

ing of the local Rules relates to the number of the Pa. Rules of Civil Procedure and where there is an omission in the sequence of the local rules it was considered unnecessary to make a rule to supplement, for local purposes, the Pa. rule.

Rule 1910.4. Commencement of Action.

(a) The action shall be commenced by filing a complaint with the Domestic Relations Section, in Franklin County at the Court House Annex, 100 Lincoln Way East, Chambersburg, PA 17201 and in Fulton County at 208-R North Second Street, McConnellsburg, PA 17233. Upon filing the record shall be immediately transferred to the Prothonotary's office. All subsequent support papers may likewise be filed in the Domestic Relations Section and thereafter transferred to the Prothonotary's office. This procedure is adopted to continue the practice of numbering all of the several actions, support, divorce, custody, etc. between the parties under the same Family Relations number.

(b) No filing fee shall be required in advance, but a filing and other fees shall be required as provided by law and order of the court to be paid by the person ordered to do so to the Prothonotary of the County.

Rule 1910.10. Hearing Procedures.

Actions shall proceed to hearing as prescribed by Rule 1910.11 of the Rules of Civil Procedure, but only after informal adjustment at the Domestic Relations Section as heretofore conducted has failed.

Rule 1910.11. Office Conference, Subsequent Proceedings, Order.

(a) The office conference shall be conducted by a hearing officer designated from time to time by the Chief of the Domestic Relations Section.

(d) The written agreement provided for in Pa. R.C.P. 1910.11(d), the order in conformity with the agreement and the form of the hearing officer's recommendation shall be in a form as prescribed from time to time by the Domestic Relations Section.

(e) If no agreement is reached, then the hearing officer shall prepare the conference summary required by Pa. R.C.P. 1910.11(e) and file a proposed order on a form to be prescribed from time to time by the Domestic Relations Section.

(j) Motions for separate listing under Pa. R.C.P. 1910.11(j) shall be on a form prescribed from time to time by the Domestic Relations Section.

upon the offering of evidence not admissible under the pleadings, the court is authorized in the interest of justice to permit a continuance of the trial and the amendment of the pleadings on the condition that the offending and surprising party pay to the surprised party those reasonable expenses incurred by the latter as a result of the surprise. By analogy to that rule, we will require the plaintiff to reimburse the defendant for additional expenses incurred as a result of the plaintiff's failure to exercise diligence in the preparation of his case.

ORDER OF COURT

NOW, this 14th day of April, 1981, the petitioner is granted leave to amend his complaint pursuant to the allegations of his petition for leave to amend on the condition that the plaintiff shall pay to the defendant those reasonable expenses incurred by the defendant as a result of the plaintiff seeking leave to amend and amending his pleadings.

Exceptions are granted both parties.

KURTZ v. KURTZ, C.P. Franklin County Branch, No. A.D. 1980 - 263

Civil Action - Law - Assumpsit - Accounting - Form of Account - Distribution Prior to Trial

1. A Court Order requiring a defendant to file an accounting requires that the account conform to the Supreme Court and Local Rules of Court applying to Orphan's Court accountings.

2. It is proper for a court to enter judgment prior to trial for an amount admitted to be due and at the same time to order an accounting for all further sums remaining in controversy.

William H. Kaye, Esquire, Attorney for Plaintiff

Joseph J. Dixon, Esquire, Attorney for Defendant

OPINION AND ORDER

Keller, J., June 9, 1981:

This action in assumpsit and for an accounting was commenced by the filing of a complaint on September 10,

1980, and a true copy of the same was served upon the defendant on September 18, 1980 by the Sheriff of York County. An answer to the complaint was filed on October 23, 1980. By stipulation of counsel at a Pre-Trial Conference the Honorable George C. Eppinger entered an order on February 23, 1981 directing the defendant to prepare an accounting to the plaintiff for all funds received by the defendant for the plaintiff and expended on his behalf from and after June 1, 1978; the accounting to be filed within two months of the date of the order. A handwritten two-page document captioned "Accounting in Compliance with Court Order-No. A.D. 1980-263" together with a certification of a C.P.A. was filed in the Office of the Prothonotary on April 23, 1981. Exceptions to the accounting were filed by the plaintiff on April 29, 1981, and a copy of the same was served upon counsel for the defendant. The matter was placed on the list for June Argument Court and arguments were heard on June 4, 1981. The matter is ripe for disposition.

