

Orphans' Court for Montgomery County
Estate No. W94656

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 3498

September Term, 2018

JENNIFER SIMON

v.

KAREN BUSHELL

Meredith,*
Berger,
Friedman

JJ.

Opinion by Friedman, J.

Filed: November 12, 2020

*Meredith, Timothy E., J., now retired, participated in the hearing of this case while an active member of this Court, and after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and preparation of this opinion.

*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.

The purpose of this litigation was to determine who should be the personal representative of the estate of Kevin Bushell. The choices were Kevin Bushell's wife, Jennifer Simon, the Appellant here, or Kevin Bushell's mother, Karen Bushell, the Appellee. As we will explain, the priority statute, MD. CODE ESTATES & TRUSTS ("ET") § 5-104 explicitly gives spouses priority over parents. If that's all there was to it, this would be an easy case.

For reasons that are not completely clear, however, when Karen Bushell filed an improper petition seeking appointment as the personal representative, rather than rejecting it, the Register of Wills for Montgomery County issued an Order naming Karen Bushell as the personal representative. Kevin's widow, Jennifer Simon, objected. The Orphans' Court for Montgomery County, however, determined that it was unable to correct the Register of Wills's mistake and, as a result, Karen Bushell remains the personal representative.

We shall hold that Karen Bushell was not entitled to file the petition, made a material misrepresentation in that petition, and that the Orphans' Court erred by failing to remove her as the personal representative.

FACTS AND PROCEDURAL HISTORY

The *U.S.S. John S. McCain*, a United States Navy, *Arleigh Burke*-class destroyer was rammed by a civilian oil tanker, *M/V Alnic MC*, off the coast of Singapore and Malaysia. Ten U.S. Navy sailors were killed in the collision, including Petty Officer

Second Class Kevin Bushell, an electronics technician, late of Gaithersburg, Maryland.¹
Kevin Bushell died without leaving a will.

On a standardized, preprinted form provided by the Register of Wills, Karen Bushell prepared a Petition for Administration for the Estate of Kevin Bushell. On that form, Karen Bushell made eleven separate statements that she, “solemnly affirm[ed] under the penalties of perjury” were “true to the best of [her] knowledge, information[,] and belief.” Those eleven statements were:

1. I am (a) at least 18 years of age and either a citizen of the United States or a permanent resident of the United States who is the spouse of the decedent, an ancestor of the decedent, a descendant of the decedent, or a sibling of the decedent or (b) a trust company or any other corporation authorized by law to act as a personal representative.
2. The Decedent, **KEVIN SAYER BUSHELL** was domiciled in **MONTGOMERY [COUNTY]**, State of **MARYLAND** and died on the **21st** day of **AUGUST, 2017**, at **SINGAPORE STRAITS**.
3. If the decedent was not domiciled in this county at the time of death, this is the proper office in which to file this petition because: **THE DECEDENT WAS DOMICILED IN MONTGOMERY COUNTY, MARYLAND.**
4. *I am entitled to priority of appointment as personal representative of the decedent's estate pursuant to §5-104 of the Estates and Trusts Article, Annotated Code of Maryland because: **I AM AN HEIR. I AM THE DECEDENT'S MOTHER.***
5. I am mentally competent.

¹ There is litigation pending in the United States District Court for the Southern District of New York concerning liability and damages for the collision between the *U.S.S. John S. McCain* and the *M/V Alnic MC*. As we understand it, Simon and Karen Bushell seek to serve as the personal representative of the estate of Kevin Bushell to control the claims in that litigation. Despite the invitation of the parties, we take no position on the nature or status of those claims.

6. I am not a disqualified person because of feloniously and intentionally killing, conspiring to kill, or procuring the killing of the decedent.
7. I have not been convicted of fraud, extortion, embezzlement, forgery, perjury, theft, or any other serious crime that reflects adversely on my honesty, trustworthiness, or fitness to perform the duties of a personal representative.
8. I am not excluded otherwise by law from serving as a personal representative.
9. I have made a diligent search for the decedent's will and to the best of my knowledge none exists.
10. Other proceedings, known to petitioner, regarding the decedent or the estate are as follows: **PENDING LITIGATION IN NEW YORK**.^[2]
11. If appointed, I accept the duties of the office of personal representative and consent to personal jurisdiction in any action brought in this State against me as personal representative or arising out of the duties of the office of personal representative.

