IN THE CIRCUIT COURT OF CLEBURNE COUNTY, ARKANSAS

IN THE MATTER OF THE ESTATE OF MIKE MEYERS A/K/A MIKE MEYER DISFARMER, DECEASED **NO. 12PR-59-963**

BRIEF IN SUPPORT OF THE ARKANSAS MUSEUM OF FINE ARTS FOUNDATION'S OBJECTION TO FRED STEWART'S PETITION TO REOPEN THE ESTATE OF MIKE MEYERS A/K/A MIKE MEYER DISFARMER

Mike Meyer Disfarmer died alone in his Heber Springs photography studio in 1959 at the age of 75-years old. The administration of Mr. Disfarmer's estate was handled, not by family members, but by officers of the Arkansas National Bank of Heber Springs ("ANB") who fulfilled their every obligation to distribute, settle, and close Mr. Disfarmer's estate. Among the items of personal property liquidated by the estate's administrator at public sale were photographic negatives that Mr. Disfamer had created during his nearly 40-year career as a photographer. The proceeds of the sale, along with the remainder of Mr. Disfarmer's estate, were distributed to estate's heirs by order of the probate court, and the estate was closed in 1961. Now, some 60 years later, Fred Stewart, Mr. Disfarmer's great, great-nephew, says that the property that was sold at Mr. Disfarmer's estate sale has been recently found and its purported value entitles him to reopen the estate to establish whatever rights he may be able to claim. But that ignores reality. Mr. Stewart does not have standing to petition this Court, but even if he did, nothing at all has been found, no necessary act of any administrator of the estate was left undone, and no other cause exists for this Court to grant Mr. Stewart's petition. The petition should be denied.

BACKGROUND

Mr. Disfarmer, for nearly four decades, served as the only professional portrait photographer in Heber Springs, Arkansas. During that time, he developed a reputation for being eccentric and reclusive. Mr. Disfarmer's eccentricities reached their peak in 1939, when he petitioned this Court for a name change. Then known as Mike Meyer or "farmer" in German, Mr. Disfarmer claimed to have been, "about three years after his birth, . . . blown in a tornado to the home of one Martin Meyer and his wife, Margaretha Meyer who lived near Kellerville, Indiana, and with which he lived and made his home until they each departed this life." *In the Matter of the Change of Name of Mike Meyer to Mike Disfarmer*, Petition (Cir. Ct. Cleburne Cty., Ark. Mar. 20, 1939). The petition goes on to document Mr. Disfarmer's estrangement from his family and their "fear that he might attempt to inherit" as reasons for his request to be legally known as "Disfarmer," a name that he interpreted to mean "not a farmer." *Id*. This Court, to the general amusement of Mr. Disfarmer's neighbors and clients, granted the petition, a decision that was featured in the April 15, 1939, edition of *The Heber Springs Time and The Headlight*. From that point on, Mr. Disfarmer went about the work of capturing the faces of post-depression Arkansans, selling the prints to the subjects in triplicate for fifty cents, and storing the images in thousands of glass-plate photographic negatives.

After Mr. Disfarmer passed away, Charles W. Meyers, Mr. Disfarmer's younger brother, petitioned the Probate Court of Cleburne County to appoint an administrator of the Estate of Mike Meyers a/k/a Mike Meyer Disfarmer (the "Estate"), estimating the value of the Estate at $10,000.00 in personal property. (Ex. 1, Petition). The probate court appointed U.S. Hensley, the then president of ANB, as the Estate's administrator. (Ex. 2, Letters of Administration). The letter of appointment authorized Mr. Hensley to "take possession of the property of [the Estate] as

