a wrongful death beneficiary, nor were you entitled to any recovery under the Wrongful Death Act. I know that you graciously and appropriately renounced any claim on Mr. Marcoux's house, and ask that you do so now with respect to the lawsuit proceeds. Please sign the letter below indicating your agreement to renounce any claim or right to share in the proceeds of the lawsuit.*" The desired result of John Marcoux, Jr. in securing Emily Bumbaugh's disclaimer was to secure an additional $42,467.00 for each of the 3 natural children of John Marcoux. The net amount after taxes was $38,308.26.

What is missing from the letter is John Marcoux, Jr.'s knowledge of the amounts distributed to him and the other heirs of John Marcoux under the settlement agreement with Manitowoc. What is missing from the letter is the fact that not only did the Pennsylvania Department of Revenue determine 40% of the settlement amount of $2,000,000.00 was to be allocated to the estate for distribution to the four heirs; such a right was established by the laws of the Commonwealth, under 42 Pa.C.S. §8302, Survival Act. The letter fails to remind Emily Bumbaugh she is a lawful 25% recipient of the estate of her step-grandfather, John Marcoux, as result she was a lawful heir under the Survivor Act. Despite knowing "to the penny" the amount to be distributed to the estate under the Survival Act and approved by the court, that amount is not set forth in the letter. Despite using simple math and dividing the Survival Act amount by 4, the amount Emily Bumbaugh was to receive, $127, 463.01, was not set forth in the letter.

Emily Bumbaugh signed the letter September 28, 2020. By December 2, 2020 she had misgivings about her decision. She contacted attorney Michael Finucane, who issued a letter December 2, 2020 to John Frey, attorney for the estate, indicating Emily Bumbaugh had not knowingly or validly renounced her interest in the Survival Claim proceeds. Emily Bumbaugh testified credibly that she has a natural son, J..

The original letter disclaimer after being signed by Emily Bumbaugh was returned by John Marcoux, Jr. to the files of Saltz, Mongeluzzi & Bendesky, P.C. It was never provided to John Frey, attorney for the estate and was not recorded with the Register of Wills or Clerks of the Orphans' Court. The original was moved into evidence, but per directive of the court, although made a part of the evidentiary record for the hearing, was not permitted to be filed of record as requested by the Petitioner under 20 Pa.C.S. § 6204, as the court did not believe that to be the responsibility of the court, but rather the responsibility of the disclaimant or the co-executors of the estate.

The court found Emily Bumbaugh to be credible in her testimony. The court found attorney John Frey to be credible in his testimony. The court found John Marcoux, Jr.'s testimony to be credible as to his actions and his choices as a child, heir, sibling, and beneficiary of John Marcoux. It was apparent to the court that credibly stated he did not believe Emily Bumbaugh should receive the benefits that lawfully were hers. His disdain for Emily Bumbaugh was palpable.

After the hearing the court considered the potential outcomes if the disclaimer was upheld as valid as it related to Emily Bumbaugh's minor child J.. The court was aware of the statutory requirements of 20 Pa.C.S. §6205 and having been credibly advised Emily Bumbaugh has a natural born

son alive at the death of John Marcoux, determined that the court needed to appoint a guardian ad litem to protect any interests of the minor child under the probate code. On October 15, 2021, the court issued an order appointing attorney Janice Hawbaker as guardian ad litem for the minor child, to determine if the child would be the recipient of her disclaimed interest. On November 15, 2021, attorney Hawbaker filed a motion for declaratory judgment seeking to confirm that if Emily Bumbaugh was determined by the court to have executed a valid disclaimer, her natural born son, J. would be entitled to receive the 25% share of the Survival Action proceeds. Ultimately petitioner, John Marcoux, Jr. agreed with the finding of the guardian ad litem. The court entered an order making the rule absolute on January 25, 2022. When the court issued a subsequent rule to show cause to ask counsel for all parties if the issue of the disclaimer needed to be decided, now that the issue of the distribution of the 25% of the Survival Action benefits would either be distributed to Emily Bumbaugh or her son, J., the only party that filed a request for determination was Emily Bumbaugh through her counsel. This is further evidence that once John Marcoux, Jr. no longer personally stood to financially gain from the enforcement of her disclaimer, he had no interest in pursuing the matter.

