

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-4207-13T1

IN THE MATTER OF THE ESTATE  
OF BERTHA POLAK.

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Submitted December 8, 2015 – Decided December 31, 2015

Before Judges Yannotti and St. John.

On appeal from Superior Court of New Jersey,  
Chancery Division, Bergen County, Docket No.  
P-246-12.

James E. Young, Jr., argued the cause for  
appellant Linda Hall.

Arthur Del Colliano argued the cause for  
respondent Carol Polak Reid.

PER CURIAM

Linda Hall, Executrix of the Estate of Bertha Polak,  
appeals from an order dated June 2, 2014, entered by the Probate  
Part of the Chancery Division, which provided, among other  
things, that judgment shall be entered against Hall for  
\$44,570.70, and that Hall is not entitled to an executrix's  
commission. For the reasons that follow, we affirm.

I.

We briefly summarize the relevant facts and procedural history. Ms. Polak died on April 7, 2012. She was ninety-five years old at the time of her death. She was survived by three daughters: Hall, Carol Polak-Reid, and Lisa Pean.<sup>1</sup> Ms. Polak was also survived by three grandchildren: Monique, William and Andrea Tracy Payne, who are the children of Ms. Polak's deceased daughter Andrea.

Ms. Polak had been living with Hall prior to her death, at premises in Teaneck. Polak apparently executed a will dated February 14, 2005, and Hall had that will admitted to probate. Hall was named executrix of Ms. Polak's estate.

In June 2012, Reid filed a complaint in the trial court, alleging that Ms. Polak had executed another will dated July 5, 2011, which included a provision revoking all prior wills. Reid sought entry of a judgment setting aside the 2005 will and admitting the 2011 will to probate.

Reid also sought an accounting from Hall of all the property that she received from Ms. Polak during Ms. Polak's life and from the estate, removal of Hall as executrix, and certain other relief. Hall filed an answer to the complaint and

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<sup>1</sup> Although this individual was identified throughout the proceedings as Lisa Dean, she referred to herself as Lisa Pean when she testified at trial.

a certification in which she stated that she had endeavored to have Ms. Polak's 2011 will admitted to probate, but the Surrogate of Bergen County had rejected the will because it contained numerous scratch-outs.

The trial court entered an order dated August 3, 2012, which set aside the probate of the 2005 will and admitted the 2011 will to probate, with the initialed scratch-outs. The court found insufficient grounds to remove Hall as executrix. The court noted that Hall could seek the issuance of new letters testamentary upon probate of the 2011 will.

The court also denied without prejudice Reid's request for an accounting, without prejudice, noting that under N.J.S.A. 3B:17-2, a court cannot compel an executor to account until one year after appointment. The court noted that there was no evidence of misconduct on Hall's part, and found that the application for an accounting was premature.

Reid thereafter filed another motion in the trial court seeking to compel Hall to provide information concerning the sale of certain property that Ms. Polak had owned in Englewood. It appears that in the 2011 will, Ms. Polak directed that the property be sold promptly following her death. In addition, Reid sought an award of counsel fees, an order compelling the distribution of Ms. Polak's personal property as set forth in

the will, an inventory of the estate's assets, and a plenary hearing on whether Hall should be removed as executrix.

The trial court entered an order dated December 14, 2012, which awarded Reid's attorney counsel fees and costs in the amount of \$5211, and directed that the fees and costs be paid out of the estate. The court denied as moot Reid's motion for information about the sale of the property, noting that Hall had provided that information.

The court also denied the motion to compel distribution of Ms. Polak's personal property, but ordered Hall to provide an inventory of Ms. Polak's assets within forty-five days. In addition, the court denied without prejudice Reid's motion for a hearing as to whether Hall should be removed as executrix, again finding insufficient evidence of misconduct.

