IN THE SUPREME COURT OF PENNSYLVANIA

IN RE: ESTATE OF ADELAIDE BRISKMAN, DECEASED,	**:**	**NO. E.D. ALLOC. DKT. 2002**

PETITION FOR ALLOWANCE OF APPEAL OF ESTATE OF JULIE PALLEY, AN INTESTATE HEIR OF ADELAIDE BRISKMAN, DECEASED

Appeal of Estate of Julie Palley
From Order Of Pennsylvania Superior Court Docketed November 13, 2002
At 2772 EDA 2001 Denying Palley Estate's Application For Reargument And/Or Rehearing
From Judgment of Pennsylvania Superior Court Entered On September 9, 2002
At 2772 EDA 2001 Reversing Decree of Court of Common Pleas of Philadelphia
County, Orphans' Court Division, At O.C. No. 1487 of 1994 Issued
August 13, 2001

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Petitioner, the estate of Julie Palley[1], respectfully requests that this Honorable Court grant its petition for allowance of appeal from the Superior Court's order dated November 13, 2002 denying reconsideration of its order reversing the decree of the Court of Common Pleas of Philadelphia County, Orphans' Court Division ("the lower court") in Palley Estate's favor.

ORDERS IN QUESTION

On November 13, 2002, the Pennsylvania Superior Court entered the following order:

> **AND NOW**, this 13th day of November, 2002, it is hereby ordered that the application filed September 23, 2002, requesting reargument/reconsideration of the decision dated September 9, 2002 is **DENIED**.

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PER CURIAM

On September 9, 2002, the Superior Court entered an opinion and the following order:

> Decree reversed; case remanded to Register of Wills for proceedings consistent with this Opinion. Jurisdiction relinquished.

JUDGMENT ENTERED.

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PROTHONOTARY

ISSUES PRESENTED FOR REVIEW

1. On the basis of the unclean hands doctrine articulated in Estate of Pedrick, 505 Pa. 530, 482 A.2d 215 (1984), the lower court sustained Ms. Palley's appeal from the Register of Wills' decree

[1]Ms. Palley died on September 3, 2000. R. 75a. The co-executors of her estate substituted themselves as the contestants in her place. For convenience, this petition will refer to the petitioner as "Ms. Palley."

admitting an alleged will of Adelaide Briskman, deceased, to probate. The evidence overwhelmingly demonstrated that Mark Resop, the executor and sole beneficiary of the will, arranged for Ms. Briskman to sign the will in secret and then instructed his subordinates to act as bogus "witnesses" to the signature. The probate of the 1993 will was therefore obtained by a fraud upon the Register of Wills because Mr. Resop knew that the affidavit filed in support of the probate was false.

The Superior Court reinstated the probate decree on the grounds that Ms. Palley lacked standing to appeal and stipulated to the authenticity of Ms. Briskman's signature. This decision squarely conflicts with Pedrick's holding that the unclean hands doctrine (a) supersedes procedural matters such as standing and the parties' stipulations and (b) requires the court to reverse probate decrees that are obtained through fraud.

2. The Superior Court erred in holding that Ms. Palley lacked standing to challenge the probate of Ms. Briskman's will, since Mr. Resop waived the issue of Ms. Palley's standing in the lower court. The Superior Court's decision that the issue of standing is jurisdictional and non-waivable conflicts with multiple decisions of this Court and that standing is not a jurisdictional issue and can be waived.

3. The Superior Court held that Ms. Palley, an intestate heir, lacked standing to appeal the probate of the 1993 will because of the existence of a 1984 will, not admitted into evidence below, which named her as a successor trustee but not as a beneficiary. At the time of trial, the validity of the 1984 will had not been established, nor had that will been admitted into probate. Moreover, lower court decisions in this Commonwealth, as well as appellate decisions in other states, have held that the existence of a prior will does not defeat an intestate heir's right to challenge a will that is admitted into

probate. Furthermore, the Superior Court took the inconsistent positions that the 1984 will was valid, and yet failed to recognize Ms. Palley's right and obligation to defend the charitable trust under that will, allowing the trust to fail for want of a trustee. Therefore, this Court should review whether the existence of the 1984 will precludes an intestate heir such as Ms. Palley from appealing the probate of the 1993 will, and whether the lower court and the Superior Court should have recognized Ms. Palley's right to serve as trustee under the 1984 will.

