SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0441-16T1

IN THE MATTER OF THE ESTATE
OF JOHN J. MCLAUGHLIN, Deceased.

Argued December 20, 2017 – Decided February 16, 2018

Before Judges Fuentes, Koblitz and Manahan.

On appeal from Superior Court of New Jersey, Chancery Division, Probate Part, Somerset County, Docket No. 12-00298.

Craig J. Albert (Albert PLLC) argued the cause for appellant Rita Loughlin.

Marcia Polgar Zalewski argued the cause for respondent Estate of John J. McLaughlin.

William J. Soriano argued the cause for respondents Jamie McLoughlin Ubaldi and Licia McLoughlin Zegar (Soriano, Henkel, Biehl & Matthews, PC, attorneys; William J. Soriano, on the brief).

PER CURIAM

Appellant Rita Loughlin appeals an order approving a final accounting in a probate matter regarding the distribution of assets and the award of fees to the Administrator and respondents' counsel. Loughlin also appeals the dismissal of a summary action.

Having considered the factual record and after application of controlling law, we reverse the order and remand for further proceedings.

Decedent John J. McLaughlin died intestate on January 31, 2012. At the time of his death, decedent had four heirs. The heirs consisted of two sisters, Rita Loughlin and Mary Lynch (collectively, sisters), and two nieces, Licia McLoughlin Zegar and Jamie McLoughlin (collectively, nieces).

Without notice to the sisters, and prior to the appointment of an estate administrator, the nieces arranged decedent's funeral. They also retained an attorney, William J. Soriano, a principal of Soriano, Henkel, Biehl & Matthews, PC, to commence the probate of decedent's estate. In furtherance of his representation, Soriano submitted an "Administration Fact Sheet" (AFS) to the Somerset County Surrogate Court. The AFS listed a house, a car, and a Vanguard IRA — GNMA Fund Investor Shares, as assets. No further action was taken by the nieces to petition for administration.[1]

[1] In addition to the assets listed on the AFS, the nieces took possession of, and sold, other assets found in decedent's home. Those assets were not listed on the AFS. A check payable to the estate was later issued to the Administrator representing proceeds from the sale of these items.

Thereafter, the sisters learned of decedent's death. Lynch contacted the Surrogate Court to inquire about the estate's administration. The Surrogate Court contacted Soriano, who then filed a caveat on behalf of the nieces objecting to the sisters' administration of the estate. In April 2012, the nieces filed a complaint seeking administration. In response, the sisters filed a complaint seeking administration. Each complaint objected to the other party's appointment as administrator of the estate.

A Chancery Division, Probate judge conducted a hearing on the complaints in July 2012. At the conclusion of the hearing, the judge appointed Marcia Polgar Zalewski as Administrator, and ordered the parties to "cooperate to the greatest extent possible with said administrator to complete the administration of the estate."

I.

In 1999, decedent established two separate IRA accounts with Vanguard Group (Vanguard). On one account, decedent designated the nieces as co-beneficiaries. Alice McLoughlin, wife of decedent's late brother and mother of the nieces, was designated as the secondary beneficiary. In 2001, decedent added three additional IRA accounts. On two of the accounts, decedent designated the beneficiaries in the same manner as he did in 1999.

When decedent opened a non-retirement individual (non-IRA) account in 2002, no beneficiary was named.

In September 2007, Vanguard advised decedent regarding a new policy concerning the designation of beneficiaries. In pertinent part, the policy stated:

> Beneficiaries on the accounts listed below are now maintained at a plan level for retirement accounts (for example, traditional IRAs or Roth IRAs) and at a registration level for nonretirement accounts enrolled in a Transfer on Death (TOD) plan.

The following September, Vanguard again advised decedent concerning the forms required to be completed relative to the designation of beneficiaries for IRA accounts as well as the separate "Transfer on Death Plan Kit" for non-IRA accounts.

Decedent commenced closing the five IRA accounts in March 2008 and completed the closing of the accounts on January 2, 2009. Decedent opened six non-IRA accounts with Vanguard. In 2008, decedent made transactions in the six non-IRA accounts. At the time of his death, three non-IRA accounts remained. Decedent did not register the non-IRA accounts in a TOD plan.

II.

