

[J-46-2020][M.O. - Donohue, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

IN RE: PASSARELLI FAMILY TRUST	:	No. 71 MAP 2019
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APPEAL OF: MARGARET G. PASSARELLI	:	Appeal from the Order of the Superior Court dated 3/28/19 at No. 3150 EDA 2016 reversing the Chester County Court of Common Pleas, Orphan's Court, Decree dated 9/19/16 at No. 1516-0101
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	:	ARGUED: May 21, 2020

CONCURRING AND DISSENTING OPINION

CHIEF JUSTICE SAYLOR

DECIDED: December 22, 2020

While I agree with the majority's decision to adopt the common-law test for fraud in relation to the inducement to enter into an irrevocable trust agreement, see Majority Opinion, *slip op.* at 20; see generally *id.* at 7 (setting forth the common-law test), I respectfully dissent as I believe Wife has satisfied her burden under that standard.

The majority notes that a central issue in this case is whether Husband's failure to disclose the existence of the Florida properties amounted to "a material misrepresentation that induced Wife to create the Trust." Majority Opinion, *slip op.* at 22. The majority also suggests that Husband's failure to tell Wife that his paramour was living in one of the properties was irrelevant to the question of materiality. See *id.* at 25 n.18 (observing that Wife's "post-settlement angst" arose from the person living in one of the Florida properties rather than the failure to disclose the existence of those properties).

A misrepresentation is generally considered material if the complaining party would not have entered into the transaction but for the misrepresentation. See, e.g., *De Joseph v. Zambelli*, 392 Pa. 24, 24, 139 A.2d 644, 647 (1958) (pertaining to a contract to purchase realty); *Eigen v. Textron Lycoming Reciprocating Engine Div.*, 874 A.2d 1179, 1186 (Pa. Super. 2005) (relating to an agreement to settle a civil suit); RESTATEMENT (SECOND) OF CONTRACTS §162(b) (providing that a misrepresentation is material if the maker knows it is likely to induce the recipient to assent to the transaction). This suggests that Husband's failure to list the Florida properties on the asset schedule attached to the trust instrument, or to disclose that his paramour was living in one of those properties, was material if Wife would not have agreed to the trust had that information been disclosed.

I find it germane that: (a) integral to the trust document was the naming of Husband as trustee to manage the marital property transferred into the trust; and (b) by hiding his affair from Wife, Husband was able – during a timeframe when he was aware his affair could lead to a divorce and that Wife did not yet know about it – to induce Wife to make him the trustee relative to property that would otherwise be subject to equitable distribution in the event of a divorce.

As understood by the Superior Court, the orphans' court found that Wife would not have signed the trust document had she known that, several weeks prior to the signing, Husband spent marital assets purchasing the Florida properties and that he was having an affair with a person living in one of those properties.¹ See generally *In re*

¹ In this regard, the Superior Court indicated:

The Orphans' Court found that [Husband] concealed the fact that he was having a long-term extra-marital affair and had used marital assets to purchase and maintain a Florida home for his girlfriend. The court (continued...)

Thorne's Estate, 344 Pa. 503, 511, 25 A.2d 811, 816 (1942) (noting fraud can stem from "silence when good faith required expression").² Finally, it is difficult to see how Wife was not harmed by such misrepresentation even if one assumes her purpose for creating the trust was fulfilled. That being the case, I would conclude that all elements of the common-law fraud standard have been satisfied.

(...continued)

concluded that [Wife] would not have executed the trust if she had been aware of those facts.

In re Passarelli Family Trust, 206 A.3d 1188, 1191 (Pa. Super. 2019). The majority's approach of upending this perspective on the case as it was decided in the intermediate court results in Appellant being deprived of her day in court on a fundamental element of her claim that she has raised and pursued throughout, including in her testimony before the orphans' court, her proposed findings of fact, her argument to the Superior Court, and her briefs to this Court. See Petitioner's Proposed Finding of Fact No. 29 ("[Wife] would not have signed the documents, had she known about [Husband's] long-term affair and the fact that his girlfriend was living in a home that was purchased and maintained with marital assets."), *reprinted in* RR. 445a-446a; N.T., June 23, 2016, at 23 (same), *reprinted in* RR. 229a; Appellee's Brief in *In re Passarelli Family Trust*, No. 3150 EDA 2016, 206 A.3d 1188 (Pa. Super. 2019), at 4-8, 12, 15 (same); Brief for Appellant at 36, 46-49; Reply Brief for Appellant at 3 n.4, 6, 8, 11, 22.

In other words, if the Superior Court believed (as the majority holds) that the trial court had skirted the issue of the non-disclosure of the affair, it seems to me that the proper resolution would have been a remand for a corrective opinion rather than a final pronouncement that no material misrepresentations had been made.

² The majority considers materiality to subsume another issue: whether the attached Schedule A had to list the properties owned by the holding companies as a predicate to creating a valid trust. See Majority Opinion, *slip op.* at 22-23. Additionally, the majority states that materiality hinges on whether Wife's overall purposes are, in fact, accomplished by the trust in spite of the misrepresentation. See *id.* at 23-24; see also *id.* at 25 ("Wife fails to demonstrate how specifically listing the Florida Properties on Schedule A would have thwarted her intention in creating the Trust."). In the circumstances of this case, I would not find these factors to be finally determinative because, as noted, Husband withheld information that would have nullified Wife's willingness to execute the trust instrument.

Accordingly, I would direct reinstatement of the orphans' court's mandate.

Justice Mundy joins this concurring and dissenting opinion.