4. The Superior Court erred in determining that Ms. Palley's stipulation to the authenticity of decedent's signature on the 1993 will resolved all questions concerning the will's validity, since the evidence of fraud and undue influence adduced in the lower court invalidated the will even if the decedent's signature was authentic.

CONCISE STATEMENT OF THE CASE

The decedent, Adelaide Briskman, died on June 15, 1993 at the age of 82 in the state of Florida. R. 262a. She never married and had no children. Id. In the five months preceding her death, Ms. Briskman transferred substantially all of her assets, both real and personal, to Mark Resop, the manager of a NationsBank branch located near her last residence in Naples, Florida. Id. Specifically, between January 1993 and June 1993, Ms. Briskman deeded her residence to Mr. Resop for nominal consideration and transferred over $2,000,000 in investments to a new joint account with Mr. Resop, from which he spent freely. Id. Mr. Resop convinced her to take these measures in order to protect her from legal actions that a hospital might take against her for an unpaid bill. R. 93-94a, 117a.

On January 21, 1993, Ms. Briskman purportedly executed a will ("the 1993 will") naming Mr. Resop as the executor and sole beneficiary of her estate. R. 263a. The only asset of value presently

remaining in her estate is a parcel of commercial property located at 1632 Walnut Street in Philadelphia ("the Philadelphia property"). R. 262a. The 1993 will purported to replace a prior will that Ms. Briskman executed in 1984 ("the 1984 will")[2].

On December 3, 1993, Mr. Resop probated the 1993 will and was granted letters testamentary by the Register of Wills. R. 263a. Subsequently, Julie Palley, Ms. Briskman's niece and sole intestate heir, appealed from the Register's decision, alleging that Mr. Resop procured the 1993 will by fraud and undue influence at a time when Ms. Briskman was not of sound mind. Id. On March 23, 1995, the lower court enjoined the transfer of the Philadelphia property pending resolution of the will contest. Id.

In February 1998, the lower court presided over a two-day trial. On May 7, 2001, the lower court, per the Honorable Alex Bonavitacola, reversed the decision of the Register of Wills admitting the 1993 will into probate and vacated the letters testamentary issued to Mr. Resop. R. 270a. The lower court found that Mr. Resop did not establish the authenticity of the 1993 will, since Mr. Resop did not produce two competent witnesses to the will and "even a cursory comparison of the purported signature of the Decedent on the 1993 will with her (presumably genuine) signature on [her] 1984 will leads. . .to the conclusion that the Decedent's signature on the 1993 will is quite probably a forgery. . ." R. 265a.

The lower court found significant the fact that both of the subscribing witnesses to the 1993 will

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[2]Ms. Palley was named as a successor trustee in the 1984 will but not as a beneficiary. Although the 1984 will was not accepted into evidence during these proceedings, the Superior Court deemed it relevant during its discussion of Ms. Palley's alleged lack of standing. See infra, p. 5.

and the notary worked at the bank branch managed by Mr. Resop: "Presumably, all three individuals were considered his subordinates and took work-related direction from him." R. 264a. One of the subscribing witnesses could not recall whether she saw Ms. Briskman sign the will, and admitted that she might sign a document as a witness even though she did not actually see the document signed. R. 267a-268a. The second witness, Ms. John, testified that she did not see Ms. Briskman sign the will, and that the will appeared on her desk one morning with Ms. Briskman's signature and the notary's stamp already on the document, along with a note from Mr. Resop asking Ms. John to witness the will. R. 268a. The notary testified at her deposition in 1997 that she had no recollection concerning Ms. Briskman. R. 268a. Six months later, however, she claimed to recall Ms. Briskman's signature ceremony in detail, demonstrating what the lower court termed a "remarkable" (and unexplained) improvement in memory which rendered her testimony neither credible nor worthy of belief. R. 269a. The lower court concluded that the "malodorous aroma of this case was overpowering." R. 265a.

