

Orphans' Court for Montgomery County
Estate No. W79511

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 975

September Term, 2021

IN RE: ESTATE OF ERNESTINA BOU

Kehoe,
Leahy,
Friedman,
JJ.

Opinion by Kehoe, J.

Filed: December 6, 2022

* This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1–104.

Appellant Thomas F. Kennedy asks us to reverse a judgment of the Orphans' Court for Montgomery County that denied his exceptions to the seventh administrative account filed in the Estate of Ernestina Bou. The appellee is Walter P. Kennedy, who is one of Thomas's siblings and is the personal representative of Ms. Bou's estate.¹ Thomas presents four issues:

1. Whether the Orphans' Court committed error of law and/or clearly erroneous findings of fact (or lack thereof), by denying the subject Exceptions without first making inquiry into allegations that the personal representative and counsel made and then verified in the Seventh Account, certain false, fraudulent, intentional and/or negligent misrepresentation of material facts relating to many thousands of dollars.
2. Whether the Orphans' Court committed error of law or abused its discretion in denying exceptions filed in connection with the Seventh Account by not ordering an evidentiary hearing to determine certain allegations of improper conduct on the part of the personal representative and counsel, specifically, that they knowingly made and then verified in the Seventh Account, certain false, fraudulent, intentional and/or negligent misrepresentation of material fact relating to many thousands of dollars.
3. Whether, based on a finding of fraud, irregularity, misrepresentation, mistake or otherwise, the Orphans' Court has the power to amend, rescind or revise a previous order made in connection with an account or to make a new order in an estate, and to direct a personal representative to amend, correct and report in any subsequent account, that incorrect information previously reported by the personal representative and counsel concerning material facts.
4. Whether the Orphans' Court committed error of law invoking the doctrine of res judicata when it overruled and denied the subject Exceptions, where there was no prior case; no hearing on the merits; and the case remains open.

¹ To avoid confusion, we will refer to the parties by their first names. We mean no disrespect.

We will affirm the judgment of the orphans' court.

BACKGROUND

Ms. Bou passed away on April 1, 2014. Prior to her death, she suffered from dementia and Thomas acted as her attorney-in-fact. She was survived by a sister, as well as three nieces and four nephews (including Thomas and Walter), all of whom are children of her predeceased sister, Ana L. Bou Kennedy.

Ms. Bou died with a will. In it, she named Thomas as the executor of her will and the personal representative of her estate. She devised the residue of her estate to her nephews and nieces, per stirpes.

Shortly after Ms. Bou's death, Thomas filed a petition with the register of wills to admit Ms. Bou's will into probate and to elect administrative probate. The orphans' court accepted the will for probate and appointed him as personal representative of her estate.

About two weeks later, Walter and other persons interested in the Bou estate filed a petition to remove Thomas as personal representative. They alleged that Thomas had abused his authority as Ms. Bou's attorney-in-fact by transferring portions of Ms. Bou's assets to a business owned by him and to the estates of their deceased parents. During a hearing on the petition, Thomas admitted that he had done so and further admitted that he had not reimbursed Ms. Bou during her lifetime. Based on what the orphans' court characterized as the "overwhelming" evidence of Thomas's "past bad behavior," the court removed him as personal representative and named Walter as successor personal representative.

On April 10, 2015, Walter, as personal representative of the Bou Estate, filed suit against Thomas in the Circuit Court for Montgomery County, alleging, among other things, breach of fiduciary duty and conversion by a fiduciary.² On July 1, 2016, a jury returned a verdict in favor of the Bou estate and against Thomas for compensatory damages in the amount of \$150,000, plus post-judgment interest. On March 9, 2017, Walter requested that the circuit court issue writs of garnishment against Thomas’s business, his bank accounts, and Ms. Kennedy’s estate. The circuit court granted that request in an order entered the following day.

Walter’s first, second, and third interim administration accounts

Personal representatives are required to file periodic reports of their administration of the estate’s assets and liabilities with the orphans’ court. *See* Md. Rule 6-417.³

² We take judicial notice of the docket entries in this circuit court case, as they are available on the Maryland Judiciary website. *See Lewis v. State*, 229 Md. App. 86, 90 n.1 (2016) (“We take judicial notice of the docket entries . . . found on the Maryland Judiciary CaseSearch website, pursuant to Maryland Rule 5–201.”), *aff’d*, 452 Md. 663 (2017).

