IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FOURTH DISTRICT

CASE NO. 4D09-1805

RICHARD S. LEHMAN, and
RICHARD S. LEHMAN, P.A.,

Appellants,

vs.

HILDA PIZA LUCOM, ET AL.,

Appellees.

On Appeal from a Final Judgment of the
Circuit Court for the Fifteenth Judicial Circuit
in and for Palm Beach County, Florida

APPELLANTS' REPLY BRIEF

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ARGUMENT

THE FINAL JUDGMENT SHOULD BE VACATED.
THE ORDER DENYING THE MOTION TO VACATE THE FINAL JUDGMENT SHOULD BE REVERSED

A. INTRODUCTION

Any reading of the Final Judgment compels the conclusion that it's *raison d'etre* was the belief that Richard Lehman was not the Albacea of the Panama Lucom Estate when Lehman opened the ancillary estate in Florida. *See* paragraph 1, Final Judgment at Appendix A of Initial Brief: Lehman's appointment "was automatically and immediately null and void when Hilda P. Lucom filed her appeal of that Order [appointing Lehman Albacea] on July 18, 2006. At all times material to the action before this Court, Lehman was not installed or properly serving as the Albacea of the Panama Estate." We know now that finding was wrong.

Both sides have spent much effort on the issue of whether that starting point for the Final Judgment was correct. The Appellants' Supplemental Brief detailed why it was an erroneous finding of fact and conclusion of law, pointing to the various post-judgment orders of various Panamanian courts. *See* Supplemental Brief, Appendices B-G. The Appellees' Answer Brief devotes a substantial portion of its submission to the Panama law issue, dividing its position into the "status of Panamanian Proceedings

at Time of Final Judgment" and "Panamanian Proceedings After Final Judgment." Answer Brief, pp. 15-23. *See also* pp. 28-32, defending the expert opinion introduced at trial.

Perhaps recognizing that there is no longer a foundation for Judge Phillips' (the original trial judge) "null and void" decision, the Appellees' begin their argument with the heading: "The Court Does Not Need to Reach the Issue Regarding Panama Law." Answer Brief, p. 25. That too is wrong.

We respectfully suggest the Court must reach that issue because even though Judge Colin (the successor judge who denied the Rule 1.540 Motion to Vacate) veered away from "null and void," his Order Denying the Motion to Vacate still was tied to the "null and void" stigma that prompted Judge Phillips harsh condemnations derived from his view of the Panama proceedings and Judge Colin's perception that Judge Phillips would not have been persuaded to a different result. Judge Colin wrote: "[I]t is clear that even if Judge Phillips was informed that the appeal in Panama of Lehman's appointment as Albacea only suspended or stayed Lehman's status as P.R. (instead of rendering it automatically and immediately null and void), it has not been shown that Judge Phillips "would have reached a different result in this case, for many reasons, some of which are . . . ." *See* Order Denying Motion to Vacate, p. 3, Appendix A to Appellants' Supplemental Brief.

Because the reasons that Judge Colin enumerated are the reasons that are offered by the Appellees, we turn to them *seriatim* to show why they are not persuasive.

B. LEHMAN ACTED APPROPRIATELY ONCE HE WAS APPOINTED EXECUTOR IN PANAMA

There was no Panama court order that removed Lehman from his position as executor. As we have detailed in the Initial Brief and the Supplemental Brief, Hilda's appeal did not remove Lehman as Albacea. Because he was not removed during the period from his opening of the Florida Ancillary Estate through his actions under the aegis of that estate, those actions were authorized. There was no need to notify Hilda or Ruddy of Lehman's intent to, and opening of, an ancillary estate because neither were "interested parties;" neither had been appointed as executors in Panama. We show at p. 4, *infra*, why the Notice provisions of the Probate Rules were not violated by Lehman.

