IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

ORPHANS' COURT DIVISION

IN RE: ESTATE OF NICHOLAS L PANTAGES, DECEASED,	:	No. 07-9402

John M. Gallagher, Esquire	Counsel for the Estate of Nicholas L. Pantages
Larry R. Roth, Esquire	Counsel for Beverly Pantages
Charles J. Fonzone, Esquire	Counsel for Beverly Pantages

Nanovic, P.J. – March 29, 2012

MEMORANDOM OPINION

Two questions are presented in the petition now before us of Decedent's surviving spouse to void her previously signed waiver of right to elect against Decedent's will and accept, *nunc pro tunc*, the untimely filing of her election against that will: whether Decedent's surviving spouse has established in the first instance a factual basis upon which to void the waiver of her statutory right to elect against Decedent's will and, if so, whether such request, when made after the statutory time to make an election has expired, entitles the surviving spouse to make a new election to take against the will *nunc pro tunc*. We address both issues in this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

The Decedent, Nicholas L. Pantages, died testate on August 9, 2007, a resident of Lake Harmony, Carbon County, Pennsylvania, leaving to survive his wife, Beverly Pantages, and

son, Louis Pantages. Louis Pantages is an only child of both Decedent and Wife (hereinafter, Decedent and Wife are referred to jointly as "the parties").

The bulk of Decedent's estate consists of two operating restaurants located at Lake Harmony, Shenanigan's and Nick's Lake House, and real estate located in the City of Hazleton where a former restaurant, the Blue Comet, had previously operated. In his last will and testament dated September 15, 2006, the Decedent specifically devised and bequeathed all of his interest in these properties to the parties' son, together with all of his tangible personal property. Under this will, the residue of the estate is to be transferred to the trustee of an Agreement of Trust, also dated September 15, 2006, pursuant to which there is to be funded a Qualified Terminal Interest Property (Q-TIP) marital deduction trust in which Wife holds a lifetime interest entitling her to all income, together with discretionary distributions of principal for her health, support and maintenance, with any remainder, upon her death, to be distributed to the parties' son.[1]

Decedent's will was probated on October 31, 2007 and, on the same date, letters testamentary were granted to the

[1] The trust agreement itself divides property held by the trustee into two categories: the marital deduction trust to be funded by "the smallest amount of the principal needed to reduce the federal estate tax falling due because

parties' son, one of two co-executors named in Decedent's will.[2] Attorney Martin D. Cohn, Esquire was employed by the parties' son to represent both himself as executor and the estate. Attorney Cohn, who had known Decedent for more than thirty-five years, was also the scrivener of Decedent's will and the agreement of trust.

Prior to the probate of Decedent's will, Wife met twice with her son and Attorney Cohn in Attorney Cohn's office: once in mid-September 2007, and a second time on October 22, 2007. At both meetings Wife was asked to sign a waiver of her spousal right to elect and take against the will. Attorney Cohn prepared the waiver after being assured by the parties' son that Wife would not be taking against the will. At the second meeting, Wife executed the waiver.

By late February 2008, Wife was having second thoughts about the waiver she had signed in Attorney Cohn's office. Upon the advice of an attorney, she requested a copy of the trust agreement from Attorney Cohn. This was sent to her on April 22, 2008, however, it appears that the copy sent was incomplete.

Wife next asked to meet with Attorney Cohn. This occurred on June 12, 2008. In that meeting, Wife explained her

---

of Settlor's death to the lowest possible figure"; the balance is to be distributed outright to the parties' son.

[2] The co-executor named in the will, PNC BANK, N.A., filed a renunciation of its right to serve as an executor of the estate. PNC also declined to serve as trustee under the Agreement of Trust. To date, no substitute trustee has been appointed.

misgivings about signing the waiver and stated that she had changed her mind. This meeting was confirmed by Attorney Cohn by letter dated June 17, 2008. Enclosed with the letter was a copy of the executed waiver and copies of the filed federal estate tax and Pennsylvania inheritance tax returns for the estate. The letter further indicated that as counsel to the executor and the estate Attorney Cohn could not provide Wife with legal advice, urged her to seek other counsel, and stated that under the statute her rights must be exercised within one year of Decedent's death.

