

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(FILED: September 2, 2016)

IDA D'AMORE and MARTIN MALINO, :
APPELLANTS :

V. :

BARBARA NERI and DONALD D'AMORE, :
Individually as Petitioners for Guardianship, :
and as Permanent Co-Guardians of Ida :
D'Amore :
APPELLEES :

C.A. No. PP 14-3437
CONSOLIDATED WITH

YOLANDA D'AMORE and MARTIN :
MALINO, :
APPELLANTS :

V. :

BARBARA NERI and DONALD D'AMORE, :
Individually as Petitioners for Guardianship, :
and as Permanent Co-Guardians of Yolanda :
D'Amore :
APPELLEES :

C.A. No. PP 14-3436
CONSOLIDATED WITH

MARTIN MALINO, :
APPELLANT :

V. :

BARBARA NERI and DONALD D'AMORE, :
Individually and as Permanent Co-Guardians of :
Ida D'Amore :
APPELLEES :

C.A. No. PP 14-4885
CONSOLIDATED WITH

MARTIN MALINOU	:	
APPELLANT	:	
	:	
V.	:	C.A. No. PP 15-1580
	:	CONSOLIDATED WITH
BARBARA NERI and DONALD D'AMORE,	:	
Individually and as Permanent Co-Guardians of	:	
Ida D'Amore	:	
APPELLEES	:	

MARTIN MALINOU	:	
APPELLANT	:	
	:	
V.	:	C.A. No. PP 15-4333
	:	
BARBARA NERI and DONALD D'AMORE,	:	
Individually and as Permanent Co-Guardians	:	
of Ida D'Amore	:	
APPELLEES	:	

DECISION

VAN COUYGHEN, J. Appellees Barbara Neri and Donald D'Amore, individually and as co-guardians of Ida D'Amore and Yolanda D'Amore, as well as Robert E. Craven, Esq., on behalf of Ida D'Amore (collectively, Appellees), pursuant to Super. R. Civ. P. 41(b)(2) (Rule 41(b)(2)), bring this motion to dismiss five consolidated probate appeals brought by Martin Malinou (Mr. Malinou or Appellant) from decisions of both the Cranston Probate Court and the Providence Probate Court. Appellees also bring a motion for the release and transfer of the probate files of decedents Ida and Yolanda D'Amore (the D'Amore sisters) currently held by the Providence Probate Court to the Cranston

Probate Court.¹ For the reasons set forth herein, this Court grants Appellees' motions and hereby dismisses all five of Appellant's consolidated appeals with prejudice.² The Court also orders that the D'Amore sisters' probate files held by the Providence Probate Court be transferred to the Cranston Probate Court in order to give the Appellees the opportunity to initiate probate proceedings in that court.

I

Synopsis

Because of the long and vexing history of these cases, the Court will provide a brief synopsis. The issues before this Court emanate from five consolidated probate appeals. All of the appeals were taken by Attorney Martin Malinou. The appeals involve two sisters, now deceased, Ida and Yolanda D'Amore. Three of the appeals involve the appointment of guardians for the D'Amore sisters by the Cranston Probate Court. That court appointed Barbara Neri and Donald D'Amore as co-guardians. Ms. Neri and Mr. D'Amore (collectively, co-guardians) are the niece and nephew and heirs-at-law of the D'Amore sisters. Mr. Malinou, alleging that he represented the D'Amore sisters, appealed the Cranston Probate Court's decisions—PP-2014-3436 (Guardianship of Yolanda D'Amore), PP-2014-3437 (Guardianship of Ida D'Amore), and PP-2015-1580 (Order granting the co-guardians' petition for issuance of a citation compelling Mr. Malinou to provide testimony regarding the D'Amore sisters' assets). Pursuant to G.L.

¹ Appellees Neri and D'Amore originally filed a motion seeking the transfer of these records on April 21, 2016. Appellees renew that motion at this time.

² See Gosset v. Reid, 764 A.2d 138, 141 (R.I. 2001) (where the Supreme Court reasoned that dismissing a plaintiff's complaint pursuant to Rule 41(b)(2) without prejudice would trivialize the defendant's interests in obtaining a final resolution of the matter and would effectively give the plaintiff a prolonged and unintended continuance).