DISCUSSION:

1. Should a disclaimer of a testate heir, Emily Bumbaugh be declared valid or invalid?

20 Pa.C.S. § 6201 provides the methodology by which a "person to whom an interest in property would have devolved by whatever means, including a beneficiary under a will . . . may disclaim it in whole or in part by a written disclaimer which shall:

(1) describe the interest disclaimed;

(2) declare the disclaimer and extent thereof; and

(3) be signed by the disclaimant."

20 Pa.C.S. § 6201.

In reviewing the letter dated September 25, 2020 prepared by the law firm of Saltz, Mongeluzzi, Bendesky, P.C., there is no doubt that Emily Bumbaugh signed and dated the letter on September 28, 2020 in the presence of John Marcoux, Jr. Therefore, this court finds that requirement number 3 of 20 Pa.C.S. §6201 has been met.

When reviewing the document to determine the description of the interest to be disclaimed by Emily Bumbaugh, it reads as follows, "*The*

Department of Revenue has determined that a portion of the proceeds of this case must pass through the estate of John Marcoux Sr. and eventually be distributed in accordance with Mr. Marcoux's will . . .You were not a blood relation of Mr. Marcoux, nor were you financially dependent on him during his life. Under Pennsylvania law, you were not a wrongful death beneficiary, nor were you entitled to any recovery under the Wrongful Death Act. I know that you graciously and appropriately renounced any claim on Mr. Marcoux's house, and ask that you do so now with respect to the lawsuit proceeds. Please sign the letter below indicating your agreement to renounce any claim or right to share in the proceeds of the lawsuit."

Counsel for John Marcoux, Jr., are correct that there is little case law issued by appellate or trial courts which outline the level of detail that is required of the description of an interest to be waived. It has been recommended that this court take direction from a ruling by Common Pleas Judge Gilfert Mihalich of Westmoreland County, in the case of Kuhns Estate, 1989 WL 229392 (1989), 4 Pa. D.&C. 4th 422. In that case, Judge Mihalich, pointed out there was little case law to guide him or the lawyers involved in the case regarding the level of information to be set forth in the description of the waiver. Judge Mihalich decided that based on his reading of the official commentary to the rule, which emphasized permitting disclaimers to avoid paying taxes on unwanted gifts, when combined with the plain language the statute requiring that a "disclaimer", "describe the interest disclaimed", that the word "interest" requires "something different than a strict and precise delineation of the property disclaimed." 1989 WL 229392 at 3, 4 Pa. D.&C. at 426.

In the case before Judge Mihalich, he recounted that the father was seeking to revoke a disclaimer after he had been given the opportunity to walk through his son's residence, see all the personal property, and Judge Mihalich determined the entire net value of the estate was approximately $35,000.00. The father was presented a written document in which he agreed to receive a 1984 Datsun pickup truck, cross bow, lawn mower, gun, & fishing equipment, and in exchange, he relinquished all claims to the estate. 1989 WL 229392 at 1, 4 Pa. D.&C. at 423. In that instance the evidence supported the judge's ruling that a general statement of disclaimer is sufficient, because there was time and opportunity for the father of decedent to learn of the size and nature of his deceased son's estate before he executed the document, which in addition to affirmatively giving him certain things, included a disclaimer of receiving anything else in the estate. Judge Mihalich went on to explain that the document, not written by counsel, technically met the requirements of 20 Pa.C.S. §6201(1), as there is no requirement to precisely identify the interest to be disclaimed. He indicated that his ruling under section 6201 was entered with great