On August 11, 2008, Wife executed and filed an election to take against Decedent's will. This was followed on May 19, 2010, with the filing of Wife's petition to void her previously signed waiver of right to elect against the will and to accept, *nunc pro tunc*, the filing of her election against the will. In her petition, Wife contends that the waiver should be voided because of fraud.

DISCUSSION

The statutory period for a surviving spouse to elect to take against a decedent's will is within six months of either the decedent's death or the date of probate, whichever is later. 20 Pa.C.S.A. § 2210(b). Given that Decedent's will was probated on October 31, 2007, and Wife's election was not filed until August 11, 2008, the election was late. Ordinarily, this

would end the discussion, since an untimely filing is "deemed a waiver of the right of election." *Id.* An exception exists, however, where either actual fraud induced the election and no laches appears, or where the delay in filing was caused by fraud. *See* In re DiMarco Estate, 257 A.2d 849, 852 (Pa. 1969) ("This time requirement is *mandatory* and cannot be extended except upon proof that the surviving spouse, *by actual fraud*, has been induced or misled to delay the election."); *see also* In re Daub's Estate, 157 A. 908, 911 (Pa. 1931) (noting that absent actual fraud in obtaining a widow's election or in delaying that election until after the statutory period for filing has expired, a petition to revoke an election previously made, presented after expiration of the statutory period, would ordinarily be deemed too late).

Fraud in the Inducement

"The burden of proving actual fraud which would relieve the surviving spouse from the mandatory time requirement of the statute rest[s] upon the widow and, in support of that burden, it [is] her duty to prove actual fraud by evidence clear, precise and convincing in nature." DiMarco Estate, 257 A.2d at 852. Here, Wife claims fraud both in the inducement and as the cause of her late filing.

Wife concedes that there is no absolute duty on the part of the executor of an estate or his counsel to inform a

surviving spouse of her right to claim an elective share of the estate. DiMarco Estate, 257 A.2d at 853. Wife contends, however, that the rule is otherwise where the executor or his counsel actively seeks to obtain the waiver of a surviving spouse's elective rights: that in such situation there exists a fiduciary duty on the executor and counsel to provide full disclosure to the surviving spouse of all facts necessary to make an informed decision, including the duty to disclose the value of the assets of the estate in sufficient detail such that the surviving spouse can intelligently evaluate her options. Daub's Estate, 157 A. at 910. This is especially true, Wife argues, where a waiver is sought soon after a decedent's death and before any appraisals have been obtained or an accounting prepared for the estate. In re Woodburn's Estate, 21 A. 16, 17 (Pa. 1891).

In this case, Wife's waiver of her elective rights was sought and obtained shortly after Decedent's death, before probate of his will, and before any appraisals of Decedent's real estate and business interests were made. At the September 2007 meeting in Attorney Cohn's office, Wife was first presented with the waiver to sign. In advance of the meeting, the parties' son had advised her only that the purpose of the paperwork was to save death taxes. The parties' son had also

told Attorney Cohn prior to this meeting that there would be no difficulty in obtaining his mother's signature.

At the meeting, Attorney Cohn reviewed the waiver with Wife. For the first time, as far as the evidence shows, Wife was being told that the estate had a gross value of approximately 2.6 million dollars and that she had a right to take against the will and receive one-third of that amount. Wife was also told that it was Decedent's plan for the parties' son to succeed him as owner of his business interests, to run these businesses, and that Decedent's will was written with these objectives in mind.

Wife was uncertain what to do when confronted with the waiver. She needed more time to make a decision. As a result, Wife did not sign the waiver at this first meeting. However, a copy was provided to her and this was retained by her when she left the meeting.