(Items preprinted on the form in regular type; Karen Bushell's additions to the forms underscored and **emboldened**; emphasis added in *italics*). Karen Bushell filed the petition with the Register of Wills on March 26, 2018 and on that same day, the Register of Wills issued an Order naming Karen Bushell as the personal representative for the estate of Kevin Bushell.

Some months later, Simon filed petitions with the Register of Wills and the Orphans' Court that sought, in effect, to remove Karen Bushell as the personal representative and to appoint Jennifer Simon instead. Karen Bushell filed an Opposition to

² We understand this as referring to the litigation discussed *supra* at n. 1.

Simon's petitions. The Orphans' Court scheduled a hearing for Tuesday, December 4, 2018.

On the Friday before the Tuesday hearing, Karen Bushell filed a surreply accompanied by affidavits from the elected Register of Wills for Montgomery County, Joseph M. Griffin, and the Deputy Register of Wills, James J. Kelley. Those affidavits set forth the affiants' view that Karen Bushell had been truthful in her petition and was entitled to serve as the personal representative. On Monday, December 3, 2018, Simon filed a document captioned as a "motion for continuance," but which argued in *limine* to preclude the Orphans' Court from receiving the affidavits into evidence on the grounds that they contained inadmissible hearsay and opinion on the ultimate issue. In the alternative, Simon asked the Orphans' Court for a continuance that would allow her to subpoena the affiants so they might be cross-examined at the hearing.

The Orphans' Court denied Simon's motion and went forward with the hearing on Tuesday.³ At the conclusion of the hearing, the Orphans' Court denied Simon's petitions and left Karen Bushell as the personal representative. Simon noted a timely appeal.

³ Although we do not reach the correctness of the Orphans' Court's denial of Simon's motion for a continuance, we note that precluding a party from examining last-minute, undisclosed, surprise witnesses that purport to testify to the ultimate issue like the affiants did here, may raise significant due process concerns.

DISCUSSION

A. Was Karen Bushell Properly Issued Letters of Administration to Serve as the Personal Representative of the Estate of Kevin Bushell?

Before reaching the question before us, which concerns the Orphans' Court's power to remove an improperly named personal representative, we must consider whether Karen Bushell was improperly named as the personal representative in the first instance.

Only the person who is “*entitled* to administration pursuant to [ET] § 5-104,” may file a petition. ET § 5-602. If the decedent has left a will that identifies a personal representative or a process for identifying one, that person is entitled to file a petition. ET § 5-205(b)(1)(i).⁴ On the other hand, if the decedent did not leave a will, then the person with the highest priority under the priority statute, ET § 5-104, is the only person entitled to file the petition. The only exceptions that allow a person with a lower priority to file a petition are if a person with lower priority is joined in the petition by a person with higher priority, or if the person with higher priority consents in writing to the person with lower priority filing the petition. ET § 5-205(b)(1)(ii). Of course, a non-relative friend or even a stranger to the decedent can become entitled to file the petition, so long as they receive permission in writing from any persons with higher priority.

The priority statute provides:

⁴ This is reinforced by the priority statute, ET § 5-104(1) and (2), which grants those persons identified as personal representative by a decedent's will as having Class 1 priority, and those persons identified as personal representative by a process created by the decedent's will as Class 2 priority.

In granting letters in administrative or judicial probate...the court and register shall observe the following order of priority, with any person in any one of the following paragraphs considered as a class:

- (1) The personal representatives named in a will admitted to probate;
- (2) The personal representative nominated in accordance with a power conferred in a will admitted to probate;
- (3) The surviving spouse and children of an intestate decedent, or the surviving spouse of a testate decedent;
- (4) The residuary legatees;
- (5) The children of a testate decedent who are entitled to share in the estate;
- (6) The grandchildren of the decedent who are entitled to share in the estate;
- (7) [T]he parents of the decedent who are entitled to share in the estate;
- (8) The brothers and sisters of the decedent who are entitled to share in the estate;
- (9) Other relations of the decedent who apply for administration;
- (10) The largest creditor of the decedent who applies for administration;
- (11) Any other person having a pecuniary interest in the proper administration of the estate of the decedent who applies for administration; or
- (12) Any other person.