Even though Ms. Palley stipulated prior to trial that the signature on the 1993 was Ms. Briskman's, the lower court reasoned that it had an independent duty to review this issue:

> [A]s a judge of the Orphans' Court, I have an independent duty to the Decedent, to her heirs, and to the administration of justice itself to look beyond the parties' positions if necessary to ensure that justice is properly served; and that equity is done. '[I]t is plain that the Orphans' Court must apply the rules and principles of equity. Estate of Pedrick, 505 Pa. 530, 482 A.2d 515 (1984). 'The familiar maxim that "he who comes into a court of equity must come with clean hands" applies to matters within the Orphans' Court's jurisdiction.' Ibid., Cross' Estate, 319 Pa. 1, 179 A. 38 (1935).
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> Further, once a party's unclean hands are established, public policy makes it obligatory for the court to deny relief, and – in view of the public policy interest involved – the Court may raise the issue of 'unclean hands' sua sponte. Gaudiosi v. Mellon, 269 F.2d 873, at 881 (3rd Cir., Pa., 1959), cert. denied, 361 U.S. 902, 80 S.Ct. 211, 4 L.Ed.2d 159 (1959).

> Accordingly, I am not necessarily bound by the parties' pleadings, nor by a stipulation of facts that is demonstrably and palpably false.

R. 265a.

At no time before or during trial did Mr. Resop object to Ms. Palley's standing to challenge the probate of the 1993 will[3]. Nor did Mr. Resop raise any objection to standing in his post-trial exceptions, R. 274-275a, or in his brief in support of exceptions.

On August 13, 2001, the lower court entered a decree denying Mr. Resop's exceptions to its May 7, 2001 order.

On September 9, 2002, in a published opinion, the Superior Court reversed the lower court's decree on the ground that Ms. Palley lacked standing to challenge the probate of the 1993 will. The Court stated that 20 Pa.C.S. § 908 permits "any party in interest who is aggrieved by a decree of the register" to appeal from probate. In the Court's view, Ms. Palley was not a "party in interest." It acknowledged that Ms. Palley, an intestate heir of Ms. Briskman, would be a "party in interest" in the absence of a valid will. The Court, however, found that "in addition to the 1993 will, there is a prior will of the decedent, executed in 1984, still in existence." Superior Court Opinion, p. 6. Under the 1984 will -- which was not admitted into evidence in the lower court -- Ms. Palley was not a beneficiary but was "named only as a successor trustee" Id. Ms. Palley's "contingent interest, either as a successor trustee under the 1984 will or as an intestate heir at law if both [the 1993 and 1984] wills are deemed invalid, is too remote to confer upon her an interest in the probate of the 1993 will." Id.,

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[3]Prior to trial, Mr. Resop questioned whether Ms. Palley was in fact Ms. Briskman's niece. During trial, however, Mr. Resop conceded this issue. R. 128-129a. He never questioned whether an intestate heir such as Ms. Palley had standing to contest the probate of the 1993 will.

pp. 8-9.

The Court rejected Ms. Palley's argument that Mr. Resop waived the issue of standing by failing to raise it in his exceptions:

> 'However, when a statute creates a cause of action and designates who may sue, this issue of standing becomes interwoven with that of subject matter jurisdiction[,]' and may be raised by this Court sua sponte. Grom v. Burgoon, 672 A.2d 823, 824-25 (Pa. Super. 1996). Here, [Ms. Palley]'s cause of action arises from § 908; therefore, her standing is a 'jurisdictional prerequisite' to the action. Id. at 824. Accordingly, [Mr. Resop]'s failure to raise the issue below is not fatal.

Superior Court Opinion, pp. 9-10.

The Court further observed that the same result would obtain even if reviewed the lower court's opinion on its merits, because Ms. Palley stipulated to the authenticity of Ms. Briskman's signature on the 1993 will prior to trial. Superior Court Opinion, p. 10 n. 9. The Court did not mention the lower court's finding of unclean hands or the lower court's decision that it had a duty independent of the parties' stipulations to examine the authenticity of the will.

CONCISE STATEMENT OF REASONS RELIED UPON FOR ALLOWANCE OF APPEAL

I. THE LOWER COURT WAS REQUIRED TO REVERSE THE PROBATE DECREE ON THE BASIS OF MR. RESOP'S UNCLEAN HANDS, REGARDLESS OF WHETHER MS. PALLEY (A) LACKED STANDING TO APPEAL THE PROBATE DECREE AND (B) STIPULATED TO THE AUTHENTICITY OF MS. BRISKMAN'S SIGNATURE ON THE 1993 WILL; TO THE EXTENT THE SUPERIOR COURT SUGGESTS OTHERWISE, ITS DECISION SQUARELY CONFLICTS WITH THE SUPREME COURT'S HOLDING IN ESTATE OF PEDRICK.