Before meeting with Attorney Cohn on October 22, 2007, Wife contacted and met with Attorney Morton Gordon. Attorney Gordon was a longtime friend whom she trusted and whose advice she valued.[3] The parties' son attended this meeting at Wife's request. The proposed waiver was shown to Attorney Gordon. The

[3] It appears likely from the evidence that Attorney Gordon, who has since died, was disbarred at the time of this meeting. Wife's counsel seems to make an issue over this point. We see it as irrelevant to the issues we have to decide. Wife was aware of Attorney Gordon's legal status as an attorney. She did not employ him as her counsel, nor did she pay for his services. She

details of exactly what was discussed and by whom were not made part of the evidence, however, Attorney Gordon's bottom line advice to Wife as to whether she should sign the waiver was whether she trusted her son.

At the second meeting with Attorney Cohn, Attorney Cohn again reviewed the waiver and its terms with Wife. The waiver is relatively short. Excluding the acknowledgement page, it consists of two pages and eight numbered paragraphs. The waiver recites some brief background history of Decedent and Wife; identifies Decedent's will and the trust agreement, with copies said to be attached; advises by providing the cite and quoting from 20 Pa.C.S.A. § 2203(a) that "when a married person domiciled in this Commonwealth dies, his surviving spouse has a right to an elective share of one-third of: (1) property passing from the decedent by will or intestacy"; estimates the gross value of Decedent's estate to be approximately $2.6 million; and has Wife acknowledge that pursuant to Decedent's will, if she does not waive her rights, the parties' son "would be the recipient of a minimum of $2 million, and more if it is determined that the business interests which have been bequeathed to him exceed that amount."[4]

---

sought his guidance because he was a trusted friend who had experience with legal matters.

[4] This provision of the waiver is inartfully drawn - containing a double negative - and is inaccurate. As worded, the language of the waiver states the exact opposite of what was intended: by waiving her rights, and letting

The second meeting in Attorney Cohn's office took approximately one hour. On the same date as this meeting, either before or after, but likely before, Attorney Gordon telephoned Attorney Cohn and advised that he saw no objection to Wife signing the waiver. (N.T., p. 49).[5] It is also unclear, whether the written waiver which was presented to Wife at this second meeting was identical to the one presented to her in September, there being no evidence either way. It must be noted, however, that the document presented to Wife at this second meeting expressly has her acknowledge she had been informed to seek separate counsel to advise her on "this matter," and that she had done so. After reviewing and having the waiver explained to her, Wife signed the document, saying as she did so that she trusted her son.

Wife denies that she was provided any explanation as to the financial consequences of signing the waiver. She denies she was given any information about the debts of the estate or the estimated expenses of administration, and what amount she would receive under the will versus what amount she would receive by exercising her elective share. Wife further denies that she was told how the estimated gross value of the estate

---

the provisions of the will stand, the parties' son would be the recipient of the monies referred to.

[5] Attorney Cohen's time records reflect that both events occurred on the same date and that the combined time for both was an hour and thirty minutes. Attorney Cohen believed he spoke with Attorney Gordon for approximately

was computed or that appraisals had been ordered, but were not yet available, and argues that the estimated value stated in the waiver, 2.6 million dollars, was a gross underestimation.

In actuality, the gross value of the estate as provided in the federal estate tax return was $3,958,298.15. This includes a valuation for Decedent's real estate interests alone at $3,300,500.00. Appraisals for the business real estate at Lake Harmony dated November 27, 2007, and totaling $1,751,000.00, and an installment sale agreement for the Blue Comet dated November 20, 2007, with a purchase price of $1,250,000.00, are attached to the federal estate tax return. The tentative taxable estate, before taking any deductions for transfers to be made to the marital deduction trust, is shown in the return to be $3,567,073.17. This return also includes a copy of a disclaimer of partial interest executed by the parties' son on May 2, 2008, in which the parties' son disclaims all of his interest in the estate as set forth in the will in excess of the net value of $2,000,000.00.[6] None of this information was provided or made available to Wife before the waiver was signed.

We believe and we find that the estimate of the value of Decedent's estate as stated in the waiver signed by Wife was

---

fifteen minutes. He could not recall whether this conversation occurred before or after he met with Wife.