From an examination of the complaint and answer, the following facts can be deemed true:

1. The plaintiff is Frank A. Kurtz, a sui juris adult who lives and resides at 49 Woodland Way, Chambersburg, Franklin County, Pennsylvania.

2. The defendant is Herbert W. Kurtz, a sui juris adult who lives and resides at 84 Pleasant View Terrace, New Cumberland, Cumberland County, Pennsylvania.

3. The defendant is plaintiff's father.

4. From October 1972 until September 1978, plaintiff was enrolled as a student at Scotland School for Veterans Children (hereinafter "Scotland School"), located at Scotland, Franklin County, Pennsylvania.

5. At the time plaintiff withdrew from Scotland School, these conserved funds amounted to \$3,858.78 in Social Security funds and \$955.21 in Veterans Administration funds.

6. The conserved Social Security funds were released to the Social Security Administration by Scotland School, and were paid over to defendant as successor conservator upon plaintiff's withdrawal from Scotland School.

7. The conserved Veterans Administration funds were paid over to defendant as successor conservator upon plaintiff's withdrawal from Scotland School.

8. The defendant received one additional payment of \$15.00 from the Veterans Administration.

10. The plaintiff has since becoming an adult upon occasion requested that the defendant pay over the funds.

11. The defendant is willing to return the funds of the plaintiff that have not already been utilized for the plaintiff's support, education, maintenance and well-being.

The defendant's "accounting" sets forth the following:

Assets after June 1, 1978

Received from S.S. for Frank A. Kurtz	\$ 3,858.78
Received from VA for Frank A. Kurtz	955.21
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Total funds received	4,813.99
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Expenditures: after June 1, 1978

Clothing - shoes, track clothing, school clothing	190.00
Lodging & meals away from home - 5½ weeks (30.00/wk.)	165.00

Phone calls - while staying at above home	72.00
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Phone calls - To Frank, for Frank and about Frank	211.00
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Travel for Frank - visits, school conferences and family boarding him	778.50
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School fee - Valley Forge Military Academy	100.00
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Medical expenses - Chambersburg Hospital x-rays and emerg. room	36.00
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Fiduciary charge - 3.75% for 2 years	361.04
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Misc. expense - driver's permit	\$ 5.00
food & spending money on Thanksgiving & Xmas vacation (about 2 wks)	25.00

Travel to keep Frank's job in Chambersburg - 2 trips	
Hbg. to Chambersburg & return	54.00

Expense for driver	50.00	
Change locks on house due to threat to father	<u>32.00</u>	
		<u>166.00</u>
		2,079.54

BALANCE SHEET

Frank A. Kurtz - after June 1, 1978

Fund on Hand	\$ 4,813.99
Expenses	<u>2,079.54</u>
Balance	\$ 2,734.45

Assets on Hand for Frank A. Kurtz

3 - \$1000.00 certificates of deposit 7 years - CCNB - N.A. Bridge St. -N. Cumberland Pa.	\$ 3,000.00
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Attached to the defendant's "Accounting" is the following statement:

"I, Jeanne Bruder, a Certified Public Accountant, hereby certify and affirm that I have prepared the accounting labeled Accounting in Compliance with Court Order No. A.D. 1980-263, said accounting consisting of two handwritten pages. I have reviewed H. Waldo Kurtz's records and I affirmed that the Accounting is true and correct to the best of my knowledge and belief.

s/ Jeanne Bruder

The plaintiff's exceptions to the accounting are:

1. That the account is inadequate in that it fails to specify the date or dates of receipt of conserved funds; the identity of payees; the dates on which payments were made; and the person or persons in whose behalf payments were made.
2. The accounting fails to set forth interest to which plaintiff is entitled.
3. The accounting includes a "fiduciary charge" to which defendant is not entitled.

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LEGAL NOTICES, cont.

mission and eight members of each United States Attorney Commission except for the Eastern District, which has ten members.