trepidation. He felt it as it was better and more easily decided as simply a written document that was a binding agreement between intestate heirs, and properly enforceable by the court. Judge Mihalich went on to point out that the document should be enforced because the administratrix of the estate did not withhold pertinent information to the resolution of the settlement agreement. The father was afforded broad and extensive access to his son's meager estate assets and selected what he wanted, allowing his estranged wife the remaining estate assets. In reviewing the facts before Judge Mihalich, the individual disclaiming the interest had as much knowledge of what was being waived and given the opportunity to gain knowledge of what was in the decedent's estate before executing the agreement, which Judge Mihalich, more appropriately described as a family settlement agreement than a disclaimer. 1989 WL 229392 at 4, 4 Pa. D.&C. at 427.

That is not to say that this court is ruling that a disclaimer requires "to the penny" descriptions of values or interests to be a valid disclaimer. In fact, as Judge Mihalich lamented, a well drafted disclaimer drafted by knowledgeable counsel would include language that would represent that a personal representative, administrator, and the heir or those holding a right to disclaim may not know the precise size and extent of the interest disclaimed.

In the case of In re Pedrick's Estate, 1993 WL 313179 (1993), 13 Fid.Rep. 2d 240, 19 Pa.D.&C. 4th 360, the decedent husband left a will in which he created a, "Credit Equivalent Trust", to provide a source of income for his wife, Mollie, for her lifetime and the balance left at her death to be given to his children. The trust language included precise descriptions of the amounts that were to be available for distribution to Mollie was either $5,000.00 or 5% of the market value of the principal per year. Mollie Pedrick was appointed and served as executrix of her deceased husband's estate. Presumably she was fully familiar with the size and amount of his estate and the amount of money available from which she could receive either $5,000.00 or 5% of the market principal, but even that would fluctuate year to year depending on the market. The disclaimer she executed, (It is not indicated who drafted the document), stated, "I hereby irrevocably disclaim all powers and beneficial rights and interests enjoyed by me, with respect to the income of said 'Credit Equivalent Trust.'" The interest that was being disclaimed is the "Credit Equivalent Trust", a defined term in the testator's will. In the case there is no suggestion that Mollie Pedrick didn't know what interest she was disclaiming, rather Mollie Pedrick sought to revoke the disclaimer based upon the resultant distribution to the decedent's heirs if enforced, as it was contrary to the decedent's intent in his will. She had mistakenly believed that her disclaimer would result in the money going to her children. When that turned out to not be correct, she sought to revoke

it, rather than let the money be immediately distributed to her husband's children. That is not the issue raised by John Marcoux, Jr. and/or Emily Bumbaugh and before the court.

In the case before the court, there are facts that support a finding that John Marcoux, Jr., acted with full intent of doing whatever was necessary to obscure and mislead Emily Bumbaugh from knowing the actual interest that she was disclaiming. He and the counsel who he requested to draft the letter of disclaimer knew the exact amount to be distributed to the estate under the survival action portion of the settlement. It was not speculative. John Marcoux, Jr. entered into an agreement with counsel to pursue litigation against Manitowoc Crane Company, Inc. and its various other legal entities. He was the only signatory to the settlement agreement. He failed to share any information regarding the settlement with the co-executor or estate counsel, and Emily Bumbaugh choices which have other ramifications addressed hereafter. He knew what he and the Wrongful Death heirs were receiving from the settlement and what he and the other Survival Action heirs were to receive from the settlement. (There was no evidence supplied to this court to know when and how the other two heirs were advised of their interests.) The only heir who didn't know what she stood to receive in a dollar figure was Emily Bumbaugh. In fact, a fair reading of the letter presented to her seemed to diminish that which she was to receive, with an emphasis that she was not entitled to wrongful death benefits as she was not a natural heir. However, she was not affirmatively advised that there was a Survival Action statutory right under her step-grandfather's will guaranteeing her 25% of that interest, a specific percentage that is not referenced in the letter. There is only a vague reference to the will and a vague reference to the lawsuit which by the time the letter was presented to her had been settled.