[6] At the time, the federal estate tax credit was $2,000,000.00.

misleading, especially given the information then known or which should have been known to both the parties' son and Attorney Cohn. In a letter dated September 6, 2007, after PNC had elected not to serve as co-executor, Attorney Cohn stated that he guesstimated the value of the real estate and businesses to be between 1.5 and 2 million dollars. This did not include real estate in Hazleton and two additional adjacent parcels - one with a home, the other with a cabin - located at Lake Harmony. A copy of this letter, which was addressed to another financial institution being considered as a possible substitute co-executor in place of PNC, was sent to the parties' son.

The estimate for Shenanigan's and Nick's Lake House, between 1.5 and 2 million dollars, was fairly accurate.[7] Attorney Cohn also correctly estimated the value of the residential real estate at Lake Harmony at $300,000.00.[8] The value of the real estate (i.e., the Blue Comet) in Hazleton, however, appears to have been grossly ignored even though Decedent was in the midst of selling this property at the time of his death and had apparently reached agreement with the buyer on a purchase price of $1,250,000.00, the amount for which the

[7] The appraisals attached to the federal estate tax return for these businesses and real estate show a combined value of $1,780,959.00. (Wife's Exhibit J, United States Estate Tax Return, Schedules A and F).

[8] The appraisals for these properties attached to the federal estate tax returns show a total value of $288,000.00. (Wife's Exhibit J, United States Estate Tax Return, Schedule A; N.T., p. 31). These properties refer to Decedent's home and an adjacent lot on which a cabin was located. (N.T., pp. 231-32).

property actually sold. (N.T., pp. 20-21, 233-34). The agreement which Decedent was negotiating was later memorialized in a written installment sale agreement dated November 20, 2007. (N.T., pp. 50, 233-34). There is no evidence that Wife was ever told about the pending sale of this property or its value before the waiver was executed. This notwithstanding the parties' son's acknowledgment that one of the reasons Wife's waiver was required was for him to be able to sell this property. (N.T., p. 249).

The values in the preceding paragraph total between $3,050,000.00 and $3,550,000.00. This does not include an additional $356,039.72 in stocks and bonds; $16,634.25 in mortgages, notes, and cash; $105,019.78 in life insurance on Decedent's life for which the parties' son was the beneficiary; $18,565.62 in stock jointly owned between Decedent and the parties' son; $85,114.00 in miscellaneous properties, which include values for the business interests held by Decedent in Shenanigan's and Nick's Lake House, as well as the value of two 2005 Mercedes motor vehicles; $76,424.78 in annuities; and $160,000.00 in a small revocable trust at PNC.[9] All told, these assets total between $3,867,798.15 and $4,367,798.15. It is

[9] The figures in this sentence total $817,798.15. The parties' son acknowledged he knew of most, if not all, of these properties prior to his father's death and would often discuss them with his father. (N.T., pp. 236-241).

evident from these figures that the 2.6 million dollar figure used in the waiver was unrealistically low.

The difficulty with Wife's reliance on fraud as the basis both for invalidating the waiver and extending the time within which to file her election against the will, is that for these purposes, active fraud, not constructive fraud, is required: "proof of an intent to deceive on the part of the person or persons who misrepresented or misstated either a fact or the law," DiMarco Estate, 257 A.2d at 853, and there must be reliance. We are not convinced either exists.

The marriage between Decedent and Wife was not a good one. They married in 1961, separated in 1973, and remained separated for the next thirty-four years. Wife filed for divorce in the early 1980s but, for whatever reason, never followed through. At the time of his death, Decedent was residing at Lake Harmony and Wife in Hazleton.

The parties' son was approximately nine years old when his parents separated. Although he was raised by his mother, he began working for his father in the restaurant business from the bottom up, beginning when he was 12 to 14 years of age. The parties' son's employment in Decedent's businesses continued after his graduation in 1988 from Penn State with a degree in economics. From 1988 until his father's death in 2007, the parties' son continued working for and with his father.

Decedent was seventy-two years old at the time of his death and had been in poor health since 2001. For almost six years prior to his father's death, the parties' son managed Shenanigan's and Nick's Lake House. (N.T., pp. 229-30). It was Decedent's plan for his son to own and operate these businesses after his death.

