Orphans' Court for Montgomery County
Estate No. W90130

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 661

September Term, 2018

IN RE ESTATE OF LOIS SIMONTON

Wright,
Shaw Geter,
Wells,

JJ.

Opinion by Wells, J.

Filed: July 15, 2019

Fifteen (15) purported heirs and their assignee, Brandenburger & Davis, LLC, appeal from an order of the Orphans' Court for Montgomery County denying their Petition to Reopen Estate and Motion to Set Aside the Order Approving the Final Account for the Estate of Lois Simonton. Appellants present three questions for our review:

1. Did the Register of Wills/Orphans' Court err in failing to initiate judicial probate proceedings when it appeared that Appellee's petition for probate did not include the purported fifteen paternal-side heirs?

2. Did the Orphans' Court err in denying the interested persons' requests to reopen the Estate and by not finding mistake or substantial irregularity?

3. Did the Orphans' Court err in finding that Appellants bore the burden of proving their heirship, and that Appellee complied with the statutory requirements for the administration and proper distribution of an intestate sale?

We conclude that Questions 1 and 3 are not preserved for review; we decline to address them. As to Question 2, we affirm the Orphans' Court's denial of Appellants' request to reopen the estate, concluding there was no mistake or irregularity in the proceedings below.

FACTUAL AND PROCEDURAL BACKGROUND

On December 30, 2016, Lois Simonton died intestate. Predeceased by her parents, aunts, uncles, and grandparents, having never married, and without issue, Simonton's estate was to be inherited by her only known heir, Emily Durso, a maternal first cousin. Having previously acted as Simonton's guardian, attorney Robert M. McCarthy, Appellee, filed a Regular Estate Petition for Probate with the Montgomery County Register of Wills on January 27, 2017. McCarthy also filed a List of Interested Persons that identified Ms. Durso as the sole-surviving heir. On January 31, 2017, the Register of Wills sent McCarthy

a memorandum requesting an updated list of interested persons "to reflect the names and addresses of all the heirs at law to the decedent." Ms. Durso later informed McCarthy that Simonton had a predeceased maternal first cousin who was survived by two children. On February 22, 2017, McCarthy filed a revised List of Interested Persons to reflect the two additional heirs.

On March 2, 9, and 16, 2017, McCarthy published the statutory Notice of Appointment, Notice to Creditors, and Notice to Unknown Heirs in the *Montgomery County Sentinel* newspaper, which stated that any objections to the Personal Representative's appointment "shall [be] file[d] . . . with the Register of the Wills on or before the 23rd day of August 2017." On March 21, 2017, attorney Thomas Callahan filed a Line with the Orphans' Court on behalf of Brandenburger & Davis, LLC and the other fifteen Appellants, which identified the latter group as Simonton's surviving paternal heirs. After being notified of additional potential heirs, on March 29, 2017, McCarthy sent a letter to Callahan informing him that it was not McCarthy's "usual policy to add [Appellants] as interested persons until I am able to confirm that they are, in fact, heirs of the decedent." McCarthy forwarded the list to the three maternal heirs for confirmation, and asked Callahan for any documentation he may have had supporting the relationship between the purported heirs and Simonton. Ms. Durso told McCarthy that she had "never heard of any of [Appellants]."

Between March 21, and September 12, 2017, Callahan did not correspond with McCarthy, nor did he submit any court filings seeking to establish the Appellants' status as heirs-at-law. On September 12, Callahan sent a letter asking McCarthy for a copy of

the estate's inventory from March 7, 2017 and notification of any future filings pertaining to the estate. McCarthy replied, enclosing the inventory of assets and again asking Callahan to provide him with "government documentation" supporting the relationship between the fifteen purported heirs and Simonton.

Hearing nothing further from Callahan, McCarthy filed a First and Final Administration Account on October 10, 2017, along with a Notice to Interested Persons, which he sent to Durso and the two additional maternal heirs. On October 20, the Register of Wills sent McCarthy an audit request, asking him to clarify the relationship between Appellants and Simonton. McCarthy responded in writing, informing the Register that the known heirs "had no knowledge of [Appellants] and denied that they were heirs," that he had not received any "further documentation on any of the additional heirs," and that he did "not consider [Appellants] to be heirs to the estate." On November 15, 2017, the Orphans' Court approved the accounting, subject to any exceptions to be filed within twenty days. No exceptions were filed. The Order of Accounting became final.

