IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

ORPHANS' COURT DIVISION

IN RE: ESTATE OF EARL L. MILLER, DECEASED : No. 06-9200

Edmund J. Healy, Esquire — Counsel for Executor
Vance E. Meixsell, Esquire — Counsel for Objector

Nanovic, P.J. – September 12, 2011

MEMORANDUM OPINION

In these estate proceedings, the surviving spouse of Earl L. Miller sought initially to void the parties' prenuptial agreement and to take against her husband's will. Having previously ruled that the prenuptial agreement was facially valid and enforceable, and that enforcement of the agreement was not barred for failure of consideration, the remaining issue before us is whether the testator performed his obligations under the prenuptial agreement prior to his death.

FACTUAL AND PROCEDURAL BACKGROUND

Earl L. Miller ("Decedent"), died on May 12, 2006, survived by his wife, Doris E. Miller ("Wife"), and two sons from a former marriage. Prior to their marriage on November 12, 1994,[1] Decedent and Wife executed a prenuptial agreement dated September 16, 1994 (hereafter referred to as both the

[1] This was the second marriage for each.

"Prenuptial Agreement" and "Agreement"). Therein, both agreed to waive, release and relinquish any and all rights to share in the other's property as a surviving spouse, or otherwise, including but not limited to the right as a surviving spouse to take against the other's will. In further consideration, the Agreement provided, *inter alia*:

> **[Decedent] agrees to make provisions in his Will or through jointly-owned property to provide [Wife] with the sum of Twenty Thousand Dollars ($20,000.00) upon his death. Said sum shall be payment in full for any and all claims [Wife] may make under the Probate Code regarding her elective share or her intestate rights.**

(Prenuptial Agreement, Paragraph 9).

Decedent's Last Will and Testament was executed on February 20, 2002, and probated on June 8, 2006. The Fifth Clause of this Will provides:

> **I direct that my executor(s) distribute the sum of Twenty Thousand Dollars ($20,000.00) to Doris E. Snyder Miller who is my wife. Said sum may come from jointly-owned property and/or from the assets of my Estate so long as the total amount of property she receives upon my death is worth Twenty Thousand Dollars ($20,000.00).**

(Decedent's Last Will and Testament, Fifth Clause). On August 11, 2006, pursuant to 20 Pa.C.S.A. §2203 (Right of Election; Resident Decedent), Wife filed an election to take a one-third share of Decedent's Estate.

On February 4, 2008, the Executors of the Estate, Decedent's two sons, who are also the primary beneficiaries

under the Will, filed a First and Final Formal Account on behalf of the Estate. Therein, the Executors claimed that Wife's election filed against the Will constituted a violation and breach of the provisions of the Prenuptial Agreement. The Account presented by the Executors set forth various property jointly owned by the Decedent and Wife at the time of Decedent's death which was claimed to be in satisfaction of Decedent's obligations under Paragraph 9 of the Prenuptial Agreement.

Wife filed objections to the Estate account on April 2, 2008, and supplemental objections on April 4, 2008. These objections, which consisted of twelve counts and eighty-one numbered paragraphs, have all been resolved with the exception of one: whether Decedent fulfilled the terms of the Prenuptial Agreement by providing Wife with the sum of $20,000.00 through jointly-owned property at the time of his death.[2] The jointly-owned property and date of death values listed in the Executors' Account are as follows:

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[2] ***See*** **orders dated January 13, 2009 (narrowing the issues to the validity and enforceability of the Prenuptial Agreement, together with the parties' respective claims for the award of attorney fees thereunder, and a question whether certain property was a fixture, and therefore part of the residential real estate belonging to the Estate, or personal property to which Wife was entitled); June 26, 2009 (denying Wife's challenge to the facial validity of the Prenuptial Agreement, *citing* Simeone v. Simeone, 581 A.2d 162, 167 (Pa. 1990) (holding that where a prenuptial agreement states that each party has made full disclosure to the other, the agreement is presumptively valid with the burden upon the challenging party to rebut the presumption by an assertion of fraud, or misrepresentation or otherwise)); and July 20, 2010 (documenting that the issue of whether certain property was either a fixture or personal property was no longer in question and that the sole remaining issue was whether the Decedent had fulfilled his obligation under Paragraph 9 of the Prenuptial Agreement).**

2005 Subaru Forester XS SUV Automobile	$17,230.00
AIG Income Funds of America Class C	$ 4,270.95
AIG Capital Income Builder Class C	$ 4,396.75
AIG Cash Management Trust of America Class A	$ 3,047.48
M&T Bank Class Checking Account	$ 6,874.03
Total	$35,819.21

(*See* First and Final Account, Statement of Proposed Distribution, p.3).[3] That this jointly-owned property existed at the time of death is not in dispute.