1956 § 33-23-3, the co-guardians were able to administer the wards' estates despite the appeals.

After the D'Amore sisters passed away, Mr. Malinou attempted to initiate probate proceedings for each in the Providence Probate Court. Mr. Malinou is named as an alternate executor in each of the D'Amore sisters' Wills. The Providence Probate Court found that it lacked jurisdiction because the D'Amore sisters were domiciled in Cranston, Rhode Island. Mr. Malinou appealed those decisions to this Court—PP-2014-4885 (Probate of Yolanda D'Amore's Will) and PP-2015-1580 (Probate of Ida D'Amore's Will). As a result of the appeal of the Providence Probate Court's decisions, the D'Amore sisters' estates have not been probated.

During the course of the proceedings, this Court ordered Mr. Malinou to deposit funds in his possession belonging to the D'Amore sisters into the registry of the Court. Although some of the funds have been deposited, Mr. Malinou has failed to deposit \$33,107.33 of the D'Amore sisters' money into the registry of the Court, claiming he is entitled to the money as an attorney fee. The Court again ordered Mr. Malinou to deposit the missing funds and provide a detailed accounting regarding payments and hours spent as the basis of the alleged fees. Mr. Malinou has not deposited the funds and has failed to provide sufficient documentation to justify a legitimate basis regarding his claim that the funds were taken as a fee. This Court has held Mr. Malinou in contempt for failing to comply with these orders. The present motions are based upon Mr. Malinou's failure to comply with the above-referenced orders.

II

Facts and Travel

Sisters Ida and Yolanda D'Amore were 93 and 98 years of age, respectively, at the time these matters first reached the Superior Court. Both have passed away during the pendency of this litigation.³ From 2009 to their deaths, the D'Amore sisters lived at the Cedar Crest Nursing and Rehabilitation Centre (Cedar Crest) in Cranston, Rhode Island. According to Mr. Malinou, soon after arriving at Cedar Crest, Ida and Yolanda each signed a short form Power of Attorney appointing him as their attorney-in-fact. See Short Form Power of Attorney of Ida D'Amore, signed Dec. 5, 2009; Short Form Power of Attorney of Yolanda D'Amore, signed Nov. 30, 2009.⁴ Those documents were notarized by Diane Laferriere (Ms. Laferriere).

At the outset of the probate proceedings, the co-guardians alleged that Cedar Crest representatives approached them in late 2013 or early 2014 with concerns regarding the D'Amore sisters' well-being. Thereafter, the co-guardians initiated guardianship proceedings with the Cranston Probate Court. A hearing date of February 13, 2014 was set to appoint temporary guardians, and notice of the guardianship proceedings were hand delivered to both Ida and Yolanda D'Amore on February 13, 2014. See Certificate of Notice for Yolanda D'Amore dated Feb. 13, 2014; Certificate of Notice for Ida D'Amore dated Feb. 13, 2014.⁵ Appellees Neri and D'Amore were subsequently granted appointment as temporary co-guardians of the D'Amore sisters by the Cranston Probate

³ Yolanda D'Amore passed away on July 26, 2014, and Ida D'Amore passed away on May 31, 2015.

⁴ Case Nos. PP-14-3436 and PP-14-3437.

⁵ Case Nos. PP-14-3436 and PP-14-3437.

Court on February 18, 2014. See Certificate of Appointment for Yolanda D’Amore dated Feb. 18, 2014; Certificate of Appointment for Ida D’Amore dated Feb. 18, 2014.⁶

On March 13, 2014, Mr. Malinou appeared before the Cranston Probate Court—purportedly representing the D’Amore sisters—to oppose the temporary guardianship entered on February 18, 2014. He did not produce a retainer agreement, but he did submit the aforementioned Short Form Power of Attorney documents dated from 2009, which were allegedly signed by each Ida and Yolanda D’Amore. The Probate Court did not explicitly find these documents insufficient at that time, but extended the temporary guardianship and continued the hearing to permit the parties to conduct further discovery. See March 26, 2014 Order of Cranston Probate Court.⁷