Nearly three months later, on February 6, 2018, Callahan wrote to McCarthy, informing him that, after reviewing the docket sheet, he noticed the First and Final Accounting was approved on November 15, 2017. Callahan told McCarthy that he was still collecting documentation for the paternal heirs and that, if the distribution was already made to the maternal heirs, it was done in error. On February 9, 2018, Callahan submitted a Petition to Reopen Estate and Motion to Set Aside the Order Approving the Final Accounting on behalf of the Assignee and the purported heirs.

The Orphans' Court set a hearing to reopen the estate for April 20, 2018. At that hearing, Callahan claimed fraud, mistake, or irregularity during the probate proceedings pursuant to Maryland Code (1974, 2011 Repl. Vol.), Section 5-304 of the Estates & Trusts Article ("ET"). As to mistake and irregularity, Callahan argued that the fifteen purported heirs were entitled to notice not as interested persons, but as parties to the proceedings by virtue of Callahan's entry of appearance on their behalf.[1] Because he had reason to know there were other persons alleging to be heirs of the estate, Callahan argued, McCarthy should have treated the purported heirs as interested persons and provided them notice. Because of McCarthy's failure to send to the purported heirs notice that the first and final accounting had been approved, Callahan claimed there was mistake or irregularity in the proceedings requiring the estate to be reopened. As to fraud, McCarthy, in Callahan's view, had a fiduciary duty as the personal representative to "follow up on" the purported heirs' allegations of heirship. Callahan claimed that this failure to investigate, coupled with McCarthy's failure to notify the purported heirs, "smell[ed] like [fraud]."

When the Orphans' Court asked how long it should have to wait for these claims to conclude, Callahan said that collecting "proofs of heirship will take a while," which "reasonabl[y]" requires one year to establish. According to Callahan, although public policy demands expeditious administration of estates, an estate open for at least one year would not be unusual. Callahan complained that, in contrast, "McCarthy opened and shut the case within 10 months."

[1] Maryland Rule 1-321 states that "[e]very pleading and other paper filed after the original pleading shall be served upon each of the parties."

McCarthy countered that he had no obligation pursuant to ET Section 5-304 to provide Appellants with legal notice because they had yet to firmly establish themselves as lawful heirs of the estate. Assuming Appellants were entitled to notice, McCarthy claimed that they had "actual notice" of the probate because Callahan was representing them. As for proving heirship, McCarthy argued that, as the estate's personal representative, he did not have the burden to establish Appellants' claims. Rather, it was the burden of the fifteen putative heirs to establish their status. Given that probate concluded within "13 or 14 months" of the estate's opening, in McCarthy's view, Callahan had ample time to collect documentation to prove his clients' heirship. At the very least, Callahan could have filed exceptions or moved to delay the estate's closing. Callahan failed to do any of these things within one year of Simonton's death, and, so, McCarthy claimed he was legally required to close the estate when he did. McCarthy stressed that his handling of this case was consistent with the policy against unduly prolonging the administration of estates.

On April 26, 2018, the Orphan's Court issued a ruling in favor of McCarthy. In his findings, the judge emphasized the fact that Callahan presented no evidence to substantiate his claim that McCarthy committed fraud. As to mistake and irregularity, the court said that it needed to answer two questions: (1) whether McCarthy, as the personal representative, made reasonable efforts to ascertain the Appellants' status as heirs; and (2) whether the Appellants themselves took reasonable efforts to be recognized as heirs and interested persons either by the personal representative or the Orphans' Court. The court underscored the fact that McCarthy requested the Appellants establish themselves as

interested persons and that he expressly stated that he was not going to consider Appellants as heirs until they provided proof. The court found Appellants "tacitly recognized the reasonableness of that request," by trying to gather documentation to "satisfy [McCarthy's] request." In response to Callahan's claim that a year is "not an unreasonable" period of time for heir-search firms to collect documentation, the judge concluded that he had no basis to evaluate this assertion because Callahan did not present any evidence, such as expert testimony, to establish a standard of care for what would be a reasonable period of time for an estate to remain open. Consequently, "it [was] hard for [the Orphans' Court] to say that [McCarthy] acted unreasonably by affording the [Appellants] the amount of time that [McCarthy] did before deciding to proceed."