authorized by law." (*Id*). Mr. Hensley, in keeping with his obligations to the Estate, held an estate sale in December of 1959 to liquidate the entire contents of Mr. Disfarmer's photography studio for cash distribution to the heirs, and, as part of that sale, all of Mr. Disfarmer's photographic negatives were sold to Joe Albright, a resident and former mayor of Heber Springs. (Ex. 3, Order, at 18 (showing $5.00 deposit in December 1959); *see also* Ex. 4, KIM O. DAVIS, DISFARMER: MAN BEHIND THE CAMERA 99 (Kim O. Davis ed., 1st ed. 2013) (documenting the sale of "the contents of Disfarmer's decaying studio at an estate sale for five dollars")). After conducting an inventory of the photography studio, Mr. Albright discovered $8,000.00 in savings bonds, (Ex. 4, DAVIS, DISFARMER: MAN BEHIND THE CAMERA at 130), which he returned to the Estate for distribution to Mr. Disfarmer's heirs. (Ex. 3, at 18 (showing $8,000.00 deposit in December 1959)). As of March 31, 1960, the Estate consisted of $18,146.80 in cash held in an account maintained by ANB. (Ex. 5, Petition).

U.S. Hensley passed away during the administration of the Estate, and, on August 14, 1961, Charles Meyers petitioned the probate court for the appointment of a new administrator, stating under oath that U.S. Hensley "did serve well and faithfully in [his capacity as administrator] until September 22, 1960, when he deceased." (Ex. 6, Petition). U.S. Hensley's son, Buel W. Hensley, took up administration of the Estate by order of the probate court on September 14, 1961. (Ex. 7, Order). Six days later, Buel Hensley submitted an accounting to the probate court that confirmed the amount held in the Estate's account at ANB was unchanged since March 31, 1960. (Ex. 8, Accounting). Buel Hensley distributed the Estate to the heirs in checks payable to each and the probate court closed the Estate on December 19, 1961. (Ex. 3, Order).

After the Estate closed, the photographic negatives remained in Mr. Albright's possession for a number of years before he sold them to Peter Miller, an attorney and then newspaper editor

living in the Heber Springs area, in the late 1960s. Mr. Miller restored the negatives and transferred them to The Group, Inc. ("The Group") sometime before June 9, 1977. The Group preserved the negatives for its own use until it donated them to the Arkansas Arts Center Foundation (now known as the Arkansas Museum of Fine Arts Foundation (the "Foundation")) by a Declaration of Gift dated June 9, 1977. The Foundation took possession of the negatives, many of which were in various stages of decay and decomposition.

The Foundation, over the last four decades, has spent hundreds of thousands of dollars to restore and preserve the negatives. At all times, the Foundation has held the negatives for the benefit of the public and made them available to scholars, researchers, curators, and photography historians. The revenue, if any, that the Foundation has been able to generate from the negatives is negligible compared to the cost to preserve them. The Foundation has been and continues to be the true owner of the property that is at issue in Mr. Stewart's petition to reopen the Estate. On February 9, 2021, the Foundation made a demand for notice in this matter. A hearing is scheduled for Mr. Stewart's petition on August 3, 2021.

LEGAL STANDARD

Arkansas' probate code allows for the reopening of an estate by petition of an interested person "[i]f, after an estate has been settled and the personal representative discharged, other property of the estate is discovered, or it appears that any necessary act remains unperformed on the part of the personal representative, or for any other proper cause." Ark. Code Ann. § 28–53–119(a)(1). "On or before the day set for a hearing, an interested person may file written objections to a petition previously filed." Ark. Code Ann. § 28–1–110(a).

ARGUMENT

As a threshold matter, Mr. Stewart does not have standing to petition this Court to reopen the Estate. Even if he did, the property at issue in Mr. Stewart's petition has not been "discovered" within the meaning of the probate code, and no other reason has been or could be provided to reopen the Estate. Mr. Stewart says that the property at issue in his petition is recently discovered, but, in fact, it was discovered and sold by the Estate's administrator almost 60 years ago. No claim was made then that the administrator acted outside of his authority to handle the Estate's affairs, and no such claim can be made today. Mr. Disfarmer's family entrusted the administration of the Estate to third parties who performed their duties in accordance with the law and under the watchful eye of the probate court of Cleburne County. There is nothing else for this Court to do.