During the first two meetings in Attorney Cohn's office after Decedent's death, Attorney Cohn explained to Wife the basic terms of Decedent's will and trust, and that they reflected Decedent's intent for their son to own and operate Decedent's business properties. Although at neither of these meetings was Wife given information about what other assets existed in Decedent's estate beyond those specifically devised in the will (as to the specifically devised properties, Wife knew of their existence, location and Decedent's ownership prior to Decedent's death), or even an approximation of what the value of such other assets might be, with an estimated gross value of the estate at 2.6 million dollars and the parties' son to receive all of the business properties, it was or should have been apparent to Wife that the parties' son would be the primary beneficiary of Wife agreeing to accept the terms of Decedent's will: son would receive free and clear of any claim of his mother his father's business interests which clearly constituted the bulk of the estate. Moreover, the parties' son's self-

interest in obtaining his mother's waiver could not have gone unnoticed by Wife. It explains, without any further explanation necessary, why Attorney Gordon advised Wife that the decision of whether to sign the waiver rested on whether she trusted her son. (N.T., pp. 133-34).

Nor does it necessarily follow that the parties' son's desire for his mother to execute the waiver means he intended to deceive his mother or to cause her harm. (N.T., p. 263). In the son's mind, execution of the waiver would effectuate Decedent's intentions, assure him of certainty in his inheritance, permit him to retain his employment and the means to support himself and his family, and provide him with the financial wherewithal to care for his mother which he assured her he would do. (N.T., pp. 63-66, 247-49).

As counsel to the executor and the estate, Attorney Cohn had a duty of loyalty to his clients. At the same time, Attorney Cohn owed an ethical obligation to Wife and advised her on more than one occasion that she should seek separate and independent counsel. When considered together – Attorney Cohn's knowledge of Decedent's intentions, the parties' son's expectations and involvement in his father's businesses, and the relationship which existed between the parties' son and his mother - we are not convinced that Attorney Cohn actively sought to deceive or harm Wife. (N.T., pp. 51, 193, 206).

That Wife's decision to execute the waiver based upon what she was told by her son and Attorney Cohn was not determined by what was financially best for her is clear: with the gross value of Decedent's estate estimated at 2.6 million dollars, the vast majority of the estate's assets passing under the will to the parties' son, and at a time when Wife was not told that her son would be disclaiming any interest in the estate in excess of the net value of 2 million dollars, it was simple math that Wife would receive more by electing against the will than by waiving that right. These circumstances clearly evidence that the information which was provided to Wife by Attorney Cohn and her son about the estate, its value and the assets in it, was not provided with the intent of misleading Wife so she would waiver her right to elect against the will. Equally clearly, Wife agreed to the waiver because she loved her son, wanted him to succeed, and as she said at the time of signing, she trusted her son. Simply put, Wife decided to place her son's interests and future above her own.

Full Disclosure

At the same time, having found that there was no intentional deception practiced, no fraud in inducing Wife to execute the waiver, and that the burden of proving fraud in the inducement which rests with Wife has not been met, as Wife also argues, the burden of proving the fairness of the transaction,

that the waiver was signed by Wife after full disclosure and with all information necessary for her to make an informed decision as to her elective rights, was upon the estate. Koonce's Appeal, 4 Walk. 235, 239 (Pa. 1882).

Both the parties' son, as executor of the estate, and his counsel, owed a fiduciary duty to Wife as the surviving spouse, particularly under circumstances such as these where the waiver was sought shortly after the Decedent's death and there then existed no accounting of the assets, liabilities, income, and expenses of the estate, upon which a reliable and detailed estimate of the worth of the estate could be fairly determined. Koonce's Appeal, 4 Walk. at 242; *see also* In re Rowe Estate, 17 Fid. Rep. 107, 110 (1967).

> [The surviving spouse] should know, and, if she does not, she should be informed, of the relative values of the properties between which she was empowered to choose. In other words, her election must be made with a full knowledge of the facts. The rule applies with especial force where the widow is called upon, as in this case, to make her election shortly after her husband's death.