The Orphans' Court also found that the Appellants should have been more proactive in "solidifying their status" as legally-recognized interested persons. The court stressed the fact that there were several steps the Appellants could have taken to address "any concerns they had about the proceedings prior to their status being firmed up." For example, the Appellants could have requested an extension of time to establish themselves as interested persons, requested an injunction against any further proceedings, or sought McCarthy's removal as personal representative, among other recourses.[2] The court reasoned that had the Appellants solidified their status as interested persons, then the Orphans' Court would have found that McCarthy's failure to provide them notice of the

[2] The Orphans' Court recognized that the Appellants could have also "filed a proceeding to establish their status as interested persons or heirs if they felt that [McCarthy] was somehow breaching his fiduciary duty. . . ; they could have filed a petition for judicial probate; and there are probably other actions they could have taken."

filings was an irregularity. Because the Appellants failed to do so, the judge denied their request to reopen the estate. Appellants subsequently filed this appeal.

DISCUSSION

I. Unpreserved Issues

Appellants present two issues that were not raised before the Orphans' Court at the April 20, 2018 hearing. The first question asks us to determine whether the Register of Wills and/or the Orphans' Court erred in failing to initiate judicial probate proceedings when it appeared that McCarthy's petition for probate, in Appellants' view, was incomplete and incorrect. Appellants next ask us to decide whether the Orphans' Court erred in finding that: (1) Appellants bore the burden of proving their heirship, and (2) McCarthy fully complied with his fiduciary obligations to administer the estate. While they concede that these issues were not expressly raised in the petition to reopen the estate nor determined by the Orphans' Court, Appellants maintain that they were "implicitly raised through arguments made by counsel at the Hearing." Appellants argue that Maryland Rule 8-131 permits this Court to consider these issues on direct appeal.

Generally, this Court "will not decide any issue unless it plainly appears by the record to have been raised in or decided by the trial court [. . .]" Md. Rule 8-131(a); *Bible v. State*, 411 Md. 138, 148 (2009). However, an appellate court may exercise its discretion and decide an unpreserved issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal. *Id*. The Court of Appeals has held that "an appellate court's review of arguments not raised at the trial level is discretionary, not

mandatory." *Id*. (quoting *State v. Bell,* 334 Md. 178, 188 (1994)). More precisely, the Court of Appeals has provided guidance regarding when we should exercise our discretion under Rule 8-131. First, the reviewing court "should consider whether the exercise of its discretion will work unfair prejudice to either of the parties." *Jones v. State*, 379 Md. 704, 714-15 (2004). Secondly, the court "should consider whether the exercise of its discretion will promote the orderly administration of justice." *Id*.

As noted, public policy demands that probate should be prompt. A decedent's property should be distributed and the estate closed as soon as reasonably possible. *See* ET §§ 1-105, 7-305; *Green v. Nelson*, 227 Md. App. 698, 707-08 (2016) (citing *Carney v. Kosko*, 229 Md. 112, 118 (1962); *Watkins v. Barnes*, 203 Md. 518, 523 (1954)). In keeping with public policy, Maryland requires a personal representative "to settle and distribute the estate of the decedent . . . as expeditiously as possible and with as little sacrifice of value as is reasonable under the circumstances." ET § 7-101(a). If adverse claims are made against the estate, state law further mandates that those claims are to be brought no later than twenty days after the final accounting order. Md. Rule 6-417(f), (g); ET § 7-501(b).

Although this Court may exercise its discretion to resolve issues not otherwise preserved for appeal, we decline to do so in this instance. As will be discussed in detail below, the factual findings of an Orphans' Court are entitled to a presumption of correctness. *Pfeufer v. Cyphers*, 397 Md. 643, 648 (2007) (internal citations omitted). Assuming Appellants had implicitly raised the issues of burden of proof and fiduciary duty, they did not present any evidence to the Orphans' Court to prove their claims. We conclude

that it would be improper for this Court to evaluate, for the very first time, any evidence that Appellants could have presented to the Orphans' Court but did not.