ET § 5-104 (alteration to reflect exceptions for commission of crimes or abandonment that are not relevant to this case). Thus, absent joinder with, or consent from, a person with higher priority, a person with a lower priority is not entitled to file the petition.

If an improper person does file the petition, the Estates and Trusts Article, the Maryland Rules, and the written administrative policies of the Register of Wills all work together to prevent the improper petitioner from being named personal representative. *First*, as discussed above, the Estates and Trusts Article only permits a person with lower priority to file a petition if the person with lower priority is joined in the petition by the person with higher priority, or if the person with higher priority consents in writing to the person with lower priority filing the petition. ET §§ 5-104; 5-602. *Second*, the Maryland Rules governing these procedures require that a person filing a petition must file several forms that allow the Register of Wills to ascertain if the person who has filed the petition is entitled to do so. MD. R. 6-201(b) (listing additional required documents); MD. R. 6-202 (describing the list of interested persons, which includes all of those persons listed in the priority statute); MD. R. 6-203 (describing form of consent); MD. R. 6-313 (same); MD. R. 6-204 (concerning form for renunciation of rights, *i.e.*, surrender of higher priority to serve as personal representative). *Third*, the Probate Policies and Procedures Handbook issued by the Register of Wills for Montgomery County explicitly requires that the list of interested persons and written consents be filed simultaneously with the petition. REGISTER OF WILLS FOR MONTGOMERY COUNTY, MARYLAND, PROBATE POLICIES AND PROCEDURES 20 (2019) (available online at <http://registers.maryland.gov/main/region/montgomery/Probate%20Policies%20and%20Procedures%202019.pdf> (last visited November 12, 2020)).⁵ This allows the Register of

⁵ A cover letter from the Register of Wills explains the purpose of the Handbook:

Wills to be able to determine instantly whether a petitioner is entitled to file the petition at the time of filing. Moreover, the Handbook requires referral of a petition to the Orphans' Court if the, “[p]etitioner [does] not hav[e] priority status.” HANDBOOK at 23. Thus, all three of these—the Estates and Trust Article, the Maryland Rules, and the Handbook—work together to prevent a person who is not entitled from filing a petition and being named personal representative.

This book is not a do-it-yourself manual. It is a compilation of the various policies and procedures that are in effect for probate proceedings in Montgomery County. These policies and procedures are based on Maryland Statute, Opinions of the Attorney General, letters of advice of the Attorney General and case law. This is intended primarily as a reference for the estate proceeding requirements. It is also intended to clarify what are considered allowable disbursements from estate assets and what the filing requirements are to make such disbursements. This book identifies the information, which the Court generally requests be submitted with a filing, before the Court will issue a ruling on the matter. One of these books will be given to every member of the Register of Wills team, every Judge in Montgomery County who presides over the Orphans' Court and is available to all persons practicing probate law. The information contained herein will be used by every member of my staff as a reference for the policies and procedures, which they must adhere to in performing their duties. It is my sincere hope that this book will be utilized by our Judges and members of the Bar Association not as instructions on how to perform their duties but rather as a tool. A member of the public who must go through the probate process is, in a sense, a client to us all. I believe we will each serve our client better if everyone involved is working from the same book. These policies and procedures are subject to change and may not be applicable to every situation. In an attempt to keep this resource as current and useful as possible it will be updated annually.

HANDBOOK at 1. The Handbook is not included as part of the Record, but the Court takes judicial notice of the contents of the Handbook because its contents are “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” MD. R. 2-501(b). It is also an official public document that can be judicially noticed. *See Chesek v. Jones*, 406 Md. 446, 456 n. 8 (2008).

