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Recent Case

RECENT CASE

IN RE SETTLEMENT OF SURVIVAL CLAIMS

By

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The opinion of the Supreme Court of Pennsylvania in the recent case of Pantazis v. Fidelity and Deposit Company of Maryland, 369 Pa. 221, 85 A.2d 421, contains language relative to the settlement of survival claims in Pennsylvania death cases generally disconcerting to the state's insurance counsel. The writer's opinion of Pantazis' significance follows. But first, the cases's factual skeleton.

Frances Pantazis, individually and as administratrix, instituted an action in trespass against Edward Follweiler for damages growing out of an automobile accident involving the death of her husband. Plaintiff's claim as widow was in a "death action" whereas her claim as administratrix was in a "survival action." Upon the trial of this action, the plaintiff in the *death action* suffered a voluntary nonsuit. "Individually and as widow" she had released the defandant, Edward Follweiler, the owner of the car, Robert Follweiler, its operator, and also the State Farm Mutual Automobile Insurance Company, the liability insurance carrier of the defendants. The named consideration was $1500.00. The trial proceeded in the survival action with plaintiff *as administratrix*. The jury returned a verdict for the plaintiff administratrix for $7280.00. The court refused defendant's motion for judgment N.O.V. The defendant appealed the the Supreme Court. The Fidelity and Deposit Company of Maryland (the present defendant) with defendant in such tort action filed an appeal bond in the usual form in the sum of $15,000.00. The surety company obligated itself to pay the judgment, interest, and costs, should the principal (the defendant in the appeal action) fail to duly prosecute the appeal with effect. The Supreme Court, in a *per curiam* opinion reported in 364 Pa. 553, 73 A.2d 410, affirmed the judgment.

Meanwhile, the plaintiff, in one of the many proceedings in this case, had entered into a written stipulation wherein she admitted that she was not only the administratrix of her deceased husband's estate but also his sole heir, and she further represented in this stipulation that there were no debts in the estate. It was, consequently, the contention of the defendant, Robert Follweiler, and his insurance carrier, State Farm Mutual Automobile Insurance Company, that though the release given by Mrs. Pantazis did not on its face estop her from bringing a "survival action" as her husband's administratrix, it nevertheless estopped her from taking anything as an heir of her husband's estate which accrued to it by reason of any "survival action" recovery. Rather than pay the full judgment directly to Mrs. Pantazis as administratrix, therefore, Follweiler and his insurance company commenced a proceeding in the Orphans' Court wherein they sought a decree pro-

viding what portion of the sum recovered in the "survival action" should be payable to Mrs. Pantazis as Mr. Pantazis' sole heir which portion, apparently, they would then have retained for themselves on the theory that Mrs. Pantazis had by her release assigned it to them.

Since, because of this Orphans' Court proceeding, Mrs. Pantazis was unable immediately to recover her judgment by attaching the liability insurance, she thereupon brought the present action against the Fidelity and Deposit Company of Maryland on the defendant's appeal bond. The surety company filed an answer setting up the proceedings in the Orphans' Court and asked that proceedings in Common Pleas be suspended pending determination of the Orphans' Court proceedings. Mrs. Pantazis then moved for judgment on the pleadings, but the lower court refused to enter judgment until the Orphans' Court had made its decision. There followed the instant appeal in which the Supreme Court reversed the decision below and forthwith entered judgment for Mrs. Pantazis on the appeal bond.

Legally, the *Pantazis* case actually stands for but one proposition: where a tortfeasor causes the death of a spouse, and the surviving spouse executes a release of his individual right in the death action, such release does not constitute a release of the survival action accruing to the decedent's estate, nor does it constitute a release and assignment of the surviving spouse's distributive share under the intestate law in whatever accrues to the deceased spouse's estate by reason of any sum recovered on the survival claim.

Furthermore, the foregoing holding represents no change from prior law. In *Shiroff* v. *Weiner,* 299 Pa. 176, 149 A. 175, it was held that a widow who was also an administratrix of a decedent and who had an interest in one of his contracts aside from her interest as an administratrix might enter into a personal agreement with her husband's debtor whereby, so far as she individually was concerned, she agreed to the substitution of another debtor in place of the original debtor. However, the Supreme Court held, in a subsequent action brought by the widow as her husband's administratrix against the original debtor to enforce this same contract in her husband's right, an affidavit of defense was inadequate in which the original debtor did no more than set up the agreement with the widow individually and aver that although the agreement was executed only by the widow in her own right, it was nevertheless the intention of the parties that such agreement should be binding upon the plaintiff in her capacity as administratrix as well, and that an expression of such an intent had accidentally been omitted in drafting the writing. This is exactly the ruling in the Pantazis case.

