

As revealed by the parties in the pleadings, we summarize the facts and procedural history as follows. Cooper Sr. failed to pay real estate taxes for property² he owns for the years 1997 through 2010. On December 12, 2011, in an effort to collect the unpaid taxes, the City initiated an action against Cooper Sr.'s property by filing and serving a rule to show cause why the property should not be sold free and clear of all liens and encumbrances. The trial court scheduled a "rule returnable" hearing for March 6, 2012. On the date of the rule returnable hearing, which Cooper Sr. did not attend, the trial court entered an order of assessment of damages, which authorized the sale of Cooper Sr.'s property at a sheriff's sale for the purpose of recovering the delinquent real estate taxes.

The City provided notice to Cooper Sr. that the sheriff's sale would occur on June 28, 2012, and the property was sold on that date to Roman Friedman, who had the winning bid of \$66,000.00. On July 20, 2012, Cooper Jr., exercising his power of attorney on behalf of Cooper Sr., filed the petition to set aside the tax sale of the property. In the set-aside petition, Cooper Jr. claimed that Cooper Sr. was incapacitated at the time the City sent notice of the tax sale, and, therefore, the notice was inadequate and resulted in a denial of Cooper Sr.'s due process rights.³

In the petition to set aside the tax sale, Cooper Jr. averred the following facts. Cooper Sr., who was eighty-nine (89) at the time of filing the

² The property is located at 2605-07 Federal Street in Philadelphia.

³ Cooper Jr. also asserted that the City failed to comply with the procedural and notice requirements for a sheriff's sale under the act commonly referred to as Pennsylvania Municipal Claims and Tax Liens Act (MCTLA), Act of May 16, 1923, P.L. 207, *as amended* 53 P.S. §§ 7101-7505, but he has since abandoned those arguments.

set-aside petition, resides at 2223 Ellsworth Street in Philadelphia. Cooper Sr. has been incapacitated since and before December 2011 (the month during which the City filed its rule to show cause), and did not have the mental or physical capacity to defend against the rule to show cause. Cooper Jr. referred to Pa. R.C.P. No. 2056(d), which relates to the incapacity of a party in a legal action. In his brief in support of the set-aside petition, Cooper Jr. indicated that Cooper Sr. has glaucoma, which prevented him from reading the notices the City sent to him. Cooper Jr. also described Cooper Sr.'s mental state, stating that Cooper Sr. suffered from "prolonged bouts of confusion and dizziness . . . and regularly los[t] important items and documentation." (Br. in Support of Petition to Set Aside Tax Sale at 2.) Cooper Jr. attached a copy of medications Cooper Sr. takes and the documents effectuating the power of attorney, which Cooper Sr. signed.

Cooper Jr. also attached his own affidavit averring various aspects of Cooper Sr.'s life, including: (1) Cooper Jr. has been taking physical care of Cooper Sr. since October 2011; (2) Cooper Sr. is physically unable to shop, buy food or clothing, or do household chores; (3) Cooper Sr. was unaware that his daughter, who had previously provided care for him, had stolen a safe deposit box key and removed \$11,000 of Cooper Sr.'s money; (4) Cooper Sr. has glaucoma and vision loss (which prevents him from reading), hearing loss, and memory loss (which has resulted in the loss of important documents and an inability to understand the importance of documents); (5) Cooper Sr. was scheduled to submit to a psychiatric evaluation but forgot about the appointment and did not inform Cooper Jr. about the appointment; (6) Cooper Sr. was mugged and seriously injured in or about May 2011, and has suffered from headaches, confusion, and dizziness as a consequence of that incident, and continues to be treated for injuries

resulting from that incident; (7) Cooper Sr.'s daughter drove him to the collection agent's office sometime before June 2012, but she did not accompany him into the meeting; (8) Cooper Sr. told Cooper Jr. that he met with representatives of the collection agency and signed a document, but Cooper Sr. did not understand that the agreement he signed did not pertain to the property but rather to other properties he owns; and (9) because of Cooper Sr.'s mental and physical infirmities, even if Cooper Sr. had documents that should have alerted him to the delinquent taxes on the property and the potential sale, he could not understand what was happening.

In his set-aside petition, Cooper Jr. simply requested the trial court to grant the petition to set aside the sheriff's sale and stated in the conclusion section of his brief that there was "ample" *evidence* to meet the applicable burden of proof to establish incapacity. Cooper Jr., however, did not specifically request a fact-finding hearing on Cooper Sr.'s alleged incapacity.

In response to the averments in the set-aside petition, the City denied all of the factual averments in the petition relating to Cooper Sr.'s alleged incapacity. In its new matter, the City averred, *inter alia*, that, on or about March 30, 2012, Cooper Sr. went to the collection agent for the City "but elected not to make an agreement for this property[.] [I]nstead he stated he would go to his councilman's office." (New matter, ¶ 4.) The City also averred in its new matter that "[o]n or about April 19, 2012, [Cooper Jr.] called [the same collection office] and was offered a payment agreement for the taxes on the property; Mr. Cooper never came into the office to sign said agreement." (*Id* at ¶ 5.) Based upon our review of the record and the trial court's docket, it does not appear that Cooper Jr. ever responded to the averments in the new matter.