Kevin Bushell did not leave a will. Kevin Bushell’s wife, Jennifer Simon, as the decedent’s surviving spouse, had Class 3 priority. Karen Bushell, as decedent’s mother, had Class 7 priority. Thus, Simon was entitled to file the petition because she had the higher priority under the priority statute, ET § 5-104. Kevin Bushell’s mother was not entitled to file the petition because she (1) had a lower priority than Simon, (2) Simon did not join in Karen Bushell’s petition, and (3) Simon did not consent to Karen Bushell’s appointment as personal representative.

Moreover, Karen Bushell’s petition was defective when filed. *First*, her petition contained a misrepresentation. As noted above, by signing the petition, Karen Bushell affirmed under the penalty of perjury that all eleven statements on the standardized, preprinted form were true, including statement No. 4 that, “[she is] entitled to priority of appointment as personal representative of the decedent’s estate pursuant to [ET § 5-104] because: **I AM AN HEIR. I AM THE DECEDENT’S MOTHER.**” (Items preprinted on the form in regular type; Karen Bushell’s additions to the forms underscored and **emboldened**). That statement was a misrepresentation because Karen Bushell was not entitled to priority of appointment.⁶

⁶ Karen Bushell makes much of the fact that the statement she filled in on the preprinted form— “**I AM AN HEIR. I AM THE DECEDENT’S MOTHER**”—is literally true. But that is not how the petition form works. By signing the form, a petitioner affirms the truth of all eleven statements, regardless of whether the statement was preprinted or added by the petitioner. For example, to serve as personal representative, Karen Bushell had to truthfully affirm that she was competent. MD. R. 6-122(a). That such an averment was preprinted on the form provided by the Register of Wills makes it no less Karen Bushell’s own statement under oath. Thus, Karen Bushell misrepresented that she was entitled to priority of appointment. We are confirmed in this view by use of the word, “because” on the preprinted form. That is, although the words “**I AM AN HEIR. I AM**

Second, even a casual perusal of Karen Bushell’s petition and the attached forms by the Register of Wills should have revealed its inadequacy. The list of interested persons attached revealed: (1) the existence of “Jennifer Simon, Spouse,” a person with a higher priority than Karen Bushell, the petition itself revealed that (2) Jennifer Simon had not joined Karen Bushell’s petition, and the attached consents, or lack thereof, revealed that (3) Jennifer Simon had not provided written consent to Karen Bushell’s petition. Such a petition simply cannot be correct.

There cannot be any question that Karen Bushell’s petition was, at the time filed, facially improper. It should not have been granted, and instead should have been either dismissed outright by the Register of Wills or referred to the Orphans’ Court for dismissal. Nevertheless, as noted above, the Register of Wills erroneously issued an Order naming Karen Bushell as the personal representative of the estate of Kevin Bushell.⁷

THE DECEDENT’S MOTHER” are true, they must be read in conjunction with the words that come before “because.” When read as a complete sentence, the statement is a material misrepresentation. Karen attests that her status as the decedent’s mother entitles her to appointment as personal representative, which is not the case where there is a surviving spouse.

⁷ We note here, that we are not persuaded by the affidavits filed by (1) “The Honorable Joseph M. Griffin, Register of Wills for Montgomery County, MD” or (2) “James J. Kelley, Deputy, Register of Wills for Montgomery County, MD.” Both affidavits purport to state the affiants’ views that Karen Bushell did not misrepresent facts and that their office properly issued letters of administration. For the reasons, described above, we reject the affiants’ conclusions. We take no position whether it is ethically permissible for the affiants to take such a position on matters pending in their office because we have been unable to find ethical standards governing the conduct of registers of wills beyond their oaths of office. MD. CONST., Art. I §§ 9, 11. We caution, however, that at a minimum those of us who work in courthouses serving the people of Maryland must be careful to ensure that there is not even an appearance, let alone the fact, of impropriety. Given that Karen Bushell too is a courthouse employee (she serves as the

B. Did the Orphans’ Court have the Power to Remove Karen Bushell as the Personal Representative of the Estate of Kevin Bushell?

