

Orphans' Court for Baltimore County  
Estate No. 186731

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 1820

September Term, 2017

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VINCENT FAVA

v.

JOSEPHINE HOCHULI

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Graeff,  
Arthur,  
Harrell, Glenn T., Jr.  
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Harrell, J.

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Filed: February 7, 2019

\*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This appeal from an order of the Orphans’ Court for Baltimore County involves the removal of Appellant, Vincent Fava (“Vincent”), as Personal Representative of the Estate of his father, Salvatore Fava (“Mr. Fava”). After conducting four hearings, the Orphans’ Court issued an Order and Opinion which, among other actions, removed Vincent as the Personal Representative, under Md. Code, Estates & Trusts § 6-306(a)(3). To that end, the court found specifically that Vincent “[was] unable or incapable, with or without his own fault, to discharge his duties and power effectively.” This timely appeal followed.

### **QUESTION PRESENTED**

Vincent presents a single query for our consideration, which we have rephrased slightly:<sup>1</sup>

Did the Orphans’ Court err in removing Vincent as the Personal Representative of Mr. Fava’s estate?

### **FACTUAL BACKGROUND**

#### **I. Retitling of certain assets belonging to Mr. Fava.<sup>2</sup>**

In the last months of Mr. Fava’s life, he retitled two of his assets. The first was his Bank of America checking account, which Mr. Fava changed, on 24 August 2015, to a joint account with Vincent, with attendant survivorship rights in Vincent. The second was Mr. Fava’s treasury bill account, which he changed, on 18 September 2015, to pay on death

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<sup>1</sup> The original question was phrased:

Did the Orphans’ Court err in removing the Personal Representative for asserting a property interest in assets which another interested person suggests belongs to the estate?

<sup>2</sup> More on this *infra* Sec. VI.

to Vincent.

II. Mr. Fava’s passing.

Mr. Fava died testate on 9 October 2015, survived by his two children, Vincent and a daughter, Josephine Hochuli (“Josephine”). He was 90 years old at the time of his death. A copy of his Will and a codicil were admitted to probate in Baltimore County. Vincent was appointed as Personal Representative as nominated in the Will.

In the Last Will and Testament, dated 27 November 2004, Mr. Fava divided his estate between Vincent and Josephine. He left Vincent his business, Trinacria Macaroni Works, and left Josephine two parcels of real property.<sup>3</sup> In regard to the residue of his estate, Mr. Fava established a Family Trust, divided into equal shares, for the benefit of Vincent and Josephine.

III. The problems begin.

Vincent, as Personal Representative, filed an Inventory and a First, not Final, Account. Josephine excepted to this filing, because: (1) no payment of estate taxes was listed in the Account; (2) the Account recited, verified under oath by Vincent, a “Promissory Note” and \$179,000 debt owed ostensibly by Mr. Fava to the Charlestown Retirement Community where he had resided; and, (3) despite Mr. Fava leaving in his Will the two properties and their furnishings to Josephine, some items of personal property associated with the properties were not turned over to her by Vincent, despite her specific

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<sup>3</sup> Section 2.3.C of Mr. Fava’s will stated: “[m]y love and affection for my children is equal, and these gifts represent what I believe to be a fair disposition of certain assets among them.”

requests for them.

In response to Josephine's exceptions, Vincent, who was represented at that time by a different attorney than his current appellate counsel,<sup>4</sup> provided proof of payment of estimated taxes and a draft tax return. This information revealed also that Mr. Fava held \$1.5 million in U.S. Treasury Bonds (the T-bill account) at the time of his death, which were not listed as an estate asset in the First Account. Regarding Josephine's second exception, documentation revealed that no promissory note existed. Although Charlestown submitted a claim against Mr. Fava's estate for an unpaid sum, the claim was for \$21,233.49 only and did not mention a promissory note in connection with the claim.

#### IV. The first two hearings in the Orphans' Court.

The Orphans' Court held a hearing on Josephine's initial exceptions on 23 January 2017. Vincent fired his first attorney at the hearing and requested a postponement to retain new counsel. His request was granted. Vincent's second attorney entered his appearance on 24 February 2017.

A second hearing was held on 10 April 2017. The foci of the hearing were the \$1.5 million in T-bills, the \$179,000 owed allegedly to Charlestown, and the Bank of America checking account. With regard to the T-bills, Vincent's second attorney stated that a subpoena would be needed to obtain necessary information concerning the original titling of the bonds.<sup>5</sup> As to the alleged debt owed to Charlestown, Vincent admitted that it was

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<sup>4</sup> A total of three attorneys represented Vincent at various times during this matter.