The August 12, 2009 Superior Court Opinion confirmed Lehman's position as Albacea. *See* Exhibit E to the Supplemental Brief; in which the Panama Court writes: "Having Seen: In Order No. 203 of February 19, 2009, the Fifth Civil Circuit Court for the First Judicial Circuit of Panama decided to deny the Motion to Remove the Administrator filed by Richard Sam Lehman. . . . ;" and having seen that, the court reversed the denial of Lehman's motion, then revoking that Order at the behest of

Lehman: "**REVOKES** Order No. 203 of February 19, 2009 issued by the Fifth Circuit Civil Circuit Judge . . . in the Motion to Remove the Administrator filed by RICHARD SAM LEHMAN and LUCOM WORLD PEACE LIMITED in the Testamentary Estate Proceedings of the late WILSON CHARLES LUCOM and, in its stead, **REMOVES** Ms. Marta Lucia Canola as Administrator of the Aforesaid Testamentary Estate. . . ." Appendix E, Supplemental Brief, pp. 1, 15 (emphasis in original). Lehman's ability in 2009 to remove the administrator confirms that he, as Albacea, had an authoritative role in the estate. Obviously, the notion that Lehman had been suspended by a Panama Probate Court in August 2006 has no currency, and since he was not suspended he was duty bound to protect and defend the Estate.

Clearly, Lehman had standing under Panama law to act. Nothing in the plethora of Panama Orders support the notion that "Lehman did not give proper notice to Hilda or Ruddy in the initial Panamanian probate proceeding" (Judge Colin's Order Denying Motion to Vacate, p. 3, ¶ 11(a), Appendix A to Supplemental Brief). The fact that Lehman could remove the administrator established that Lehman's status as Albacea, although under attack by Hilda, did not preclude him from acting as the Albacea.

C. NOTICE

Judge Colin denied the Motion to Vacate, and the Appellees' pursue the view, that Lehman failed to give "proper notice per Rule 5.201 and Rule 5.470, Fla. Probate

Rules to Hilda and Ruddy," and that Lehman "did not reveal to the Court the challenge to his appointment as albacea." *Id.* at 3, ¶ 11(b) and (c). The Probate Rules provide in relevant part:

> **Rule 5.201**
>
> **(a) Petitioner Entitled to Preference of Appointment.** Except as may otherwise be required by these rules or the Florida Probate Code, no notice need be given of the petition for administration or the issuance of letters when it appears that the petitioner is entitled to preference of appointment as personal representative.
>
> **(b) Petitioner Not Entitled to Preference.** Before letters shall be issued to any person who is not entitled to preference, formal notice must be served on all known persons qualified to act as personal representative and entitled to preference equal to or greater than the applicant, unless those entitled to preference waive it in writing.
>
> **Rule 5.470**
>
> **(a) Petition.** The petition for ancillary letters shall include an authenticated copy of so much of the domiciliary proceedings as will show:
>
> (1) for a testate estate the will, petition for probate, order admitting the will to probate, and authority of the personal representative; or
>
> * * *
>
> **(b) Notice.** Before ancillary letters shall be issued to any person, formal notice shall be given to:
>
> (1) all known persons qualified to act as ancillary personal representative and whose entitlement to preference of

> appointment is equal to or greater than petitioner's and who have not waived notice or joined in the petition; and
>
> (2) all domiciliary personal representatives who have not waived notice or joined in the petition.
>
> **(c) Probate of Will.** On filing the authenticated copy of a will, the court shall determine whether the will complies with Florida law to entitle it to probate. If it does comply, the court shall admit the will to probate.

Neither Rule required Lehman to give such notice, nor do the cases offered by the Appellees support the notion that the failure to provide notice to Hilda, Ruddy, or the challenge in Panama supported any bad faith findings. Hilda and/or Ruddy were not, under Panama law, entitled to preference of appointment equal to or greater than Lehman's. Lehman was the Albacea, and as the Albacea was the only proper party to open the Florida ancillary estate. No notice was required and the statements to the contrary by Judge Phillips, Colin, and the Appellees are based on the flawed understanding of Panama law.