In re Woodburn's Estate, 21 A. 16, 17 (Pa. 1891). Moreover, this duty is not affected by the motive of the surviving spouse in signing the waiver: "The only question being was she informed of the choices available to her and the consequences of such a choice." Rowe Estate, 17 Fid.Rep. at 111.

As discussed in Rowe Estate, in Appeal of Cunningham, 15 A. 868 (Pa. 1888), within three days of the decedent's death,

the executor and his attorney met with decedent's widow and had her execute an agreement in which she should receive less than fifty percent of what she would have received if she had elected against the will. At the time of this agreement, no inventory or valuation of the assets of the estate had been prepared, nor did there exist a schedule of debts and deductions. As such, it was impossible for the widow to make a knowing and intelligent election because she was not provided with sufficient information to do so. In reversing the trial court and permitting the widow to take against the will, the Supreme Court stated:

> ". . . the burden was on appellees [i.e., executor] to prove the fairness of the transaction; that the release was not procured by fraud, concealment, or other improper means; and that it was executed by appellant [i.e., widow] with full knowledge of the character, extent, and value of the estate, real and personal, and her interest therein.
>
> The rule above stated as to the burden of proof results from the relation of trust and confidence which the executor occupies to the widow and devisees, especially in connection with the following . . . facts: The release was procured by the executor with unreasonable haste, within 48 hours after the funeral, and before either he or the widow, or any one interested in the estate, had or could have had such knowledge of its character, extent, or value as to enable them to act understandingly. The consideration for the release is less than 50 per centum of appellant's statutory interest in the personal estate, as shown by the executor's account."

15 A. at 869.

Similarly here, although not done with the intent to deceive and take advantage of Wife, Wife was not provided with the information necessary for her to intelligently and accurately determine the value of what she would receive if she elected to take against the will versus if she accepted the terms of the will. (N.T., pp. 46, 88). Wife was given no information as to the separate values of either Shenanigan's or Nick's Lake House, or even told that appraisals had been ordered and would be forthcoming. She was not told of the pending sale for the Blue Comet or the sale price. Nor was she advised that the estate's liquid assets themselves were worth over $800,000.00. She was provided no information as to the debts and expenses of the estate, or as to the fees and taxes to be paid. Other than knowing of the existence of Shenanigan's, Nick's Lake House, and the Blue Comet, and of their location, there is no evidence to suggest that Wife, who was separated from Decedent for approximately thirty-four years, possessed any knowledge of Decedent's assets and debts, income and expenses, or the amount and value of any such items. *Cf*. In re Johnson's Estate, 90 A. 923, 925 (Pa. 1914) (election made fifteen days after decedent's death upheld "where no undue advantage was taken of the widow, and she was fairly informed of her legal rights and the facts necessary to an intelligent choice").

The estimated gross value of the estate stated in the waiver was more than 1.3 million dollars less than its actual value. The share which Wife is to receive in trust under the combined will and Agreement of Trust, without consideration of the disclaimer signed by the parties' son on May 2, 2008 and of which Wife had no prior knowledge, is less than 30 percent of what she will receive if permitted to elect against the will. (Wife's Exhibits M and N). Further, this share is for a life interest only, to be held in trust, rather than outright ownership of property subject to Wife's exclusive use and disposition. As stated in the Appeal of Cunningham, "[i]t was far from being any part of [son's] duty as executor to lend himself to the work of procuring from [his mother], with such undue haste, and for the benefit of [himself], a release of that interest for very much less than he knew, or ought to have known, it was worth." *Id.* at 869. The fiduciary duty owed by the estate and its executor to Wife was not met. As such, the evidence is insufficient to sustain the validity of the waiver.