This court finds that the failure of John Marcoux, Jr. to reference the exact language of the will and the 25% distribution, is sufficient to find that the disclaimer does not meet the requirements of 20 Pa.C.S. §6201(1). The interest has not been described. The general reference to the lawsuit, without a description of the interest waived, is also fatal to the assertion that the interest was described with sufficiency for the disclaimer to be enforced. For those reasons alone the court will enter an order denying the request for the disclaimer to be enforced.

The court now will address the importance of the context of the description set forth in a disclaimer and the knowledge the disclaimant may have outside of the document of the interest to be disclaimed. In this instance John Marcoux, Jr. controlled access and had the sole knowledge of the settlement of the lawsuit. This court recollects that a request to seal the petitions and orders was made by counsel to the settlement. Unfortunately

for John Marcoux, Jr., this placed greater need for him as a co-executor of his father's estate to honor the fiduciary requirement to protect the interests of all the beneficiaries, specifically Emily Bumbaugh and to provide her that information as a fiduciary, a statutory and common law requirement, that cannot be overridden by any court order. Even if Emily Bumbaugh had tried to obtain information about the settlement before she signed the letter, which she did not, she could not have done so by consulting court records, speaking to estate counsel or asking the co-executor. The testimony at the hearing reveals that John Marcoux, Jr., both individually and as the co-executor of his father's estate, possessed the information as to what dollar amount Emily Bumbaugh was being asked to disclaim, and he withheld it from her and the co-executor. In addition, she was given no time to investigate that which she was disclaiming.

All of these factors support this court's finding that the statute was not complied with and the disclaimer shall not be enforced.

2. Should the Petition to Determine the Validity of Emily Bumbaugh's Disclaimed Interest be denied due to acts of fraud and deceit on the part of Co-Executor, John Marcoux, Jr.?

The following facts are not in doubt: 1. John Marcoux, Jr. was appointed as a co-executor of his father's estate in his father's will dated December 3, 2014. John Marcoux, Jr. and Laura Bumbaugh- Miller were granted letters testamentary by the Franklin County Register of Wills on February 28, 2018, thus making him a personal representative of his late father's estate. Under the December 3, 2014 will, Emily Bumbaugh was entitled to receive 25% of the residuary estate of her step-grandfather. John Marcoux, Jr. believed that by securing Emily Bumbaugh's disclaimer he would gain an additional $42,000 +/- from the estate.

Under 20 Pa.C.S. § 102, a **"Fiduciary."** Includes personal representatives, guardians, and trustees, whether domiciliary or ancillary, individual or corporate, subject to the jurisdiction of the orphans' court division."

Judge Herron in the case of In re Hydock Estate, 2006 WL 445937, 26 Fid.Rep.2d 209, 80 Pa. D. & C.4th 78, clearly and precisely set forth the standard with which a personal representative must conduct themselves, especially when dealing with the assets of an estate and the heirs to an estate.

Under long standing Pennsylvania precedent, that trust is protected by the fiduciary duty imposed on an executor or administratrix of an estate. As the Superior Court recently observed:

More than one-half century ago, our Supreme Court

> defined the role and duty of an executor as a fiduciary. "An executor is a fiduciary no less than is a trustee, and, as such, primarily owes a duty of loyalty to a beneficiary of his trust. Executors, as well as other fiduciaries, are under an obligation to make full disclosure to beneficiaries respecting their rights and to deal with them with utmost fairness." 80 Pa. D. & C.4th 78, 86 (citing Estate of Harrison, 2000 Pa.Super. 19, 745 A.2d 676, 679 (2000) (other citations omitted)).
>
> In addition to this obligation of full disclosure, a fiduciary is also bound by a rule forbidding self-dealing both "to shield the estate and its beneficiaries and ensure(s) the propriety of the executor's conduct." Id. (citing Harrison, 745 A.2d at 679). As the Pennsylvania Supreme Court observed, the "test of forbidden self-dealing is whether the fiduciary had a personal interest in the subject transaction of such a substantial nature that it might have affected his judgment in a material connection. Id. (citing Noonan Estate, 361 Pa. 26, 31, 63 A.2d 80, 83 (1949)).