D. LEHMAN'S CONDUCT WAS NOT IMPROPER

Judge Colin's fall back position was that Judge Phillips' "multiple findings in paragraphs 13, 14 and 15 of the Final Judgment indicating that even if Lehman was properly appointed as Lucom's A.P.R., Lehman's conduct was nonetheless improper." *Id.* at ¶ 11(d). Those three paragraphs stated, *inter alia*, Lehman "exhausted the liquid

assets . . . for illegitimate purposes" and failure to "maintain sufficient local assets to pay the foregoing obligations represents a reckless disregard of the interests of interested persons in the Ancillary Estate;" that there was '[c]ommingling of $423,261.15 of estate money with the assets of RLPA . . . ." and that he acted in "bad faith" (Final Judgment, ¶¶ 13-15, pp. 7-8, Appendix A to Initial Brief). The paragraphs have been addressed (Initial Brief, pp.27-31), but because both Judge Colin and the Appellees ultimately rely on those findings, given the now debunked "null and void" conclusions, we address them briefly in this Reply.

E. LEHMAN WAS NOT A "COVETOUS OPPORTUNIST"

Judge Phillips used that term in describing Lehman (Final Judgment, ¶ 9), but Lehman's conduct preserved assets for the estate in Panama, and in any case, the court should have deferred to Panama.

The decedent specifically wanted the distribution of his estate to be under Panama law. It is axiomatic that the paramount objective when construing and administrating a will is to ascertain and carry out the intent of the testator. *McKean v. Warburton*, 919 So. 2d 341 (Fla. 2005). In the Executors and Trustees provision of Lucom's will, Lucom specifically expressed his desire that:

> Executors or Trustees must manage the assets and funds entrusted with all necessary powers granted by the Panamanian State in respect of provisions in the Civil Code

> and complementary laws of the Republic of Panama, so that they may efficiently manage the assets of the estate and funds entrusted thereto, always for the purpose of acting in the best interest, as required by the situation. Appendix C to Initial Brief.

Thus, not only did Lucom not expressly designate Florida law as controlling over his personal property, he specifically expressed his intent by designating the application of Panamanian law over his property. Accordingly, based upon *Cuevas v. Kelly*, 873 So. 2d 367, 372 (Fla. 2d DCA 2004), the $655,241.25 in the Wachovia account at issue in the surcharge action was never an asset of the ancillary estate; it was an asset of the Panama Estate and never should have been subject to administration by the Florida Court. The adversarial proceeding regarding the $655,241.25 should have been in Panama, not Florida, therefore the trial court's conclusions regarding those assets, failed to respect the comity with, and adhere to, the Panamanian law desired by the testator.

Nevertheless, the evidence was also legally insufficient to support the findings of liability in the Final Judgment. This was due in large part to errors in admitting and excluding evidence. By focusing on Lehman's appointments and commingling, but failing to admit and consider all of the evidence as to how the $655,241.25 was actually spent, the court did not have sufficient evidence to find Lehman liable under the standard of liability for trial. Indeed, Lehman's Exhibit 26 reflected the solvency of the

estate. To prevail as to each of their claims of liability by Lehman, the interested persons had to put on affirmative evidence and prove liability based upon the standard of liability in the trial court's January 15, 2009 Order, which paralleled Lucom's will's exculpatory clause in Appendix C to the Initial Brief.

> Each individual executor or trustee shall not be subject to any legal liability for any act, omission, or loss in connection with the administration of this estate, except for bad faith or with reckless indifference to the purposes of the will or the interests of interested persons, or for fraud or theft, or any other crime committed against the assets of the Wilson C. Lucom Trust Fund Foundation.