The parties were heard again before the Cranston Probate Court on May 8, 2014, when the temporary co-guardians sought an extension of the temporary guardianship and the compulsion of financial discovery of Mr. Malinou’s records pertaining to his actions as the D’Amore sisters’ attorney-in-fact. Following that hearing, that Court entered an order in which it 1) ordered Mr. Malinou to provide limited specific discovery of financial documents relating to his representation of the D’Amore sisters; 2) continued the matter for further hearing on the guardianships for June 26, 2014; 3) extended the temporary co-guardianship of Appellees Neri and D’Amore; and 4) set the temporary guardianships’ expiration for June 26, 2014. See May 28, 2014 Order of the Cranston Probate Court.⁸ Notice of the June 26, 2014 hearing and the petition to appoint Barbara Neri and Donald D’Amore as co-guardians was provided to the D’Amore sisters by their

⁶ Case Nos. PP-14-3436 and PP-14-3437.

⁷ Case No. PP-14-3437.

⁸ Case Nos. PP-14-3436 and PP-14-3437.

former Guardian Ad Litem, Paula Cuculo, at a meeting with them on June 18, 2014. See Supplemental Report of Guardian Ad Litem.⁹

At that June 26, 2014 hearing, Appellees Neri and D'Amore were appointed co-guardians of the D'Amore sisters. See June 26, 2014 Order of Cranston Probate Court; Certificate of Appointment dated June 26, 2014.¹⁰ The Court also heard the co-guardians' Petition to Remove Mr. Malinou as attorney-in-fact and to Strike Power of Attorney at the June 26, 2014 hearing. See July 3, 2014 Order of Cranston Probate Court.¹¹ As grounds, the co-guardians presented evidence of the creation of a Centreville Bank account—which was separate from the D'Amore sisters' other known accounts—into which Ms. Laferriere had placed as much as \$200,000 in funds, purportedly owned by Yolanda D'Amore. The co-guardians alleged suspicious account activity linking Ms. Laferriere to instruments drawn to offset a car registration and property closing in Florida, among other highly irregular transactions. As stated above, Ms. Laferriere notarized the so-called power of attorney authorizing Mr. Malinou to act on the D'Amore sisters' behalf. Moreover, upon the compulsion of discovery regarding the account, the account was closed, and on May 14, 2014, the remaining funds, \$133,107.33, were transferred to Mr. Malinou rather than the active co-guardians. See Hr'g Tr. 10:1-6, June 26, 2014 before the Probate Court of the City of Cranston. At the conclusion of this hearing, the Probate Judge ordered Mr. Malinou disqualified as counsel for the D'Amore sisters and found that, given the present condition of the D'Amore sisters, they could not have entered into an attorney-client relationship. July 3, 2014 Order of Cranston Probate

⁹ Case No. PP-14-3437.

¹⁰ Case Nos. PP-14-3436 and PP-14-3437.

¹¹ Case No. PP-14-3437.

Court at ¶¶ 1-2.¹² Though the Probate Judge did question whether Mr. Malinou ever rightfully possessed that fiduciary power, the Court declined to rule on that point. Id. These decisions were appealed by Mr. Malinou to the Superior Court (discussed infra).

Subsequent to Yolanda's death, Mr. Malinou brought a Petition to Probate her Will in the Providence Probate Court on September 9, 2014. See September 16, 2014 Order and Decision of Providence Probate Court. After Appellees Neri and D'Amore objected to the jurisdiction of the Providence Probate Court, the Court found that it lacked jurisdiction to hear the matter based on the facts presented and directed that the Petition be filed in the Probate Court of Cranston. Id. Specifically, the Court determined that it lacked jurisdiction because Yolanda D'Amore was domiciled in Cranston at the time of her death. Mr. Malinou appealed that decision to the Superior Court.¹³

The following year, on June 4, 2015, after the death of Ida D'Amore, Mr. Malinou brought a Petition to Probate her Will—again in the Providence Probate Court—and Appellees Neri and D'Amore again objected based on lack of jurisdiction. See Petition for Probate of Will, Ida D'Amore.¹⁴ Specifically, they averred that the Court had already determined that it lacked jurisdiction when it dismissed Mr. Malinou's Petition to admit Yolanda D'Amore's Will for probate on September 16, 2014. Consequently, on September 3, 2015, the Providence Probate Court found that it lacked jurisdiction to probate Ida D'Amore's Will, and dismissed the Petition. See Compl. ¶ 1.¹⁵ Mr. Malinou yet again appealed this decision to the Superior Court (discussed infra).