Our decision to decline review of two of the issues that Callahan raises is also consistent with public policy. McCarthy, as the personal representative, had a responsibility to perform his duties as administrator of Ms. Simonton's estate expeditiously. If we granted the relief Appellants request and remand to the Orphans' Court, the heirs-at-law would suffer undue prejudice. The probate of this estate would become prohibitively protracted. Considering that Appellants have yet to submit competent evidence to establish their heirship, were we to remand, we are concerned that the necessary time to collect the proof would unnecessarily delay the closing of the estate. Maryland law and public policy protect the interests of the estate against those who might be entitled to it. It is possible that those with valid interests in the estate may be omitted, as "we must . . . be cognizant of the vital interest of the State in bringing issues to a final settlement." *Durham v. Walters*, 59 Md. App. 1, 14-15 (1984). We adhere to the well-stated policy that mandates that estates be probated as quickly as possible to prevent protracted and potentially meritless litigation.

II. Request to Reopen the Estate

The sole issue now before us is whether the Orphans' Court erred in denying the Appellants' request to reopen the estate by not finding mistake or irregularity. Appellants

argue that, in direct contravention to Rules 6-127(b)[3] and 6-316, and ET Section 7-105[4], McCarthy "knowingly filed incomplete . . . and legally improper documents with the Register of the Wills" when he neglected to include the Appellants on the List of Interested Persons. Even after the Register of Wills requested an updated list "to reflect the names and addresses of all heirs at law to the decedent," Appellants argue that McCarthy made no reference to the purported paternal heirs. Appellants assert that this failure to include them on the List of Interested Persons and to send them the required notice was a mistake or substantial irregularity pursuant to ET Section 5-304(b), thereby compelling the setting aside of administrative probate and reopening the estate. Therefore, Appellants argue, the failure of the Orphans' Court to find mistake or substantial irregularity is incorrect as a matter of law and requires reversal.

It is well-settled that the factual findings of an Orphans' Court are entitled to a presumption of correctness. *Pfeufer v. Cyphers*, *supra*, 397 Md. at 648 (internal citations omitted). Any of the Orphans' Court findings of fact must be supported by a sufficiency of the evidence standard of review. *Id*; *New York State Library School Ass'n v. Atwater*, 227 Md. 155, 157 (1961); *Shapiro v. Marcus*, 211 Md. 83, 88 (1956). "Its legal

[3] "Required Corrections: A personal representative who discovers that a document previously filed is incomplete or erroneous shall promptly file with the register an amendment or supplemental document reciting the correct information." Md. Rule 6-127(b).

[4] "Whenever a personal representative discovers that a document previously filed by him or a predecessor personal representative is incomplete or erroneous, he shall promptly file a revised and corrected document with the register, reciting the correct information if known by him." ET § 7-105.

conclusions, however, are reviewed *de novo*." *Dougherty v. Rubenstein*, 172 Md. App. 269, 283 (2007). Therefore, this Court "must apply the law as it understands it to be." *Pfeufer*, 397 Md. at 648.

During probate, a personal representative must file administration accounts certifying that they mailed a notice of the filing to all "interested persons." ET § 7-501(a). Maryland law defines an "interested person", pertinent to the case at bar, as "a person serving as personal representative after judicial or administrative probate" or "an heir, even if the decedent dies testate [. . .]" ET §§ 1-101(i)(2), (4). An "heir" is therefore "a person entitled to property of an intestate decedent [. . .]" *Id*. at § 101(h).

The Trusts and Estates Article also requires that "exceptions to an administration account be filed within twenty days after the court's approval of the account." *Vito ex re. Vito v. Klausmeyer*, 216 Md. App. 376, 379 (2014) (citing Md. Rule 6-417(f); ET § 7-501(b)). However, "unless a timely request for judicial probate has been filed pursuant to [Section 5-304(b)], or unless a request has been filed pursuant to [Section] 5-402 of this title within six months of administrative probate, any action taken after administrative probate shall be final and binding as to all interested persons." ET § 5-304(a). Section (b) necessitates the setting aside of administrative probate for "fraud, material mistake, or substantial irregularity in the prior probate proceeding." ET § 5-304(b). Thus, absent fraud, mistake, or irregularity, or if timely exceptions are not filed, the Orphans' Court's account approval order becomes final. *Vito*, 216 Md. App. at 379 (internal citations omitted).

To establish fraud, mistake, or irregularity, the evidence must be clear and convincing. *Tandra S. v. Tyrone W.*, 336 Md. 303, 314 (1994). "Maryland courts have

narrowly defined and strictly applied [these terms] in order to ensure finality of judgments." *Thacker v. Hale*, 146 Md. App. 203, 217 (2002) (internal citations omitted); *see Platt v. Platt*, 302 Md. 9, 13 (2005). Because the parties do not argue that the judgment of the Orphans' Court was entered as a result of fraud, we limit our analysis to solely mistake and irregularity pursuant to Rule 2-535(b).

