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THE CONCLUSIVENESS OF DECREES IN THE ORPHANS' COURT OF PENNSYLVANIA

By

James M. Arensberg*

When are unrepresented minors and the interests of unborn children conclusively bound by the five year limitation of the Fiduciaries Act of Reviews of Fiduciaries' Accounts? Does the fact that an accounting executor is also testamentary trustee make any difference?

When should guardians or trustees ad litem be appointed in the adjudication of executors' or trustees' accounts?

I.

In Hall's Estate,¹ decided in 1939 in the Orphans' Court of Philadelphia County, a petition for review, on behalf of minors who were interested in a residuary trust and who were not in being at the time of the adjudication of the executor's account, was presented more than five years after the final confirmation of the account.² The executor was also trustee of the residuary estate and the balance for distribution was awarded to it as such trustee. There was no separate representation of unborn interests.³ Two able and experienced judges wrote separate opinions in the case. Judge Ladner, in his concurring opinion, agreed that the bill of review should be dismissed, but said this:

"I regard it the duty of a fiduciary who, as here, occupies the dual position of executor as well as trustee for a person not sui juris, to apply for the appointment of a guardian or trustee ad litem when his account as executor is audited. Only by this practice can such cestuis que trustent be protected against possible injury from their trustee's conflicting interests: . . .

"Now in this case, the fiduciary, notwithstanding its dual capacity, did not petition for such an appointment. I take its failure to do so to be the equivalent of an undertaking to represent an act for its cestuis que trustent. . . . since it [the trustee] undertook to so represent possible conflicting interests, it has made itself responsible to its cestuis quo trustent for any neglect or failure to raise any questions that the minors might have raised had they been independently represented. This responsibility I believe it must meet when it files its account in its trustee capacity."⁴

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¹ 36 D. & C. 582 (1939).
³ Section 59(k) of the Fiduciaries Act, supra, [(20 P. S. 1070) as amended, 1931, May 6, P. L. 98, section 1.], deals with the appointment of guardians ad litem. Trustees ad litem, although formerly appointed under decisional law [see Kenna Estate, 348 Pa. 214, 34 A. 2d 617 (1943)] now receive statutory sanction in section 17 of the Orphans' Court Act, Act of June 7, 1917, P. L. 363, section 17(j) added 1943, May 21, P. L. 493, section 1, 20 P. S. 2341.
⁴ Hall's Estate, supra, at page 587.
Judge Van Dusen, on the other hand, imposed no such duty on the fiduciary nor did he leave the door open for any possible subsequent liability of the trustee to its beneficiaries, whether they were, at the audit of the account, independently represented by a guardian or trustee ad litem or not. He said:

"We agree with the statement in Steel's Estate, 32 D. & C. 55, that the appointment of guardians and trustees ad litem for minors and unborn persons at the audit of the account of an executor or administrator or trustee is discretionary with the auditing judge, and that failure to create such representatives of minors or unborn persons does not render the adjudication void as to them. Where there has been no such representation, and an application is made within five years for a review, and the error is not with respect to distribution but with respect to a personal claim against the trustee or executor, as, for example, a surcharge, parties under a disability who have not thus been represented may have the adjudication opened: Earle's Estate, 30 D. & C. 29. See McGrew's Appeal, 14 S. & R. 396. But after five years an adjudication is conclusive even as to a claim for surcharge." 6

In commenting on the failure of the auditing judge to appoint a trustee ad litem, Judge Van Dusen remarked:

"If the learned and careful auditing judge conceived that information with regard to such persons was necessary, he might have required it, and might no doubt have required a trustee ad litem for those not yet born. But he did not require it, and proceeded to audit the account. In so doing, he followed the practice which has been followed by every judge of this court from the beginning, and which has been followed in this very month by every judge of this court, at least upon audits of executors' accounts. To this day the appointment of guardians and trustees ad litem upon the audit of the account of an executor or administrator is very exceptional. Indeed, the practice of appointing trustees ad litem is of recent origin." 7

Actually, these two opinions reflect a basic conflict inherent in the problem. Necessity requires eventual final adjudication; judicial fairness requires, wherever possible, that all persons interested shall have their "day in court". The five year limitation of the Fiduciaries Act upon the allowance of a review of accounts intensifies this conflict. The opportunity to be afforded to all persons and interests a "day in court" has persistently opposed the necessity for final adjudication. 8

Judge Van Dusen felt that the necessity for finality should prevail:

