

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

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| IN RE: ESTATE OF JOHN KESTER | : | IN THE SUPERIOR COURT OF |
| | : | PENNSYLVANIA |
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| APPEAL OF: FRANCIS W. KESTER | : | No. 1489 MDA 2013 |

Appeal from the Decree Entered April 18, 2013
In the Court of Common Pleas of Lackawanna County
Orphans' Court at No(s): 32012-00807

BEFORE: GANTMAN, P.J., ALLEN, J., AND LAZARUS, J.

MEMORANDUM BY GANTMAN, P.J.:

FILED APRIL 22, 2014

Appellant, Francis W. Kester, appeals from the decree entered in the Lackawanna County Court of Common Pleas, which removed Appellant as executor of Decedent's Estate, and ordered Appellant's inmate account to be frozen and funds transferred from the account to the newly appointed administrator.¹ We quash this appeal as untimely.

The relevant facts and procedural history of this case are as follows. Appellant is the son of Decedent, John Kester, who died on December 4, 2010. Prior to Decedent's death, the Department of Public Welfare ("DPW") expended \$58,471.83 for his stay in a nursing home and related health care. Following Decedent's death, Appellant was named executor of Decedent's Estate. Appellant retained Attorney Kevin Dempsey to assist Appellant in the administration of the Estate. On August 1, 2012, Attorney Dempsey

¹ The decree is appealable as of right under Pa.R.A.P. 342(a)(8) and Pa.R.A.P. 313.

contacted DPW and requested a statement of claim for the nursing home and health care expenses. DPW responded and sent Attorney Dempsey a statement of claim on August 23, 2012, for \$58,471.83. Meanwhile, the relationship between Appellant and Attorney Dempsey deteriorated and, on August 4, 2012, Appellant sent Attorney Dempsey a letter dismissing him as Appellant's counsel. Attorney Dempsey sent Appellant a response on August 8, 2012, and enclosed a check for \$18,269.67, which represented the proceeds from Decedent's insurance policy, made payable to Appellant as the personal representative of the Estate. Attorney Dempsey then sent a letter to DPW on August 29, 2012, explaining his withdrawal as Appellant's counsel, that Appellant is currently incarcerated, and that Attorney Dempsey had mailed Appellant a check for estate funds in the amount of \$18,269.67.

After receiving Attorney Dempsey's letter, DPW contacted officials at the prison where Appellant is incarcerated and asked that the estate funds be frozen and transferred to a third party to be held in trust for the Estate. Nevertheless, the prison informed DPW the funds could not be frozen without a court order. In response, DPW filed a petition for citation on January 3, 2013, and requested the Orphans' court to remove Appellant as executor, grant letters of administration to a proposed fiduciary, freeze Appellant's inmate account, and transfer the \$18,269.67 from Appellant's account to the proposed fiduciary. The court held a hearing on the petition on February 26, 2013, in which Appellant represented himself. The court

granted DPW's requested relief and entered a decree *nisi* on April 18, 2013. Appellant filed *pro se* exceptions to the court's decree on May 20, 2013; however, the court dismissed the exceptions as untimely on June 6, 2013. Appellant filed a *pro se* notice of appeal on June 20, 2013. The court did not order Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b), and Appellant did not file a voluntary Rule 1925(b) statement.

Appellant raises the following issue for our review:

WHERE A HEARING ON THE MERITS OF AN ACTION THE PARTY HAVING THE BURDEN OF PROOF INTRODUCED NO EVIDENCE, DID NOT ATTEMPT TO INCORPORATE ANY EVIDENCE, AND FAILED TO SERVE NON-MOVING PARTY WITH FACTUAL PROOF IN MOVING PARTY'S ORIGINAL ACTION, IT WAS ERROR FOR THE HEARING COURT TO FAIL TO DECIDE THE ABOVE MATERIAL ISSUE AND RULE IN FAVOR OF THE MOVING PARTY?

(Appellant's Brief at 4).

Initially, we must address the timeliness of Appellant's appeal. Pennsylvania Rule of Appellate Procedure 903 provides: "[E]xcept as otherwise prescribed by this rule, the notice of appeal required by Rule 902 (manner of taking appeal) shall be filed within 30 days after the entry of the order from which the appeal is taken." Pa.R.A.P. 903(a). The notice of appeal shall be filed with the clerk of the lower court; "[u]pon receipt of the notice of appeal the clerk shall immediately stamp it with the date of receipt, and that date shall constitute the date when the appeal was taken, which date shall be shown on the docket." Pa.R.A.P. 905(a)(3).