I. MR. STEWART IS NOT AN INTERESTED PARTY BECAUSE HE HAS NO RIGHTS IN THE PROPERTY AT ISSUE IN HIS PETITION.

Only an interested person may petition this Court to reopen the Estate, and Mr. Stewart is not an interested party here. The probate code defines an "interested person" as "any heir, devisee, spouse, creditor, or any other having a property right, interest in, or claim against the estate being administered, and a fiduciary." Ark. Code Ann. § 28–1–102(a)(11). Mr. Stewart claims to be an "heir" of the Estate. (Petition ¶ 2). An "heir" is "a person *entitled by the law of descent and distribution* to the real and personal property of an intestate decedent, but does not include a surviving spouse." *Id*. § 28–1–102(a)(10) (emphasis added). Assuming the Estate had been reopened as of the date of Mr. Stewart's petition and this Court then decided that it was appropriate to distribute personal property of the Estate, the property would have been "divided into as many equal shares as there [were] . . . [s]urviving heirs in the nearest degree of kinship to the intestate; and . . . [p]ersons . . . in the same degree of kinship as the [surviving heirs] . . . who predeceased the intestate leaving descendants who survived the intestate." *Id*. § 28–9–205(a)(2).

Ellen Stewart, Mr. Stewart's mother and Mr. Disfarmer's great-niece, *might be* an heir of the Estate, but Mr. Stewart cannot be one because his mother, a closer familial tie to Mr. Disfarmer, is still living. *See* (Petition at 9 (listing Ellen Stewart as a living heir of the Estate)). "Only an interested person may petition to reopen an estate." *White v. Welsh*, 323 Ark. 479, 481–82, 915 S.W.2d 274, 276 (1996) (discussing *Doepke v. Smith*, 248 Ark. 511, 452 S.W.2d 627 (1970), and affirming petitioners' lack of standing to question the issuance of an order in probate because they were not interested parties); *see also Pickens v. Black*, 316 Ark. 499, 872 S.W.2d 405 (1994) (affirming children of decedent had no standing to petition the probate court because they were not interested parties). Mr. Stewart is not an interested person within the meaning of the probate code. The petition should be denied for lack of standing.

II. THE PROPERTY WAS NOT "DISCOVERED" WITHIN THE MEANING OF THE PROBATE CODE.

In any event, the sale of the Estate's property by its duly appointed administrator cannot be grounds to reopen the Estate because the proceeds of the sale were distributed in the settlement. Mr. Stewart says that "the Negatives were wrongfully taken from the Decedent's residence by unrelated third parties who then used them for their own gain and benefit." (Petition at ¶ 7). He and other heirs claim to have recently discovered the property (*id*), and want to use that discovery as the sole ground for this Court to reopen the Estate. (*Id*. at ¶ 10). But the record shows that all of Mr. Disfarmer's personal property—to include the photographic negatives—was accounted for, liquidated, and distributed with the Estate. (Ex. 7).

Only property that is omitted from the settlement of an estate can be "discovered" within the meaning of the probate code. *See Wilson v. Davis*, 239 Ark. 305, 308, 389 S.W.2d 442, 444–45 (1965) (omission of "40 head of cattle, certain United States Savings Bonds and other personal property" from settlement warranted reopening estate); *see also Bullock v. Barnes*, 366 Ark. 444,

450–51, 236 S.W.3d 498, 503 (2006) (holding allegations of *an improper sale* or exchange of bank stock to the executor and a lack of notice on the petition for final distribution *did not warrant reopening the estate*). Mr. Stewart cannot point to any property that was omitted from the administration of the Estate, and therefore reopening the Estate is not authorized under Arkansas law.

Important facts cannot be disputed. U.S. Hensley, acting as administrator of the Estate, deposited $5.00 in the Estate's account in December of 1959, bringing the total account balance to $2,357.90. (Ex. 3, at 18). In January 1960, the Estate's account balance maxed out at $18,146.80, (*id*), and that same amount remained in the account until Buel Hensley conducted a final accounting on September 20, 1961, before settling the Estate. (Ex. 7). Additionally, anecdotal evidence, which is compelling in this matter, documents the sale of the photographic negatives to Joe Albright "[s]hortly after Disfarmer's death . . . at an estate sale for five dollars." (Ex. 4, DAVIS, DISFARMER: MAN BEHIND THE CAMERA at 99). This means that U.S. Hensley, who by the sworn testimony of Mr. Disfarmer's brother "did serve well and faithfully in [his capacity as administrator]" (Ex. 6), took possession of the photographic negatives, sold them, and disclosed that sale to the heirs by depositing the proceeds of the sale into the Estate's account.