8 Hall's Estate, supra, at pages 583-586.
6 See also Footnote 27.
7 Hall's Estate, supra, at page 585. See also Judge Van Dusen's opinion in Steel's Estate, 32 D. & C. (1938), at page 58: "At the audit of an account in the Orphans' Court, whether executor's or trustee's, a guardian ad litem for minors or a trustee ad litem for unborn persons is not a necessary party. The appointment is made in the interest of good administration. It is still unusual, in fact, extremely rare, to appoint such offices upon the audit of an executor's or administrator's account, and there is no difference in principle between an executor's and a trustee's account in this respect."
8 See A. L. I., RESTATEMENT OF PROPERTY, Vol. 2, Chapter 12, Introductory Note.
"Repose requires that after a certain time everyone should be barred, whether he has had an opportunity to be heard or not."

Judge Ladner's opinion, on the other hand, reflected a persistent and traditional view that unrepresented interests should have their day in court before they are conclusively bound.

II.

It is interesting to follow the course of these conflicting ideas, as applied to this problem, in several of the leading cases both before and after Hall's Estate. In Komara's Estate, decided in 1933, the testator left $5,000.00 to each of his minor children but did not appoint a guardian of their estates. In September of 1922 the executor's account was confirmed absolutely. The balance for distribution included sufficient cash to pay the pecuniary legacies and also certain stock in a wholesale tobacco company. In January of 1923, the executor petitioned the Orphans' Court for the appointment of a guardian of the estates of the minor children and for authority to deliver the stock at its par value to the appointed guardian, on account of each minor's legacy. The court granted the petition and ordered that the stock be turned over at par value to the guardian in part payment of the aggregate legacies to the minor children.

Six months later, the wholesale tobacco company went into bankruptcy. The minors' guardian did nothing about the stock, and in fact, had made no investigation of its value at the time he received it on behalf of the minors. Upon the majority of one of the minors, eight years later, he filed an account. Exceptions were filed resulting in a surcharge of the guardian.

The Supreme Court upheld the surcharge, saying that section 59 (k) of the Fiduciaries Act required "actual or constructive notice and an opportunity to be heard" as "essential before anyone's property can be taken from him, or be converted into some other kind of property, without his consent."

The court, moreover, cited the following language in M'Grew's Appeal, decided in 1826: "I do not see how any account can be settled according to law, where minors are interested, and those minors have no guardians appointed to attend to their interests... Guardians must be appointed to receive notice on the part of infants, or the account will not be settled according to law."

The court, in Komara's Estate, made this comment on the quoted language of M'Grew's Appeals:

9 Hall's Estate, supra, at page 586.
10 Supra.
11 311 Pa. 135, 166 A. 577 (1933).
12 Supra, footnote 2.
13 Komara's Estate, supra, at page 140.
14 Komara's Estate, supra, at pages 141-142
15 14 S. & R. 396 (1826), at page 397.
16 Supra, at pages 141-142.
"We have ever since steadily adhered to the principle embodied in that extract; not only in the settlement of accounts, but whenever the court is asked to act upon a matter affecting the estate of a minor; and this must always be so if the courts are to continue to do their whole duty."

Following the import of this language, the court further held that where there was no notice to the minor, and insufficient time for the guardian to examine matters fully, the decree of the court below was "void and is subject to collateral attack." 17

In Elkins's Estate, 18 decided in 1937, the problem again came before our Pennsylvania Supreme Court. In this case petitions for review of accounts of trustees were presented more than five years after the decrees of confirmation and discharge of the trustees. The lower court found that the petitioner was a minor at the time of the audit of the trustees' account and, although they had been represented in earlier proceedings by an appointed guardian ad litem, this guardian did not in fact represent them at the audit of the account under review. 19

The lower court, in Elkins's Estate, took the stand that section 48 of the Fiduciaries Act was a statute of limitations which was not binding upon unrepresented minor interests. 20

Apparently Komara's Estate had lulled both the lower court and counsel in Elkins's Estate into an acceptance of the prevalence of the concept that a decree of distribution by the Orphans' Court was, if not void, at least voidable by unrepresented minors even after the five year period.