In his role as the attorney for the nieces, Soriano contacted Vanguard in March 2012, and requested the distribution of the funds in the non-IRA accounts directly to his clients based on the

beneficiary designations for the closed IRA accounts. Vanguard denied the request. Upon Zalewski's appointment, she requested that Vanguard distribute the non-IRA accounts' funds to the nieces. Again, Vanguard refused. However, Vanguard agreed to distribute the funds to Zalewski in her fiduciary capacity as Administrator. Upon receipt of the funds, Zalewski, without notice to the sisters, determined that the nieces were beneficiaries of the non-IRA accounts. Zalewski based her determination on the beneficiary designation on the closed IRA accounts. Consistent with that determination, Zalewski treated those accounts as a non-probate asset.

In 2015, Loughlin learned of the existence of the non-IRA accounts and Zalewski's determination to provide the funds in the accounts to the nieces. On November 9, 2015, Loughlin filed an Order to Show Cause (OTSC) seeking substitution of Zalewski as the Administrator, the forfeiture of her fees, the refunding of estate assets, the recalculation of taxes, and the reimbursement of attorney's fees and costs. Despite the filing of the OTSC, the relief sought was not decided and was ultimately dismissed.

At a case conference held on April 20, 2016, the judge inquired whether the non-IRA accounts and counsel fees were the

remaining open issues. The parties, including Loughlin's then counsel, responded to the inquiry in the affirmative.[2]

On July 26, 2016, the judge entered an order that approved the final accounting and affirmed the non-IRA account as non-probate. The judge also directed Zalewski to prepare a final Certification of Services. In a written opinion, the judge noted all matters, other than the issue of Soriano's fees, had been "resolved" at the April 20, 2016 proceeding. The judge held that Vanguard failed to provide adequate notice to the decedent relative to the TOD, and that the governing law did not require that designation.

Thereafter, on August 16, 2016, the judge approved the final Certification of Services and entered an order which effectuated the final distribution of the estate. This appeal followed.

Loughlin raises the following points on appeal:

POINT I

THE TRIAL COURT ERRED IN EXCLUDING THE DECEDENT'S VANGUARD INDIVIDUAL ACCOUNT FROM THE PROBATE ESTATE.

A. The Administrator Adopted The Nieces' Position That The Vanguard Individual Account Was Simply Not Part Of The Estate.

[2] Notwithstanding, Loughlin's counsel thereafter filed exceptions to the accounting taking issue with Zalewski's fees, Soriano's counsel fees, and his counsel fees.

B. The Vanguard Individual Account Was Part Of The Probate Estate Because It Was Owned Individually By The Decedent.

1. The Nieces Acknowledged That The Vanguard Individual Account Was Individually Owned.

2. The Decedent Maintained His Two Types Of Accounts Separately.

a. The Decedent Had Individual Retirement Accounts At Vanguard From 1999 to 2009.

b. The Decedent Opened An Individual Account At Vanguard In 2002, Which Remained Open Until His Death in 2012.

c. The Decedent Treated His Two Types of Accounts Separately, Complying With the Separate Tax And Documentation Rules Relating To Each.

3. After Terminating His IRA In 2009 And Depositing The Proceeds With His Other Funds In The Individual Account, The Decedent Used The Money As His Own.

C. The Trial Court Misapplied The Relevant Statute In Deciding How To Dispose Of The Individual Account That Had Been Expanded By The Addition (In 2009) Of Assets Distributed From The IRAs.

D. The Trial Court's Disposition Amounts To Improperly Writing A Will For An Intestate Decedent.

POINT II

THE TRIAL COURT ERRED IN DISMISSING THE COMPLAINT AGAINST THE ADMINISTRATOR AND THE NIECES' LAWYER.

POINT III

THE TRIAL COURT ERRED IN APPROVING THE FINAL ACCOUNTING AND FINAL CERTIFICATION OF SERVICES.

Our review of the factual findings made by a trial judge in a non-jury trial is limited. Estate of Ostlund v. Ostlund, 391 N.J. Super. 390, 400 (App. Div. 2007). Here, the findings were made not after trial, but after oral argument. Therefore, we owe no deference to the judge's finding relative to Vanguard's lack of notice to decedent regarding the required designation of a beneficiary. Here, it is without dispute that the nieces were designated as beneficiaries of the IRA accounts. It is also without dispute that when decedent closed the IRA accounts and opened the non-IRA accounts he did not designate the nieces or anyone else as beneficiaries.