Timeliness of Election

This being said, we must still determine on what basis Wife claims to be excused from the mandatory six-month period for filing an election against the will under 20 Pa.C.S.A § 2210(b). The will was probated on October 31, 2007; the six-month statutory period expired on April 30, 2008; Wife's

election was filed on August 11, 2008. The burden of establishing an excusable basis for delay is upon Wife. If that basis is fraud, as Wife appears to claim, it must be actual fraud, proven by clear, precise and convincing evidence. DiMarco Estate, 257 A.2d at 852.

As previously discussed, we have determined that actual fraud did not induce Wife to execute the waiver. We now find that after the waiver was signed on October 22, 2007, there was no fraud which delayed the filing of her election. In fact, there was very little, if any, contact involving Wife and the estate between October 22, 2007 and April 2008, even though Wife testified that she had begun questioning her decision to execute the waiver as early as late February 2008. In April 2008, Wife received a copy of the trust agreement from Attorney Cohn following her request at some unspecified date between late February and April. The next contact occurred in June 2008 – after the April 30, 2008 filing deadline - when Wife requested and received copies of the federal estate and state inheritance tax returns from Attorney Cohn.

During the time between late February 2008 and Wife's filing of the waiver on August 11, 2008, Wife appears to have contacted and consulted with several attorneys, however, with one exception, the dates of these visits and what legal advice Wife was given does not appear in the record. This exception

refers to an appointment Wife scheduled with an attorney from Kingston, Pennsylvania, in early August 2008, which was cancelled when Attorney Gordon, who was to accompany Wife to the appointment, died unexpectedly. By letter dated August 8, 2008, this attorney suggested Wife obtain local counsel and also forwarded to Wife the election which Wife signed and filed on August 11, 2008.

Although we have found that the trust agreement sent by Attorney Cohn to Wife in April 2008 was incomplete and the time to file an election stated in his letter of June 17, 2008, was incorrect, exactly what was missing from the trust agreement was never made clear and a misstatement of law, unless knowingly or intentionally made, is insufficient to support a claim of active fraud. Daub's Estate, 157 A. at 911. Not only are we unpersuaded that Attorney Cohn acted in bad faith or with fraudulent intent, in contrast to being mistaken, or at worst negligent, there is no evidence that Wife delayed filing her election because of the deadline stated in Attorney Cohn's letter, which itself was dated a month and a half beyond the April 30, 2008 filing deadline. In addition, as of May 12, 2008, copies of the trust agreement and the tax returns were filed in the register of wills' office and were matters of public record.

The delay between October 22, 2007 - when the waiver was signed - and August 11, 2008 – when Wife's election to take against the will was filed – a period of almost ten months, is, for the most part, unexplained and does not demonstrate the requisite due diligence to be effective. For reasons which do not appear on the record, approximately four months after signing the waiver, Wife began having second thoughts about what she had signed. She spoke to at least one attorney during the next two months about her reservations, yet no action was taken to undo the waiver. (N.T., p. 190). Not until another three months had passed was an appointment with a different attorney scheduled, which by then was three months past the deadline for making an election. *Cf*. In re Salomon's Estate, 146 A. 891 (Pa. 1929) (holding election filed one month after statutory period, where surviving spouse learned six months earlier of an innocent but material misrepresentation of law made by executor, was untimely).

"[A] person claiming the right to change an election after the expiration of [the statutory period for filing the election] must have acted with due diligence." Daub's Estate, 157 A. at 911. "No matter how hard the decision in a particular case may seem to be, if a widow does not make her election within the statutory period, the courts, because of [the statute], must declare that she is deemed to have made an

election to take under the will, for this statute here fixes the time as definitely as does that relating to taking appeals, and both are mandatory." *Id.* (quotation marks and citation omitted). In Daub's Estate, as here, absent fraud and notwithstanding that the widow may not have been provided full information about her husband's estate before making her election to take under the will, her delay in seeking to change that election after expiration of the statutory period was held to be fatal to her claim.

CONCLUSION

Because we find the evidence is unpersuasive to establish actual fraud as either the basis for Wife executing the waiver or the reason for the delay in filing her election, Wife's request to void the waiver of election signed by her on October 22, 2007, and to permit her to make an election *nunc pro tunc* will be denied.

BY THE COURT:

_____
P.J.