The Superior Court premised its decision on two grounds: (1) Ms. Palley lacked standing to appeal the probate decree; and (2) even if she had standing, she stipulated to the authenticity of Ms.

Briskman's signature on the 1993 will. Pursuant to Estate of Pedrick, 505 Pa. 530, 482 A.2d 215 (1984), however, the lower court was required to reverse the probate decree due to overwhelming evidence of Mr. Resop's unclean hands, regardless of whether Ms. Palley lacked standing, and regardless of whether she stipulated to the authenticity of Ms. Briskman's signature.

Mr. Resop perpetrated a fraud on the Register of Wills by instructing subordinates at his workplace to act as bogus "witnesses" to Ms. Briskman's signature on the 1993 will, so that the probate of the will was obtained through an affidavit which Mr. Resop knew to be false. Under these egregious circumstances, the lower court correctly concluded that Pedrick mandated reversal of the probate decree. By reinstating this decree, the Superior Court ignored the unclean hands doctrine and disregarded Pedrick's admonition to ensure that justice is done. The fact that the Superior Court's published opinion so clearly contravenes Pedrick provides compelling reason for this Court to grant Ms. Palley's petition for allowance of appeal.

The unclean hands doctrine is an equitable doctrine[4] "'derived from the unwillingness of a court to give relief to a suitor who has so conducted himself as to shock the moral sensibilities of the judge, **and it has nothing to do with the rights or liabilities of the parties**.'" Pedrick, 482 A.2d at 222

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[4]The Orphans' Court

> must apply the rules and principles of equity. Estate of Hahn, 471 Pa. 249, 369 A.2d 1290 (1977); Estate of Freihofer, 405 Pa. 165, 174 A.2d 282 (1961); Re Douglas' Estate, 303 Pa. 227, 154 A. 376 (1931). Thus, the familiar equity maxim "he who comes into a court of equity must come with clean hands" applies to matters within the Orphans' Court's jurisdiction. Re Cross' Estate, 319 Pa. 1, 179 A. 38 (1935); Re Hays' Estate, 159 Pa. 381, 28 A. 158 (1893). See also Weber Estate, 15 Fid. Rep. 464, 57 Berks 163 (1965).

Pedrick, 482 A.2d at 222.

(citing Gaudiosi v. Mellon, 269 F.2d 873, 881 (3d Cir.), cert. denied, 361 U.S. 902, 80 S.Ct. 211, 4 L.Ed.2d 157 (1959)) (emphasis added). The unclean hands doctrine arises from the court's duty to look sua sponte beyond the parties' positions to ensure that justice is properly served and equity is done. Id. When the court finds evidence of unclean hands, "public policy not only makes it obligatory for the court to deny relief. . .but to refuse the case.'" Id. (citing Gaudiosi, 269 F.2d at 881).

Under Pedrick, the Orphans' Court has the non-waivable duty to reverse probate decrees sua sponte that shock the court's conscience. This duty supersedes procedural niceties such as those invoked by the Superior Court, viz., Ms. Palley's standing to contest the 1993 will and her stipulation to the authenticity of Ms. Briskman's signature on the will. By failing to rule in accordance with Pedrick -- indeed, by ignoring the lower court's express reliance on Pedrick and finding of unclean hands -- the Superior Court committed a fundamental error that requires this Court's intervention.

The evidence herein proves that Mr. Resop obtained a probate decree from the Register of Wills through fraud. Mr. Resop, a bank manager, convinced Ms. Briskman, an elderly spinster, into transferring millions of dollars of assets to him in real and personal property on the pretext that it would protect her from legal actions that a hospital might take against her for an unpaid bill. R. 93-94a, 117a. Mr. Resop spent these assets freely. He also convinced her to execute a will that made him executor and sole beneficiary.[5] The witnesses to the will and the notary all were Mr. Resop's subordinates at the bank. Neither of the witnesses remember witnessing Ms. Briskman's signature. In fact, one "witness",

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[5]Because Mr. Resop chose the arrange for the execution of the will in secret, he is responsible for every inference which may fairly be drawn against him with respect to the means used to obtain the signature of Ms. Briskman. Blume v. Hartman, 115 Pa. 32, 39-40, 8 A. 219 (1886); accord, Estate of Clark, 461 Pa. 52, 334 A.2d 628 (1975).