We commence our discussion by reference to the law governing intestate succession. When a person dies intestate, the property owned at the moment of the person's death goes "to his heirs . . . subject to right of creditors and to administration." N.J.S.A.

3B:1-3. When there is no surviving spouse or domestic partner, the entire estate passes to the individuals designated in N.J.S.A 3B:5-4. In accord with that statute, one-third of decedent's net estate should pass to each of the sisters and one-sixth of the estate should pass to each of the nieces as the surviving children of decedent's predeceased brother. Ibid.

Decedent's estate "means all of the property of a decedent, minor or incapacitated individual, trust or other person whose affairs are subject to this title as the property is originally constituted and as it exists from time to time during administration." N.J.S.A. 3B:1-1. Here, by the statute's definition, the assets decedent held in a security account, titled in his name, would constitute part of the estate absent a designation to the contrary.

We next turn to the law governing the designation of beneficiaries in relation to probate matters. The Uniform TOD Securities Registration Act (codified at N.J.S.A. 3B:30-1 to -12) sets forth the method by which the owner of either an individual security or a security account can identify an individual or individuals who will take the account upon the account owner's death, without the account becoming a probate asset. "A security, whether evidenced by certificate or account, is registered in beneficiary form when the registration includes a designation of

a beneficiary to take the ownership at the death of the owner or the deaths of all multiple owners." N.J.S.A. 3B:30-5. "Registration in beneficiary form may be shown by the words 'transfer on death' or the abbreviation 'TOD,' or by the words 'pay on death' or the abbreviation 'POD,' after the name of the registered owner and before the name of the beneficiary." N.J.S.A. 3B:30-6.

The registration of either a particular security or an account containing securities must include an indication of both the present owner and the future owner. The permitted words are "transfer-on-death," "TOD," "pay-on-death," or "POD." N.J.S.A 3B:30-6. More specifically, the statute requires securities or a securities account to be "registered in beneficiary form" for such securities to transfer non-probate upon the death of the owner. N.J.S.A. 3B:30-5. Beneficiary form "means a registration of a security which indicates the present owner of the security and the intention of the owner regarding the person who will become the owner of the security upon the death of the owner." N.J.S.A. 3B:30-2.

"A registering entity offering to accept registration in beneficiary form may establish the terms and conditions under which it will receive requests for registrations in beneficiary form, including requests for reregistration to effect a change of

beneficiary." N.J.S.A. 3B:30-11(a). Because the beneficiary form was not completed, Vanguard was correct to deny the distribution of the funds to Soriano held in the non-IRA account.

We are unpersuaded by the argument raised by Zalewski and the nieces that the designation of TOD and POD is permissive. To the contrary, the controlling statutes require a registration that indicates a beneficiary. N.J.S.A. 3B:30-2; N.J.S.A. 3B:30-6. The legislative intent of the uniform statute, which is identical to N.J.S.A. 3B:30-6, explains why there were alternative terms introduced by the word "may."

> The committee would have used only the abbreviation TOD except for the familiarity, rooted in experience with certificates of deposit and other deposit accounts in banks, with the abbreviation POD as signaling a valid non-probate death benefit or transfer on death.
>
> [Uniform TOD Securities Registration Act Section 5 comment (1989) (Westlaw).]

While the use of either term is permissive for purpose of designation, the designation itself is mandatory. Thus, a pre-death written designation to carry out a decedent's wishes for post-death dispositions was required to permit the non-IRA account to pass outside the estate.

Given the law governing the non-IRA accounts, in the absence of any designation as to the distribution of the account's funds

upon decedent's death, the judge erroneously approved Zalewski's decision to treat the account as a non-probate asset.

Similarly, the mistaken dismissal of the OTSC, which sought relief other than the status of the non-IRA accounts, was in error.[3] Whether Loughlin is entitled to that relief should be determined upon remand.

Reversed and remanded. We do not retain jurisdiction.

[3] We do not fault the judge for relying upon the representation of both counsel at the status conference that only two issues remained.