Mr. Stewart cannot lean on a theory of "discovery" where the property at issue was not omitted from the administration of the Estate. *See Wilson*, 239 Ark. at 308, 389 S.W.2d at 444–45; *Bullock*, 366 Ark. at 450–51, 236 S.W.3d at 503. Mr. Stewart's becoming aware of the property and developing an interest in its purported value 60 years after it was sold does not mean that it has been discovered within the meaning of the probate code. Because Mr. Stewart has not discovered the property and because he offers no other reason for this Court to reopen the Estate, his petition should be denied.

III. THE DOCTRINE OF INCONSISTENT OPINIONS BARS ANY CLAIM AGAINST THE FOUNDATION'S INTEREST BY THE PURPORTED HEIRS.

Mr. Stewart and all of Mr. Disfarmer's purported heirs are estopped from asserting any interest in the photographic negatives. "The doctrine against inconsistent positions is a form of estoppel that prevents an individual from asserting claims that are inconsistent with the individual's previous positions." *Jackson v. Smiley Sawmill, LLC*, 2019 Ark. App. 235 at *4, 576 S.W.3d 43, 45 (citing *Dupwe v. Wallace*, 355 Ark. 521, 140 S.W.3d 464 (2004); *Fureigh v. Horn*, 2014 Ark. App. 234, 434 S.W.3d 390). As an overarching principle, this doctrine encompasses both judicial estoppel and equitable estoppel to bar a litigant from taking a position that is contrary to a position already taken. *Id*. Judicial estoppel focuses on how the inconsistent position impairs the integrity of the judicial process. *See Dupwe*, 355 Ark. 521, 533–54. Equitable estoppel focuses on how the inconsistent position negatively affects another party. *See Dicus v. Allen*, 2 Ark. App. 204, 209, 619 S.W.2d 306, 308 (1981) (holding a party is estopped from taking an inconsistent position in relation to a third party where the rejected position had previously inured to the party's benefit). Both are present here.

Mr. Stewart, 60 years after the fact, now seeks to disclaim the distribution of Mr. Disfarmer's estate that had previously inured to his remote benefit. *First*, Mr. Stewart is judicially estopped from challenging the administration of the Estate. It cannot be reasonably contested that the sale of Mr. Disfarmer's photographic negatives took place during the administration of the Estate by U.S. Hensley. On behalf of each heir, Charles Meyers, under oath, swore that U.S. Hensley "did serve well and faithfully" as the Estate's administrator until his death on September 22, 1960, (Ex. 6), meaning there was nothing irregular about the sale of the negatives to Mr. Albright. Mr. Stewart claims to be a descendant of Mary Fricker. (Petition ¶ 15). After Buel Hensley was appointed administrator of the Estate, each of Mary Fricker's children ratified Charles

Meyers' sworn statement by accepting payment and endorsing checks for 1/8 of 1/6 of the Estate. (*See* Ex. 3 at 2; 15–16 (check endorsed by Mrs. Pearl Wilks); 4–5 (check endorsed by Joe Fricker); 6–7 (check endorsed by William Fricker); 12–13 (check endorsed by John Fricker); 8–9 (check endorsed by Phillip Fricker); 6–7 (check endorsed by Mrs. Marie Fillman); 10–11 (check endorsed by Roy Fricker); 4–5 (check endorsed by Mrs. Elsie Boothe)). Not one of those individuals objected to the accounting or distribution of the Estate. Mr. Stewart cannot take a position now that is inconsistent with the positions taken by his relatives, and predecessors in interest, almost six decades ago. The integrity of the probate process should rest with those who had first-hand knowledge of the facts and circumstances about the Estate's administration.

