

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

IN RE: ESTATE OF NORMAN E. : NOs. 41-20-0343  
WENGERT, Deceased, and IN RE: : 41-13-0578  
THE MARGUERITE P. BIERMAN :  
LIVING TRUST : ORPHANS' COURT  
 : DIVISION  
 :  
 :  
 :  
 : 1925(a) Opinion

**Pa. R.A.P. 1925(a) Opinion in Support of September 3, 2021 Decree**

The procedural history of these two related cases is summarized in the Court's September 3, 2021 Decree from which the instant appeal is taken. Appellants (Respondents) are Andrew Cole ("Cole"), in his capacity as Executor of the Estate of Norman E. Wengert, and Mary Hertenberg ("Hertenberg"), in her capacity as Trustee of the Marguerite P. Bierman Living Trust.<sup>1</sup> Appellants have each filed a separate concise statement of errors complained of on appeal. This Opinion will address Hertenberg's second allegation of error, as well as the appealability of the September 3, 2021 Decree.

The second issue raised by Hertenberg is that the Court "erred in not allowing Appellant to file a further responsive pleading to the Appellant's Petition to address factual allegations after denying Appellant's Preliminary Objections." The Court agrees that this was error.

Chapter 3 of the Orphans' Court Rules governs petition practice in the Orphans' Court. Rule 3.1 states that "[m]atters may be raised before the court by written petition...." A party may respond to a petition by, *inter alia*, filing an answer or filing preliminary objections to the petition.<sup>2</sup> Rule 3.9 governs the filing of preliminary objections; Rule 3.9(e)(1) states "[i]f the preliminary objections are overruled, the

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<sup>1</sup> Cole and Hertenberg were initially jointly represented, and all filings through the September 30, 2021 Notice of Appeal were filed on behalf of both of them. On October 19, 2021, Cole retained new counsel. Hertenberg filed her concise statement of errors complained of on appeal on October 28, 2021. Cole filed his concise statement of errors complained of on appeal on October 29, 2021.

<sup>2</sup> Pa. O.C. Rule 3.6.

party who filed the preliminary objections shall have the right to file an answer within 20 days after entry of the order overruling the preliminary objections or within such other time as the court shall direct.”

The September 3, 2021 Decree overruled Respondents’ Preliminary Objections and “direct[ed] Respondents to file accountings of Decedent’s Estate and the Trust.” Rather than immediately granting partial relief and ordering an accounting, the Court should have ordered Respondents to file an Answer within 20 days, and at the close of pleadings scheduled a conference for the parties to discuss the need for discovery, argument, or evidentiary hearings. By instead ordering Respondents to file an accounting, without providing the opportunity for the filing of additional pleadings or discovery, the Court erred.

Respondents’ appropriate remedy, however, was not to appeal but to file a Motion for Reconsideration. It is clear to the Court that the September 3, 2021 Decree is not an appealable order.

Generally, unless specified by statute, an appeal must be taken from a final order.<sup>3</sup> With two exceptions inapplicable here, a final order is one that “disposes of all claims and of all parties....”<sup>4</sup> The September 3, 2021 Decree did not dispose of all claims: Petitioner seeks accountings, injunctive relief, and distribution of real property, but the Court ordered Respondents to provide accountings and did not rule on Petitioner’s requests for injunctive relief or distribution of real property.

Pennsylvania Rule of Appellate Procedure 342 lists eight categories of Orphans’ Court orders from which an appeal may be taken as of right:

- (1) An order confirming an account, or authorizing or directing a distribution from an estate or trust;
- (2) An order determining the validity of a will or trust;

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<sup>3</sup> *In re Estate of Borkowski*, 794 A.2d 388, 389 (Pa. Super. 2002).

<sup>4</sup> Pa. R.A.P. 341(b)(1). Pa. R.A.P. 341(b)(3) defines “final order” to include an order “as to one or more but fewer than all of the claims and parties [when the court makes] an express determination that an immediate appeal would facilitate resolution of the entire case.” Pa. R.A.P. 341(b)(4) includes in the definition of “final order” certain Post Conviction Relief Act orders. Neither Rule 341(b)(3) nor (b)(4) are implicated in this case.