<sup>5</sup> The judge expressed concern that Vincent had been Personal Representative for many months and was only now indicating additional records needed to be the subject of a subpoena.

an error and those funds would be placed into the estate as an additional asset. Lastly, Vincent acknowledged that he had taken \$91,000 out of the joint checking account and transferred it into a personal account of his that he had opened. He justified that action on the basis that the account was titled jointly, and thus the transfer outside of the estate proceeding was proper.

Two days after the second hearing, the Orphans' Court issued an order directing Vincent to provide, within 30 days, evidence regarding the titling of \$1.5 million in T-bills as of the date of Mr. Fava's death and how mechanically ownership of the bonds had been changed prior to his death. Additionally, the court ordered Vincent to obtain the 2015 statements, checks, signature cards, titling information, and any documentation concerning ownership (and changes thereof) of the Bank of America checking account.

#### V. More problems.

In response to the Orphans' Court order, Vincent filed an Interim Administration Account on 12 May 2017. This Account revealed that the alleged \$179,000 "debt" owed to Charlestown had been included in the Estate filing by Vincent's first attorney solely at Vincent's direction. Additionally, with Vincent's approval, his first attorney paid himself \$36,890 in attorneys' fees, in violation of Md. Code Estates & Trusts § 7-602.<sup>6</sup> The Account failed also to include a payment of \$400,000 in estimated estate tax. Josephine

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<sup>6</sup> This section reads, in pertinent part: "[u]pon the filing of a petition in reasonable detail by the personal representative or the attorney, the court may allow a counsel fee to an attorney employed by the personal representative for legal services." MD. CODE, EST. & TRUSTS § 7-602.

learned also that Vincent made payments for his personal expenses, using Estate funds, which were not chargeable properly to the Estate.

As a result of the 12 May 2017 filing, the Orphans' Court held a third hearing on 31 July 2017. At that hearing, it was revealed that Vincent did not obtain or produce records pertaining to the T-bills, despite the Orphans' Court's earlier order. Additionally, Vincent did not produce all of the required records related to the Bank of America checking account, as ordered also by the Orphans' Court's. Vincent's second counsel, at the hearing, conceded that there were "still some irregularities and there's still some unanswered questions." The judge asked Vincent if he wished to remain as Personal Representative, stating that he would be in favor of removing Vincent from the role based on what had been presented regarding his performance at the hearings to that point. At the conclusion of the third hearing, the judge continued the matter until 23 October 2017 and informed the parties that an evidentiary hearing would be held regarding possibly removing Vincent as Personal Representative. The court issued an order scheduling the removal hearing and a Show Cause Order for Removal.

#### VI. Third attorney a charm?

Following the third hearing, Vincent fired his second attorney and retained new counsel, his third and present attorney. With the benefit of advice from this attorney (who remains as appellate counsel), Vincent, prior to the 23 October 2017 hearing, filed a Third Administration Account, Amending and Restating First and Second Administration Accounts. The Third Administration reported a total estate of \$2,022,796.66, but did not include among the Estate's assets the \$1.5 million in T-bills or the Bank of America

account, which had a value of \$397,000. This filing reported \$132,446.39 in stock dividend reinvestments that were not reported previously. It also re-classified the \$179,000 Charlestown payment as an asset of the Estate, rather than a debt.<sup>7</sup> It included an additional \$90,000 returned as Estate assets that Vincent had taken improperly from a UBS account owned previously by Mr. Fava, and payments that Vincent made from the Estate's conceded assets for his personal benefit, which were also returned to the Estate. In all, a total of \$309,923.57 in cash was returned to the Estate.

VII. Encore, Encore! Another hearing.

The Orphans' Court conducted on 23 October 2017 an evidentiary hearing (the fourth) on Josephine's exceptions and whether Vincent should be removed as Personal Representative. Testimony and exhibits admitted into evidence revealed that: Mr. Fava suffered from many ailments for years prior to his demise; he had been in-and-out of the hospital many times before his death; and, he required use of a wheelchair and continuous use of oxygen in the months prior to his death.

Regarding the Bank of America checking account, it was revealed that on 24 August 2015 (six weeks before Mr. Fava's death), Vincent took his father to a Bank of America branch where Mr. Fava changed his personal checking account to a joint account with Vincent. On 16 September 2015, Vincent created a new Bank of America checking account of his own and transferred \$397,000 from the joint account into his new personal

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<sup>7</sup> These funds were returned to the Estate in full.

account.<sup>8</sup>

Additionally, it was shown that, on 23 September 2015 (sixteen days before Mr. Fava's death), Vincent contacted Mr. Fava's broker at UBS and instructed the broker to withdraw \$90,000 from his father's account and wire it to the joint Bank of America account.<sup>9</sup> Vincent withdrew \$91,000 from the joint checking account and transferred the funds to his personal account thirteen days after Mr. Fava's death.<sup>10</sup>

Regarding Mr. Fava's T-bill account, it was shown that Vincent became the beneficiary of this account twenty-one days before Mr. Fava's death, on 18 September 2015. In order to make the change, Vincent drove Mr. Fava from the Charlestown Retirement Community to the office of Trinacria Macaroni Works. There, the change was made online, with Vincent's assistance. Vincent cashed-in the T-bills and deposited the \$1.5 million into his personal checking account at Bank of America.