Mistake and irregularity are typically found in similar circumstances. Maryland's appellate courts will only find mistake, as read in Rule 2-535(b), when there has been a jurisdictional error, *i.e.*, "where the court has no power to enter judgment." *Tandra S.*, 336 Md. at 317. The Court of Appeals has similarly held that an irregularity is usually one "of process or procedure, and not an error, which in legal parlance, generally connotes a departure from truth or accuracy of which a defendant had notice and could have challenged." *Weitz v. MacKenzie*, 273 Md. 628, 631 (1975). Under this definition, mistake occurs when a court enters a judgment without valid service of process. *Tandra S.*, 336 Md. at 317. Irregularity has been defined as "the doing or not doing of that, in the conduct of a suit at law, which, conformable to the practice of the court, ought or ought not to be done." *Weitz*, 273 Md. at 631. As such, the Court of Appeals has found mistake and irregularity occurred where a party did not receive notice that was required by law. *Radcliff v. Vance*, 360 Md. 277, 292-93 (2000); *Early v. Early*, 338 Md. 639, 652 (1995); *Hardy v. Hardy*, 269 Md. 412, 416 (1973). A mistake, and by extension an irregularity, *does not*

include "unilateral error[s] of judgment on the part of [a] part[y]." [5] *Tandra S.*, 336 Md. at 318.

However, merely proving fraud, mistake, or irregularity is not sufficient to set aside an enrolled judgment. In addition to proving one of the three factors, the moving party "must establish that he . . . act[ed] with ordinary diligence and in good faith upon a meritorious cause of action or defense." *Thacker*, 146 Md. at 217 (quoting *Platt*, 302 Md. at 13).

The Appellants rely on *Radcliff v. Vance*, *supra*, in support of their claim that McCarthy's failure to provide notice was a mistake and irregularity, thus requiring the estate be reopened. In *Radcliff*, the surviving spouse of the decedent, Vance, moved to vacate an Orphans' Court order that required legal fees be paid from estate assets to a former attorney, Radcliff, without providing the statutory notice to Vance. 360 Md. at 283.

[5] Per the Court of Appeals in *Hughes v. Beltway Homes, Inc.*, 276 Md. 382, 386-87, (1975), jurisdictional mistakes, which do not permit a court to exercise its revisory power, include:

> a mechanics' lien foreclosure case making reference to the wrong lot; a mistaken belief by out-of-state counsel that the Maryland procedure relative to attachment was similar to that in his state, which belief brought about a judgment by default; a mistake of the agents and counsel of a complaining party; a failure to attach a ledger card to an affidavit with a motion for summary judgment or the failure of counsel to file an appropriate pleading prior to the expiration of the time specified by rule; a finding that a judgment by default was based upon vouchers, some of which were in the name of the defendant, some in the name of a corporation, and some in the name of another person; a mistaken determination that summary judgment should be entered against a defendant; or a failure by defendants to inform their attorneys of the defenses that they had.

The Orphans' Court vacated the order, finding "that the payment should not have been ordered without prior notice to [Vance.]" *Id*. at 284. The Court of Appeals affirmed the judgment of the Orphans' Court, holding that there was "substantial irregularity in the proceeding" per Rule 2-535 when the estate's personal representative failed to provide Vance with proper notice. *Id*. at 292. The Court further stated that the "irregularity was 'substantial'" because the failure to notify "prevented [. . .] Vance from opposing the motion to pay Radcliff's fees before the order to pay was entered." *Id*. at 293.

Although *Radcliff* provides guidance, we view *Durham v. Walters*, 59 Md. App. 1 (1984) to be more instructive. In *Durham*, twenty-six (26) appellants, identified as issue of the decedent's maternal and paternal grandparents, filed a petition and caveat in the Orphans' Court of Worcester County, asserting that they had not been sent notice of the probate proceedings. *Id*. at 4. In particular, the appellants claimed that the personal representative's failure to notify "any of the issue of the decedent's paternal grandparents who were entitled to receive notice of the proceedings" was "'a fraud [pursuant to Section 5-304(b)], innocent or otherwise,' that should preclude the personal representative from invoking the limits set forth in Section 5-207[6] to the detriment of the legal heirs." *Id*. at 7, 10. This Court affirmed the circuit court's finding that the personal representative/appellee

[6] [. . .] Regardless of whether a petition for probate has been filed, a verified petition to caveat a will may be filed at any time prior to the expiration of six months following the first appointment of a personal representative under a will, even if there be a subsequent judicial probate or appointment of a personal representative.