Judge Herron went on to explain,

> It is well established that "fraud consists of anything calculated to deceive, whether by a single act or combination, or by suppression of truth, or suggestion of what is false, whether it be by direct falsehood or by innuendo, by speech or silence, word of mouth, or look or gesture." 80 Pa. D. & C.4th 78, 87 (citing Moser v. DeSetta, 527 Pa. 157, 163, 589 A.2d 679, 682 (1991)(other citations omitted)). Moreover, the Pennsylvania Supreme court observed in Moser, the "concealment of a material fact can amount to a culpable misrepresentation no less than does an intentional false statement." Id. The elements of fraud consist of: "(1) a misrepresentation, (2) a fraudulent utterance thereof, (3) an intention by the maker that the recipient will thereby be induced to act, (4) justifiable reliance by the recipient upon the misrepresentation, and (5) damage to the recipient as the proximate result." Id. at 88 (citing Pittsburgh Live, Inc. v. Servov, 419 Pa.Super. 423, 429, 615 A.2d 438, 441 (1992) (other citations omitted)). Moreover, fraud or intent to defraud "is never presumed

and must be proved by evidence that is clear, precise and convincing." Id. (citing Snell v. Commonwealth, 490 Pa. 277, 281, 416 A .2d 468, 470 (1980)(other citations omitted)).

In cases involving a confidential relationship, however, the Pennsylvania Supreme Court has emphasized that the "well settled doctrine, founded on strong considerations of public policy, renders inapplicable the general rule requiring an affirmative showing of fraud. To the contrary, transactions between persons occupying a confidential relationship are prima facie voidable, and the party seeking to benefit from such a transaction must demonstrate that it was 'fair, conscientious and beyond the reach of suspicion. 80 Pa. D. & C.4th 78, 88 (citing Young v. Kaye, 443 Pa. 335, 342, 279 A.2d 759, 763 (1971)(other citations omitted)).

This court urges all counsel and attorneys who represent fiduciaries to be aware of the heightened standards of conduct and rules and requirements that they must adhere to when dealing with heirs and the interests and property of an estate.

There is simply no doubt on the facts before this case that John Marcoux, Jr. was and is fiduciary as a co-executor of his father's estate. As a result, he must comply with a higher standard of conduct especially when handling matters for his father's estate. In fact, the litigation he initiated identified him as co-executor of his father's estate. The amended settlement petition contains an affidavit executed by him as the executor of the estate. As a result, he had an obligation to make full disclosure to beneficiaries respecting their rights and to deal with them with utmost fairness. This extended not just to his natural brother and sister, but to Emily Bumbaugh. A simple reading of the letter he presented to Emily Bumbaugh reveals that he did not comply with that standard. He withheld critical information necessary for her to make an informed decision about whether or not she should execute the disclaimer. While he may have thought that by characterizing himself as a beneficiary of the wrongful death benefits would excuse him from a fiduciary obligation, the law does not excuse him from the duties of a fiduciary in this matter.