The Appellees presented no affirmative evidence of bad faith, reckless indifference, fraud, theft or a crime to satisfy this standard. Lehman's testimony and documentary evidence, on the other hand, was uncontroverted that he acted only to preserve and protect the overall estate. Lehman offered testimony, and the Final Accounting (Appendix D to Initial Brief) shows that he acted only to preserve and protect the estate and also to show that there was no damage as a consequence of the commingling. All of the money spent by Lehman out of Lucom's Wachovia account was to carry out Lucom's testamentary intent. The Final Judgment contains no language that Lehman used any money personally. He did not. Instead the court stated that Lehman spent the money "to fund ongoing litigation in the Panama Domiciliary Estate and to pay other administration expenses specific to the Panama Domiciliary

Estate and probate proceedings in other countries." Final Judgment, p. 4, ¶ 6, Appendix A to Initial Brief. This clearly was not the act of a "covetous opportunist." It was the act of an Albacea and ancillary personal representative – an Albacea appointed by the Panama court in July 2006 who was viable throughout the trial court proceedings. It was the act of a personal representative in furtherance of the testator's intent to benefit the poor children of Panama. After May 4, 2007 when the Panama appellate court ruled Lehman was one of three Albaceas, he continued to advance hundreds of thousands of dollars of his own money to the estate. TR-Vol. IV:481-482. Such conduct is not that of a covetous opportunist.

Lehman also offered as evidence Exhibit 4 for identification which was a composite of five notebooks containing invoices, checks, attorney bills and other documents showing how Lehman spent the ancillary estate's money to preserve and protect the overall estate. The Court excluded this evidence despite the fact that Lehman had an affirmative duty to present it. *See Beck v. Beck*, 383 So. 2d 268, 271 (Fla. 3d DCA 1990)(upon showing of commingling, the trustee has a duty to present evidence as to show how the funds were expended). The Court did not exclude Exhibit 4 for identification for an evidentiary reason, but instead excluded it because it was too bulky to put in the record. *See*, pp. 31-33, Initial Brief. Consequently, the trial judge did not have the requisite evidence to decide the liability issues in this action.

Consequently the Final Judgment is not supported by sufficient evidence.

F. ADMITTING THE UNRELIABLE HEARSAY REPORT OF THE ADMINISTRATOR PENDENTE LITE WAS ALSO LEGAL ERROR

Over Lehman's counsel's objection at trial and in an Order denying Lehman's Motion *in Limine* (D.E.# 629), the Court admitted the March 11, 2008 Report of the Administrator *Pendente Lite* (D.E. #471) as evidence. The report was clearly inadmissible hearsay and the Administrator *Pendente Lite*, Larry Miller, Esq., testified as to matters which were hearsay. *See*, pp. 36-37, Initial Brief. The report and the testimony were based on out of court statements offered in court for the truth of the matters asserted. Such a report and testimony based on inadmissible hearsay are themselves inadmissible and should have been excluded. *Scaringe v. Herrick*, 711 So. 2d 204 (Fla. 2d DCA 1998). The Administrator Larry Miller, had no first hand knowledge of any of the events in his report. The report and Miller's testimony about the Report should have been excluded. Had they been, it would have further supported the conclusion that Lehman acted appropriately in his Albacea capacity. Indeed, had Miller's report been excluded, and Lehman's accounting, with its "bulky" records of the hows and whys of Lehman's expenditures been admitted, the Final Judgment would have painted a different picture – a picture of a man valiantly striving to protect Lucom's estate from the covetousness of those who sought the proceeds for

themselves, not the poor children of Panama, as Lucom intended.

CONCLUSION

For the reasons advanced in the Initial Brief, the Supplemental Brief, and this Reply Brief, the Final Judgment should be reversed and the Order Denying the Motion to Vacate should be reversed and, at a minimum, a new trial granted.

Respectfully submitted,

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I HEREBY CERTIFY that this Brief is in compliance with Rule 9.210, Fla.R.App.P., and is prepared in Times New Roman 14 point font.

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