#### VIII. The fallout.

As a result of the revelations demonstrated at the cumulative hearings, the Orphans' Court issued an Order and Opinion on 26 October 2017. In it, the court sustained Josephine's exceptions. In addition, the court removed Vincent as Personal Representative, pursuant to § 6-306(a) of the Md. Estates and Trusts Article. Specifically,

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<sup>8</sup> Vincent did not include the \$397,000 on the Third Administration Account because he contended that the joint account money belonged to him and was not an asset of the Estate.

<sup>9</sup> According to the record, Vincent did not have power of attorney or any other form of authority to direct the UBS broker to transfer the funds from his father's account.

<sup>10</sup> The \$90,000 was returned to the Estate and was included as an asset in the Third Administration Account.



the Orphans’ Court found applicable § 6-306(a)(3)<sup>11</sup> of the Article, concluding that “[Vincent] is unable or incapable, with or without his own fault, to discharge the duties and powers effectively.” The court directed that “an independent personal representative shall be appointed and shall investigate and determine all estate assets.”

Vincent appealed the ruling and filed a Petition to Stay the order. The court denied the petition on 1 December 2017, appointed Frank Lidinsky, Esq., to serve as Personal Representative, and directed that he conduct an impartial investigation into whether the T-bill account and the Bank of America checking account were assets of the estate or Vincent’s property.

### STANDARD OF REVIEW

Pertinent to our appellate review, the judgment of an orphans’ court to remove a personal representative will not be set aside unless it is clearly erroneous. *Ayers v. Liller*, 65 Md. App. 178, 183, 499 A.2d 1309, 1312 (1985). On appeal from a final judgment of an orphans’ court, “the ‘findings of fact of an orphans’ court are entitled to a presumption of correctness.’” *Allen v. Ritter*, 196 Md. App. 617, 625, 10 A.3d 1183, 1187–88 (2010), *aff’d*, 424 Md. 216, 35 A.3d 443 (2011).<sup>12</sup>

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<sup>11</sup> That section reads:

(a) A personal representative shall be removed from office upon a finding by the court that he:

...

(3) Is unable or incapable, with or without his own fault, to discharge his duties and powers effectively ...

MD. CODE, EST. & TRUSTS § 6-306 (a)(3).

<sup>12</sup> Appellant contends that Vincent was removed solely because of a perceived conflict between his assertion of property interests arising pre-death in what had been Mr. Fava’s

## DISCUSSION

“A party may appeal to the Court of Special Appeals from a final judgment of an orphans' court.” MD. CODE, CTS. & JUD. PROC. § 12-501. An appealable final judgment for purposes of orphans' court proceedings is different from the concept of a final judgment in conventional civil litigation. *Green v. McClintock*, 218 Md. App. 336, 363 n.24, 97 A.3d 198, 213 (2014). In an orphans' court, final judgments are: “judgments, orders, decisions, etc. which . . . finally determine the proper parties, the issues to be tried and the sending of those issues to a court of law.” *Banashak v. Wittstadt*, 167 Md. App. 627, 657, 893 A.2d 1236, 1253 (2006). It follows that the Orphans’ Court for Baltimore County’s Order, inter alia, removing Vincent and appointing Mr. Lidinsky as Personal Representative constitutes an appealable final judgment.

The primary goal when probating a will, which includes the selection of an executor or personal representative, is to achieve the testator’s intent. *Friedman v. Hannan*, 412 Md. 328, 339, 987 A.2d 60, 67 (2010). There are certain circumstances where an executor/personal representative shall be removed. Md. Code, Est. & Trusts § 6-306

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Bank of America checking account and his T-bill account and his duties as Personal Representative to maximize the estate’s assets, which presents a question of law (see fn. 1 *supra* at 1) for this Court to decide *de novo*. See *Walter v. Gunter*, 367 Md. 386, 392, 788 A.2d 609, 612 (2002) (stating that this Court reviews questions of law *de novo*). We disagree with Appellant’s characterization. The Orphans’ Court stated that the issue of “what does or does not constitute estate assets. . . . must be investigated by the Personal Representative . . .” The Orphans’ Court, in its Order removing Vincent, concluded that Vincent was unable or incapable of performing this duty impartially under § 6-306(a)(3), stating: “[i]t is unreasonable to expect a personal representative to investigate himself.” In arriving at its finding of unreasonableness, the court considered properly all of the evidence adduced at the four hearings. Accordingly, we shall review that decision under the clearly erroneous standard.

provides:

(a) A personal representative shall be removed from office upon a finding by the court that he:

- (1) Misrepresented material facts in the proceedings leading to his appointment;
- (2) Willfully disregarded an order of the court;
- (3) *Is unable or incapable, with or without his own fault, to discharge his duties and powers effectively;*
- (4) Has mismanaged property;
- (5) Has failed to maintain on file with the register a currently effective designation of an appropriate local agent for service of process as described in § 5-105(c)(6) of this article; or
- (6) Has failed, without reasonable excuse, to perform a material duty pertaining to the office.

