

Orphans' Court for Montgomery County
Case No. W77533

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1992

September Term, 2019

LYNETTE SILVERBERG

v.

ALAN A. COHEN, Personal Representative

Fader, C.J.,
Zic,
Moylan, Charles E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zic, J.

Filed: March 3, 2021

*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.

Lynette Silverberg, appellant and an interested person¹ in her father’s estate (the “Estate”), appeals an order of the Orphans’ Court for Montgomery County denying a portion of her Petition for Allowance of Claims (“Petition”). Her Petition was for the value of her personal labor in maintaining an asset of the Estate, the family home (the “Property”), which she expected would be hers, but was sold by the personal representative of the Estate, her brother, Dr. Alan Cohen.

During the hearing on the Petition, the Orphans’ Court raised and erroneously relied on a presumption that such personal labor, in the absence of an agreement for payment, is provided gratuitously in this context. Notwithstanding the Orphans’ Court’s reliance on the presumption, we shall affirm the denial of the Petition for Ms. Silverberg’s personal labor because the court correctly concluded there was no agreement for the Estate to pay for her personal labor. She expected the Property to be hers; she did not expect to be paid an hourly rate for her labor. We explain.

FACTS AND PROCEEDINGS

The administration of the Estate and other litigation² between the parties has a long, detailed history. We limit the presentation of facts to those necessary to resolve the issues on appeal.

¹ “Interested Person” is defined in § 1-101 of the Estates and Trusts Article.

² In his brief, Dr. Cohen identified three cases Ms. Silverberg filed against him: *Silverberg v. Cohen*, No. 423311-V (Md. Cir. Ct. Montgomery Cnty. July 21, 2016); *Silverberg v. Cohen*, No. 434695-V (Md. Cir. Ct. Montgomery Cnty. July 26, 2017); *Silverberg v. Cohen*, Case No. 467461-V (Md. Cir. Ct. Montgomery Cnty. June 3, 2019).

Ms. Silverberg’s Work on the Property and Communications with Dr. Cohen

Through a series of communications regarding the Property, Ms. Silverberg came to understand that the Property would be hers. The communication that Ms. Silverberg emphasizes is a text message from Dr. Cohen: “Whatever[,] [i]t[’]s your inheritance.” Based on this understanding, Ms. Silverberg expended efforts regarding the repair and maintenance of the Property with the expectation that she would turn it into a rental property to generate income for her retirement. She spent two and one-half years on this effort but limited her claim to two years.

Ms. Silverberg’s Claims for Expenses and Personal Labor

On April 11, 2016, Ms. Silverberg filed a Claim Against Decedent’s Estate with the Register of Wills for Montgomery County (“Register”) for the sum of \$48,749. Among the items claimed was “Labor, Lynette \$15,730.” Just over one year later, Ms. Silverberg filed another Claim Against Decedent’s Estate on May 30, 2017 in the sum of “approximately \$150,000[:] details to be filed before 6-1-17 or . . . at the hearing on 6-1-17.”³

On June 1, 2017, the Orphans’ Court removed Ms. Silverberg as co-personal representative, leaving Dr. Cohen as the sole personal representative.⁴ Dr. Cohen filed

³ The record does not reflect that details were filed on or before the June 1, 2017 hearing.

⁴ The Estate started with three siblings as co-personal representatives, but Ms. Silverberg and Dr. Cohen settled with their sister, Sarine Schrank. Ms. Schrank brought her own claims against the Estate in 2013. *See Schrank v. Silverberg*, Case No. 382952-

two Notices of Disallowance of Claims on April 2, 2019 in response to Ms. Silverberg’s claims. Ms. Silverberg filed her Petition with the Register on May 31, 2019. Her Petition claimed \$124,800 for personal labor and \$39,117.88 for supplies and reimbursement for professional services performed by others.

The Hearing on the Petition and Ms. Silverberg’s Motion for Reconsideration

On October 18, 2019, the Orphans’ Court held a hearing on Ms. Silverberg’s Petition. The court granted Ms. Silverberg’s claims for supplies and reimbursement for professional services performed by others. Citing a presumption that Ms. Silverberg’s personal labor was provided gratuitously and a lack of agreement between the parties, the court denied Ms. Silverberg’s claim for personal labor.⁵

On October 21, 2019, Ms. Silverberg filed a motion for reconsideration in which she discussed several cases that applied or did not apply (depending on the caregiver’s relationship to the decedent) a presumption that services, as opposed to the repair and maintenance of an estate asset, were provided gratuitously during the decedent’s lifetime. The court denied the motion on November 5, 2019. This appeal followed. The only issue on appeal is Ms. Silverberg’s claim for the value of her personal labor.

V (Md. Cir. Ct. Montgomery Cnty. Oct. 10, 2013); *Schrank v. Silverberg*, Case No. 383587-V (Md. Cir. Ct. Montgomery Cnty. Oct. 29, 2013).

⁵ The court continued the hearing regarding the award for supplies and professional services to November 6, 2019 to decide whether there should be offsets.

QUESTIONS PRESENTED

Ms. Silverberg presents two questions for appellate review, which we have rephrased as follows:

1. Did the Orphans' Court err in its application of a presumption that Ms. Silverberg's personal labor in the repair and maintenance of the Property was rendered gratuitously?
2. If the Orphans' Court did err in its application of the presumption, was the Orphans' Court nevertheless correct in denying the claim for personal labor because there was no agreement for the Estate to pay Ms. Silverberg and she did not expect to be paid an hourly wage for her personal labor?⁶

⁶ Ms. Silverberg raised the following questions presented in her brief:

1. Whether the trial court erred by applying a presumption that services rendered by a family member of a decedent to the Estate after the death of the decedent is gratuitous.
2. Even if there is a presumption that Appellant's services were rendered gratuitously, was there sufficient evidence that Appellant reasonably expected to be compensated for her work?

Dr. Cohen phrased the questions as follows:

1. Did the Orphans' Court err in applying a presumption that Silverberg's personal services to Decedent's Estate were provided gratuitously?
2. Was the Orphans' Court clearly erroneous in denying Silverberg's claims for personal services where Silverberg failed to overcome a presumption that her services were provided gratuitously based on her evidence and admissions?
3. Was the Orphans' Court application of a presumption of gratuitous services harmless error where a comprehensive review of the record would probably have supported no material effect on the outcome of the case?

For the reasons outlined below, we answer both questions in the affirmative and shall affirm the judgment of the Orphans’ Court.

STANDARD OF REVIEW

“[T]he findings of fact of an Orphans’ Court are entitled to a presumption of correctness.” *Kelly v. Duvall*, 441 Md. 275, 280 (2015) (quoting *N.Y. State Libr. Sch. Ass’n v. Atwater*, 227 Md. 155, 157 (1961)). “But ‘[t]he [Orphans’ Court]’s interpretations of law enjoy no presumption of correctness on review: the appellate court must apply the law as it understands it to be.” *Kelly*, 441 Md. at 280 (quoting *Rohrbaugh v. Estate of Stern*, 305 Md. 443, 446 n.2 (1986)). “Thus, an appellate court, including this Court, must ascertain whether the conclusions of law made by a trial court in the first instance are ‘legally correct.’” *Kelly*, 441 Md. at 280 (quoting *Pfeufer v. Cyphers*, 397 Md. 643, 648 (2007)).

DISCUSSION

I. THE PRESUMPTION OF GRATUITOUS SERVICES DOES NOT APPLY TO THIS CASE.

“Under Maryland decisions services rendered for a decedent by a member of his [or her] family give rise to a presumption that the services were rendered gratuitously so that the plaintiff must show that the services were performed under circumstances so as to demonstrate a reasonable expectation that there would be compensation” *Shaefer v. Hewes*, 225 Md. 207, 211 (1961). Ms. Silverberg made a claim for her personal labor for the repair and maintenance of the Property, not for the personal care of her father. The

presumption of gratuitous services came up three times during the hearing on the Petition.

It was initially raised when the court questioned Ms. Silverberg's expert:

[THE COURT]: -- in real estate and management do you often run into homes that are being sold for elderly folks, I mean people that are deceased?

THE WITNESS: Yes.

[THE COURT]: Does the family often do it gratuitously, fixing up the house?

THE WITNESS: Not necessarily, I mean, because there's -- like if there's time involved, there's expenses involved, buying materials, some of the work has to be outsourced.

[THE COURT]: So you're saying family members do not fix up, you've never seen family members fix up --

THE WITNESS: In most cases --

[THE COURT]: -- for their parents?

THE WITNESS: I guess they could. I guess -- so --

[THE COURT]: They could?

THE WITNESS: I have seen people like help.

Then, during an exchange between the court and Ms. Silverberg's counsel:

[COUNSEL FOR MS. SILVERBERG]: You know, for the argument that, you know, kids need to do -- kids do good things for their parents out of good will and that she'll get her inheritance that would be all and well in that she should get --

[THE COURT]: Well, it's not just argument, you know, it's the case law.

[COUNSEL FOR MS. SILVERBERG]: That's true, and she would get --

[THE COURT]: And you've read the case law, haven't you, Counsel?

[COUNSEL FOR MS. SILVERBERG]: Understood, and --

[THE COURT]: *And isn't it a presumption?*

[COUNSEL FOR MS. SILVERBERG]: Correct, but I think good will and for the parents goes to, you know, more short-term care taking and, you know, end of life and that sort of stuff, not spending two years on your life to rehab and to improve a piece of property.

[THE COURT]: You got any case law that I can refer to?

[COUNSEL FOR MS. SILVERBERG]: I'd be happy to submit a post hearing memo if Your Honor would like, but I think this goes above and beyond what is expected or is presumed by the children to do this work. You've heard that Dr. Cohen wanted nothing to do with it. It's your inheritance, I'm not doing it. I'm their child just like you, but I'm not doing it.

(emphasis added)

And finally, when the court announced its ruling:

[THE COURT]: Okay. Well, I'll deny the claim for her labor. People do that all the time for estates *The law is it's presumed family members do these things out of their own free choice. There was no agreement between her and the estate*, so I will grant as to the -- for the bills for the contractors in total.

I will grant for her bills for all the supplies in total, but again your client made the choice that she would choose to do two years of labor and that's understandable when she's going to receive this asset, whether the actual asset or the proceeds from it.

(emphasis added)

Ms. Silverberg argues that the Orphans’ Court erroneously applied the presumption in denying the personal labor claim, the error was not harmless, and “[t]he decision of the Orphans’ Court clearly shows that its consideration and evaluation of the claim would have been materially different absent its application of the presumption.”⁷ Dr. Cohen argues that there is no controlling case that holds the presumption does not apply to services provided after the death of the decedent, and the application of the presumption was not error, but sound public policy.⁸ In other words, Dr. Cohen effectively argues that we should hold, as a matter of first impression, that the

⁷ Ms. Silverberg’s brief does not provide any additional explanation of this point. As explained below, the Orphans’ Court’s finding that there was no agreement to pay Ms. Silverberg for her personal labor is a sufficient basis for us to affirm.

⁸ At page 14 of his 16-page brief, Dr. Cohen contends, for the first time, that “[a]s the proponent of the [c]laims for personal services, Silverberg had the burden of proving that her services fell within the requirements of [§ 8-103(c) of the Estates and Trusts Article] and were not gratuitous.” Dr. Cohen’s brief does not identify the subject matter of Estates and Trusts § 8-103(c), which is a statute of limitations, or contain any argument on this point. Indeed, his brief does not contain the phrase “statute of limitations.” At oral argument, Dr. Cohen argued for the first time that the statute of limitations in that statute precluded Ms. Silverberg’s claim. This is not in compliance with Maryland Rule 8-504. Specifically, the Rule requires a brief to supply an “[a]rgument in support of the party’s position on each issue” and, in the event of noncompliance, allows an appellate court to “dismiss the appeal or make any other appropriate order with respect to the case.” Md. Rule 8-504(a)(6), (c). As Judge Kehoe succinctly stated for this Court, “[a] single sentence is insufficient to satisfy [Rule 8-504(a)(6)]’s requirement.” *Silver v. Greater Balt. Med. Ctr., Inc.*, 248 Md. App. 666, 688 n.5 (2020); *see also DiPino v. Davis*, 354 Md. 18, 56 (1999) (“[I]f a point germane to the appeal is not adequately raised in a party’s brief, the court may, and ordinarily should, decline to address it.”); *Albertson v. State*, 212 Md. App. 531, 570-71 (2013) (citing cases wherein Maryland Courts have opined that the failure to discuss or specifically argue an issue in briefs or oral argument, or to set forth the authority for a proposition, is a waiver of that issue). Accordingly, we decline to address the issue.

presumption applies in this context. In the alternative, he argues that the application of the presumption was a harmless error because there was no agreement for Ms. Silverberg to be paid for her personal labor.

The parties have not cited a controlling case where the presumption applies to the repair and maintenance of an asset of an estate, even when the estate is of a family member, and we have found none. In the cases cited by Ms. Silverberg⁹ and Dr. Cohen,¹⁰ the presumption has been applied with regard to services provided for the benefit of the decedent *during the decedent's lifetime*. There is no presumption of gratuitous services under Maryland law that applies in the context of the repair and maintenance of an asset of a family member's estate, and the Orphans' Court erred in applying it to Ms. Silverberg's claim. We need not address whether we should extend the presumption under these circumstances. Although the presumption was erroneously

⁹ In her motion for reconsideration and her brief, Ms. Silverberg cited several cases: *Shaefer v. Hewes*, 225 Md. 207, 210-11 (1961) (presumption did not apply to wife of nephew of decedent's husband for personal services rendered during decedent's lifetime); *Zahn v. Heil*, 192 Md. 576, 578-79 (1949) (no presumption of gratuitous services rendered by housekeeper-nurse who cared for decedent and his elderly father as she was not a family member); *Krug v. Mills*, 159 Md. 670, 678-79(1930) (presumption applied to nephew's personal services performed during his uncle's lifetime); *Jones v. Jones*, 146 Md. 19, 24-26 (1924) (presumption did not apply to board, housing, and service provided to wife's great uncle before his death); *Harper v. Davis*, 115 Md. 349, 352 (1911) (presumption applied to "many valuable services," including "nursing and care" rendered during decedent's lifetime).

¹⁰ In his brief, Dr. Cohen cited several cases including *Shaefer*, 225 Md. at 210-11, and *Harper*, 115 Md. at 352, which were also referenced by Ms. Silverberg. He also cited *Bixler v. Sellman*, 77 Md. 494, 496-97 (1893) (granddaughter provided services to grandfather during his lifetime) and *Bantz v. Bantz*, 52 Md. 686, 693-96 (1880) (son provided services to mother during her lifetime).

applied here, we can affirm the Orphans’ Court’s ruling “on any ground adequately shown by the record.” *Harris v. McKenzie*, 241 Md. App. 672, 678 (2019) (quoting *Monarc Constr., Inc. v. Aris Corp.*, 188 Md. App. 377, 385 (2009)). There is adequate support in the record for the Orphans’ Court’s finding, which is entitled to a presumption of correctness, that there was no agreement for Ms. Silverberg to be paid for her personal labor and the court’s denial of that claim.