Ms. John, admitted she did not witness either Ms. Briskman's signature or the notary seal. Instead, the will was placed on her desk one morning with Ms. Briskman's purported signature and the notary's stamp already on the document. Accompanying the document was a note from Mr. Resop asking Ms. John to witness the will. R. 268a. Confronted with this evidence of out-and-out fraud, the lower court correctly concluded that the "malodorous aroma of this case was overpowering." R. 265a.

Under Pedrick, this overwhelming evidence of unclean hands obligated the lower court to reverse the probate decree, regardless of whether Ms. Palley had standing to contest the will or whether she stipulated to the authenticity of Ms. Briskman's signature. The Superior Court's decision to the contrary effectively sanctions the frauds upon Ms. Briskman and the Register of Wills, a result which this Court cannot permit.

II. MR. RESOP WAIVED HIS OBJECTION TO MS. PALLEY'S STANDING TO CONTEST THE PROBATE OF THE 1993 WILL BY FAILING TO RAISE THIS ISSUE IN THE LOWER COURT; SINCE THE SUPERIOR COURT'S DECISION THAT THE ISSUE OF STANDING IS JURISDICTIONAL AND NON-WAIVABLE CONFLICTS WITH MULTIPLE DECISIONS BY THE SUPREME COURT AND SUPERIOR COURT THAT STANDING IS NOT A JURISDICTIONAL ISSUE, THIS COURT SHOULD GRANT ALLOCATUR TO RESOLVE THE CONFLICT.

Ms. Palley, the decedent's niece and sole intestate heir, proved in her appeal from the probate of the 1993 will that the 1993 will could not be admitted into probate. Based on the highly suspicious circumstances surrounding the execution of the will, the lower court sustained Ms. Palley's appeal, holding: "At best, the Will lacks sufficient authentication, and at worst, it is an outright forgery." R. 270a. At no time in the lower court did Mr. Resop challenge Ms. Palley's standing to appeal from the probate of the 1993 will. The Superior Court, however, held in a published opinion that Ms. Palley lacked standing to appeal from probate under 20 Pa.C.S. §908. It excused Mr. Resop's waiver of the

standing issue with the rationalization that "when a statute [such as § 908] creates a cause of action and designates who may sue, the issue of standing becomes. . .a 'jurisdictional [i.e., non-waivable] prerequisite' to the action." Superior Court Opinion, pp. 9-10.

The Superior Court's interpretation of § 908 conflicts with several decisions from this Court which hold that statutes practically identical to § 908 are not jurisdictional in nature. Beers v. Unemployment Compensation Board of Review, 534 Pa. 605, 633 A.2d 1158 (1993); accord, Hertzberg v. Zoning Board of Adjustment of the City of Pittsburgh, 554 Pa. 249, 721 A.2d 43 (1998). It also contradicts a well-developed body of law that the issue of standing cannot be raised sua sponte and is waived if not properly raised. Huddleston v. Infertility Center of America, Inc., 700 A.2d 453, 457 (Pa. Super. 1997). The Supreme Court should grant allocatur to resolve the conflict created by the Superior Court's published opinion and to reach the proper decision that the question of standing is non-jurisdictional and waivable,

The language which governs standing in 20 Pa.C.S. § 908 is virtually identical to the statutory language at issue in Beers. Section 908 prescribes:

> **Any party in interest who is aggrieved by a decree of the register, or a fiduciary whose estate or trust is so aggrieved**, may appeal therefrom to the court within one year of the decree.

[Emphasis added]. The statute in Beers, 20 Pa.C.S. § 702, prescribes:

> **Any person aggrieved by an adjudication of a Commonwealth agency who has a direct interest in such adjudication** shall have the right to appeal therefrom to the court vested with jurisdiction of such appeals by or pursuant to Title 42 (relating to judiciary and judicial procedure).