¹² Case Nos. PP-14-3436 and PP-14-3437.

¹³ Case No. PP-14-4885 (No. PP-14-3437).

¹⁴ Case No. PP-15-4333 (attachments 2 and 6 to the Compl.).

¹⁵ Case No. PP-15-4333.

On October 21, 2014, this Court heard argument on Mr. Malinou's motion to stay the transfer of the Petition to Probate the Will of Yolanda D'Amore from Providence to Cranston. See Hr'g Tr. 17:10-12, Oct. 21, 2014. At that time, the Court denied Mr. Malinou's motion to stay and continued the matter for further hearing. Id. at 25:24-26:2. It was also at this hearing that the Court was made aware of \$153,107.33 of the D'Amore sisters' money that Appellees averred—and Appellant admitted—had been given to Mr. Malinou. Id. at 19:23-20:4. Moreover, when the parties returned for further hearing on January 15, 2015, the Court disqualified Mr. Malinou from representing Ida D'Amore, who was still alive, finding, inter alia, that a conflict of interest existed due to Mr. Malinou's potential liability and possible need to testify as a witness regarding these missing funds, considering his substantial involvement in their transfer and whereabouts. See Hr'g Tr. 22:19-24:11, Jan. 15, 2015; see also Order After January 15, 2015 Hearing.¹⁶ At that point, Attorney Craven was appointed to represent Ida D'Amore's interests. Id.

The parties returned before this Court on February 26, 2015, at which time Mr. Malinou asserted that a third party—Joe Vendresca—might have an ownership interest in \$20,000 of the missing funds. See Hr'g Tr. 11:3-6, Feb. 26, 2015. Additionally, at a subsequent hearing on March 16, 2015, Mr. Malinou stated that he had no ownership interest in \$153,107, but again averred that there was a legitimate question regarding what interest two third-parties—Ms. Laferriere and Mr. Vendresca—might have in the funds. See Hr'g Tr. 2:2-11; 8:18-22, Mar. 16, 2015. Considering this, the Court expressed its concern as to why Mr. Malinou had not filed a motion to deposit those funds with the

¹⁶ Case No. PP-14-3437.

Court registry and provided notice to all parties who might have an interest in them. Id. at 8:1-17. Consequently, after an additional hearing on May 5, 2015, the Court issued an Order compelling Mr. Malinou to return the \$153,107.33 to the registry of the Court by May 10, 2015 (this sum represented the \$133,107.33 that had been transferred to him by Ms. Laferriere on May 14, 2014 plus an additional \$20,000 Mr. Malinou had reportedly received from attorney Michael Fitzpatrick).¹⁷ Notably, Mr. Malinou clearly indicated both that he understood this Order and that he had more than \$133,000 worth of the D'Amore sisters' money in his possession. See May 5, 2015 Order of the Superior Court¹⁸; Hr'g Tr. 9:7-25; 12:18-20, May 5 and 26, 2015. It was also at the May 5, 2015 hearing that Mr. Malinou—for the first time—indicated that he might have a claim to those funds “as a lien for attorney’s fees” despite previously stating that he had no ownership interest in any of the subject funds at the March 16, 2015 hearing. Id. at 6:17-19.

The matter returned before the Court on May 26, 2015, at which point Mr. Malinou had yet to deposit the funds into the registry of the Court, stating that he did not understand that the Court had ordered it be done by May 10, 2015—in spite of his clear indication that he understood the Court’s order at the prior hearing. Id. at 18:19-19:4. He did, however, indicate once again that the amount of \$133,000 could be deposited. Id. at

¹⁷ Mr. Fitzpatrick was apparently holding these funds for his client, Mr. Vendresca. They were being held in the form of a Citizen’s Bank check which had both Ida and Yolanda’s name on it and was payable to both of them. See Hr’g Tr. 20:22-21:3; 26:9-15, May 26, 2015. Thus, this check was not payable to Mr. Malinou. On August 13, 2015, it was represented to the Court by Mr. Fitzpatrick that his client held no interest in the money, so he transferred this check to Mr. Malinou upon learning of his apparent involvement with the D’Amore sisters’ estates. Id. at 26:13-27:16. This money was subsequently deposited into the registry of the Court. Id. at 27:17-28:15.