But the Supreme Court, in Elkins's Estate, reversed, dismissing both the petition for review and the argument that unrepresented minors were not bound by the five year limitation of section 48 of the Fiduciaries Act. Mr. Justice Schaffer said, somewhat emphatically:

"We again declare that, except where fraud is properly alleged and proved, there can be no review of an account presented to the orphans' court, advertised, audited, adjudicated and confirmed absolutely after five years from the date of the decree of confirmation; it matters not that some of the parties in interest were minors or under other disability at the time of the entry of the decree. Such a decree is binding upon all the world unless fraud be shown." 21

17 Komara's Estate, supra, at page 140.
18 325 Pa. 373, 190 A. 650 (1937), cert. den. 302 U. S. 638.
19 The guardian had actually entered his appearance for the minors at the audit. The lower court held, however, that the earlier appointment was limited and therefore did not extend to subsequent proceedings. See, in this connection, Strickler's Estate, 140 Pa. Superior Ct. 372 (1940), and Kenna Estate, supra.
20 The court, Judge J. Burnett Holland said: "We are also in accord with petitioner's fourth contention that a statute of limitation does not run against a minor and does not "start to run until after she reaches her majority. Section 48 of the Fiduciaries Act is a statute of limitation and is no exception to this rule." Elkins's Estate, 48 Montg. 272, (1932) at page 276.
20a It is interesting to note that both briefs of counsel in Elkins's Estate, supra, confined themselves largely to the question of surcharge involved and did not mention the binding effect after five years even on unrepresented interests of a decree of distribution.
21 Elkins's Estate, supra, at page 376.
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In answer to the lower court’s argument that the period of limitation in section 48 did not run against unrepresented persons, Mr. Justice Schaffer held that since its provisions did not expressly exclude persons under disability, its limitation was binding upon all persons, whether represented or not. Citing Wood, Limitation of Actions, the Justice said:

"The Act of 1917, supra, does not exempt persons under disability from the operation of its provisions. Such being the case, it provides an effective bar to the claims of all persons whether sui juris or not. 'A saving from the operation of statutes for disabilities must be expressed or it does not exist.' . . A law general in its nature binds minors and femmes covert, and there is a multitude of statutes by which the rights of such persons are affected, though they are not specially named': Warfield v. Fox, 53 Pa. 382, 385; McCall v. Webb, 88 Pa. 150; Way v. Hooten, 156 Pa. 8, 26 A. 784. 'The exemptions from the operation of statutes of limitation usually accorded to infants do not rest upon any fundamental doctrine of the law, but only upon express provisions therefore in such statutes. It is competent for the legislature to put infants and adults upon the same footing in this respect, and this is the effect of a statute containing no savings clause exempting infants'."22

But the persistence of the "day in court" concept required still further tests of its efficacy in avoiding the finality of a decree of distribution of a fiduciary’s account.

In Steel’s Estate,28 another case decided in the orphans’ court of Philadelphia County in 1938, the trustees made certain unauthorized investments. At the death of one of the trustees, an account was audited in 1924, at which time a guardian ad litem appeared for minors in being. There was, however, no trustee for unborn persons. The guardian conceded that the 1924 adjudication bound the represented minors, but would not concede that it also bound the unrepresented unborn interests.24 Judge Van Dusen saw no difference. He held that both types of interests were bound by the adjudication.25

The opinion in Steel’s Estate is enlightening in that it clarified the issues in two important respects. First, Judge Van Dusen held that the confirmation of a trustee’s account (as well as an executor’s account) constituted a final judgment in a proceeding quasi in rem:

"The judgment is quasi in rem, that is to say, it is so far in rem that the order of confirmation and distribution is conclusive upon all the world, if the statutory notice by advertising has been given, whether that notice reaches the party or not, and it is conclusive upon minors and unborn persons whether they are represented or not: Fiduciaries Act of June 7, 1917, P. L. 447, sec. 46 (d)."26

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22 Elkins’s Estate, supra, at page 376.
23 Supra.
24 On the argument that Elkins’s Estate, supra, held only, on its facts, that unrepresented minors were bound by the adjudication of the account.
25 I. e., as to items of investment retained by the trustee from the time of the 1924 audit.
26 Steel’s Estate, supra, at page 38.
Secondly, Steel’s Estate criticized adversely the emphasis put in Komard’s Estate upon the mandatory character of the word “shall” as used in section 59 (k) of the Fiduciaries Act, as requiring the appointment of a guardian *ad litem* and impliedly making it a prerequisite of both the jurisdiction of the court and of the validity of the decree of distribution. The Judge held emphatically that the word was directory and did not impose an affirmative duty upon the court to appoint a guardian or trustee for minor or unborn interests.27

After Steel’s Estate and Hall’s Estate, one more attempt was made to circumvent the finality of a decree of distribution of an executor’s account where unrepresented interests were concerned. In Hamilton Estate,28 decided in 1945, a petition for review of an executor’s account was filed after five years. The petitioner was a non-resident daughter and alternate life tenant of the testamentary trust, the trustee of which was also the executor of the estate. The testator’s other daughter was the primary life tenant of the trust. Shortly after the testator’s death, she had been committed to an institution as a weak-minded person. No guardian was ever appointed for her estate.