ET § 5-207.

did not "commit[] any fraud upon the decedent's heirs at law" even when the appellee "personally knew the decedent's parents" and had prior knowledge of some members of the decedent's extended family. *Durham* at 4, 10-11. The *Durham* court concluded that the personal representative's obligations pursuant to ET Sections 2-210 and 7-104 require only that he "notif[y] the Register of all of the decedent's heirs that were known to him." *Id*. at 11. "The law requires nothing more." *Id*.

Consistent with our holding in *Durham*, we disagree with the Appellants' contention that they were entitled to legal notice pursuant to ET Section 7-501(a). In this case, the Appellants' entire argument is premised on their assertion that they are "interested persons" and were required to receive written notice of any account filings with the Orphans' Court. We observe that Section 7-501(a) requires notice only to "interested persons," which defines them as heirs to the estate. In *Radcliff*, the appellee was a surviving spouse of the decedent – a designation neither of the parties contested. As such, she was considered an heir under ET Sections 1-101(h), (i) and was thus required to receive notice of account filings. Here, however, we hold that none of the Appellants established themselves as interested persons to Simonton's estate. While they refer to themselves as "paternal heirs," Appellants did not, during the entire eleven months between the decedent's death and the estate's closure, submit evidence of their relationship to Simonton. This is so despite the fact that on two separate occasions McCarthy requested Callahan produce any documentation he had regarding the Appellants' relationship to Simonton. Callahan did not respond to either request, and instead opted to petition the Orphans' Court to reopen

the estate nearly five months after McCarthy's second request for verification went unanswered.

It is also irrelevant that, despite the Appellants' contention, McCarthy knew of their existence solely as a result of Callahan's entry of appearance. Like McCarthy, the personal representative in *Durham*, Henry P. Walters, had a long personal relationship with the decedent. 59 Md. App. at 6. Walters was "very familiar with [the decedent's] family, having known the decedent for more than fifty years." *Id*. Walters also knew that the decedent was predeceased by both parents and his only brother, but was survived by three aunts. *Id*. We did not conclude that Walters committed fraud when he failed to send notice to the 26 claimed heirs in *Durham.* Walters testified that he sent notice only to "the heirs and decedents *to the extent known to him*." *Id.* at 10-11 (emphasis provided). Applying *Durham's* reasoning to this case, we fail to see how Callahan's entry of appearance on behalf of the purported heirs provided McCarthy with proof of their existence as heirs-at-law. Consequently, we hold that Callahan's entry of appearance did not obligate McCarthy to notify the Appellants under Rule 2-535.

In this case, McCarthy believed Durso to be Simonton's sole surviving family member because of his role as Simonton's legal guardian. In that position, McCarthy had knowledge of who likely were Simonton's heirs. Just as in *Durham* we did not conclude that Walters, the personal representative, should have notified the appellants in that case of probate, we similarly hold that McCarthy was not obliged to notify Appellants of these proceedings based on nothing more than Callahan's entry of appearance on their behalf.

Our conclusion conforms to the general principle that the "party seeking to change the status quo [has] the burden both to come forward with the evidence in support of its action and to persuade the trier of fact that the change is justified." Jacob A. Stein, Trial Handbook for Maryland Lawyers § 9:1 (3d ed. 2019) (citing *Baltimore Gas and Elec. Co. v. Everett*, 61 Md. App. 288 (1985), *judgment rev'd on other grounds*, 307 Md. 286 (1986) (overruled by *Coleman v. Anne Arundel County Police Dept.*, 369 Md. 108 (2002))). As such, the burden of proof is ordinarily on the moving party, *id*., or on the party "who presumably has peculiar means of knowledge enabling him to prove its falsity, if it is false." *Owens-Corning v. Walatka*, 125 Md. App. 313, 326 (1999) (abrogated on other grounds by *John Crane, Inc. v. Scribner*, 369 Md. 369 (2002)). Considering Appellants initiated contact with McCarthy claiming to be heirs, it follows that the burden of proving their heirship rested with them. Our conclusion is that the Appellants themselves would be best positioned to prove that they were, in fact, one of Simonton's patrilineal heirs. *See Owens-Corning*, 125 Md. App. at 313. Once Appellants presented evidence that tended to establish their heirship, the Orphans' Court could then require McCarthy to offer proof that Appellants were not, in fact, heirs-at-law. *See In re Adoption/Guardianship of Amber R.*, 417 Md. 701, 720-21 (2011) (quoting *Commodities Reserve Corp. v. Belt's Wharf*, 310 Md. 365, 368 (1987)).