It appears that Ms. Polak's Englewood property was thereafter sold. The court entered an order dated April 24, 2013, providing that the proceeds of the sale should be distributed to Reid and three of Ms. Polak's grandchildren: Monique, William, and Andrea Tracy Payne. The court ordered the payment of legal fees and costs. The court directed that the balance of the sale proceeds be placed in a trust account of Hall's attorney, and ordered that a trial would be held to

determine whether Hall would be required to pay the estate certain monies, pursuant to the terms of Ms. Polak's will.

The judge thereafter conducted a trial in the matter on October 28, 2013, and November 22, 2013. At the trial, Hall testified and presented testimony from Lisa Pean. Reid testified, and presented testimony from Kim Reid, Andrea Tracy Payne, and Elaubette C. Lewis. The judge rendered an oral decision in a telephone conference call on December 13, 2013.

Based on the testimony and evidence presented at trial, the judge found that Ms. Polak had been living with Hall and paying her \$1,000 a month in rent. Ms. Polak obtained a loan of \$79,784.28, which was secured by a mortgage upon her property in Englewood. Ms. Polak kept \$10,000, and Hall borrowed the remaining \$69,784.28 from Ms. Polak to use to pay for renovations to Hall's home. In lieu of paying Hall rent, Ms. Polak began to make mortgage payments of \$922.93 per month.

The judge noted that Article III(c) of Ms. Polak's will stated that Ms. Polak had taken out a loan for Hall in the amount of \$69,000. The will stated:

At the time of the sale of the property Linda Hall shall be responsible for repayment of this loan. The total amount shall be paid back to the [e]state and this amount shall then be added to the proceeds of sale and be divided amongst my children, Carol, Lisa and Linda and the surviving children of my daughter Andrea.

The judge found that, based on the terms of the will, it was clear that Hall must pay the amount due on the mortgage. The judge also found that the testimony presented at trial showed that it was Ms. Polak's intent that Hall pay the loan.

The judge noted, however, that Hall would not be responsible for the \$10,000 that Ms. Polak kept from the loan proceeds, and she would be given credit for Ms. Polak's payments of \$922.93 per month on the loan, because Ms. Polak would have otherwise paid Hall monthly rental payments of \$1,000. The judge also observed that his interpretation of the will was consistent with Ms. Polak's probable intention.

Thereafter, the court entered an order dated April 7, 2014, which provided that a judgment would be entered against Hall in the amount of \$44,570.70, which was determined to be the amount remaining due on the loan. The court's order notes that \$79,727.05 remained in counsel's trust account, and that amount was to be divided equally between Reid, Pean and Hall.

The order states, however, that Hall's share would not be paid to her but would be a credit against the monies the court had ordered her to pay the estate. The order further provided for the distribution of the \$44,570.70 that Hall had to pay the estate. In addition, the order states that, since there were no funds remaining for any distribution pursuant to the residuary

clause of Polak's will, Hall would not be paid an executrix commission.

Thereafter, Hall made a motion for relief from the judgment. The court granted the motion and entered an amended judgment dated June 2, 2014, which changed the distributions of the monies in counsel's trust account. The order stated that the monies would be distributed in four shares. Reid, Pean and Hall each would receive a share. The fourth share would be divided equally among Monique, William and Andrea Tracy Payne.

The provision of the earlier order which required Hall to pay the estate \$44,570.70 was unchanged, as was the provision stating that Hall would not receive an executrix commission. The order indicated that Hall would not be paid her share of the funds in the trust account, but her share would be a credit against the monies she owed the estate. The order also allocated the \$44,570.70 that Hall was required to pay the estate, dividing that sum in four shares, in the same manner as the monies held in the trust account. This appeal followed.

## II.

Hall argues that the trial judge erred by requiring her to pay the estate \$44,570.70. Hall asserts that in the will, Ms. Polak stated that she had made a loan for her in the amount of \$69,000, which was secured by a mortgage on Ms. Polak's

Englewood property. In the will, Ms. Polak directed that, upon the sale of that property, Hall would be responsible for repayment of the loan.

Hall argues that the trial judge erred by enforcing this provision of the will. She contends that at the time Ms. Polak made the loan, she was not conducting her mother's affairs. Hall asserts that she never signed any documents obligating herself for the mortgage. She claims she never received the proceeds of the loan.