Second, the Foundation has expended significant time and resources since 1978 to restore and preserve the glass-plate negatives for the public good. Mr. Stewart cannot credibly assert that his predecessors in interest were unaware that Mr. Disfarmer was a photographer or that he was likely to have remnants of his work in his studio. In 1959, none of Mr. Disfarmer's relatives cared that U.S. Hensley sold the contents of Mr. Disfarmer's studio because, at that time, everything that was sold was sold for a fair price and the money that was received was also distributed with the Estate. At least as early as 1976, anyone interested in Mr. Disfarmer's body of work would have been put on notice that the negatives existed through the publication of *Disfarmer: The Heber Springs Portraits 1939–1946* by Addison House. In 2005, Mr. Disfarmer's work had a resurgence with the discovery of prints by a photography collector, Michael Mattis, who was the subject of both national and local news stories. (Ex. 9, Werner Trieschmann, *Portraits of a Master*, Arkansas Democrat-Gazette, Oct. 9, 2005, at 1E–2E; Ex. 10, Russell Hart, *Vintage Disfarmer*, American Photo, Nov. 2005, at 22; Ex. 11, Philip Gefter, *From a Studio in Arkansas, A Portrait of America*,

N.Y. Times, Aug. 22, 2005, at E1). Heirs of Mr. Disfarmer have even been to the Arkansas Museum of Fine Arts; the fact that the Foundation had the negatives was no secret.

In all that time, no person ever petitioned this Court or any court—and no interested person has done so to date—to make a claim against the Foundation's interest in the negatives. The Foundation has never had any reason to question its interest in the negatives. Allowing the Foundation to expend hundreds of thousands of dollars to preserve and maintain the negatives over the course of four decades only to assert an interest after so many years is not just and it should not be allowed. Mr. Stewart and any other heir who may purport to have an interest in the negatives should be equitably estopped and barred from any claim against the Foundation's interest.

IV. NO OTHER REASON EXISTS TO REOPEN THE ESTATE.

Although Mr. Stewart does not give this Court any reason other than his alleged discovery to warrant reopening the Estate, the Foundation objects to this Court allowing Mr. Stewart to amend his petition because no other reason exists to reopen the Estate. The Foundation is the true owner of the property at issue in the petition, and it should not be made subject to a lengthy proceeding before this Court to establish its interests. The property was sold to a bona fide purchaser for value without notice of any superior claim to the property and that purchaser was entitled to dispose of it in any way he chose. The Foundation acquired its rights in the property through a series of transactions after the bona fide purchase, and its interest in the property is sheltered against any claims that could be brought against that interest. The petition should be denied with prejudice.

A. The sale of Mr. Disfarmer's property was not wrongful, but, even if it was, that does not warrant reopening the estate after 60 years.

Mr. Stewart claims that the sale of the property by the Estate was "wrongful" (Petition at 2), but even if that is true (which it is not), an administrator's wrongful act does not entitle an

interested party to reopen an estate. Arkansas Code Annotated section 28–53–119(a)(1) only applies to unperformed necessary acts, not "wrongful" ones. While wrongful acts performed in the administration of an estate may expose the administrator to liability and consequently the forfeiture of the administrator's bond, "an order of discharge . . . shall be final, except that upon a petition's being filed *within three (3) years of the entry thereof,* the order may be set aside for fraud in the settlement of the account of the personal representative." Ark. Code Ann. § 28–53–118(b) (emphasis added). Regardless, an administrator's fraudulent acts in the disposition of property of an estate can never be grounds for recovery of the property from "bona fide purchasers for value, without notice of a defect in the title." *Walters v. Lewis*, 276 Ark. 286, 291, 634 S.W.2d 129, 132 (1982) (affirming dismissal of purchasers of real property from action by widow and child of decedent where administrator fraudulently conveyed the property). Fraudulent conveyances are treated similarly throughout the probate code. *See* Ark. Code Ann. § 28–49–109(b) ("No property [fraudulently conveyed] or transferred [to delay a creditor's just demands] shall be taken from, nor shall any recovery be had from, any person who acquired any legal interest therein for a valuable consideration in good faith and without notice.").

Mr. Stewart has not alleged fraud, but even if this Court could construe his petition to cast the shadow of fraud over the original probate of the Estate, reopening the Estate is not an available remedy. Mr. Albright bought the contents of Mr. Disfarmer's studio for $5.00 and there is no indication—nor any allegation in Mr. Stewart's petition—that he had reason to believe that U.S. Hensley was not authorized to sell the items purchased. For one, U.S. Hensley was in fact authorized to handle the Estate's affairs. And, as a bona fide purchaser for value without notice of any defect in title, Mr. Albright was free to dispose of the property in any way he saw fit. The

Foundation obtained its current property rights in the photographic negatives from The Group in 1977 and, at considerable expense, has preserved them for the benefit of the public ever since.