- (3) An order interpreting a will or a document that forms the basis of a claim against an estate or trust;
- (4) An order interpreting, modifying, reforming or terminating a trust;
- (5) An order determining the status of fiduciaries, beneficiaries, or creditors in an estate, trust, or guardianship;
- (6) An order determining an interest in real or personal property;
- (7) An order issued after an inheritance tax appeal has been taken to the Orphans' Court pursuant to either 72 Pa.C.S. § 9186(a)(3) or 72 Pa.C.S. § 9188, or after the Orphans' Court has made a determination of the issue protested after the record has been removed from the Department of Revenue pursuant to 72 Pa.C.S. § 9188(a); or
- (8) An order otherwise appealable as provided by Chapter 3 of [the Rules of Appellate Procedure].

The September 3, 2021 Decree does not fall into any of the first seven of these categories. Rather, the Decree directed Respondents to file accountings,<sup>5</sup> which was prerequisite to the Court's ultimate determination of any of those issues. Thus, the Decree is appealable only if some other provision of Chapter 3 renders it appealable.

Rule of Appellate Procedure 311 allows certain categories of interlocutory appeals to be taken as of right. The September 3, 2021 Decree does not fall into any of those categories, however, because it is not "[a]n order refusing to open, vacate, or strike off a judgment"; "[a]n order confirming, modifying, dissolving, or refusing to confirm, modify or dissolve an attachment, custodianship, receivership, or other similar matter affecting the possession or control of property"; "[a]n order changing venue or venire in a criminal proceeding"; "[a]n order that grants or denies, modifies or refuses to modify, continues or refuses to continue, or dissolves or refuses to

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<sup>5</sup> In the civil context, "[a]n order directing an accounting is interlocutory in nature." *Sanders v. Seay*, 447 A.2d 998 (Pa. Super. 1982). As an accounting of an estate or trust does not adjudicate the rights of any parties or alter the relationship between any parties, an order directing an executor or trustee to file an accounting of an estate or trust is similarly interlocutory.

dissolve an injunction”; “[a]n order granting peremptory judgment in mandamus”; “[a]n order in a civil action or proceeding awarding a new trial”; “[a]n order directing partition”; “an order in a civil action or proceeding sustaining the venue of the matter of jurisdiction over the person or over real or personal property”; “an order in a civil action or proceeding changing venue, transferring the matter to another court of coordinate jurisdiction, or declining to proceed in the matter on the basis of *forum non conveniens*”; or any other appealable interlocutory order as described by Rule 311. Further, the September 3, 2021 Decree is not a “collateral order... separable from and collateral to the main cause of action where the right involved is too important to be denied review and the question presented is such that if review is postponed until final judgment in the case, the claim will be irreparably lost,” as would render it appealable under Rule 313.<sup>6</sup>

In short, the September 3, 2021 Decree is an interlocutory order, not a final order, and there is no provision of the Rules of Appellate Procedure that renders it appealable.

### **Conclusion**


For the foregoing reasons, the Court agrees that it erred in partially granting the relief requested in the Petition without giving the parties the opportunity for further pleadings and discovery. However, because the September 3, 2021 Decree is a non-appealable interlocutory order under the Pennsylvania Rules of Appellate Procedure, the appropriate remedy for Respondents was to file a motion for reconsideration. The Court respectfully requests that this matter be REMANDED to allow Respondents to file Answers to the Petition and to allow the Court to schedule a conference to discuss scheduling, discovery, and the need for additional argument or hearings.

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<sup>6</sup> A “right involved is too important to be denied review” when it “implicate[s] more than just the individual parties in the matter, and, instead, [is] deeply rooted in public policy going beyond the particular litigation at hand.” *K.C. v. L.A.*, 128 A.3d 774, 779 (Pa. Super. 2015) (internal quotations omitted). Although important to the parties in this case, the September 3, 2021 Decree does not touch on matters of “public policy going beyond the particular litigation at hand.”

IT IS SO ORDERED this 23<sup>rd</sup> day of November 2021.

BY THE COURT,



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Eric R. Linhardt, Judge

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