Judicial Commission members are:

Western District

Alexander Unkovic, Esquire - Pittsburgh, PA
Ronald Davenport, Esquire - Pittsburgh, PA
Mrs. Dorothy Aschermann, Assistant Secty. - Erie, PA
Wendell Frieland, Esquire - Pittsburgh, PA

Middle District

Ms. Nancy Neuman, Vice Chairman - Lewisburg, PA
Fred Speaker, Esquire - Harrisburg, PA
Mrs. Jean Snowiss - Lock Haven, PA
E. W. Croyle - Harrisburg, PA

Eastern District

Charles W. Bowser, Esquire, Chairman - Philadelphia, PA
Herbert Barness - Warrington, PA
H. Francis DeLone, Esquire - Philadelphia, PA
Richard A. Sprague, Esquire - Philadelphia, PA
Mrs. Marban Sparkman, Secretary - Devon, PA
Dr. Bernard Watson - Philadelphia, PA

United States Attorney Nominating Commission District Members are:

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Malcolm Anderson, Esquire - Pittsburgh, PA
David Glavin - Pittsburgh, PA
Mrs. Nancy Swanson - Sheffield, PA
Paul Titus, Esquire - Pittsburgh, PA

Middle District

Melvin Allen, Millersville, PA
Joseph Gallagher, Esquire - Scranton, PA
Arthur Piccone, Esquire - Wilkes-Barre, PA
Frank A. Sinon, Esquire - Harrisburg, PA

Eastern District

William H. Brown, III, Esquire - Philadelphia, PA
Mrs. Marshia Carlino - Wyomissing, PA
Donald Goldberg, Esquire - Philadelphia, PA
Deloris Wilson, Esquire - Philadelphia, PA

EDITOR'S NOTE:

Because of the extensive amount of news items and legal advertising in this issue, it will not be possible for us to follow our usual practice of publishing a cumulative table of reported cases this week. Hopefully, we will be able to do this next week, so as not to stray too far from our established custom of publishing such tables.

4. The accounting is for a period commencing prior to defendant's receipt of the conserved funds, and to the extent of payments made prior to such date, credits for payments made are improper.

5. The accounting was not made under defendant's oath or affirmation.

6. The accounting appears to claim credit for items of a personal nature.

The plaintiff requests as a result of his exceptions:

1. That the defendant be ordered to pay the full amount of the conserved funds without credit for disbursements made, together with interest from the date of receipt at the lawful rate, punitive damages, and court costs, or

2. That the Court order the defendant forthwith to file an accounting in proper form, in sufficient detail to inform plaintiff of credits claimed to determine the validity thereof, and under oath or affirmation; and

3. Order defendant to pay over immediately to plaintiff the sum of \$2,734.45 to which defendant admits plaintiff is entitled, plus interest at the lawful rate, and that plaintiff be awarded costs of suit.

At this stage of the proceeding there are two issues before the Court for immediate resolution. The first is whether the accounting is legally sufficient. The second is whether the plaintiff is entitled to any immediate distribution from the defendant. We will consider the issues in that order.

The word "account" is defined in Black's Law Dictionary Revised Fourth Edition as:

"A detailed statement of the mutual demands in the nature of debt and credit between parties, arising out of contracts or some fiduciary relation. *Portsmith v. Donaldson*, 32 Pa. 202."

"A statement in writing of debts and credits, or receipts and payments; a list of items of debts and credits with their respective dates. *Renselaer Glass Factory v. Reid*, 5 Cow., N.Y. 593."

Rule 1 of the Rules regulating the practice in the Court of Common Pleas of the 39th Judicial District provides:

“The practice and procedure relating to accounts and statements of proposed distribution over which the Court of Common Pleas-Civil Division—has jurisdiction shall correspond in all respects to the rules governing that procedure in the Orphans’ Court Division unless otherwise provided by law, the prothonotary performing the duties of the register of wills and the clerk of the Orphans’ Court division.”