³ Md. Rule 6-417 states:

- (a) Time for Filing. The personal representative shall file with the register an initial account (1) within nine months after the date of the appointment of the personal representative or (2) if the decedent died before October 1, 1992, within the later of ten months after the decedent’s death or nine months after the date of the first publication. The personal representative shall file subsequent accounts until the estate is closed at intervals of the first to occur of: six months after the prior account is approved or nine months after the prior account is filed.

During the pendency of the estate’s civil action against Thomas, Walter filed two interim administration accounts for the Bou estate. The first, filed on September 28, 2015, indicated a “total balance on hand” in the amount of \$32,981.30. The orphans’ court approved that account in an order entered on October 30th. Walter filed the second interim account on June 24, 2016, reflecting a balance of \$14,695.56, which the orphans’ court approved on July 21st. In both accounts, Walter referenced amounts due from Ms. Kennedy’s estate as well as an undetermined amount due from Thomas, which was “pending litigation.”

On February 14, 2017, that is, after the judgment in the action against Thomas, Walter filed a third interim account which valued the Bou estate at \$224,041.72, \$150,000 of which he attributed to the judgment against Thomas and an additional \$69,200, which Walter asserted was owed by Ms. Kennedy’s estate to the Bou estate. Walter asserted that this obligation was the basis of a pending claim against Ms. Kennedy’s estate. Neither Thomas nor any other interested party filed exceptions to the third account.

The fourth and fifth administration accounts

In a fourth interim account, filed on December 12, 2017, Walter reported that the Bou Estate had collected \$69,200 from Ms. Kennedy’s estate on May 5, 2017. The account continued to identify the \$150,000 judgment against Thomas (less \$1,168.80,

which had been garnished from his bank account) as a separate asset of the Bou Estate. The court approved that account in an order entered on February 8, 2018.⁴

Thomas filed exceptions to the fourth account on February 28th, asserting, in pertinent part: “In the accounting filed by [Walter], a \$69,200 payment is not credited to [Thomas] and is wrongly reported as a separate asset of [the Bou estate], but it is not.” (Cleaned up.) Without delving too deeply into Thomas’s reasoning, the substance of his objection appears to have been that the Kennedy estate had agreed to pay the Bou estate’s claim against it in full. Thomas asserted this payment should be credited against the \$150,000 judgment entered against him in favor of the Bou estate.⁵ The orphans’ court held a hearing on Thomas’s exceptions on April 12, 2018, but deferred ruling on it “until the resolution of all matters in the Ana Bou Kennedy Estate.”

On September 11, 2018, Walter filed a fifth interim account, which identified an outstanding \$148,826.99 judgment debt against Thomas as an asset of the Bou Estate. The court approved that account in an order entered on October 19th.

Thomas excepted to the fifth account on November 7th, asserting, in part that:

⁴ The court initially approved the fourth interim account in an order entered on January 17, 2018. The court vacated that order, however, on January 31st due to an unspecified conflict with the issuing judge.

⁵ Why this would be so is very unclear. As we have related, in the hearing on Walter’s motion to remove him as personal representative of the Bou estate, Thomas conceded that he transferred some of the funds that he had converted from Ms. Bou to his real estate company and some of the funds to the Kennedy estate. Thomas provides no explanation in his brief.

Ms. Bou's Estate never borrowed any money from Ms. Kennedy's Estate. and Ms. Kennedy's Estate did not owe Ms. Bou's Estate any money for any reason. The Claim paid by Ms. Kennedy's Estate to Ms. Bou's Estate was for money borrowed by [Thomas] to help maintain Kennedy Family properties.

* * *

In sum, the \$69,200 paid by Ms. Kennedy's Estate to Ms. Bou's Estate is not a separate asset of Ms. Bou's Estate but reduces the \$150,000 jury verdict against [Thomas].

(Cleaned up.)