In order to comply with the rule of Elkins’s Estate, the petitioner alleged fraud on the part of the executor-trustee. The audit statement contained a printed averment that actual notice of the account and its audit was given to all parties in interest when, in fact, there was no such notice given to either of the life beneficiaries of the trust. The executor-trustee knew of the disability of the primary life tenant, as well as the residence of the alternate life beneficiary. Notice of the filing of the account was, however, duly published and the alternate life beneficiary, who was *sui juris*, never had requested that she be given actual notice by the executor.29

The petitioner’s bill for review, after alleging the facts as constituting fraud, complained that the executor had made investments without authority, had failed to convert assets promptly during its administration, had taken improper losses and had improperly purchased securities from itself.

The lower court,30 upon the preliminary objections of the executor-trustee, dismissed the bill of review. In discussing the complaints of the executor-trustee’s administration of the estate prior to the audit of the account, the lower court admitted frankly:

27 "I regard section 59(k) when applied to the audit accounts as directory rather than mandatory, as an admonition to the judge. The statute does not provide that a decree of confirmation shall be void if the minors who are concerned are not represented. If that were so, then there are thousands and thousands of adjudications in our files which are not good." Steel’s Estate, supra, at page 59. It is important to note that Judge Van Dusen remarked that Komara’s Estate, supra, did not involve, a proceeding *quasi in rem* and he therefore excluded that case as authority for making a decree of distribution of an executor’s or trustee’s account void for lack of representation of minor or unborn interests.


29 Cf. Section 46(c), Fiduciaries Act, supra, (20 P. S. 833).

30 P. J. Holland, who had written the opinion of the lower court in Elkins’s Estate, supra.
"It might have developed that the management was so bad and so negligent as to have warranted a surcharge. On the other hand, it might have all been explained."31

Nevertheless, the lower court held that the bill for review must be dismissed. The Pennsylvania Supreme Court upheld the dismissal.

In its opinion in *Hamilton Estate*, the Supreme Court held that although she had no actual notice of the audit, the petitioner was bound by the publication of the required statutory notice. This publication had "'the same affect as actual notice' and was equally binding upon everyone...".32 The court mentioned the fact that the petitioner had not joined her sister, a person under disability, but added in reference to the binding effect of the publication upon her also:

"The same would seem to be equally true with respect to the effect of the notice by publication upon the life tenant even though she was, at the time, committed as a weak-minded person. See Elkins's Estate, supra, at p. 376. While the disability of the interested persons involved in Elkins's Estate, supra, was that of minority, it would indeed be difficult to differentiate on any reasonable legal basis between various kinds of disability in their relation to notice by publication."

The court gave an additional reason for not allowing the review. There had been a distribution, albeit from the left hand to the right of the executor-trustee. In the opinion of the court, the proviso at the end of section 48 of the Fiduciaries Act allows no review where such distribution has been made.34

III.

When should the executor-trustee, or any accounting fiduciary, at the filing of his account, require the appointment of a guardian or trustee *ad litem* to represent minor or unborn interests? There is certainly little argument left against the rule that the decree of distribution by the executor to himself as trustee, if made after due advertisement, is final and conclusive after five years from the date of the confirmation of the account. Under our cases, this rule applies to unrepresented minors, and unborn interests or persons under a disability. Fraud only tolls the period, with the vague possible exception of a case in which the orphans' court's inherent power to correct its or the parties' palpable error is successfully evoked.35

It is interesting to note the language of the statutes and rules of court dealing generally with appointments of guardians and trustees *ad litem*. Section 59 (k) of the Fiduciaries Act provides that the court *shall* appoint. After Elkins's Estate, the amendment to section 17 of the Fiduciaries Act provided that the court "shall have the power, either on its own motion or on a petition of any person or fiduciary

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31 *Hamilton Estate*, 60 Montg. 71, at page 76 (1944).
33 *Hamilton Estate*, supra, at page 423.
34 In this connection see Doster Estate, 346 Pa. 455 (1943). In Downing v. Felhein, 309 Pa. 566, 164 A. 598 (1932), review was not permitted even prior to expiration of five years, where executors, in good faith, distributed a part of the estate to themselves individually.
interested, to appoint. . ." The Supreme Court Orphans' Court Rules provide that "on the petition of the accountant or of any party in interest, or upon its own motion, the court shall appoint (1) a guardian ad litem . . . or (2) a trustee ad litem. . .unless the court considers that the interests of the minor or the unborn or unascertained interests are adequately represented."

