

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

IN RE: : ORPHANS' COURT DIVISION  
:  
NANCY STUART, SR. : 41-14-0106

**OPINION AND ORDER**

This matter came before the court on August 21, 2015 for a hearing and argument on exceptions filed by Petitioner, Jeanette Brelsford. Petitioner filed a request to set aside a real estate conveyance. The court denied this petition in an Opinion and Order dated April 29, 2015. The decision was filed stamped May 4, 2015 in the Register and Recorder's office. Petitioner filed Exceptions to the opinion and Order on May 29, 2015. On June 5, 2015, Respondent filed a Reply to Petitioner's Exceptions, in which Respondent asserted, among other things, that the Exceptions were untimely pursuant to Orphan's Court Rule 7.1(a).

A hearing and argument was held on August 21, 2015. At the hearing, the court immediately questioned Petitioner's counsel regarding the timeliness issue. Specifically, the court inquired as to how the Exceptions were timely when the rules required that they be filed within 20 days.

Petitioner's counsel contended that there was a 30-day time period to file Exceptions. He also asserted that the Opinion and Order was time-stamped on May 4 and that he would need to check as to when he received the decision, believing that it was several days later. Counsel for Petitioner conceded, however, that the Order was received within 20 days of the date it was filed and that he also received Respondent's Reply.

With respect to Respondent's Reply, counsel for Petitioner indicated

that he “glossed over:” it and must have missed the timeliness objection.

In sum, Petitioner’s counsel believed that the time to file Exceptions was 30 days after the date of the Order. He was not aware of the Rule of Orphan’s Court Procedure requiring Exceptions to be filed within 20 days. The Exceptions were untimely filed and even when Respondent’s Reply noted such, he failed to properly read the Reply or to prepare for a timeliness objection at the time of the hearing. In fact, the Reply was filed on June 5, 2015, approximately 45 days prior to the August 21, 2015 hearing.

After consultation with co-counsel, Petitioner’s counsel made an oral motion to proceed *nunc pro tunc*. The court permitted counsel to make said motion as of August 21, 2015.

In support of that oral motion, co-counsel argued that he was not entirely familiar with the Orphan’s Court Rules and that the original Exceptions were filed within five days after the 20-day deadline. He argued as well that it would restore the “equities” between the parties and that normally the time for filing an appeal was thirty days. He admitted that he did “not pay close attention” to Respondent’s Reply.

Respondent’s counsel argued that the request for *nunc pro tunc* relief should be denied because no exceptional circumstances were argued. Simply put, counsel made a mistake and Respondent should not have to suffer from such. In essence, Petitioner argues that the court should allow the *nunc pro tunc* exceptions because the failure to timely file them was a result of counsel’s negligence.

Orphan’s Court Rule 2.2 notes that the court, upon its own motion or

the motion of any party, may extend any limitation of time prescribed by the rules. Clearly, the court has discretion to permit the *nunc pro tunc* filing of exceptions. The court's discretion, however, is not limitless. The court is bound by the decisions of the appellate courts and an abuse of discretion standard.

“An abuse of discretion is not merely an error of judgment but is found where the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill will as shown by the evidence of record.” *Freeman v. Bonner*, 761 A.2d 1193, 1194-95 (Pa. Super. 2000)(citation omitted).

As Respondent correctly noted, Rule 7.1(a) imposes a 20-day time limit for the filing of Exceptions. It stops the running of the 30-day appeal time limit. Once timely Exceptions are filed, no appeal may be filed until the Exceptions are disposed of. A new 30-day limit under the Pennsylvania Rules of Appellate Procedure begins on the date an Order is entered disposing of the Exceptions or on the day the Exceptions are deemed denied by operation of law. The court has 120 days from the date the Exceptions are filed to decide them. Pa. O. C. Rule 7.1 (f). As Respondent correctly notes, if the court fails to decide the Exceptions within that period, then the Exceptions are deemed denied by operation of law on the 121<sup>st</sup> day.

In addressing a *nunc pro tunc* request, more is required than the mere hardship imposed on Petitioner. A trial court may grant a *nunc pro tunc* request when the delay in filing the petition is caused by extraordinary circumstances involving fraud or some breakdown in the court's operation through a default of its officers.

*Lenhart v. CIGNA*, 824 A.2d 1193, 1196 (Pa. Super. 2003); *Bass v. Commonwealth*, 485 Pa. 256, 401 A.2d 1133, 1135 (1979). Additionally, such relief may be granted when the delay is the result of unforeseeable non-negligent circumstances, provided the motion is filed within a short time after the petitioner or petitioner’s counsel learns of and has an opportunity to address the untimeliness and the opposing party is not prejudiced by the delay. *Criss v. Wise*, 566 Pa. 437, 781 A.2d 1156, 1159-60 (2001).

Clearly, and as essentially conceded by Petitioner, there is no fraud or breakdown in the court’s operations. The failure to file the Exceptions in a timely manner was the result of counsel’s negligence. That negligence consisted of counsel not being aware of the time period in which Exceptions were required to be filed. Counsel mistakenly believed that there was a 30-day time limit within which to file Exceptions when, in fact, it was 20 days. This negligence was exacerbated by counsel “glossing over” or not paying “particular attention” to the Reply of Respondent which specifically raised the timeliness issue. Indeed, it is incredulous to the court that at the time of the hearing and argument in this matter, approximately 45 days after the Reply was filed, that Petitioner’s counsel was not prepared to meet the timeliness argument. The court was ready and willing to accept any evidence Petitioner’s counsel wished to offer regarding the reasons that the exceptions were not filed in a timely manner, but he was not even prepared to tell the court exactly when he received its Opinion and Order.

The court is well aware of the impact of this decision. If the nunc pro tunc request is denied, then Petitioner will not have an avenue to appeal the

underlying decision, as the appeal period would have expired 30 days from the date of the underlying decision. It is especially egregious since Petitioner will suffer as a result of her counsel's negligence. Petitioner, however, is not entirely without recourse, because she can appeal this decision denying the nunc pro tunc request and/or sue counsel for money damages due to his negligence. Unfortunately, there is the possibility that neither avenue will provide Petitioner with the redress she ultimately seeks, which is return of the 1/7<sup>th</sup> interest in the property to the trust.

Petitioner's counsel has failed to provide the court with any legal authority whatsoever which supports his proposition that a nunc pro tunc request should be granted based upon counsel's negligence. Indeed, it appears to this court that case law is to the contrary. *Lenhart*, 824 A.2d at 1197-98 ("The grant of *nunc pro tunc* relief is not designed to provide relief to parties whose counsel have not followed proper procedure in preserving appellate rights."); *Bass*, 401 A.2d at 1135 ("The negligence of an appellant, or an appellant's counsel,...has not been considered a sufficient excuse for the failure to file a timely appeal.").

If the court granted *nunc pro tunc* relief in this case, it would be based solely on sympathy to Petitioner's plight, which would be an abuse of discretion.

Accordingly, the following order is entered:

### **ORDER**

**AND NOW**, this \_\_\_\_ day of September 2015, Petitioner's oral motion to proceed *nunc pro tunc* is **denied** and the exceptions filed by the Petitioner are **dismissed** as untimely.

The court also notes that Paul Petcavage was previously appointed to represent Nancy Stuart, Sr. Due to Ms. Stuart's death, Paul Petcavage is no longer involved in this case and the parties need not serve him with any future filings.

By The Court,

---

Marc F. Lovecchio, Judge

cc: James Malee, Esquire  
Christian Kalas, Esquire  
Paul Petcavage, Esquire