

A P P E L L A T E

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NOVEMBER
2013

EXCEPTIONS IN PENNSYLVANIA ORPHANS' COURT NOT NECESSARY TO PRESERVE WEIGHT-OF-THE-EVIDENCE CLAIM ON STATE-COURT APPEAL

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In a unanimous *en banc* decision, the Superior Court of Pennsylvania held on November 12 in *In re Estate of William O. Smaling*, No. 3353 EDA 2011, that filing exceptions to a Pennsylvania Orphans' Court order is not necessary to preserve weight-of-the-evidence claims on appeal. Instead, the Court held, raising that issue in a Rule 1925(b) statement prevents waiver. The holding overturns a 2012 decision in the case in which a Superior Court panel had held it was necessary to file exceptions. That earlier decision was very controversial because Orphans' Court Rule 7.1 states that the filing of exceptions is optional, not mandatory. The rule also states that "[f]ailure to file exceptions shall not result in waiver if the grounds for appeal are otherwise properly preserved," and it is that "if" clause that caused the waiver controversy.

Smaling was a will contest in which the decedent's wife appealed from the Orphans' Court's holding that a 2008 will leaving the entire estate to her was invalid because it was the product of her undue influence. Among other things, the wife-appellant argued that the decision was contrary to the weight of the evidence. Because such a "weight" claim can arise only after the trial court has issued a final order, the 2012 panel decision held that the only way an appellant can "properly preserve" such a claim is by filing exceptions, making them mandatory despite the optional language of Rule 7.1. The panel therefore raised the issue of waiver *sua sponte* and affirmed the trial court.

In overturning that holding on rehearing *en banc*, the Superior Court noted that Rule 7.1 does not specifically address whether a party must file exceptions to properly preserve a weight-of-the-evidence claim. The Court also noted that after the appellant appealed, the Orphans' Court required her to file a Rule 1925(b) statement listing the errors she planned to raise on appeal and that the appellant included her weight-of-the-evidence argument on that list. The Court held that the Rule 1925(b) statement "properly preserved" the claim by affording the trial court an opportunity to address the issue before it reached the appellate court, and, therefore, the failure to file exceptions did not waive the issue.

The Court also held that this should be the result even though, because of the trial judge's retirement prior to the Rule 1925 proceedings, the trial judge was not actually able

to decide the weigh-of-the-evidence issue. The Court explained, "we do not believe [appellant] should be denied appellate review of her weight claims for reasons which were beyond her control."

Even though the Superior Court has now overturned its earlier decision and held that there was no waiver, *Smaling* is a reminder that potential waiver traps continue to lurk in post-trial practice. Although Rule 7.1 makes filing exceptions optional, Orphans' Court practitioners should consider whether they should file exceptions in situations where preservation of a ground for appeal may be in question. The *Smaling* decision also leaves open what will happen in cases raising weight-of-the-evidence issues if the appellant does not file exceptions and the trial court does not order the filing of a Rule 1925(b) statement. Rule 1925 does not provide for the filing of such a statement if the trial court does not order it, and that means that the opportunity to preserve a weight issue through Rule 1925 may be foreclosed. This possibility that the court will not order a Rule 1925(b) statement may counsel in favor of filing exceptions in all cases in which weight arguments will be made. After all, when in doubt, the safest course is to file exceptions to ensure you have properly preserved an issue and avoided waiver. ♦

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