Rule 6.1 of the Orphans’ Court Rules of the Supreme Court of Pennsylvania provide inter alia:

Accounts shall conform to the following rules:

(a) The dates of all receipts and disbursements, the sources of the receipts, and the person to whom disbursements are made and the purpose thereof shall be stated except that where a number of payments have been received from the same source or disbursed to the same recipient for the same purpose over a period of time, such receipts or disbursements need not be itemized but may be stated in total amounts only with dates of beginning and ending of the period covered.

(b) Except where otherwise provided by a special order of the local court in a particular case, items of administration, distribution, receipts, disbursements, principle, income shall be separately stated.

Rule 6.9 provides inter alia:

(a) A fiduciary filing an account shall file a statement of proposed distribution, or, as local rules may prescribe, request that distribution be determined by the court or an auditor.

Rule 61.1 of the Rules for regulating the practice in the Court of Common Pleas of the 39th Judicial District - Orphans’ Court Division provides inter alia:

(a) Paper Size. Numbering. Accounts shall be stated on legal size paper, fastened together at the top and numbered consecutively at the bottom.

(b) All accounts shall begin with a caption which shall set forth the nature of the account, the name and capacity of the fiduciary and the name of the estate.

(c) The cover of every account filed by a personal representative shall be the printed cover furnished by the Register’s Office, and the certificate of notice to creditors shall be signed by at least one accountant or by his attorney and the affidavit

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shall be made by at least one accountant.

(d) The cover of every account filed by an accountant other than a personal representative shall conform as nearly as practicable in the particular case to the account of a personal representative.

(e) The organization of the account into subsidiary accounts, if any, and separation of items into classifications of items, if any, and the statements of the composition of the balance or balances and any summaries or recapitulations, shall be such as to fully inform the parties and the Court upon all questions likely to arise in connection with the account or distribution.

Rule 69.2 of said Local Rules provides:

“A statement of proposed distribution shall be in a paper separate from the account which it accompanies. It shall contain the names of the persons to whom it is proposed to award the balance for distribution, the amount or share awarded to each, and a brief statement of the nature and reasons for the proposed awards.”

Applying the definition of the word account, the Orphans' Court Rules of the Supreme Court and the Orphans' Court Division Local Rules all as above set forth to the “accounting” as above set forth and filed by counsel for the defendant, it is clearly evident that the document is not by the wildest stretch of the imagination an account or an accounting as required by law. It is, therefore, also equally evident that the defendant has failed to comply with the Order of Court of February 23, 1981.

The defendant, Herbert W. Kurtz, shall file an account and proposed schedule of distribution complying with the applicable Rules of the Supreme Court and this Judicial District. Specifically, it shall set forth:

1. The dates of all receipts and disbursements.
2. The sources of the receipts.
3. The names of all persons to whom disbursements were made and the purpose thereof.
4. The affidavit shall be in form similar to that used by personal representatives and made a part of accounts and proposed schedules of distribution in estates, and shall be executed and acknowledged by the accountant.

Turning now to the issue of whether the plaintiff is entitled to any immediate distribution from the defendant, we preliminarily note:

1. The defendant's “accounting” concedes he held a balance of undistributed funds in the amount of \$2,734.45.

2. The defendant's answer admits he is willing to return the funds of the plaintiff not “utilized.”

3. Neither the defendant's answer nor the defendant's “accounting” discloses any justification for withholding distribution after the plaintiff became an adult, and particularly after the plaintiff made demand upon the defendant to pay over the funds to him.

Pa. R.C.P. 1037(c) provides: “In all cases, the court, on motion of a party, may enter an appropriate judgment against a party upon default or admission.”

Pa. R.C.P. 1530(d) provides inter alia: “...If exceptions are filed, the court shall determine the amount due or may refer the account and exceptions to auditor.”

In *Hook v. Hook and Ackerman, Inc.*, 383 Pa. 67 (1955), the Supreme Court of Pennsylvania held:

“...It was proper for the court to enter the original judgment for the amount then admitted to be due and at the same time to order an accounting for all further sums then in controversy as well as those subsequently accruing.”

In the case at bar the defendant having admitted the holding of \$2,734.45 from and after the date when the plaintiff became an adult, we conclude judgment should be entered in favor of the plaintiff and against the defendant for the said sum admitted to be due and owing, together with interest from June 28, 1979.