The orphans' court denies Thomas's exceptions to the fourth and fifth administration accounts

On April 12, 2019, the orphans' court, the Honorable James A. Bonifant presiding, held a hearing on Thomas's exceptions to the fourth and fifth accounts. Pertinent to the issues in this appeal, the court took judicial notice of the docket entries in the circuit court action between the Bou and Kennedy estates. The court noted that, in the third administration account, Walter had reported that the Bou estate had assets of \$224,041 which included the estate's \$150,000 judgment against Thomas and the Bou estate's \$69,200 claim against the Kennedy estate. The orphans' court noted that no exceptions had been filed to the third interim account, but that Thomas had filed objections to the fourth and fifth interim accounts asserting, as we have explained, that \$69,200 of the amount recovered should be credited against Thomas's obligation to the Bou estate. The court asked Thomas why a partial order of satisfaction had not been entered in the circuit court. The following exchange ensued:

[THOMAS]: Because the oversight of the personal representative would be in the Probate Court.

THE COURT: The judgment is against you, sir.

[THOMAS]: Yes, Your Honor, it is against me.

* * *

THE COURT: You're saying their account is wrong because they continue to list a judgment against you as an asset of Ms. Bou's Estate that still appears in the Circuit Court records.

[THOMAS]: Correct, Your Honor.

* * *

THE COURT: And you've got all objections and problems with that judgment still being there as I understand what your argument is and you're saying that judgment should be marked as satisfied, correct?

[THE THOMAS]: Yes, Your Honor.

THE COURT: That's a Circuit Court matter.

The orphans' court overruled Thomas's objection and approved the fourth and fifth interim accounts. Thomas did not file an appeal from that judgment.

The sixth administration account

On August 30, 2019, Walter filed a sixth interim administration account, which the court approved. In exceptions filed on October 15th, Thomas asked the court to enter an order directing Walter to amend the account to reflect the payment from the Kennedy estate to the Bou estate in the amount of \$69,200 was in partial satisfaction of the \$150,000 judgment obtained against Thomas.

On October 9, 2020, the orphans' court, the Honorable Christopher C. Fogleman presiding, held a hearing on the exceptions to the sixth account. Walter advanced two arguments in opposition to Thomas's exceptions. First, he asserted that the rule of *res judicata* barred Thomas's complaints because the court had overruled his exceptions to

the fourth and fifth accounts. Additionally, Walter claimed that the orphans' court lacked jurisdiction to declare the circuit court's judgment partially satisfied.

With respect to Walter's first contention, Thomas responded that *res judicata* was inapplicable, arguing that the issues then before the court differed from those presented by his exceptions to the fourth and fifth accounts because they were different accountings. Thomas also maintained that the order denying his exceptions to the fourth and fifth accounts did not constitute a final judgment on the merits for purposes of *res judicata* because the court's decision had not been based on evidence and was not, therefore, a final judgment on the merits. As to Walter's jurisdictional challenge, Thomas rejoined that the jurisdiction of the orphans' court includes "all the issues that are relative to the people and the property of the [Bou] estate."

After hearing the parties' arguments, the orphans' court denied the exceptions. It noted that Thomas had raised the same contentions in his exceptions to the fourth and fifth accounts and that the orphans' court had denied them. The court concluded that the principle of *res judicata* barred it from addressing Thomas's contentions on their merits. As an alternative basis for its decision, the court stated that "it did not think that what [Thomas] is attempting to do is within the subject matter jurisdiction of the Orphans' Court[.]" Thomas did not appeal the court's denial of his exception.

The seventh administration account

On November 9, 2020, Walter filed a seventh interim account, which the court approved in an order entered on December 11th. Apparently undeterred by the court’s prior judgments, Thomas filed exceptions to that account. The orphans’ court, the Honorable Thomas L. Craven presiding, held a hearing in which Thomas presented the same contentions that he raised in his exceptions to the fourth, fifth and sixth accountings. After the parties reiterated the arguments that they had made during the prior hearing, the court overruled Thomas’s exceptions. Adopting by reference the reasoning articulated by Judges Fogleman and Bonifant, it ruled: “For the reasons . . . based on a series of orders by this Court . . . , the Court finds that it must deny the pending exception.” Thomas filed a timely notice of appeal.