[Emphasis added]. Beers stated plainly that the issue of standing under § 702 is not

jurisdictional:

> Some of the parties to the appeals *sub judice* confuse the issue of standing with that of jurisdiction and argue that, since employees are not "aggrieved" by an OES determination of seasonal status[6], they do not have the right to appeal such determination to the Commonwealth Court and that, as such, the Commonwealth Court lacks jurisdiction to hear such a case. *See* 2 Pa.C.S. §§ 702 and 42 Pa.C.S. §§ 763. Whether a party has standing to maintain an action is not a jurisdictional question. Jones Memorial Baptist Church v. Brackeen, 416 Pa. 599, 207 A.2d 861 (1965).
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> In Hertzberg, this Court followed Beers' construction of § 702:
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> Because the question of standing is not an issue of subject matter jurisdiction, we cannot raise it *sua sponte*. Jones Memorial Baptist Church v. Brackeen, 416 Pa. 599, 602, 207 A.2d 861, 863 (1965); see also Beers v. Unemployment Compensation Bd. of Review, 534 Pa. 605, 611 n. 6, 633 A.2d 1158, 1161 n. 6 (1993) (whether a party has standing to maintain an action is not a jurisdictional question).

Id., 633 A.2d at 1161 n. 6.

This Court's analysis of § 702 in Beers and Hertzberg provides the proper interpretation of § 908 in the case at bar. Both § 908 and § 702 grant a right of appeal to persons "aggrieved" by decisions of an official or agency to the court of common pleas. No reason exists why standing should be a jurisdictional issue under § 908 but not under § 702. Because this Court ruled in Beers and Hertzberg that standing to appeal under § 702 is not a jurisdictional question and cannot be raised for the first time on appeal, the issue of standing under § 908 is non-jurisdictional and cannot be raised for the first time on appeal or by the appellate court sua sponte. Consequently, Mr. Resop waived the

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[6]The issue in Beers was "whether employees have standing to appeal a determination by the Office of Employment Security ("OES") that certain fruit and vegetable processing operations are "seasonal operations" as defined by and pursuant to Section 802.5 of the Unemployment Compensation Law." Id., 633 A.2d at 1159.

standing issue under § 908 by failing to raise it in the lower court.

Because the Superior Court's analysis of standing under § 908 runs afoul of this Court's decisions in Beers and Hertzberg, this Court should grant allocatur, vacate the Superior Court's published decision and order reinstatement of the decree in Ms. Palley's favor.

III. THE SUPERIOR COURT'S INCONSISTENT HOLDINGs THAT MS. PALLEY LACKED STANDING TO APPEAL BOTH AS AN INTESTATE HEIR AND AS TESTAMENTARY TRUSTEE CONFLICTS WITH TRIAL COURT DECISIONS FROM THIS COMMONWEALTH AND DECISIONS FROM OTHER JURISDICTIONS, AS WELL AS THE PRINCIPLE THAT A CHARITABLE TRUST SHOULD NOT FAIL FOR WANT OF A TRUSTEE, WARRANTING THIS COURT'S REVIEW.

The Superior Court held that Ms. Palley lacked standing to appeal from the decree admitting the 1993 will to probate either as an intestate heir or as a testamentary trustee under an earlier will. The Court based its decision upon a 1984 will of Ms. Briskman which was never admitted into evidence and which named Ms. Palley as a successor trustee instead of a beneficiary. In the Court's view, Ms. Palley's "contingent interest, either as a successor trustee under the 1984 will or as an intestate heir at law if both [the 1993 and 1984] wills are deemed invalid, is too remote to confer upon her an interest in the probate of the 1993 will." Superior Court Opinion, pp. 8-9.

This Court should grant allocatur to review whether Ms. Palley had standing to appeal by virtue of her status as intestate heir or successor trustee. The Superior Court's opinion conflicts with Pennsylvania trial court decisions and decisions from other states holding that the existence of prior wills does not defeat an intestate heir's right to challenge a will submitted for probate, as well as with decisions of this Court holding that a charitable trust should not fail for want of a trustee.

The general rule is that an intestate heir has standing to contest a will. Rogers' Estate, 154 Pa.