Hall further argues that the judge erred by construing Ms. Polak's rental payments against her. She notes that Ms. Polak lived in her home for more than six years. Hall contends Ms. Polak's monthly payments to her of \$1,000 were rent and should not have been considered as evidence relied upon to diminish the amount of money she should receive pursuant to the will.

A trial court's findings of fact are binding on appeal if supported by adequate, substantial and credible evidence. Rova Farms Resort, Inc. v. Inv'rs Ins. Co., 65 N.J. 474, 484 (1974). Furthermore, deference to a trial court's fact-finding is warranted "when the evidence is largely testimonial and involves questions of credibility." In re Return of Weapons to J.W.D., 149 N.J. 108, 117 (1997) (citation omitted). However, "[a] trial court's interpretation of the law and the legal consequences



that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

We are convinced that there is sufficient credible evidence in the record to support the trial judge's findings of fact. The judge found that, despite Hall's assertions to the contrary, she had received the proceeds of the loan that Ms. Polak made and used those funds to make improvements to her home.

The evidence established that Ms. Polak made the loan in 2007. Hall admitted that in 2007, she and her husband made improvements to their home. Those improvements included installation of a new bathroom, remodeling the kitchen, and finishing the basement, which cost \$130,000. Hall also acknowledged that she and her husband borrowed \$60,000 for the improvements. Hall claimed, however, that the remaining \$70,000 came from another loan, but she never submitted any proof of the existence of such a loan.

Moreover, the judge noted that Kim Reid had testified that Hall told her Ms. Polak was helping to pay the cost of the renovations. The judge also pointed out that Ms. Polak had been paying Hall rent of \$1,000 per month, but stopped making those payments in 2007. The judge found that, in essence, Ms. Polak was making monthly payments on the mortgage loan instead of

paying Hall rent of \$1,000.

The evidence thus supports the trial judge's determination that Ms. Polak made the loan for Hall, and provided her with \$69,784 which Hall used to pay for renovations to her home. The evidence also supports the judge's determination that Ms. Polak clearly intended that Hall would repay her estate the monies remaining due on the loan, as expressly provided in the will.

We are convinced that Hall's other arguments on this issue are without sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E).

### III.

Hall further argues that the trial judge erred by refusing to grant her an executrix commission. We disagree.

The decision regarding an executor's commission is committed to the discretion of the trial court, and the court's determination will not be disturbed on appeal unless shown to be a mistaken exercise of that discretion. In re Estate of Summerlyn, 327 N.J. Super. 269, 272 (App. Div. 2000) (citing In re Estate of Moore, 50 N.J. 131, 149 (1967)). Commissions for fiduciaries may be awarded pursuant to N.J.S.A. 3B:18-14.

Hall argues that she could not be denied a commission because she was not found to have engaged in any misconduct. She argues that the dispute here was merely a legitimate

disagreement as to the meaning of a provision of Ms. Polak's will.

As we have explained, the judge correctly found that Ms. Polak's will clearly indicated Hall should repay the loan that Ms. Polak made on her behalf. Hall's claims that she did not receive any of the loan proceeds, and could not be required to repay the loan, were not supported by the evidence. The judge found that Ms. Polak's intentions regarding the loan were clear, and Hall's testimony about the loan was not credible.

Thus, the record shows that Hall was not seeking to effectuate Ms. Polak's intentions. Rather, Hall was endeavoring to avoid her responsibility for the loan in direct contravention of her mother's expressed intentions in the will. Moreover, Hall's assertions regarding the loan were not credible.

Simply put, this matter did not involve a legitimate dispute over the terms of the will, as Hall claims. Furthermore, there were insufficient funds in the estate to pay any of the bequests in the residuary clause of the will, and payment of a commission to Hall would reduce the amounts the other beneficiaries would receive. We are convinced that, under the circumstances, the judge did not abuse his discretion by refusing to award Hall a commission.

Affirmed.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.

  
CLERK OF THE APPELLATE DIVISION