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ALERT

RECENT SUPERIOR COURT DECISION UNDERSCORES DIFFICULTY AND
NEED FOR CAUTION WHEN DETERMINING APPEALABILITY OF
ORPHANS' COURT ORDERS*By Carl A. Solano and Roberta A. Barsotti*

For several years, Pennsylvania judges, lawyers, and (even) rulemakers have struggled to define when an order entered in an Orphans' Court proceeding is immediately appealable. The issue, of course, is critical, because failure to take a timely appeal from such an order may forfeit all appellate rights, and (assuming that was not the party's intent) such a failure may then lead to a malpractice action against the party's lawyer. Defining an appealable Orphans' Court order thus requires clear rules.

After abandoning several other approaches to this issue, the Supreme Court in 2012 promulgated amendments to Rule 342 of the Rules of Appellate Procedure that sought to provide such clarity by broadly listing types of Orphans' Court orders that are immediately appealable. A recent Superior Court decision demonstrates, however, that defining an appealable Orphans' Court order remains a matter of some difficulty.

Estate of Cherry, 2015 Pa. Super. Lexis 115 (No. 633 MDA 2014, Mar. 17, 2015) was a dispute about how to deal with real property in an estate. The testator's will provided that after making several cash bequests, the residue of her estate would go to her church. Because there was insufficient cash in the estate to cover the specific bequests, the church, which apparently wished to obtain real estate that was part of the residue, offered to contribute funds to the estate that would enable it to pay the cash bequests without having to liquidate the real property. When the executor rejected that offer, the

church sued to enjoin the executor from selling the realty. The Orphans' Court denied the injunction but entered an order stating: "since the [church] has offered to pay all of the cash requirements attendant to the settlement of this estate, this Court will not authorize the sale of the . . . real estate . . . and would, upon application, enjoin any proposed sale of these assets." The executor appealed, invoking the part of amended Rule 342 that lists an order "determining an interest in real or personal property" among immediately appealable Orphans' Court orders. Initially, the Superior Court affirmed in an unpublished opinion, but on reconsideration it quashed the appeal.

The Court's quashed opinion noted that before the 2012 amendments, Rule 342 permitted an appeal from an Orphans' Court order "determining an interest in realty" if the Orphans' Court judge certified that the order should be treated as appealable. In *In re Stricker* (2009), the Supreme Court had held that an Orphans' Court did not abuse its discretion under the pre-2012 version of the Rule when it declined to certify as appealable an order providing for the sale of real estate so that cash could be distributed to beneficiaries. Justice (now Chief Justice) Saylor filed a concurrence in *Stricker* in which he suggested changing Rule 342 to provide "for the general appealability of estate-related orders determining property interests at least in the real property setting" because there was a need for prompt resolution of potential title disputes. The

2012 amendments to Rule 342 were adopted in response to Justice Saylor's comments.

This history would suggest that the amendments to Rule 342 should have resulted in a different answer to the jurisdictional question in *Cherry*, but the Court held otherwise. The reason was that in a 2013 decision, *In re Estate of Ash*, the Superior Court adopted a narrow interpretation of Rule 342 that excluded property sales like that in *Stricker* from the types of property orders listed in amended Rule 342. The facts in *Ash* were similar to those in *Stricker*, in which real property was sold to accumulate cash for payment to the testator's beneficiaries, and the Court acknowledged that the sale "will eventually lead to a change in the ownership interest of the realty." But, the Court emphasized, the Orphans' Court's order did not resolve any dispute about *ownership* of the realty because no one contested the estate's ownership prior to the sale or the purchaser's ownership after the sale; the only question was whether there should be a sale at all. Therefore, even though quashing the appeal appeared inconsistent with the reasoning of Justice Saylor that led to the 2012 amendments, the Court interpreted the amended Rule in a way that would make the sale order unappealable. The Supreme Court denied a petition for allowance of an appeal from the *Ash* decision.

In light of *Ash*, the Superior Court held that the result in *Cherry* was preordained: if an order to sell property could not qualify as one "determining an interest in . . . property" under Rule 342, then an order declining to enjoin a sale could not qualify either. The Court therefore quashed the *Cherry* appeal.

This result is far from obvious, however. The 2012 amendments were intended to make it easier to appeal Orphans' Court orders, including those determining interests in realty. Although *Ash* and *Cherry* may correctly reflect an intent to limit Rule 342 to disputes between estates and others (devisees, those claiming as survivors, etc.) about current ownership of property, Justice Saylor's concurrence in *Stricker* suggested that he, at least, considered an order about whether realty indisputably owned by the estate may be sold during the estate's liquidation to merit immediate appeal, since it will determine ultimate ownership rights.

Moreover, even though the order in *Cherry* denied the church's request to enjoin a real estate sale, it gave the church equivalent relief by stating that the Orphans' Court would not authorize any future sale and "upon application, would enjoin any proposed sale of these assets." As the Superior Court noted, the order created an "untenable situation" under which "the estate is not compelled to transfer the property to the Church but is precluded from . . . selling the property . . . to settle the estate." Even if the order were not considered a *de facto* injunction (an issue not raised or considered by the Superior Court), it signaled future issuance of an injunction that would be immediately appealable under Rule 311(a)(4) (making interlocutory injunction orders immediately appealable).

The uncertainties surrounding the order in *Cherry* thus surely called for caution and justified the appeal that was filed. *Cherry* demonstrates that estate orders do not easily fit any mold — even one formed by a list of common Orphans' Court orders under amended Rule 342. And because of that, appeals from Orphans' Court orders often will lead to appellate uncertainty. Unfortunately, the only definitive way to resolve that uncertainty is to take an appeal and thereby let the Superior Court resolve the issue in each case. ♦

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