Based solely upon the pleadings and the exhibits attached to the set-aside petition (including the affidavit), the trial court, without conducting a hearing, denied the petition to set aside the sheriff's sale. Cooper Jr. filed a motion for reconsideration and also a notice of appeal. In the motion for reconsideration, Cooper Jr. only argued that the trial court erred because it did not entertain legal *argument* "to determine whether [Cooper Sr.] has sufficient grounds to show that his physical incapacitation would have been sufficient to meet the facts to set aside the sheriff's sale." (R.R. at 125.) The motion also asserted that "[i]t would be in the best interest of justice to allow argument on this instant matter before rendering a final Order." (*Id.*) The trial court denied the motion for reconsideration.

In his statement of matters complained of on appeal, however, Cooper Jr. asserted that the trial court erred in denying the set-aside petition "because the facts of record show that [Cooper Sr.]'s due process rights were not protected. [Cooper Sr.] should have been granted a hearing to determine his physical and/or mental incapacity, particularly as to his physical ability to understand and appreciate notice of a pending tax sale." (R.R. at 148.)

The trial court, in addressing the essential question at issue in this appeal—*i.e.*, Cooper Sr.'s alleged incapacity—noted that Cooper Sr. bore the burden to prove incapacity by clear and convincing evidence. (Trial Court Opinion at 7.) The trial court stated that "[Cooper] presented *no* evidence of his incapacity nor any proof of any attempt by [his son's] attorney to adjudicate [Cooper] as incapacitated." (*Id.*; emphasis in original.) Thus, the trial court inferred a lack of incapacity on the part of Cooper, because his son had not sought to have Cooper adjudicated to be incapacitated, and also apparently because the trial court viewed

the information Cooper Jr. submitted in attachments to the set-aside petition as insufficient to demonstrate incapacity.

On appeal,⁴ Cooper Jr. again argues that the trial court erred in denying the petition to set aside without first conducting a hearing to determine whether Cooper Sr. was incapacitated at the time of the entry of judgment for sheriff's sale.

Pa. R.C.P. No. 2056 provides in pertinent part:

Rule 2056. Procedure When Incapacity of a Party is Ascertained.

(a) If at any time during the pendency of the action, the court shall find that the plaintiff is an incapacitated person, who is not represented in the action by a guardian or a guardian ad litem, the court shall either

(1) forthwith appoint a guardian ad litem; or

(2) stay all proceedings and enter an order directing that the plaintiff be represented in the action by a guardian within such reasonable time as the court shall direct.

...

(d) *If, at any time after the conclusion of the trial, or after the entry of a finding, verdict or judgment against a party from whom relief is sought, the court shall find that such party was incapacitated at the time of the entry of such finding, verdict or judgment and was not represented in the action by a guardian or a guardian ad*

⁴ “This Court’s scope of review of an order denying a petition to set aside a tax sale of real property is limited to determining whether the court abused its discretion, rendered a decision with a lack of supporting evidence, or clearly erred as a matter of law.” *City of Reading v. Zeiber*, 62 A.3d 481 (Pa. Cmwlth. 2013).

litem, the court may vacate the finding, verdict or judgment and may enter an order in the nature of a procedendo.

(e) A finding of incapacity shall be based either on evidence presented to the court in which the action is pending, or on an adjudication of incapacity entered by a court of competent jurisdiction.

(Emphasis added.)

Thus, Pennsylvania Rule of Civil Procedure 2056 authorizes a trial court to vacate an order or judgment when the trial court finds that the party against whom relief was sought was incapacitated at the time the order or judgment was entered. Pa. R.C.P. No. 2056(d). It further provides that a “finding of incapacity” may be based “either on evidence presented to the court in which the action is pending, or on an adjudication of incapacity entered by a court of competent jurisdiction.” Pa. R.C.P. No. 2056(e). In the case now before the Court, Cooper Jr. requests the trial court to set aside the sheriff’s sale due to Cooper Sr.’s alleged incapacity. Cooper Jr. does not aver that Cooper Sr. has been adjudicated incapacitated, but rather, Cooper Jr. seeks to establish Cooper Sr.’s incapacity through the presentation of evidence in connection with his petition to set aside.

In denying the petition to set aside based upon its determination that the attachments to the set-aside petition are insufficient to demonstrate incapacity, the trial court appears to have conflated the concepts of pleading facts and presenting evidence. In other words, the trial court appears to confuse the requirements for pleading a claim or cause of action with the requirement to present evidence in support thereof. When preparing a pleading, such as a petition

to set aside, the “pleader must state the material facts on which a cause of action is based in concise and summary form, Pa. R.C.P. No. 1019(a).”⁵ *Stilp v. Cmwlth.*, 910 A.2d 775, 787 (Pa. Cmwlth. 2006). The pleader is not required to plead (or attach) the evidence he will present at a hearing, as “it is not proper to plead evidence.” *Id.* As discussed above, Cooper Jr. set forth numerous factual averments in his petition to set aside that could support a claim of incapacity on the part of Cooper Sr., if developed sufficiently through evidence.