Moreover, there is a clearly the matter of self-dealing, as he was operating under the belief, (mistakenly), that by obtaining the disclaimer of Emily Bumbaugh he would be securing approximately $42,000.00 additional dollars, ($38,000.00, after taxes and fees), for himself and his natural brother and sister. Acting under that misguided belief, he obtained the letter prepared by legal counsel that for the reasons already set forth heretofore, failed to contain the information required for disclosure as a

fiduciary to an heir and obtained Emily's signature. He had a personal interest because if he was successful in obtaining her signature he believed that he would gain additional monies from the settlement of the lawsuit with Manitowoc Cranes. His efforts at concealment were motivated by personal gain. They are easily seen by the court. He did not include the co-executor in the securing of counsel to pursue litigation or advise her of the amount of money resulting from the settlement. This is additional evidence of concealment. Apparently, Mr. Marcoux did not realize that obtaining her disclaimer would lead to her son receiving the benefits he secured for those entitled to receive the 25%, as it was not suggested at the hearing on October 11, 2022 by any party. A point that he has conceded in failing to challenge the petition of J.'s guardian ad litem to make the rule absolute which this court did by order of court on January 25, 2022.

This is a clear case of self-dealing and fraud on the part of John Marcoux, Jr. as co-executor of the estate of John Marcoux, Sr. That he apparently was not advised of the consequences of his choices and strategy is of no concern to this court. He bears the responsibility of his actions as a co-executor of his father's estate and the attendant standards of conduct for which a fiduciary is held. For the purposes of this issue the court finds that the disclaimer executed by Emily Bumbaugh is voidable and she is entitled to receive the 25% of the Survival Action benefits obtained by the settlement of the Manitowoc Crane litigation.

3**. Has John Marcoux, Jr. committed a breach of fiduciary duty in his actions as co-executor of the Estate of John Marcoux?**

The court has enumerated the actions on the part of John Marcoux, Jr. which constitute a breach of the fiduciary relationship in his capacity as co-executor of the estate of John Marcoux, Sr. in discussing the topic of fraud and deceit on his part relating to obtaining Emily Bumbaugh's signature on the document as a disclaimer. The court has legitimate concerns as to his breach of his fiduciary duty. His self-dealing, combined with the palpable disregard for the interests of Emily Bumbaugh expressed in open court, require this court to act under 20 Pa.C.S. § 3183. The court will issue a separate order of court directing John Marcoux, Jr. to appear before the court and show cause why he should not be removed as co-executor and to submit to this court a full accounting of his activities as co-executor to be provided to the court, his co-executor and all of the enumerated heirs of the estate of John Marcoux.

John Marcoux, Jr.'s greed prompted him to ask counsel to craft a letter in his effort to get Emily Bumbaugh to disclaim her interests, apparently not realizing that her disclaimer would result in her natural son, J.

being awarded her share of the survival action. He did so seeking to secure additional moneys for himself. Had he known that the disclaimer he induced Emily Bumbaugh to sign would result in her share of the Survival Action being distributed to her natural son, rather than to himself and his brother and sister, he may never had sought to enforce the disclaimer, and his self-dealing and this injustice may never have been brought to the attention of the court.

Editor's Note: The court entered an Order dated June 29th, 2022, consistent with its findings in the foregoing Opinion. For context, the Order is summarized by the Franklin County Legal Journal committee below and is not reproduced in full. The full Order is filed of record in this matter at Franklin County Orphans' Court Docket No. 83-OC-2020. The Order directed, *inter alia*:

> 1. The disclaimer signed and dated September 28, 2020, by Emily Bumbaugh disclaiming her interest in the results of the survivor benefits is declared invalid, null, and void as it fails to comply with the requirements of 20 Pa.C.S. § 6201.
>
> 2. The said disclaimer is declared invalid, null, and void under the common law theories of fraud, deceit, and self-dealing, which are prohibited acts of a fiduciary when engaging in estate related transactions with heirs and estate property.
>
> 3. John Marcoux, Jr. breached his fiduciary duties as co-executor of the Estate of John Marcoux, Sr. The Court will issue a separate order of court directing him to appear to show cause why he should not be removed as an executor and to provide an accounting of his activities as co-executor of the Estate of John Marcoux, Sr. He shall also answer why he should not be assessed the reasonable attorney fees incurred by Emily Bumbaugh to defend the efforts of John Marcoux, Jr. to enforce a disclaimer that was procured by fraud, deceit, and resulted from the clear breach of fiduciary duty in that he was self-dealing in estate assets.
>
> The co-executor of the estate of John Marcoux, Laura Bumbaugh-Miller, shall also appear pursuant to 20 Pa.C.S. § 3317 to answer as to why she should or should not take actions to protect the estate from the actions of fraud, deceit, and self-dealing.