Elkins's Estate, followed by Hamilton Estate, has upheld Judge Van Dusen's denial of the mandatory character of the word "shall" as used in section 59 (k) and inferentially, as used in the Orphans' Court Rules. Mr. Justice Jones, in his opinion in Hamilton Estate, expressly held that the executor-trustee was under no duty to give actual notice to either the sui juris life tenant or her weak-minded sister.

Judge Van Dusen, again, however, struck the keynote of the problem. In Steel's Estate he said: "The appointment is made in the interest of good administration, . . ." adding that "such appointments are rare." Indeed they should be, insofar as it is possible. Ever present is the added expense, caused by appointments made merely because a minor or an unborn interest is or might conceivably be involved in the estate.

Because the audit and confirmation of an executor's account is an in rem proceeding and binding upon all interests, the question of appointment must, in each case, be carefully considered. The Supreme Court Orphans' Court Rules recognize the importance of the problem. These rules, however, go a step further. No appointment is necessary if the court (or the fiduciary) "considers that the interests of the minor, or the unborn or unascertained interests are adequately represented." The fact that there are minor or unborn interests involved is not solely determinative. Good administration requires that a further question be asked: Are interested minors or unborn persons adequately represented by someone already on notice of the audit and actually joined in the proceeding? The question involves consideration of the principle known as the doctrine of virtual representation. The answer, in turn, lies in the proper application of that doctrine to the facts before the court or fiduciary.

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36 Rules 4 and 5, Section 12, Supreme Court of Pennsylvania, Orphans' Court Rules, 20 P. S. App. effective first Monday of July, 1943.
37 Italics supplied, Orphans' Court Rules, supra, Rule 4.
38 Hamilton Estate, supra, at page 423: "Beyond that, even if the averment in the petition as to notification of interested beneficiaries could be thought to suggest erroneously that the petitioner and her sister had been given actual notice of the filing of the account, the answer is that the executor was under no duty to give them actual notice." (Italics supplied).
39 Supra, at page 38.
40 See Hallstead's Estate, 338 Pa. 257, 12 A. 2d 912 (1940). Guardian ad litem fee of $7,500.00 reduced to $2,000.00.
41 See, in addition to cases discussed above: Piper's Estate, 208 Pa. 636 (1904); Clark Estate, 273 Pa. 506 (1923); Thorne's Estate, 344 Pa. 503 (1942). See also Wesner's Estate, 139 Pa. Super. Ct. 314 (1939), holding that an order granting letters of administration of a presumed decedent is a judgment in rem.
The doctrine of virtual representation recognizes that no separate representation of unborn or minor interests is necessary:

...whenever the living persons joined in the litigation include one having a legal position in the controversy so nearly like that of the unborn person, that an adequate presentation of the legal position of such living party would also be an adequate presentation of the legal position of the unborn person. In the absence of affirmative proof to the contrary it is assumed that the self-interest of the living person will assure a reasonable presentation of his position and thus assure consideration of those questions which could have been raised by the unborn person, if alive.”

The trustee himself will or can in many cases adequately represent all interests, so that no separate representation need be acquired. Where, however, the trustee's estate is defeasible upon the happening of some contingency and, under the will, the estate passes to unborn persons, separate representation should be and has been required. Also, where the fiduciary, by his own acts, manifests an obvious disregard of his beneficiary's interests, a separate representation also should be and has been required.

On the other hand, there are many situations in which separate representation would be entirely useless, and only result in adding to the expense and time involved in the auditing and confirming of accounts. Clearly no separate representation is necessary where the minor or unborn person is one of a class, one of whom is sui juris and properly joined, where the unborn person is represented by the holder of a prior estate and therefore could only take in substitute of the prior holder, or where the unrepresented remainderman of a trust is a direct descendant of the properly joined life tenant.

Many unnecessary appointments of guardians and trustees ad litem could and should be avoided by the proper application of this doctrine of virtual representation. Before asking for or recommending separate representation, an executor-trustee, or indeed any accountant, should first review the interests involved in the estate to determine whether or not the doctrine of virtual representation applies, keeping in mind the admonition of the Supreme Court contained in Kenna Estate that: "Extreme care should always be exercised to avoid unnecessary appointments..."