(emphasis added). Removal is mandatory, after notice and hearing as provided in Md. Code Estates & Trusts, when any of the causes for removal enumerated in § 6-306 are found. *Richards v. Richards*, 27 Md. App. 1, 15, 338 A.2d 377, 385 (1975).

Vincent urges us to reverse the decision of the Orphans' Court because, in his view, he was removed as Personal Representative due solely to a perceived conflict of interest between his assertion of his interests in what had been Mr. Fava's checking and T-bill accounts and a duty to investigate impartially the bona fides of the pre-death re-titling of these assets. He bolsters his position by citing cases where estate executors were removed in error for asserting title to property which others claimed belonged to the estate. *See Kerby v. Peters*, 172 Md. 1, 190 A. 511 (1937); *Dunnigan v. Cummings*, 115 Md. 289, 80 A. 922 (1911); *McIntyre v. Smyth*, 159 Md. App. 19, 857 A.2d 1235 (2004). Vincent believes that "the property Josephine *might* assert belongs to the Estate was titled by [Mr. Fava] to pass outside probate to Vincent, and Vincent cannot be removed for asserting that belief." (emphasis added). He argues, and we agree, that a personal representative's

fiduciary obligations are not inconsistent with all conflicts. *See Gianakos v. Magiros*, 238 Md. 178, 185, 208 A.2d 718, 722 (1965) (stating that a personal representative can be a debtor of the estate); *see also Talbert v. Reeves*, 211 Md. 275, 279, 127 A.2d 533, 535 (1956) (stating that an executor can assert a creditor’s claim against the estate).

Josephine retorts that Vincent was removed under § 6-306(a)(3) because he could not perform an impartial investigation as required of the Personal Representative, not solely because he asserted personal interests in the checking and T-bill accounts. She points to the following misconduct by Vincent throughout his service as Personal Representative: Vincent’s misclassification of the \$179,000 “debt” owed to the Charlestown Retirement Community; initially-undisclosed transactions that would have been part of the residuary estate; Vincent benefitting personally from estate funds; improper transfer of \$90,000 to himself from Mr. Fava’s UBS account; and, alleged improper influence exerted upon Mr. Fava in retitling challenged assets. Vincent filed eventually an amended account that corrected some previous misrepresentations and errors, but did not include the two accounts at issue, which total \$1.9 million. The question for the Orphans’ Court to decide, at this juncture, was not whether the disputed accounts were estate property, but rather, if the court, in view of Vincent’s overall conduct to date as Personal Representative, inspired a lack of confidence that Vincent could discharge his duties honestly and faithfully, including to investigate and determine impartially whether the disputed accounts should be treated as estate assets. As this argument goes, the Orphans’ Court reviewed the totality of the facts and determined that Vincent had not, and could not, discharge his duties properly, which warranted removal.

Vincent was not removed merely because of a potential conflict of interest created by asserting his claims to the disputed accounts, as he alleges. Based on the record, the Orphans' Court was presented with ample facts from which to conclude that Vincent's tenure as Personal Representative was a "disaster," as acknowledged on the record by his second counsel at the third hearing. The Orphans' Court steered clear (judiciously) of deciding whether Vincent committed any outright impropriety regarding the retitling of the two accounts on the merely suggestive record existing at that time. Rather, it considered Vincent's overall history as Personal Representative and how that colored his ability to be fair and impartial in investigating the pre-death transactions regarding certain of Mr. Fava's assets. The Order removing Vincent sustained Josephine's exceptions to certain improper conduct by Vincent, over-and-above that pertaining to the re-titling of the Bank of America checking and T-bill accounts. The removal was part of the same Order that sustained Josephine's exceptions. The Orphans' Court, as the finder of fact in this matter, is entitled to a presumption of correctness regarding such findings. There existed substantial evidence to support the Orphans' Court's determination. As such, the decision to remove Vincent was not clearly erroneous.

**JUDGMENT OF THE ORPHANS' COURT  
FOR BALTIMORE COUNTY AFFIRMED.  
COSTS TO BE PAID BY APPELLANT.**