The Estate claims in its proposed schedule of distribution which accompanied the First and Final Account that these properties satisfy Decedent's obligation under Paragraph 9 of the Prenuptial Agreement. To fulfill this obligation, however, the Court has previously determined that not only must the jointly-owned property have been acquired or created after the parties' marriage, but also that the source of the monies or funds used in the acquisition of such jointly-owned property must be from the Decedent. (Court Order dated July 20, 2010).[4]

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[3] Pursuant to Paragraph 3 of the Prenuptial Agreement, non-titled personal property acquired by the parties after marriage is presumed to be joint marital property not subject to the terms of the Agreement. Included in this category is that jointly-owned personal property described in the First and Final Account of the Estate as having a value of $6,230.00. (First and Final Account, Statement of Proposed Distribution, p.4). Accordingly, this amount has not been counted by us in deciding Decedent's performance under Paragraph 9 of the Agreement.

[4] Were this not the case, reliance on the jointly-owned assets alone would result in a failure of consideration. *Cf.* Levine Estate, 118 A.2d 741 (Pa. 1955). The facts and holding in Levine Estate were summarized by the Superior Court in Harrison Estate, as follows:

> [W]hen a party to an antenuptial agreement fails to perform his promises, consideration for the agreement fails, and the survivor may claim her statutory rights. The agreement there provided that Mrs. Levine would waive all rights in her husband's estate in return for his promise to leave her, by will, one-half of a checking account maintained in his name. Following her husband's death, the widow

Wife concedes that at the time of signing the Prenuptial Agreement there were no jointly-owned assets and has stipulated that such assets became jointly-owned after the parties' marriage. (Objections to Account, Paragraph 47; N.T. 5/7/10, pp. 11, 13-14). Therefore, resolution of the question whether Decedent has fulfilled his obligation under Paragraph 9 of the Prenuptial Agreement through the creation of jointly-owned property is dependent on the source of the funds used to acquire and create these assets.

DISCUSSION

Ultimately, the basic question we must decide is whether Wife is entitled to be paid $20,000.00 from probate assets. If the jointly-owned property identified in the Estate accounting was funded by Decedent, then the obligation imposed on Decedent under Paragraph 9 of the Prenuptial Agreement has been satisfied and Wife is entitled to no further payment. If, however, this property was not funded by Decedent, then pursuant

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> **elected to take against the will even though it left her one-half [of] the account. This Court held that because half of the funds in the account were derived from property owned individually by Mrs. Levine, there was a failure of consideration.**
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> **'Since Flora Levine did not receive the consideration contemplated and bargained for in the agreement of December, 1949, she is released from any assumed obligation owing from her in that same agreement; and she is thus not barred from electing to take against her husband's will.'**

319 A.2d 5, 7-8 (Pa. 1974).

to the Fifth Clause of Decedent's Will, Wife is entitled to be paid $20,000.00 by the Estate.

At the time of the hearing scheduled on October 25, 2010, specifically to address this issue, neither party was prepared to present any evidence as to who funded the jointly-owned property. (*See* Order dated July 20, 2010). Both contended that the burden of proof was upon the other and requested that we decide this issue before rescheduling the matter for hearing. We agreed to do so.

Procedurally, this case is closely aligned with that in the Hess Estate, 624 A.2d 1073 (Pa.Super. 1993). In Hess, the decedent's will was duly probated, his widow filed an election to take against the will, and both the executor of the decedent's estate and the beneficiaries under his will filed a petition to vacate this election because of a post-nuptial agreement wherein the surviving spouse waived her statutory rights in the estate. In the instant case, Decedent's will was probated, Wife filed an election to take against the will, and the Estate filed a petition for adjudication and distribution in the form of a first and final formal account raising the Prenuptial Agreement as a bar to this election. *See*, 20 Pa.C.S.A. §762 (Accounts). That Hess involved a post-nuptial agreement and the present case concerns an antenuptial agreement is of no moment: both claims are premised on the law of

contracts. Simeone v. Simeone, 581 A.2d 162, 165 (Pa. 1990) (antenuptial agreement); Levine Estate, 118 A.2d 741, 742-43 (Pa. 1955) (post-nuptial agreement).

In Hess, the bargained for exchange of the spouse's waiver of her statutory right to inherit included decedent's purchasing and maintaining a life insurance policy, with a minimum death benefit of $50,000.00, with his wife as beneficiary. Such a policy was purchased and maintained, however, at the time of decedent's death the insurance company refused to honor the policy claiming that decedent's physical and mental health was misrepresented in the application. Rather than litigate the insurer's denial of coverage, wife elected to claim against her husband's will asserting that due to the insurance company's refusal to pay, the post-nuptial agreement was unenforceable for failure of consideration.[5]

[5] In Estate of Hess, the Court distinguished between a failure of consideration and a lack of consideration as follows:

> When the consideration for a promise wholly fails, the promise is held not judicially enforceable. As stated by Professor Corbin, a failure of the consideration does not mean lack of consideration; nor does it often mean that the promise, now unenforceable, was never a valid contract. It does mean, on the other hand, that a performance for which the promisor bargained has not been rendered; in many cases, though not in all, that failure is a good legal excuse for his refusal to perform his own promise. . . .