Subsequent History: Following the entry of the Opinion reproduced herein and the referenced Order dated June 29, 2022, the Franklin County Court of Common Pleas held a hearing in this matter before President Judge Shawn D. Meyers. The court issued an Order of Court dated August 16, 2022,

which Order is reproduced in full below:

ORDER OF COURT

AND NOW THIS 16th day of August, 2022, following a hearing to determine whether or not John Marcoux, Jr. should be removed as co-executor of the Estate of John Marcoux, and whether or not he should be surcharged for his actions of self-dealing and fraud including the payment of the attorney's fees of Emily Bumbaugh,

IT IS HEREBY ORDERED THAT

1. John Marcoux, Jr., is hereby removed as co-executor of the Estate of John Marcoux effective this 16th day of August, 2022. Laura Bumbaugh-Miller shall serve as the sole executor of the Estate of John Marcoux. She shall not be required to post any bond or increase of bond to serve as the sole executor of the Estate of John Marcoux, Jr.

2. John Marcoux, Jr., shall be surcharged the following sums and make payment of said sums as specified:

a. He shall pay the sum of $12,000.00 for the attorney's fees expended by Emily Bumbaugh to her attorney Michael Finucane, Esquire to litigate the issue of the validity of her alleged disclaimer presented to her for execution by John Marcoux, Jr. Laura Bumbaugh-Miller and John Frey, attorney for the Estate of John Marcoux, shall pay the surcharge amount of $12,000.00 to Emily Bumbaugh from John Marcoux, Jr.'s share of the Survival Action Settlement funds held in the IOLTA account of Dick, Stein, Schemel & Frey, LLP, within 30 days of the date of this order along with lawfully approved interest as set forth in 41 P.S. § 202, which is six percent per annum, calculated from September 28, 2020, the date John Marcoux, Jr. obtained Emily Bumbaugh's signature on the alleged disclaimer, through the date of payment. Laura Bumbaugh-Miller and John Frey shall file proof of payment with the Orphans' Court . If there is a fee collected from the Orphans' Court Clerk for filing a proof of payment, that fee shall also be collected and paid from the share of the Survival Action Settlement proceeds to be distributed to John Marcoux, Jr.

b. The sum of $6,401.00 shall be surcharged and paid by John Marcoux, Jr. to Linda Bumbaugh-Miller. This sum reflects the amount John Marcoux, Jr. was paid as co-executor from the proceeds of the Survival Action Settlement paid to the Estate of John Marcoux. Laura Bumbaugh-Miller and John Frey, attorney

for the Estate of John Marcoux, shall pay the surcharge amount of $6,401.00 to Laura Bumbaugh-Miller from John Marcoux, Jr.'s share of the Survival Action Settlement funds held in the IOLTA account of Dick, Stein, Schemel & Frey, LLP, within 30 days of the date of this order along with lawfully approved interest as set forth in 41 P.S. § 202, which is six percent per annum, calculated from December 31, 2021, the date John Marcoux, Jr. was paid his co-executor fee for the Survival Action Settlement proceeds through the date of payment. Laura Bumbaugh-Miller and John Frey shall file proof of payment with the Orphans' Court. If there is a fee collected from the Orphans' Court Clerk for filing a proof of payment, that fee shall also be collected and paid from the share of the Survival Action Settlement proceeds to be distributed to John Marcoux, Jr.

The Clerk of Orphans' Court shall give written notice of the entry of this Order of Court, including a copy of this Order of Court, to each party's attorney of record and each unrepresented party and shall note in the docket the giving of such notice and the time and manner thereof.