At the April 20, 2018 Orphans' Court hearing the Appellants had the burden of establishing their heirship by a preponderance of the evidence. *Goodwich v. Sinai Hosp. of Baltimore, Inc.*, 343 Md. 185, 207 (1996). They did not do so. During the hearing, Callahan indicated that he had "just received" proof of heirship the week prior – nearly one

year after his first communication with McCarthy.[7] However, for reasons undisclosed, Callahan admitted that he did not forward this documentation to McCarthy. At the hearing, Callahan did not move that documentation into evidence. Additionally, Callahan did not provide expert testimony to support his claim that one year was a reasonable amount of time to conclude an heir search.

Based on the evidence adduced at the hearing, we conclude that the Orphans' Court correctly found that Appellants did not prove that they were interested persons by a preponderance of the evidence. *Att'y Grievance Com'n of Maryland v. DiCicco*, 369 Md. 662, 681 (2002) ("Clear and convincing evidence must be more than a mere preponderance but not beyond a reasonable doubt.") (internal citations omitted); *Thacker*, 146 Md. App. at 217 (citing *Tandra S.*, 336 Md. at 314). Consequently, we hold that McCarthy was not legally obligated to notify Appellants of the proceedings. For the same reason, we cannot conclude that McCarthy's decision not to notify Appellants was a mistake or irregularity that warranted reopening the estate.

Even assuming Appellants were entitled to receive notice, that fact would not absolve them of the responsibility to act in good faith and with ordinary diligence to prove heirship. Appellants, through Callahan, contacted McCarthy only twice in six months. On both occasions, McCarthy asked for documentation to establish the Appellants' status as heirs and put Callahan on notice that he would not consider the Appellants as heirs until he received this documentation. As noted, Appellants had various means to remedy or slow

[7] It should be noted that the family tree submitted into evidence on behalf of the Appellants in this case remains "in progress."

the process, such as filing a petition against the List of Interested Persons or the Final Accounting Order within the proper time. At the very least, Appellants could have maintained more frequent contact with McCarthy or requested an extended probate period while Callahan collected documentation.

We conclude that, although they were not provided legal notice of the proceedings, the Appellants, through Callahan, were on constructive notice of the proceedings. *See Durham*, 59 Md. App. at 13 ("[A]ppellants . . . were at fault by failing to file their caveat for over 15 months after due notice of the appointment of the decedent's personal representative had been provided by publication."). As we held in *Durham*, "[w]here further notice is not reasonably possible or practical under the circumstances because of the cost or difficulty of investigation into the status of unknown parties, the requirements of due process may be satisfied with publication." *Id*. at 15. In this case, the August deadline to file exceptions with the Register of the Wills was printed on successive days in *The Sentinel* newspaper. *See id.* at 13.

Furthermore, the record suggests that Callahan had access to the Orphans' Court docket. We observe that Callahan expressed his concern to McCarthy that a final accounting had been approved after he had reviewed the Orphan's Court's docket. Upon making this discovery Callahan could have filed exceptions and contested McCarthy's actions as personal representative, moved to enjoin McCarthy from making a distribution of the estate until heirship proofs were available, or moved for judicial probate pursuant to ET Section 5-402(c), but did not. As we explained in *Durham*, "[a] person is charged with the knowledge that the law gives him a right to caveat a will, and the statute makes no

exception in favor of relatives unaware of the probate." 59 Md. App. at 14 (citing Philip L. Sykes, *Contest of Wills in Maryland*, § 3 at 4-5 (1941)). The same is true in this case. We conclude that Appellants did not act with ordinary diligence to establish their claimed status as Simonton's heirs. The Orphans' Court properly denied their request to reopen the estate.

JUDGMENTS OF THE ORPHANS' COURT OF MONTGOMERY COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANTS.