

[Cite as *In re Estate of Stanford*, 2010-Ohio-569.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

IN THE MATTER OF THE ESTATE OF	:	
	:	Appellate Case No. 23249
	:	
JULIA STANFORD, Deceased	:	Trial Court Case No. 07-EST-1150
	:	
	:	(Civil Probate Appeal from Common Pleas Court)
	:	

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OPINION

Rendered on the 19th day of February, 2010.

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FAIN, J.

{¶ 1} Appellant Hershale Hale appeals from an order of the Montgomery County Common Pleas Court, Probate Division, removing him as Executor of the Estate of Julia Stanford. Hale contends that the trial court erred in overruling his objections to the magistrate’s decision. The trial court’s decision was based on Hale’s failure to file a transcript of the hearing before the magistrate. Hale contends

that he filed a notice with the probate court requesting an audio/video transcript, and that the court erred in refusing to consider his objections.

{¶ 2} We conclude that the form provided by the probate court could reasonably have led Hale to believe, incorrectly, that the CD-ROM transcript was being filed with the court. Accordingly, the trial court erred in rejecting Hale's objections, based upon his failure to have filed a transcript. The judgment of the trial court is Reversed, and this cause is Remanded for further proceedings.

I

{¶ 3} In July 2007, Hale filed an application to probate the will of Julia Stanford, and an application for authority to administer Stanford's estate. Hale attached Stanford's will, which named Hale as executor, to the application. An appraiser was also appointed to appraise the assets of the estate, which include a business partnership interest that was bequeathed to Hale in the will. The residue and remainder of Stanford's property, after other gifts to Hale, was bequeathed to Stanford's four children: Theodore Ellis, Glenna Sharp, Charles Delk, and Elmer Stanford.

{¶ 4} The trial court issued citations in October and November 2007, regarding Hale's failure to file a certificate of probate and an inventory. After receiving a number of extensions, Hale filed an inventory in April 2008. The inventory indicated the estate had assets of \$11,587 in tangible property, \$103,842 in intangible personal property, and \$200,000 in real property.

{¶ 5} Subsequently, two of the decedent's children, Ellis and Sharp, filed a

motion to remove Hale as executor. The alleged grounds were that Hale had neglected his duty by failing to file any accounting, even though the estate had been open for more than a year. A hearing was then held before a magistrate on October 16, 2008, at which time the magistrate heard testimony from Hale and other parties. The magistrate issued a decision in late October 2008, concluding that Hale had failed to file a final account, had lived in the decedent's residence without paying rent, had failed to prepare or file certificates of transfer regarding the decedent's real property, had used the decedent's automobiles for his own use, had failed to reimburse parties for payment of the decedent's funeral bill as of the time of the hearing on October 16, 2008, had failed to make any distribution to any of the beneficiaries of the estate as of the time of the hearing, and had failed to invest the funds of the estate in a lawful manner. The magistrate, therefore, recommended that the court issue orders granting the motion to remove Hale as fiduciary, and requiring Hale to file a final accounting within thirty days of the appointment of the next fiduciary. The magistrate further recommended that another hearing should be set to decide who should be appointed administrator.

{¶ 6} Hale filed objections to the magistrate's decision on November 12, 2008. At the same time, Hale also requested an extension of time to file supplemental objections to the magistrate's decision, following the filing of the transcript. The trial court filed an entry on November 17, 2008, granting Hale thirty days from the filing of the transcript to supplement his objections to the magistrate's decision.

{¶ 7} Hale had also filed a form on November 12, 2008, which was

apparently generated by the probate court. The form has two headings at the top. One heading says "Montgomery County Probate Division" and the other says "Request for Audio/Video Transcript." According to the affidavit of Hale's attorney, which was filed in conjunction with a request for new trial, the attorney presented a request for a written transcript to the clerk of courts at the same time the objections to the magistrate's decision were being filed. The clerk indicated, however, that a different request for the transcript should be filed. A court reporter for the court then appeared at the clerk's office and handed Hale's attorney the "Request for Audio/Video Transcript" form. Hale's attorney completed the form, and signed and dated it. The clerk then time-stamped the form with the November 12, 2008 date.

{¶ 8} The probate court's form contains a number of boxes in which litigants are directed to designate the case caption, date of hearing, magistrate, courtroom, and so forth. The form filed by Hale's attorney is complete, and contains the necessary identifying information. The probate form contains additional boxes where a litigant can specify whether a full or partial proceeding is requested. Hale's form specifies "full proceeding."

{¶ 9} The form also contains a box labeled "Copy for Requestor." Within that particular box is another box that is labeled "CD-ROM." The box requesting a copy for requestor is checked on Hale's form.

{¶ 10} The probate form contains another set of boxes, on the bottom, beneath a heading that is labeled "Payment." Under this heading, the document states, "I am requesting that the above CD-ROM be prepared. I will be responsible for the costs." Hale's attorney signed as "requestor," and dated the request

“11/12/08.”

{¶ 11} The court’s docket does not contain a record of the filing of the transcript request, even though the request is time-stamped. Accordingly, the clerk never docketed the transcript request. Hale’s attorney did receive a copy of the CD-ROM recording, however, and used it to supplement Hale’s objections to the magistrate’s decision. The supplement to the objections was filed on December 11, 2008.

{¶ 12} The Request for Audio/Video Transcript contains more boxes at the bottom, beneath a heading entitled “Order Preparation.” This part of the form states that one CD-ROM was duplicated, and is signed by a judicial assistant. The form does not indicate to whom the CD-ROM was delivered, even though the form contains more boxes that can be checked, like “Requestor,” “Clerks’s Office,” and “Court Services.” This part of the form is also dated 11/12/08.

{¶ 13} On December 5, 2008, the trial court filed an entry overruling Hale’s objections to the magistrate’s decision, because no transcript had been filed. The court then *sua sponte* set aside this entry on December 9, 2008. The reason given in the entry is that the decision of December 5, 2008, had been entered prematurely. As was noted, Hale supplemented his objections on December 11, 2008.

{¶ 14} On January 8, 2009, Ellis and Sharp filed a memorandum opposing the objections. Among other things, they alleged in their memorandum that Hale had neither requested nor filed a transcript with the court. The trial court then filed an entry on January 13, 2008, overruling Hale’s objections and adopting the magistrate’s decision. The court noted that about sixty days had elapsed since the

filing of the original objections, and no transcript had been filed. The court also noted that Hale had failed to follow procedures for objecting to the magistrate's decision and that it was impossible to undertake an independent review without a transcript of the evidence submitted to the magistrate.

{¶ 15} Hale then filed a motion for a new trial, pursuant to Civ. R. 59(A), alleging that a request for an audio/video transcript had been filed with the court on November 12, 2008. The motion was supported by the affidavit of Hale's attorney, together with a time-stamped copy of the request form that had been given to the clerk.

{¶ 16} Hale filed a timely appeal from the trial court's judgment removing him as executor. The record transmitted to the court of appeals also contains a written transcript of the magistrate's hearing, which bears a time-stamp of March 9, 2009.

II

{¶ 17} Hale's sole assignment of error, copied verbatim from Hale's brief, is as follows:

{¶ 18} "DID APPELLANT COMPLY WITH RULE WITH OHIO MONTGOMERY CTY. GEN. DIV. RULE 2.31 VI.A, FOR THE REQUEST FOR TRANSCRIPT AND OHIO CIVIL RULE 53(D)(3)(b)(iii) AND SHOULD THE ENTRY ADOPTING THE MAGISTRATE'S DECISION DUE TO A LACK OF TRANSCRIPT BE DENIED? HAS THE CD-ROM BEEN 'FILED' WITH THE COURT AND IF NOT SHOULD HE BE ALLOWED TO 'FILE' THE CD-ROM AND HAVE THE LOWER COURT RULE ON THE OBJECTIONS."

{¶ 19} Under this assignment of error, Hale contends that the trial court erred in concluding that he failed to file a transcript of the magistrate's hearing. Hale contends that the clerk represented that the audio/video tape or CD-ROM was part of the court's record and would be filed in the case. Hale also contends that his attorney was provided with a "copy" of the CD-ROM and was not aware that any additional procedures, beyond his attorney's request for an audio-visual transcript, were required to cause the original CD-ROM to be filed with the court. Hale additionally argues that Montgomery County Common Pleas Loc. R. 2.31, Section VI is not clear, and that a procedure should be established regarding how CD-ROMs are to be filed with the court. Finally, Hale contends that he has meritorious arguments to make regarding his removal as executor.

{¶ 20} Ellis and Sharp respond by noting that although CD-ROMs are initially in the court's possession after a hearing, a party objecting is responsible for preparing the transcript. Ellis and Sharp also argue that Hale had ample time to file the transcript after being made aware on December 5, 2008, that a transcript had not been filed. They also point to their own memorandum of January 8, 2009, which indicates that no transcript was filed.

{¶ 21} Objections to magistrate's decisions are governed by Civ. R. 53. Civ. R. 53(D)(3)(b)(i) permits parties to file objections to a magistrate's decision within fourteen days of the filing of the decision. If the objections are to factual findings, Civ. R. 53(D)(3)(b)(iii) requires that the objection be supported by a transcript of all evidence submitted to the magistrate, or an affidavit of the evidence if the transcript is not available. Civ. R. 53(D)(3)(b)(iii) further requires an objecting party to file the

transcript or affidavit with the court within thirty days after filing objections, “unless the court extends the time in writing for preparation of the transcript or other good cause.”

{¶ 22} “If an objecting party fails to submit a transcript or affidavit, the trial court must accept the magistrate's factual findings and limit its review to the magistrate's legal conclusions. * * * On appeal of a judgment rendered without the benefit of a transcript or affidavit, an appellate court only considers whether the trial court correctly applied the law to the facts as set forth in the magistrate's decision.” *In re Estate of Lucas*, Montgomery App. No. 23088, 2009-Ohio-6392, at ¶ 32, citing *Ross v. Cockburn*, Franklin App. No. 07AP-967, 2008-Ohio-3522, ¶ 5-6.

{¶ 23} Absent the type of procedural error alleged in the case before us, we would have to affirm the trial court’s decision, because Hale has not pointed to any error in the law applied by the trial court to the facts set forth in the magistrate’s decision.

{¶ 24} With regard to the procedural rules governing transcripts, Loc. R. 11.1(A) of the Court of Common Pleas of Montgomery County, Probate Division, provides that proceedings before a magistrate may be recorded by stenographic or other electronic means approved by the court. Subsection (B) of Loc. R. 11.1 further indicates that:

{¶ 25} “Any interested person may request a transcription of an electronic recording from the court stenographer. The person making the request shall pay the cost of the transcription.”

{¶ 26} Loc. R. 87.1 of the Court of Common Pleas of Montgomery County,

Probate Division also states that:

{¶ 27} “All matters occurring in open Court will be recorded by a court reporter or electronic recording devices. The party requesting a transcript must pay the costs of the preparation of the transcript.”

{¶ 28} Other than these comments, the local rules for the Probate Division are silent regarding procedures to be followed. The form given to Hale’s counsel in November 2008, also does not currently appear either in the local rules of the probate court, or on the probate court’s website.¹

{¶ 29} Hale acknowledges that Loc. R. 2.31, Section VI of the Court of Common Pleas of Montgomery County, General Division, requires that CD-ROMs must be filed with the court as part of the record. Hale contends, however, that this rule fails to address how the procedure is to be accomplished when a CD-ROM is already part of the court’s record. Hale suggests that a procedure should be established to indicate how parties are to file CD-ROMs.

{¶ 30} Loc. R. 2.31, Section VI, provides that:

{¶ 31} “A. When necessary as provided in Rule 53 (D) (3) (b) (iii), a transcript of the hearing must be filed with the Court by the moving party within thirty (30) days after the filing of objections to the Magistrate’s decision unless the Magistrate, in writing, extends the time for inability to complete the transcript of the testimony, or for other good cause.

¹The court’s website does contain a different form, “M.C. Form MSC 6 – Request for Digital Audio Copy of Hearing on CD 5/21/09.” See http://www.mcoho.org/government/probate/estate_form.html, form MSC 6. This form allows litigants to request a digital audio copy of hearings, but does not contain any

{¶ 32} “1. The request for a transcript shall be a read only compact disk (CD-ROM) recording of the hearing or testimony.

{¶ 33} “2. The CD-ROM must be filed with the Court as part of the record.

{¶ 34} “3. A paper transcription of the CD-ROM contents may be prepared in accordance with Appellate Rule 9 with prior approval of the Court.

{¶ 35} “4. The request for a paper transcript or CD-ROM shall be filed within three (3) days after filing of objections.”

{¶ 36} Local R. 2.31 was amended in March 2009, but the content in Section VI has not been changed from the version in effect in November 2008, when Hale requested a CD-ROM. Section VI, sub-paragraph 2 is clear, and requires a CD-ROM to be filed as part of the record. Sub-paragraph 1 is also reasonably clear, in that it indicates that the request for a transcript shall be a read-only compact disk (CD-ROM) recording. We interpret this to mean that the “official transcript” will be the record contained on the CD-ROM.

{¶ 37} Subparagraph 3 allows parties to prepare a paper transcription of the CD-ROM, in accordance with Appellate Rule 9, and with prior court approval. We interpret this to mean that paper transcription is permissive, needs prior court approval, and should follow the rules set out in Appellate Rule 9 for preparation of written transcripts. App. R. 9(A) states that:

{¶ 38} “A videotape recording of the proceedings constitutes the transcript of proceedings other than hereinafter provided, and, for purposes of filing, need not be transcribed into written form. Proceedings recorded by means other than videotape

information about procedures for filing written transcripts.

must be transcribed into written form. When the written form is certified by the reporter in accordance with App. R. 9(B), such written form shall then constitute the transcript of proceedings. When the transcript of proceedings is in the videotape medium, counsel shall type or print those portions of such transcript necessary for the court to determine the questions presented, certify their accuracy, and append such copy of the portions of the transcripts to their briefs.”

{¶ 39} App. R. 9(B) further provides that:

{¶ 40} “At the time of filing the notice of appeal the appellant, in writing, shall order from the reporter a complete transcript or a transcript of the parts of the proceedings not already on file as the appellant considers necessary for inclusion in the record and file a copy of the order with the clerk. The reporter is the person appointed by the court to transcribe the proceedings for the trial court whether by stenographic, phonographic, or photographic means, by the use of audio electronic recording devices, or by the use of video recording systems. * * * If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the weight of the evidence, the appellant shall include in the record a transcript of all evidence relevant to the findings or conclusion.

{¶ 41} “* * *

{¶ 42} “At the time of ordering, the party ordering the transcript shall arrange for the payment to the reporter of the cost of the transcript.

{¶ 43} “* * *

{¶ 44} “The reporter shall certify the transcript as correct, whether in written or videotape form, and state whether it is a complete or partial transcript, and, if partial,

indicate the parts included and the parts excluded.”

{¶ 45} Under the Appellate Rules, the appealing party has the duty to order a transcript. When the transcript is in the videotape medium, counsel must type or print the parts of the videotape record that are necessary for the court’s consideration, certify their accuracy, and append copies of the pertinent parts to the appellant’s brief.

{¶ 46} Adapting these rules to the common pleas court situation, Loc. R. 2.31 indicates, like App. R. 9, that the videotape is the official transcript. However, the objecting party may order a written transcript, and must attach the parts to its objections that are necessary for the court’s determination.

{¶ 47} Contrary to Hale’s contention, we do not find that the local rule needs clarification. The rule is further enhanced by documents currently on the court’s website, which can be downloaded and are more descriptive than the probate form provided to Hale. See <http://www.montcourt.org/forms.php>, “Request for an Audio/Video Recording and/or a Paper Transcript.” The General Division form is accompanied by a separate set of instructions, and also states on the front of the form that:

{¶ 48} “I request the above proceedings be prepared in CD-ROM format. I understand I am responsible for obtaining a paper transcript of the proceedings and any costs associated with the preparation of such a transcript.”

{¶ 49} The website and the General Division rules do not indicate whether this form was being used in November 2008, when Hale’s counsel filed a request for a CD-ROM. Nevertheless, an attorney or litigant reading the rules in November 2008,

would have been aware that the CD-ROM is the official transcript, and that the parts of the transcript necessary for decision should be transcribed and attached to the memorandum or brief that is being filed with the court.

{¶ 50} These rules do not, however, answer the question posed by Hale, which pertains to the procedure to be followed when the CD-ROM is in the possession of the court reporter. The fact that the court reporter has possession of the CD-ROM does not mean that the CD-ROM has been certified as the transcript and filed with the clerk. Typically, in appellate cases, attorneys file a praecipe with the trial court clerk, requesting the court reporter to prepare the written transcript of the proceedings. Attorneys also make arrangements with the court reporter for payment for the transcript at the time the request is filed. See, e.g., Loc. R. 6 of the Second Appellate District. Based on the affidavit of Hale's attorney, this appears to be the procedure that she attempted to follow, only to be told by the clerk that a different form should be filed.

{¶ 51} In contrast to the form currently available from the General Division of the Montgomery County Common Pleas Court, the form supplied by the probate court could reasonably have led a party to conclude that the CD-ROM already in the court's possession was being properly filed. The document itself is labeled "Request for Audio/Video Transcript," which implies that the transcript is being ordered. The pre-printed form also gives the requestor the option to ask for preparation of the full proceedings. By including a box that allows the requestor to request a copy of the CD-ROM for himself or herself, and by failing to indicate anywhere on the form that a separate copy must be ordered for filing in the trial court, the form could reasonably

lead one to believe that he or she has complied with the duty to order a transcript. This is particularly true in the case before us, given the clerk's rejection of the form that Hale's counsel had previously used to request written transcripts. Accordingly, the trial court erred in concluding that Hale had failed to file the transcript.

{¶ 52} We are also not persuaded by the argument that Hale should have known that the transcript had not been filed. Although the trial court based its December 2008 decision on the fact that a transcript had not been filed, the court *sua sponte* vacated its decision a few days later. This could have led Hale to believe that the court's initial observation about the transcript was incorrect. Furthermore, even though Ellis and Sharp referred to the lack of a transcript in their memorandum, the memorandum was filed only a few days before the trial court issued its decision overruling the objections.

{¶ 53} Accordingly, Hale's sole assignment of error is sustained. We express no opinion on the substantive merits of the objections to the magistrate's report.

III

{¶ 54} Hale's sole assignment of error having been sustained, the judgment of the trial court is Reversed, and this cause is Remanded for further proceedings.

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BROGAN and FROELICH, JJ., concur.

Copies mailed to:

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