What must be regarded in some quarters as far more alarming than the Pantazis *holding,* however, is the Supreme Court's expression, *by way of dictum,* of its opinion that, even if Mrs. Pantazis by her individual release of Follweiler and his insurer had also intended to release them from the "survival action," "As administratrix . . . she lacked *authority* . . . to release her deceased husband's estate" without leave of the Orphans' Court, upon proper cause shown. Taken literally, of

course, this language means that no release from an executor of a "survival" claim, or of any other claim for that matter, is valid and binding upon a decedent's estate, unless the compromise agreement represented by the release has first had Orphans' Court approval. The question that remains is how much heed should be paid this opinion, admitting that it is only dictum. Unfortunately, as will appear hereafter, it is the writer's opinion that the language is entitled to the greatest respect.

Prior to January 1, 1918, certainly, it seems to have been the prevailing opinion that a personal representative had authority to compromise claims by or against his decedant's estate without obtaining leave of the Orphans' Court, providing such compromise were not fraudulent or patently inequitable. Of course, once the compromise had been entered into, the personal representative might nevertheless be charged on his account with any loss resulting to his estate on account thereof, if the Orphans' Court should thereafter find that he had not acted for his estate's best interest in entering into the agreement. But, in the absence of fraud, it would seem that, prior to 1918, so far as a third party was concerned, the release of the fiduciary was binding.

Thus, in the case of *Dougherty* v. *Stephenson,* 20 Pa. 210, it was held that the executor of a decedent who had made an entire contract to buy a certain amount of iron ore to be mined by the plaintiff, and who died before the contract was completed, might excuse the plaintiff from full performance of his contract, that the plaintiff might then commence an action against the decedent's estate to recover for the reasonable value of the work already done, and that in such a case, the plaintiff could set up the release of the executor as excusing the non-performance of the executory part of the contract by himself.

In making this decision, the Supreme Court said:

> "Executors or administrators may not create a new cause of action against the estate whose interest they are charged with, nor revive an old one barred by the statute of limitations; but they may adjust an existing claim by a fair compromise, or arrange the business in their hands, so as to make the most of the assets. But they cannot do what *must* result in injury to their trust, except upon their own responsibility, and everyone who deals with them is bound to know it; but for all they do in the performance of acts required by the interest of the estate, they are acting in their official capacity."

The next important piece of law on this subject of a personal representative's authority to make binding settlements for his estate was Section 40 of the Fiduciaries Act of 1917, P.L. 447, 508, 20 P.S. 787, which provided:

> "Whenever it shall be proposed to compromise or settle any claim, whether in suit or not, by or against a minor or the estate of a decedent, or to compromise or settle any question or dispute concerning the validity or construction of any, last will and testament or the distribution of any decedent's estate, the Orphans' Court having jurisdiction of the accounts of the fiduciary shall be authorized and empowered, on petition by such fiduciary, setting forth all the facts and circumstances of such claim or question and proposed compromise or settlement, and duly

> verified by oath or affirmation, and after the notice to all parties interested, and after due consideration, aided, if necessary, by the report of a master, if satisfied that such compromise or settlement will be for the best interests, of such minor or of the estate of such decedent, to enter a decree authorizing the same to be made, which decree shall operate to relieve the fiduciary of responsibility in the premises."

The most cursory reading of the foregoing Section, of course, reveals that it was probably not intended to change the law as enunciated in *Dougherty* v. *Stephenson.* Actually the purpose of Section 40 would seem to have been to provide a convenient procedure whereby a fiduciary could protect himself from any possible surcharge on account of a proposed settlement by having the Orphans' Court examine and approve the settlement in advance of its consummation. However, despite the apparently clear intention of the legislative draftsman, it was not long before Pennsylvania appellate courts began rewriting Section 40 for themselves.

First, in *In Re Charles Mikasinovich, a Minor,* 110 Pa. Super. Ct. 252, 168 A. 506, it was held that under the Section of the Fiduciary Act of 1917 just quoted, the Orphans' Court had such control of the compromise, settlement, and release of any action or claim on behalf of one of its *minor* wards that it might, either of its own initiative, or on petition of any interested party, investigate and set aside any release made by a guardian, if the Court found that the release was entered into *improvidently* or in fraud of the ward's rights.

Again, in *Conner's Estate No.* 1, 318 Pa. 145, 178 A. 12, the Supreme Court of Pennsylvania held that under Section 40, an Orphans' Court could after hearing following notice to all parties interested, set aside any settlement made by the guardian of a *minor* without the Court's preliminary approval and consent.

Though there were no cases under the Fiduciaries Act of 1917 which actually involved the finality of settlements made by personal representatives of decedents, moreover, there is no reason to believe that, had the occasion arose for an interpretation of Section 40 as it pertained to executors or administrators of decedents as compared to guardians of minors, the Supreme Court would have made any distinction between cases.

The present counterpart of Section 40 of the Act of 1917 is the new governing Section 513 of the Fiduciary Act of 1949, providing as follows:

> "Section 513: Compromise of Controversies. Whenever it shall be proposed to compromise or settle any claim whether in suit or not, by or against the estate of a decedent, or to compromise or settle any question or dispute concerning the validity or construction of any will, or the distribution of all or any part of any decedent's estate, or any other controversy affecting any estate, the court, on petition by the personal representative or by any party in interest setting forth all the facts and circumstances, and after such notice as the court shall direct, aided if neces-

sary by the report of a master, may enter a decree authorizing the compromise or settlement to be made."

It is at once apparent, of course, that Section 513 is basically no more than a restatement of the law as previously found in Section 40, with the exception that it contains no statement that the decree approving a settlement "shall operate to relieve the fiduciary of responsibility in the premises." This last phrase, as has already been noted, was the primary clue as to the original purpose of Section 40 which was, again, not to modify the case-established power of the fiduciary to make settlements on his own authority, but merely to give him a means of protecting himself from subsequent surcharges on account of any such settlement. However, in view of the fact that the *Mikasinovich* and *Conner* cases had already ignored the purpose of Section 40, there seems very little actually to be attached to the otherwise significant omission of Section 513. The *Pantazis* decision is ample evidence to this effect, for the Court does not even attempt to buttress its *dictum* by distinguishing between the 1917 and 1949 legislation.

Summing up, therefore, the significance of the *Pantazis* decision as well as the earlier cases upon which its death settlement language would appear to be based, it seems fair to state that now, wherever letters testamentary or of administration have already been taken out upon the estate of a decedent having some right of action against an assured which it is proposed to settle, before any release be taken from the personal representative, he should first be required to set forth the nature of this settlement in a petition asking the Orphans' Court of the county of his appointment to approve the same. And, on the other hand, where a settlement is proposed on account of a decedent on whose estate letters have not issued, the interested parties should generally be required to take out letters for the purposes of seeking settlement approval, and after their issuance, proceedings should follow as above.

Of course, where letters have not issued and a settlement is proposed, if the settlement is not substantial and one is satisfied that the other assets of the decedent's estate are sufficient to meet his outstanding liabilities, a release of a "survival" claim might be obtained without court approval by having the various heirs of the decedent assign to the assured and his carrier whatever rights might accrue to them by reason of any recovery which might ever be made on any "survival" claim which might ever be asserted. But, to emphasize, this last procedure is not to be greatly commended, since it lacks finality in any event. Furthermore, it might very well be that even such a device as this would be condemned on the theory that it represented an illegal assignment of an interest in a tort claim, though as a matter of fact it should rightly be argued that what is being assigned in actuality is not an interest in a tort claim but an interest in a decedent's estate. For these reasons, at any rate, it would seem that the only sure way to settle a survival claim under the Pantazis decision is by dealing directly with the personal representative and having the settlement approved by the Orphans' Court.

Meanwhile, it must be emphasized that the *Pantazis* decision contains no language affecting the previous law on the settlement of "wrongful death" claims. In other words, while a "survival" claim should *always* be settled only with Orphans' Court approval, "wrongful death" claims, before going to suit, may still be settled by obtaining a release from the persons designated by the Act of 1855 as those who might commence such an action, i.e., the decedent's spouse, children, or parents, while after suit they can be settled only with the approval of the Court of Common Pleas. This, of coursefi in turn leads to the anomalous requirement that when, as in the usual case, a personal representative has commenced suit on both a "survival" and a "wrongful death" claim, one may safely settle with him only by having the Orphans' Court approve the "survival settlement, the Common Pleas Court approve the "wrongful death" settlement, and the docket marked "settled and discontinued" by plaintiff's attorney.