The Court declines to rule upon plaintiff's Exceptions Nos. 2, 3, 4 and 6 until a legally sufficient account is filed pursuant to this Opinion. If the defendant pays in full the judgment to be entered against him and in favor of the plaintiff, he will be entitled to claim a credit for the same in his account.

ORDER OF COURT

NOW, this 9th day of June, 1981, IT IS ORDERED AND DECREED:

1. Herbert W. Kurtz, defendant, shall file an account and proposed schedule of distribution pursuant to the within Opinion, and in compliance with the applicable Orphans' Court Rules of the Supreme Court of Pennsylvania and this Judicial District within twenty (20) days of date hereof.

2. The Prothonotary is directed to enter a judgment in favor of Frank A. Kurtz, plaintiff, and against Herbert W. Kurtz, defendant, in the amount of \$2,734.45 with interest from June 28, 1979.

Exceptions are granted the defendant.

CLUGSTON AND WIFE v. CLUGSTON AND WIFE, C.P.
Franklin County Branch, No. F.R. 1981 - 68

Civil Action - Law - Custody - Parent v. Grandparents

1. In a custody dispute between a parent and a third party, while the question remains what is the best interest of the child, the parent has a prima facie right to custody which will be forfeited only if convincing reasons appear that the child's best interest will be served by an award to the third party.

2. While the courts have often held that it is best to keep siblings together, the best interests of the child may dictate otherwise.

3. Where a 7 year old child is placed with her grandparents by her parents since birth and thereafter the parents showed little interest in her, continued custody by the grandparents is in the best interest of the child.

Kenneth E. Hankins, Jr., Esq., Attorney for Petitioners

Barbara B. Johnson, Esq., Attorney for Respondent, Joyce D.B. Clugston

Patrick J. Redding, Esq., Attorney for Respondent, Charles R. Clugston

OPINION AND ORDER

EPPINGER, P.J., June 25, 1981:

The Court is in accord with the views expressed by the Court's Custody Mediation Officer, Richard B. Mason, M.S.W.,

A.C.S.W., psychiatric social worker at the Cumberland Valley Mental Health Center, that the custody of Tanya Darlene Clugston, born July 15, 1974, the child of Charles R. Clugston and Joyce D.B. Clugston, should remain with William R. and Pearl E. Clugston. If this was a case where the contest was between two parents, one who had been doing all of the parenting for nearly seven years and the other who had done very little of it, the case would be simple. But that is not so. William and Pearl Clugston are the child's grandparents.

The confusion now visited upon Tanya Clugston started at her birth when her parents were living with the elder Clugstons. Then the parents moved away but Tanya objected to staying overnight at her family's new residence and her parents acquiesced, leaving the child to be raised by the grandparents. The father still approves of this arrangement. But when the grandparents filed this petition to confirm custody, the mother resisted. She and the father, married about 7 years, separated in January. There are two other children, Jenny, 4, and Crystal, 3, who are living with her and she is making a new start in nearby Huntingdon County. She wants Tanya to be with them. To this Tanya says, "No!"

The elder Clugstons have done a good job. They have seen to the child's needs, physical, mental and spiritual. They have been her parents for nearly seven years and she has done well in their home. The mother has maintained minimal contact with the child and the child has enjoyed this but she has always demanded that she be returned to her grandparents and never be required to stay overnight with her mother. She knows and likes her siblings but, in the words of Mr. Mason, views them more as cousins than as sisters.

After this action was filed, the stipulation of the parties to institute Joyce's visitation privileges recognized this problem. Joyce sees the child Saturday and Sunday during the day time, returning her to the grandparents Saturday night.

Because it involved the kind of situation we have in this case, *Ellerbe v. Hooks*, 490 Pa. 363, 416 A.2d 512 (1980), is the most instructive authority. In that case a father sought the custody of his daughter who had been living with her grandmother. The Common Pleas Court denied the petition, the Superior Court reversed and the Supreme Court reinstated the Common Pleas order, saying:

At the time of the hearing in this case, Carla, then eleven years old, had been living with her grandmother since she was less than two years old. Carla had developed stable and happy