As noted above, several months later, Jennifer Simon filed petitions seeking, in effect, to remove Karen Bushell as personal representative and to be appointed in Karen’s stead. Simon’s petition relied on ET § 6-306, which requires a court to remove a personal representative in any of six situations:

- (a) A personal representative *shall* be removed from office on a finding by the court that the personal representative:
 - (1) Misrepresented material facts in the proceedings leading to the personal representative’s appointment;
 - (2) Willfully disregarded an order of the court;
 - (3) Is unable or incapable, with or without the personal representative’s own fault, to discharge the personal representative’s 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 ...; or
 - (6) Has failed, without reasonable excuse, to perform a material duty pertaining to the office.

ET § 6-306(a) (emphasis added).⁸ The Orphans’ Court, however, declined, finding that Karen Bushell’s petition did not contain a material misrepresentation because her written

deputy Clerk for the Circuit Court for Montgomery County), we are concerned that that appearance of impropriety is heightened.

⁸ Among the arguments that Karen Bushell makes in this Court is that Simon selected the path of removal under ET § 6-306 but nevertheless attempted to apply the standard found under ET § 5-304 for the transfer from administrative to judicial probate.

statement “**I AM AN HEIR. I AM DECEDENT’S MOTHER**” is literally true, and that “it’s not as though the Register of Wills would have been duped into thinking that nobody else had priority.”

We hold that this finding by the Orphans’ Court was clearly erroneous. As described above, there can be no doubt that Karen Bushell’s claim of priority was a material misrepresentation. Additionally, while any person can become entitled to file a petition, here, where Karen Bushell filed a petition that she was not entitled to file, her filing was, itself, a material misrepresentation. Moreover, it is not relevant whether Karen Bushell intended to mislead. *Lutz v. Mahan*, 80 Md. 233 (1894) (“Whether the deception was the result of carelessness or mistake or was intentionally practiced, the result is the same. The grant of letters [of administration] stands condemned as improperly made”); *see also* *Watkins v. Barnes*, 203 Md. 518 (1954) (same). Regardless of Karen Bushell’s intent, the petition she filed was improper and misrepresented a material fact.

The only fact differentiating this case from *Lutz* and *Watkins* is that Karen Bushell disclosed the existence of Jennifer Simon, the person entitled to file the petition and to administer the estate. We hold that this is a distinction without a difference. Karen Bushell affirmed as true all eleven statements on the standardized, preprinted form even though at

We see no merit to this argument. First, as discussed above, we hold that Simon satisfied the standard required under ET § 6-306. Moreover, we are not certain that we agree with Karen Bushell’s characterization that the standard under ET § 5-304, which requires a showing of “fraud, material mistake, or substantial irregularity in the prior probate proceeding” is a substantially lower or different standard than required under ET § 6-306, which requires a “misrepresentation of material fact in the proceedings leading to the personal representative’s appointment.”

least one was not. She filed a petition when she was not entitled to do so. Given that, there was no evidence to support the Orphans' Court's conclusion that there was no material misrepresentation.⁹

CONCLUSION

We hold that the Orphans' Court decision not to remove Karen Bushell as the personal representative of the estate of Kevin Bushell was clearly erroneous.

JUDGMENT OF THE ORPHANS' COURT FOR MONTGOMERY COUNTY IS REVERSED. CASE REMANDED WITH INSTRUCTIONS TO REMOVE KAREN BUSHELL AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF KEVIN BUSHELL PURSUANT TO ET § 6-306(a) AND TO APPOINT JENNIFER SIMON AS SUCCESSOR PERSONAL REPRESENTATIVE PURSUANT TO ET § 6-306(d). APPELLEE TO PAY ALL COSTS.

⁹ The Orphans' Court also found, as an alternative holding, that even if Karen Bushell had misrepresented material facts in the petition, it would nonetheless retain her pursuant to ET § 6-306(b), which permits retention despite the existence of cause for the personal representative's removal, if it "finds that continuance would be in the best interests of the estate and would not adversely affect the rights of interested persons or creditors." ET § 6-306(b). Here, however, because of the Orphans' Court's failure to appreciate the cause of removal, its decision to retain Karen Bushell despite that cause was necessarily tainted.