¹⁸ This Order pertained to Case Nos. PP-14-3436, PP-14-3437, and PP-14-4885.

19:5-8; 21:14-18. Consequently, the Court ordered Mr. Malinou to deposit the money within two days (an order he once again indicated he understood) and directed the parties to return on May 28, 2015. Id. at 20:11-20.¹⁹ On May 28, 2015, Mr. Malinou indicated that he had deposited only \$100,000 into the Court registry and that he no longer had any of the additional funds that had been given to him from Ms. Laferriere, despite indicating at the May 5, 2015 hearing that he had “something more” than \$133,000 of the D’Amore sisters money, and again stating at the May 26, 2015 hearing—two days prior—that he could deposit the \$133,157.33 in question. See Hr’g Tr. 1:18-3:18, May 28, 2015. The Court then proceeded to question Mr. Malinou about his involvement with any money and/or bank accounts that originated from the D’Amore sisters and why he had failed to deposit the full amount despite the Court’s clear order to do so. Id. at 7:15-11:6. Upon completion of that questioning, the Court again 1) ordered Mr. Malinou to provide a detailed accounting of all of the funds that came into his possession via the D’Amore sisters and 2) referred the matter to the disciplinary counsel based on Mr. Malinou’s

¹⁹ It is also noteworthy that at the May 26, 2015 hearing, Mr. Malinou opposed the suggestion by Appellees that this Court remand the probate appeals back to the Providence Probate Court seeing as there was no dispute that Yolanda D’Amore’s entire estate was left to Ida D’Amore—who was still living at the time—and thus, the only issue remaining was the qualification of the proposed Executor, so there was no need to delay probate of Yolanda’s Will. However, Mr. Malinou contested that suggestion because he did not want the Providence Probate Judge making “delicate decisions” in these matters because he believed the Judge was related to one of the Appellees (though he provided no basis for such a claim). See Hr’g Tr. 38:5-25, May 26, 2015. Such opposition is puzzling considering that it was Mr. Malinou who sought to have the Wills of both D’Amore sisters probated in Providence and contested jurisdiction in Cranston, yet he at this time also contested having the matters returned to Providence, despite defense counsel’s willingness to do so.

failure to follow the Court's orders and due to the Court's concern over the missing \$33,107.33. See Order After May 28, 2015 Hearing.²⁰

The parties returned, yet again, on June 11, 2015. At that point, Mr. Malinou again averred that he had used the missing \$33,107.33 to cover legal fees stemming from his representation of the D'Amore sisters—despite failing to indicate that he had done so at the previous hearings when the Court initially ordered the full amount to be deposited. See Hr'g Tr. 4:20-5:3, June 11, 2015. After expressing its concerns over Mr. Malinou's forthrightness regarding the missing funds, the Court ordered him to provide a detailed explanation of what legal fees he purportedly took from the missing funds by August 3, 2015; an order which Mr. Malinou stated he understood. Id. at 13:21-14:17; see also Order After June 11, 2015 Hearing.²¹ The parties returned on August 13, 2015, and at that time Mr. Malinou had still not provided the breakdown of his use of the missing funds as the Court had directed. After again expressing how troubled it was with Mr. Malinou's failure to comply with its order to provide an adequate accounting of the missing funds, the Court once more ordered Mr. Malinou to provide a detailed breakdown of how he spent the missing funds by September 14, 2015—this time requiring that copies of checks be appended to support this breakdown—and engaged in a long, precise and detailed colloquy with Mr. Malinou to ensure that he understood what the Court was requiring of him. See Hr'g Tr. 22:10-32:6, Aug. 13, 2015; see also Order - Hearing of August 13, 2015, signed August 26, 2015. The Court also warned Mr. Malinou at that time that he was “dangerously close to being held in contempt” for his repeated failures to comply with the Court's orders. See Hr'g Tr. 32:1-6, Aug. 13, 2015.