ANALYSIS

The legal and factual bases of Thomas’s exceptions to the seventh account are identical to those that he asserted in his exceptions to the fourth, fifth, and sixth accounts. They fail for the same reasons: First, his claim is barred by the principle of *res judicata*, otherwise known as claim preclusion. Second, the orphans’ court does not have the authority to grant him the relief that he seeks.

A

The doctrine of *res judicata* is well established in Maryland. As the Court of Appeals has explained:

The doctrine of claim preclusion, or *res judicata*, bars the relitigation of a claim if there is a final judgment in a previous litigation where the parties, the subject matter and causes of action are identical or substantially identical as to issues actually litigated and as to those which could have or should have been raised in the previous litigation.

* * *

Under Maryland law, the elements of *res judicata*, or claim preclusion, are: (1) that the parties in the present litigation are the same or in privity with the parties to the earlier dispute; (2) that the claim presented in the current action is identical to the one determined in the prior adjudication; and, (3) that there has been a final judgment on the merits.

Board of Education . v. Norville, 390 Md. 93, 106–08 (2005) (cleaned up).

In the present case, Thomas presents two reasons why *res judicata* does not apply.

First, he argues that *res judicata* does not apply unless the claim at issue was “actually litigated” in the prior action. He equates “actually litigated” with an evidentiary hearing. He is wrong. The doctrine applies when there has been a prior adjudication on the merits. It is not limited to cases in which the court has considered testimony.

Second, Thomas contends *res judicata* does not apply because a court’s denial of exceptions to does not constitute a final judgment. The Court addressed this issue in the context of exceptions taken to a trustee’s account of its administration of a trust in *Shirk v. Sneeringer*, 163 Md. 265, 266 (1932). Writing for the Court, Chief Judge Bond explained that a court’s authority to adjudicate the merits of an exception:

yields, in cases of second exceptions filed to accounts after adjudication of earlier exceptions, to the rule that the court cannot permit litigation of the same subject by the same parties twice. . . . No offer of additional evidence, or evidence of newly discovered facts, and no deferred demand for full proof, could serve to secure him a second adjudication on new exceptions. The principle of *res judicata* extends not only to the questions of fact and of

law, which were decided in the former suit, but also to the grounds of recovery or defence which might have been, but were not, presented.

163 Md. 265, 266–67 (1932).

Although *Shirk* involved an auditor’s account filed in a circuit court proceeding, the Court applied precisely the same reasoning when it held that an orphans’ court’s denial of an exception to an accounting is appealable and, when no appeal is taken, *res judicata* precludes relitigating the issue raised in the exceptions proceeding. *Johnson v. Johnson*, 265 Md. 327, 331–32 (1972). *See also Spry v. Gooner*, 190 Md. App. 1, 3 (2010) (addressing an appeal from an orphans’ court judgment denying exceptions to an administrative account); *Banashak v. Wittstadt*, 167 Md. App. 627, 658 (2006) (noting that an orphans’ court order ratifying an administration account is a final judgment for purposes of appellate review).

B

As we have explained, the orphans’ court identified a separate and independent basis for its denial of Thomas’s exceptions, namely, that it should not enter an order to the effect that there had been a partial satisfaction of the \$150,000 judgment in the absence of any documentation in the circuit court file that this was correct. We believe that the orphans’ court’s reservations were well-founded. Because Thomas does not challenge this aspect of the orphans’ court’s reasoning in his brief, there is no reason for us to elaborate on the issue. *See*, Md. Rule 8–504(a)(6); *HNS Development, LLC v. People’s*

Counsel for Baltimore County, 425 Md. 436, 459 (2012); *DiPino v. Davis*, 354 Md. 18, 56 (1999); *Tallant v. State*, 254 Md. App. 665, 689, (2022).⁶

**THE JUDGMENT OF THE ORPHANS’
COURT FOR MONTGOMERY
COUNTY IS AFFIRMED.**

APPELLANT TO PAY COSTS.

⁶ Finally, Thomas argues that the orphans’ court was authorized to amend or revise its order(s) approving the administration accounts pursuant to Maryland Rules 2–535 or 2–602. There is no reason for us to address the issue because he did not file a motion under either rule asking the orphans’ court to revise its judgment denying his exceptions. *See* Md. Rule 8-131(a).