In the context of an Orphans' court case, Rule 7.1 of the Pennsylvania Orphans' Court Rules, which applies to exceptions, provides in relevant part:

Rule 7.1. Exceptions

(a) General Rule. Except as provided in Subdivision (e) [involving adoptions and involuntary terminations], no later than twenty (20) days after entry of an order, decree or adjudication, a party may file exceptions to any order, decree or adjudication which would become a final appealable order under Pa.R.A.P. 341(b) or Pa.R.A.P. 342 following disposition of the exceptions. If exceptions are filed, no appeal shall be filed until the disposition of exceptions except as provided in Subdivision (d) (Multiple Aggrieved Parties). Failure to file exceptions shall not result in waiver if the grounds for appeal are otherwise properly preserved.

* * *

Explanatory Note: The 2000 amendment discontinues the prior practice permitting local rules to govern whether exceptions are required after entry of an order, decree or adjudication. The 2000 amendment limits the filing of exceptions to order, decree or adjudication which are final appealable orders after disposition of exceptions under Pa.R.A.P. 341(b) or amended Pa.R.A.P. 342. If an aggrieved party appeals from such order, that appeal shall not affect proceedings with regard to other aspects of the case.

It is understood that failure to appeal shall constitute a waiver of any issues in the order which the Orphans' Court has determined as final.

The 30 day appeal period pursuant to Pa.R.A.P. 903 from such final orders begins to run from the date of entry of an order disposing of exceptions or on the date of a deemed denial pursuant to Subdivision (f) of this rule. Where no exceptions are filed, the 30 day appeal period runs from entry of the final appealable order.

If an order would not become final within the definition of Pa.R.A.P. 341(b) or Pa.R.A.P. 342, then no exceptions may be filed until subsequent entry of a final order within the definition of Pa.R.A.P. 341(b) or Pa.R.A.P. 342. This will eliminate the practice in some counties of permitting issues to be raised by exception following entry of an otherwise interlocutory order and raising the same issues in exceptions to a final order, decree or adjudication. **See, e.g., Estate of McCutcheon**, 699 A.2d 746 (Pa.Super. 1997).

Rule 7.1 permits but does not require exceptions to orders pursuant to Pa.R.A.P. 341(b) and Pa.R.A.P. 342. The election of an aggrieved party not to file exceptions will not result in waiver of issues on appeal. However, nothing in this rule is intended to abrogate the requirement of decisional law or court rule mandating that issues on appeal be preserved by a timely petition, answer, claim, objection, offer of proof or other appropriate vehicle.

Pa.O.C. 7.1(a) and *explanatory note*. Notably, the rule makes optional the filing of exceptions but if they are filed, the exceptions must be timely filed within twenty days to extend the appeal period. **Id.**

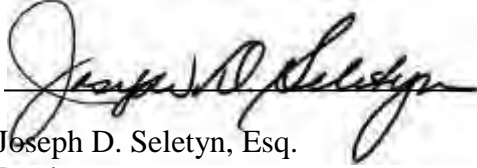
Time limitations for taking appeals are strictly construed and cannot be extended as a matter of grace. **Commonwealth v. Valentine**, 928 A.2d 346 (Pa.Super. 2007). This Court can raise the matter *sua sponte*, as the issue is one of jurisdiction to entertain the appeal. **Id.** This Court has no jurisdiction to entertain an untimely appeal. **Commonwealth v. Patterson**, 940 A.2d 493 (Pa.Super. 2007), *appeal denied*, 599 Pa. 691, 960 A.2d 838 (2008).

Here, the court entered its decree *nisi* on April 18, 2013. Appellant's exceptions were due on or before May 8, 2013. **See** Pa.O.C. 7.1(a). Nevertheless, Appellant did not file his exceptions until May 20, 2013, and the court dismissed them as untimely. Because Appellant's exceptions were untimely, the 30-day appeal period began to run from the date the court entered its order on April 18, 2013. **See** Pa.O.C. 7.1 *explanatory note*. Thus, Appellant's notice of appeal was due on or before May 18, 2013. Appellant did not file the notice of appeal until June 20, 2013. Moreover, the record contains no evidence of extraordinary circumstances such as a court holiday or closing, or breakdown in the operations of the court that might excuse Appellant's untimely filing. **See *Commonwealth v. Braykovich***, 664 A.2d 133 (Pa.Super. 1995), *appeal denied*, 544 Pa. 622, 675 A.2d 1242 (1996) (extension of filing period is permitted only in extraordinary circumstances, such as fraud or some breakdown in court's operation). Therefore, Appellant's failure to file the notice of appeal within thirty (30) days of the decree *nisi* divests this Court of appellate jurisdiction. **See** Pa.O.C. 7.1 *explanatory note*; ***Patterson, supra***. Accordingly, we quash this appeal.

Appeal quashed.

J-S17039-14

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn". The signature is written in a cursive style with a large initial "J" and a long horizontal stroke at the end.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/22/2014