Moreover, the specific language of Rule 2056 permits, and implicitly requires, courts to base findings of incapacity on “evidence,” when there has not been an adjudication of incapacity. Pa. R.C.P. No. 2056. By necessity, evidence must be presented to the court in a hearing (or, possibly, through stipulation of the parties, which did not occur here), as it is not proper to plead evidence. *See Stilp*, 910 A.2d at 787. The trial court here did not conduct an evidentiary hearing on the issue of whether Cooper Sr. was incapacitated at the time the City sent the tax sale notices. The trial court, instead, denied the petition to set aside based on a lack of *evidence* after reviewing the documents attached to the petition to set aside. By failing to conduct a hearing on the claim of incapacity, the trial court denied Cooper Jr. the opportunity to establish Cooper Sr.’s incapacity through the presentation of evidence at the hearing, in contravention of Rule 2056. Instead, the trial court should have afforded Cooper Jr. the opportunity to prove Cooper Sr.’s

⁵ Pa. R.C.P. No. 1019, pertaining to Contents of Pleadings—General and Specific Averments, provides, in part, “(a) The material facts on which a cause of action or defense is based shall be stated in a concise and summary form.”

incapacity by clear and convincing evidence presented at a hearing.⁶ Consequently, we conclude that the trial court erred in dismissing Cooper Jr.’s petition to set aside the tax sale without first conducting a hearing on Cooper Sr.’s alleged incompetency.⁷

⁶ In *Raynes v. O’Brien*, 563 A.2d 1291 (Pa. Cmwlth. 1988), this Court considered an appeal by a delinquent property owner who challenged a trial court’s order confirming a tax sale of her property. One of the issues the trial court addressed was whether the delinquent property owner was incompetent, such that the tax sale should be set aside pursuant to Rule 2056(d). The trial court, in addressing the property owner’s claim, conducted a hearing on the issue of incompetency (i.e., incapacity), during which the property owner presented the testimony of mental health professionals. The trial court rejected the property owner’s evidence of incompetency because “none of the witnesses deemed [the property owner]’s condition [during the pertinent time at issue] to warrant the initiation of formal incompetency proceedings.” *Id.* at 1293. On appeal, we affirmed the trial court. We held that the burden of proof in proceedings under Rule 2056 requires clear and convincing evidence of incapacity at the time at issue and that the trial court’s determination of a lack of incapacity based upon the evidence presented at the hearing was not against the weight of the evidence.

⁷ Neither the City nor the purchaser of the property at the tax sale contend that Cooper Jr. lost a right to obtain an evidentiary hearing on the issue of incapacity by failing (1) initially to request a hearing or (2) to make an initial showing that would necessitate the trial court to conduct a hearing on the factual and legal issues relating to Cooper Sr.’s alleged incapacity. Consequently, we will not consider whether those factors divested Cooper Jr. of a right to press for an incompetency hearing at this stage of the proceedings. The City and purchaser do contend, however, that if Cooper Sr. had the capacity to execute the power of attorney subsequent to the tax sale, then he was not incapacitated at the time of the tax sale. The City and purchaser argue that Cooper Sr. cannot have it both ways—*i.e.*, he cannot be incapacitated as of the date of the tax sale and thereafter have the legal capacity to execute the power of attorney in favor of Cooper Jr. They further argue that it was reasonable for the trial court to conclude, on the basis of the execution of the power of attorney, that Cooper Sr.’s alleged incapacity was not a valid basis to set aside the Sheriff’s sale. Here, we make no determination regarding Cooper Sr.’s capacity at the time of the tax sale or when he executed the power of attorney. We also make no determination as to the validity of the power of attorney in light of Cooper Sr.’s alleged earlier incapacity. Those issues, to the extent they are relevant to the proceedings before the trial court, are for the trial court to consider following an evidentiary hearing on this matter.

Accordingly, we will vacate the trial court's order and remand the matter to the trial court with the direction that it conduct an evidentiary hearing on the issue of whether Cooper Sr. was incapacitated at relevant times in the course of the tax sale process.

P. KEVIN BROBSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| Julius Cooper, Sr., | : | |
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| Appellant | : | |
| | : | |
| v. | : | |
| | : | |
| City of Philadelphia | : | |
| | : | |
| v. | : | No. 49 C.D. 2013 |
| | : | |
| To The Use of the Purchaser | : | |
| Roman Friedman | : | |

ORDER

AND NOW, this 30th day of July, 2013, the order of the Court of Common Pleas of Philadelphia County (trial court) is hereby VACATED. The matter is REMANDED to the trial court with the direction to conduct an evidentiary hearing on the question of whether Julius Cooper, Sr. was incapacitated at the time the City of Philadelphia sent tax sale notices to him.

Jurisdiction relinquished.

P. KEVIN BROBSON, Judge