II. THERE WAS NO AGREEMENT FOR THE ESTATE TO PAY FOR MS. SILVERBERG’S PERSONAL LABOR.

We initially note that at the Petition hearing Ms. Silverberg testified that her motivation for filing the Petition was that Dr. Cohen had sold the Property she expected to be hers:¹¹

[COUNSEL FOR MS. SILVERBERG]: Okay. And what’s the current status of the house?

[MS. SILVERBERG]: Well, it got sold without my knowledge.

[COUNSEL FOR MS. SILVERBERG]: So Dr. Cohen sold the house?

[MS. SILVERBERG]: Yes, he did.

[COUNSEL FOR MS. SILVERBERG]: And that’s why you’re seeking your claim here today?

[MS. SILVERBERG]: Yes

This was confirmed by her counsel’s argument:

¹¹ The issues of the propriety of the sale of the Property and disposition of the proceeds of the sale are not before us.

[COUNSEL FOR MS. SILVERBERG]: Your Honor, to be frank the reason why we need to ask for the labor is that because of the six and a half years, and you can see and you can take judicial notice of the last accounting that has yet to be approved Dr. Cohen has paid himself all the money from the estate.

He's said there's not going to be any money left for you, so Ms. Silverberg's remedy is that she needs to make a claim to the estate. She was -- she did this work on the -- whether it's a promise it's a belief that the house would be hers, that she did a benefit to the estate that ultimately let it get a tenant --

Ms. Silverberg's counsel necessarily conceded there was no agreement for her to be paid an hourly rate for her work on the Property.¹²

[THE COURT]: *There's no written contract with the estate. Do you agree with that?*

[COUNSEL FOR MS. SILVERBERG]: *Correct.* It's a quantum meruit,^[13] this is a benefit conferred. That --

[THE COURT]: Her testimony was because she thought she was going to inherit, so that's why she wanted to keep the house up.

(emphasis added)

Ms. Silverberg's counsel then continued with his argument on the quantum meruit claim:

¹² Ms. Silverberg provided no documentation of her time spent working on the Property. She testified to two and one-half years working on the Property full time. She took some trips during that time period and requested compensation for two years of full-time labor, which she calculated as \$124,800. Her expert witness testified to a value of \$30.00 per hour for her services.

¹³ Based on our review of the record, this is the first time that a claim for quantum meruit was raised. Ms. Silverberg did not raise quantum meruit as an issue on appeal, but Dr. Cohen addressed it in his brief. In light of our decision to affirm on the ground that there was no agreement for Ms. Silverberg to be paid for her personal labor, and given that Ms. Silverberg did not raise this issue on appeal, we need not address it.

[COUNSEL FOR MS. SILVERBERG]: Correct. That’s -- I think that further shows that she was creating a benefit. She was invested in creating the benefit at that time. That tenant ultimately purchased the house. They let them purchase the house.

* * *

If Ms. Silverberg wasn’t to do -- if Ms. Silverberg didn’t do this work the estate would have had to pay somebody more than \$30 if it’s contracted help but at a minimum \$30 an hour to do all this work, and it would have been out of the estate’s pocket.

* * *

He ultimately changed his mind and he said no, I’m going to sell it out from under you or whatever the circumstances were, but he as personal representative told Ms. Silverberg and she testified to it, it’s your -- it’s going to be yours, do the work. I’m not getting involved.

[THE COURT]: *But that doesn’t mean he’s saying the estate will pay you.*

(emphasis added)

The excerpts from the hearing demonstrate that the Orphans’ Court had an adequate basis to find there was no agreement between Ms. Silverberg and the Estate to pay for her personal labor. Indeed, Ms. Silverberg conceded as much and that she filed the Petition because the Property was not deeded to her. We hold that the Orphans’ Court did not err in its denial of Ms. Silverberg’s claim for the value of her personal labor.

**ORDER OF ORPHANS’ COURT FOR
MONTGOMERY COUNTY AFFIRMED;
COSTS TO BE PAID BY APPELLANT.**

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