217 (1893). Moreover, before this case, Pennsylvania trial courts consistently held that an intestate heir had standing to contest a will notwithstanding the existence of prior wills, because the only will before the court was the will offered for probate, and it was not certain whether the prior will would be accepted for probate in the event of a successful will contest. Holtz Estate, 30 D.&C.2d 396 (1963), aff'd on other grounds, 222 A.2d 885 (1966); Heffner Estate, 43 D.&C.2d 365, 369 (1967). This appears to be the rule in at least four other jurisdictions. See, e.g., In Re Powers' Estate, 362 Mich. 222, 106 N.W.2d 833 (1961); Marr v. Barnes, 126 Kan. 84, 267 P. 9 (1928); Murphy's Executor v. Murphy, 65 S.W.165 (Ky. 1901); Stephens v. Brady, 209 Ga. 428, 73 S.E.2d 182 (1952).

Here, under the 1984 will, Ms. Palley had no beneficial interest in Ms. Briskman's estate. Ms. Palley unsuccessfully petitioned the lower court to recognize the 1984 will and appoint her as the testamentary trustee under that will. Ms. Palley also sought to introduce the 1984 will as evidence during trial, but the lower court sustained Mr. Resop's objection to the will as evidence. Even though the lower court rejected the 1984 will twice, the Superior Court denied standing to Ms. Palley on the basis of that document.

The Superior Court thus erred in two critical respects: first, by venturing outside the evidence admitted at trial to deny Ms. Palley relief, and second, by announcing a rule that is defective as a matter of policy. Pennsylvania trial courts and other jurisdictions have aptly observed that the existence of prior wills should not defeat an intestate heir's right to challenge a will offered for probate, because it is uncertain whether the prior wills are themselves valid. Any other rule would require the Orphans' Court to work backwards, adjudicating the validity of every previous will, and determining the distribution of the estate in the absence of the contested will, before considering the validity of the will

that is actually before the court being contested.

These errors of the Superior Court might be overlooked if the Court had recognized and given effect to the 1984 will, but the Superior Court refused to uphold Ms. Palley's right to serve as testamentary trustee and failed to take any other action to enforce the charitable trust under the 1984 will. The effect of the order of the Superior Court was to reverse the lower court order denying Ms. Palley's petition to recognize the 1984 will, and yet fail to grant Ms. Palley the relief she requested in her petition, which was to be recognized as the testamentary trustee under the 1984 will.[7]

Ms. Palley's petition to the lower court alleged that the first trustee appointed by the 1984 will, a Philadelphia lawyer named Richard E. Rosin, was aware of the proceedings against Mr. Resop and had failed to join in those actions or take any other action to defend the 1984 will. It is the duty of a trustee to defend the trust. Martin Estate, 349 Pa. 255, 260, 36 A.2d 786 (1944). Mr. Rosin had a particular duty in this case because he was the scrivener of the 1984 will and the decedent had entrusted him to carry out her wishes. Mr. Rosin's failure to act and his breach of fiduciary duty were sufficient grounds for the lower court to refuse him his appointment as trustee and to recognize Palley as the testamentary trustee or as a trustee ad litem.[8] Cf., Snyder's Estate, 274 Pa. 574, 118 A. 609 (1922), aff'ng 1 D.&C. 513. It is a clear and established rule that a charitable trust

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[7]The Superior Court denied Ms. Palley's standing as trustee because she "failed to demonstrate that Mr. Rosin is unable to serve." The absence of evidence as to Mr. Rosin's ablility (or willingness) to serve was due to refusal of the lower court to hold a hearing on the issue.

[8]A petition has been filed in Ms. Briskman's domicile to remove Mr. Rosin because of his failures to act and breaches of fiduciary duties and to appoint Ms. Palley's daughters as trustees. In re Estate of Adelaide Briskman, File No. 94-1372-CP-02-TB (Circuit Court of Collier County, Florida, Probate Division).

should not fail for lack of a trustee. Mears's Estate, 299 Pa. 217, 149 A. 157 (1930). And yet that is exactly what the Superior Court has ordered in this case.

The opinion of the Superior Court is therefore likely to cause confusion in the administration of litigation in the Orphans' Court, because it both requires lower courts to consider and recognize earlier wills in choosing who has standing to contest a will, and also allows lower courts to deny representation to charitable trusts under earlier wills if the first testamentary trustee named in the will is uninterested in serving. This Court should grant allocatur and reverse the Superior Court both to prevent the failure of the charitable trust under the 1984 will and to prevent future confusion in similar cases.