²⁰ This Order pertained to Case Nos. PP-14-3436, PP-14-3437, and PP-14-4885.

²¹ This Order pertained to Case Nos. PP-14-3436, PP-14-3437, and PP-14-4885.

When the matter again returned before the Court on October 23, 2015, the Court reiterated its concerns that Mr. Malinou did not raise the issue of using part of the missing funds to cover attorney's fees until the hearing on May 28, 2015—despite having had several opportunities to do so prior to that date. See Hr'g Tr. 20:22-21:6, Oct. 23, 2015. Furthermore, the Court reviewed the records and copies of checks Mr. Malinou did provide, and not only found that they did not account for the missing \$33,107.33 in question as was ordered, but additionally questioned whether any of the money taken by Mr. Malinou from the D'Amore sisters as demonstrated by these records were a legitimate representation of payment for services rendered. Id. at 25:3-24.²² Consequently, because Mr. Malinou had continued to fail to abide by the Court's orders to account for the missing funds in question, the Court held Mr. Malinou in contempt and ordered him to deposit the missing \$33,107.33 into the Court registry within one week, or be assessed a penalty of \$100 per day for every day he failed to do so.²³ Id. at 23:9-24:9; see also Order Amending Order Regarding October 23, 2015 Hearing and Granting Motion to Consolidate, entered on Nov. 30, 2015. On November 2, 2015, the Court held

²² By way of example, it was noted by Defense Counsel that Mr. Malinou had taken numerous payments from the funds of the D'Amore sisters for approximately \$1,000 each for services rendered on a recurring basis from April of 2013 through May of 2015. See Hr'g Tr. 5:19-24, Oct. 23, 2015. The Court noted at that time that it could find no correlation between those fees and services rendered, and that there should be a bill connecting time spent by Mr. Malinou representing the D'Amore sisters and of the fees taken; yet Mr. Malinou could not provide such information. Id. at 25:3-24. In addition, some of these funds were taken by Mr. Malinou prior to coming into possession of the \$133,107.33 by Ms. Laferriere. The sources of these funds have not been identified.

²³ See G.L. 1956 § 8-6-1, which states, in pertinent part, that the Supreme and Superior Courts shall have the power “to punish, by fine or imprisonment, or both, all contempts of their authority.”; see also Town of Coventry v. Baird Props., LLC., 13 A.3d 614, 621 (R.I. 2011) (explaining that “[t]he authority to find a party in civil contempt is among the inherent powers of our courts” (internal citation omitted). Such a finding requires a demonstration, by clear and convincing evidence, that a sufficiently specific order of the court has been violated.”)

a status hearing, in which Mr. Malinou indicated he had not yet deposited the money and was unable to do so. See Hr’g Tr. 2:22-24, November 2, 2015

The matter returned for hearing on May 6, 2016. At that time, Mr. Malinou had still failed to deposit the missing funds into the court registry, citing his inability to do so. See Hr’g Tr. 12:9-13:11, May 6, 2016. The Court also determined at this hearing that the only reason remaining for Mr. Malinou to be involved in the probate of the Wills for the D’Amore sisters was because he had been named alternate Executor designate due to the deaths of Ida and Yolanda, who had named each other as primary Executrix in their Wills. Id. at 15:12-15. The case was then continued to May 19, 2016 for scheduling purposes. On that date, the Court set out a schedule for the filing of any dispositive motions by the parties. Appellees filed the instant motion to dismiss pursuant to Rule 41(b)(2) due to Mr. Malinou’s failure to comply with the orders of the Court—as well as the motion to transfer the records from the Providence Probate Court to the Cranston Probate Court—on June 2, 2016. Mr. Malinou objected to this motion on June 16, 2016. The Court also heard oral arguments on the following motions on July 8, 2016.

III

Standard of Review

Super. R. Civ. P. 41, entitled “Dismissal of actions,” presents several procedural avenues for the disposal of cases. Most pertinent to the instant case, Rule 41(b)(2) reads:

“(b) Involuntary Dismissal: Effect Thereof.

...

“(2) *On Motion of the Defendant.* On motion of the defendant the court may, in its discretion, dismiss any action for failure of the plaintiff to comply with these rules or any order of court or for lack of prosecution as provided in paragraph (1) of this subdivision.” Rule 41(b)(2).