624 A.2d 1073, 1074-75 (Pa.Super. 1993). As noted in Hess, the Pennsylvania Supreme Court held in Harrison Estate, 319 A.2d 5 (Pa. 1974), that "when a party to an antenuptial agreement fails to perform the promises agreed upon, there is a failure of consideration, and the surviving spouse need not accept a substituted performance by the executor but may assert her claims against the decedent's estate." 624 A.2d at 1074.

In Hess, after discovery was completed, both the estate and decedent's widow moved for summary judgment. The trial court denied the widow's motion and granted that of the estate. In reversing and remanding for further proceedings, the Superior Court held that there existed an unresolved issue of material fact which prevented the grant of summary judgment in favor of either party: the Court could not determine from the record before it whether decedent had in fact defrauded the insurance company, thereby rendering the policy void and resulting in a failure of consideration, as claimed by wife, or whether the policy was properly secured by decedent and enforceable against the insurance company, thereby providing the consideration bargained for in the parties' post-nuptial agreement. Until the validity of the policy was litigated, whether in a separate action or in the estate proceedings, the Court was unable to decide, as a matter of law, whether there was or was not a failure of consideration. Significantly, albeit in *dicta*, the Court stated that if the issue were litigated in the estate proceedings, the burden of proving a failure of consideration would be on the widow. *Id*. at 1075.

The instant case does not involve a failure of consideration since, in the event the jointly-owned property was not funded by Decedent, Decedent's Will provides alternatively for payment of the amount owed to Wife out of probate assets

which are more than sufficient to meet this obligation. Nevertheless, with respect to the burden of proving the source of funding for the jointly-owned property, we see no distinction between this and the burden imposed on Hess's widow to show that the policy was fraudulently obtained. Here, even more so than in Hess, Wife is in a better position than the Estate to know and prove the source of the payments for these properties. Barrett v. Otis Elevator Co., 246 A.2d 668, 672 (Pa. 1968) ("If the existence or non-existence of a fact can be demonstrated by one party to a controversy much more easily than by the other party, the burden of proof may be placed on that party who can discharge it most easily.").[6]

Moreover, Wife's status in this litigation is that of a creditor. Estate of Barilla, 535 A.2d 125, 130 (Pa.Super.

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[6] On the issue of allocating the burden of proof, in O'Neil v. Metropolitan Life Ins. Co., the Pennsylvania Supreme Court stated:

> The fundamental principle is that the burden of proof in any cause rests upon the party who as determined by the pleadings or the nature of the case asserts the affirmative of an issue . . . . One alleging a fact which is denied has the burden of establishing it . . . . The affirmative of an issue, as thus used, includes any negative proposition which the person asserting the affirmative may have to show.

26 A.2d 898, 902 (Pa. 1942). In the same opinion, the Court further stated:

> It is often said that the burden is upon the party having in form the affirmative allegation. But this is not an invariable test, nor even always a significant circumstance; the burden is often on one who has a negative assertion to prove; *a common instance is that of a promisee alleging non-performance of a contract*. Another example is found in actions for malicious prosecution where a plaintiff must show want of probable cause for his having been prosecuted.

Id. at 903 (emphasis added). As applied to the instant proceedings, it was Wife who initially filed her election against Decedent's Will, in effect claiming the Prenuptial Agreement was non-binding on her, and Wife who now claims Decedent did not fund the jointly-owned property to which she succeeded on Decedent's death.

1987) ("An antenuptial agreement establishes the surviving spouse as a creditor of the deceased spouse's estate rather than as an heir."); *see also*, Estate of Blumenthal, 812 A.2d 1279, 1290 (Pa.Super. 2002) (stating that "when a testator in his will gives specified property or a share of his estate in exact or substantial compliance with the terms of his obligations under an inter vivos property settlement [or antenuptial agreement] made with his wife, that wife is a creditor of his estate and not a legatee under his will"). As a creditor claiming non-payment, the burden of production is upon Wife to show that the jointly-owned assets she received were not funded by Decedent. East Texas Motor Freight Diamond Division v. Lloyd, 484 A.2d 797, 801 (Pa. 1984) ("The burden of proof in a contract action is upon the party alleging breach or default.").

CONCLUSION

In this case, Decedent agreed to make provisions in either his Will or through jointly-owned property to provide Wife with the sum of $20,000.00 upon his death. While this obligation has been met one way or another, because the source of funding for the jointly-owned assets created after the parties' marriage is in dispute, we are unable to determine whether the obligation has been fulfilled through jointly-owned assets, through Decedent's Will, or through a combination of

both. As to this issue, the burden of establishing that Decedent was not the source of the funds for that property jointly owned by Decedent and his Wife at the time of Decedent's death is upon Wife.

BY THE COURT:

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P.J.