Fraud or not, the law is the same; the reopening of an estate is only appropriate where some necessary act remains undone, not when it is merely conceivable that a necessary act was done wrongfully. The record is clear on this point, and Mr. Stewart has not alleged that any necessary act in the administration of the Estate remains to be done.

B. The sale of the photographic negatives divested the heirs of any interest in the copyright along with the physical property that embodied the copyright.

Mr. Stewart summarily stakes a claim in any copyrights that may exist in the photographic negatives at issue in his petition. (Petition at ¶ 8). He says common law copyrights are subject to the laws of intestate succession (*id.*), which may be true but has no bearing on the merits of his petition. Like the photographic negatives, the copyrights, if any, have not been "discovered" within the meaning of the probate code, and, for the same reasons mentioned above, Mr. Stewart has no grounds to reopen the estate. If any common law copyrights existed before the sale of the photographic negatives, those rights were assigned to Mr. Albright by the unequivocal sale and ended up with Peter Miller. Because Arkansas law is clear that property in the hands of a bona fide purchaser, for value and without notice of any prior interest, cannot be reached by an heir challenging the sale by reason of a defect in the administration of an estate, *see Walters*, 276 Ark. at 291, 634 S.W.2d at 132, Mr. Stewart has no claim to the photographic negatives or any associated copyrights.

At the time of Mr. Disfarmer's death, the copyrights in his unpublished works were governed by state common law. U.S. Hensley took possession of and sold Mr. Disfarmer's photographic negatives pursuant to his duties as the administrator of the Estate, and therefore that sale vested the copyrights, if any, in Mr. Albright. "[T]he common-law right is lost by the general

publication or unrestricted sale of a single copy." *Grandma Moses Properties v. This Week Magazine*, 117 F.Supp. 348, 350 (S.D.N.Y. 1953). Moreover, "if the sale was an absolute and unconditional one, and the article was absolutely and unconditionally delivered to the purchaser, the whole property in the manuscript or picture passes to the purchaser, including the right of publication, unless the same is protected by [statutory] copyright, in which case the rule is different." *Pushman v. New York Graphic Soc., Inc.*, 287 N.Y. 302, 306, 39 N.E.2d 249, 250 (1942).

The facts are straightforward. U.S. Hensley, in 1959, acting as administrator of the Estate, was authorized to sell and therefore sold certain personal property and all of the appurtenant rights in that property to James Albright. No heir had any cause then, and no distant heir has any cause now, to object to that sale, and, critically to Mr. Stewart's claim, no heir actually objected to it. Whatever became of the property after that time is of no consequence in this matter, and there is nothing left for the Court to do but deny the petition to reopen the Estate.

CONCLUSION

Arkansas' probate code does not allow for the reopening of an estate unless property is discovered, meaning it was omitted from the estate's administration, or some essential act remains to be done. Nothing of Mr. Disfarmer's estate has been discovered and nothing is left to be done. This Court should deny and dismiss Mr. Stewart's petition with prejudice.

Respectfully submitted,

QUATTLEBAUM, GROOMS & TULL PLLC
111 Center Street, Suite 1900
Little Rock, AR 72201
Voice: (501) 379-1700
Facsimile: (501) 379-1701

By:/s/ John E. Tull III
John E. Tull III (84150)
R. Ryan Younger (2008209)

Attorney for the Arkansas Museum of Fine Arts Foundation f/k/a the Arkansas Arts Center Foundation

CERTIFICATE OF SERVICE

I hereby certify that, on July 14, 2021, a true and correct copy of the above and foregoing demand has been served on the following via eflex and electronic mail:

Grant E. Fortson
Lax, Vaughn, Fortson, Rowe & Threet, P.A.
Cantrell West Building
11300 Cantrell Road, Suite 201
Little Rock, Arkansas 72212
gfortson@laxvaughan.com

/s/ John E. Tull III
John E. Tull III