IV. THE SUPERIOR COURT ERRED IN DETERMINING THAT MS. PALLEY'S STIPULATION TO THE AUTHENTICITY OF THE DECEDENT'S SIGNATURE RESOLVED ALL QUESTIONS CONCERNING THE WILL'S VALIDITY, SINCE THE EVIDENCE OF FRAUD AND UNDUE INFLUENCE ADDUCED DURING TRIAL INVALIDATES THE WILL EVEN IF THE SIGNATURE OF THE DECEDENT WAS AUTHENTIC.

As discussed above, the Superior Court held that Ms. Palley removed all questions concerning the validity of the 1993 will by stipulating to the authenticity of Ms. Briskman's signature. This is plainly incorrect. Mr. Resop obtained the will through fraud and undue influence, matters that are not resolved by Ms. Palley's stipulation that it was Ms. Briskman's hand that held the pen to the alleged will. The evidence adduced below demonstrates that Ms. Briskman transferred real and personal assets to Mr. Resop, a bank manager, because Mr. Resop assured her it would protect her from legal actions that a hospital might take against her for an unpaid bill. At the time of the transfers, Ms. Briskman was elderly, suffering from pains and sores on her legs, worried about losing her home and savings to a hospital that had treated her, unsure of her legal rights, not always understanding the documents she

signed, and vulnerable to the suggestions of unscrupulous individuals such as Mr. Resop. And Mr. Resop arranged for the execution of the will in secret, directing his subordinates to sign a false affidavit that they saw the decedent sign the will. This evidence of fraud and undue influence further substantiates Ms. Palley's claim of unclean hands and further justified the lower court's decision to reverse the decree admitting the 1993 will into probate.

By ignoring this evidence, the Superior Court failed to apply the binding precedents of Blume v. Hartman, 115 Pa. 32, 8 A. 219 (1886), and Estate of Clark, 461 Pa. 52, 334 A.2d 628 (1975), decisions cited by Ms. Palley in the lower court and in her Superior Court brief. In Blume, the decedent's son, the primary beneficiary of the decedent's will, arranged for the decedent to sign the will before witnesses. There was no evidence, however, that the decedent ever read the will or knew its contents. The Supreme Court reasoned:

> [T]he plaintiff, unfortunately perhaps for himself, chose to conduct his proceedings in the procurement and the preparation of the will and in the inducements to his mother to sign it, secretly and by himself alone. . . .He is directly responsible, therefore, for every inference which may fairly be made against him as the means he employed to obtain the assent of his mother to the execution of the will in question.

Id., 115 Pa. at 39-40 (quoted with approval and followed in Estate of Clark, supra). Although there was no question in Blume of the will's facial authenticity, the evidence nonetheless demonstrated that the decedent's signature was obtained through fraud and undue influence.

Here, as in Blume and Clark, Mr. Resop, the sole beneficiary under the 1993 will, arranged for the employees under his control to sign the will and the affidavit. The record is devoid of any evidence that Ms. Briskman read or understood the will or that she ever wished to give Mr. Resop anything. Therefore, Mr. Resop is subject to every inference which may fairly be drawn from the circumstances

surrounding the execution of the will, inferences which support findings of fraud and undue influence.

Since Ms. Palley's stipulation to the authenticity of Ms. Briskman's signature did not resolve the issues of fraud and undue influence, the Superior Court erred in finding no evidence to affirm the lower court's decision to reverse the probate decree. This fundamental error in law must be reversed in order to prevent unnecessary confusion and controversy in future probate proceedings.

CONCLUSION

For the reasons advanced above, petitioner, the estate of Julie Palley, deceased, respectfully requests that this Honorable Court grant its petition for allowance of appeal in the above-captioned case.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the petition for allowance of appeal of the Estate of Julie Palley were served this day upon the following individuals via first-class mail, postage prepaid:

Bernice J. Koplin
Schachtel, Gerstley, Levine & Koplin
Suite 2170
123 South Broad Street
Philadelphia, PA 19109-1029

_____

DANIEL B. EVANS, ESQUIRE

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December 13, 2002

Prothonotary
Pennsylvania Supreme Court
468 City Hall
Philadelphia, PA 19107

RE: Estate of Briskman

Dear Sir:

Enclosed please find an original and eight copies of the petition for allowance of appeal of the Estate of Julie Palley in the above case.

Thank you for your attention to this matter.

Very truly yours,

Daniel B. Evans

Enclosures
cc: Bernice J. Koplin (w/ enclosures)