Accordingly, the Court has discretion to dismiss a plaintiff's action(s) for failure to comply with the Rhode Island Rules of Civil Procedure or any order of the Court. See Nye v. Brousseau, 102 A.3d 627 (R.I. 2014) (affirming the Superior Court's decision to dismiss the plaintiff's complaint in a quiet title action for failure to comply with a Court order compelling plaintiff to obtain a title abstract.). "In responding to a motion to dismiss pursuant to Rule 41(b)(2), the trial justice is not required to view the evidence in the case in the light most favorable to the plaintiff and to draw all reasonable favorable inferences on behalf of the plaintiff but may weigh the evidence, determine the credibility of witnesses, and draw inferences." DeMascole v. Tatro, 673 A.2d 57, 60 (R.I. 1996). "The court's need to manage its docket, the public interest in the expeditious resolution of litigation, and any prejudice to the defendant caused by the delay are placed on one side of the scale. On the other side, the court must factor in the goal of trying to dispose of cases on their merits rather than on procedural defaults." Gosset v. Reid, 764 A.2d 138, 140 (R.I. 2001).

IV

Parties' Arguments

In support of their motion to dismiss, Appellees argue that Mr. Malinou has repeatedly failed to comply with various Court orders throughout this litigation, and therefore, his consolidated appeals should be involuntarily dismissed by this Court pursuant to Rule 41(b)(2). Appellees direct the Court's attention to four such orders that Mr. Malinou continues to be in violation of, and notes that the Court has repeatedly found Mr. Malinou's stated reasoning for failing to comply with these orders—namely, his

inability to do so—as insufficient. As such, Appellees contend that these cases should be dismissed.

In response, Mr. Malinou initially contends that Mr. Craven lacks standing to bring a motion to dismiss, as he can no longer be expected to act on the behalf of Ida D’Amore because she is deceased. More substantively, Mr. Malinou argues that any order from this Court to deposit the missing funds was erroneous and illegal since it was based on the results of improper guardianship proceedings in the Cranston Probate Court, and thus he should not be required to comply with them. Alternatively, Mr. Malinou argues that even if those orders were not erroneous or illegal, he has not intentionally disobeyed them, as the missing \$33,107.33 was properly used by him to cover the D’Amore sisters’ legal fees. Mr. Malinou contends that Appellees’ motion to dismiss must also be denied because Rule 41(b)(2) does not apply to probate appeals pursuant to Super. R. Civ. P. 81(a)(1) (Rule 81).²⁴ Finally, with regard to Appellees’ motion to transfer the records of the D’Amore sisters from the Providence Probate Court to the Cranston Probate Court, Mr. Malinou avers that such an action would be improper before

²⁴ Rule 81 reads: “Applicability of rules:

“(a) To What Proceedings Applicable.

“(1) These rules do not apply during the process and pleading stages to the following proceedings:

“[A] Probate appeals . . . ”

his appeals are tried before a jury.²⁵ Consequently, Mr. Malinou argues that both of Appellees' motions should be denied.²⁶

V

Analysis

A

Involuntary Dismissal Pursuant to Rule 41(b)(2)

As Appellees have argued, the facts of this case make it clear that throughout this litigation Mr. Malinou has repeatedly failed to comply with orders of this Court; most notably, orders to deposit the sum of \$133,107.33 into the Court registry.²⁷ Specifically, Appellees have identified the following orders entered by the Court that Mr. Malinou has failed to comply with:

- (a) Order entered on May 5, 2015 requiring Mr. Malinou to deposit into the registry of the Court the sum of \$133,107.33 plus any additional funds he might be holding for the estate of Ida D'Amore.
- (b) Order entered on June 15, 2015 compelling Mr. Malinou to provide a detailed accounting of the \$33,107.33 that was not deposited by him into the Court registry.

²⁵ Generally, a party can request a jury trial to resolve factual issues raised in a probate appeal pursuant to § 33-23-10, which states that “[t]he appellant may, in the reasons of appeal, claim a trial by jury of any factual dispute or issue raised in his or her reasons of appeal.” It is noteworthy, however, that Appellees’ motion seeking dismissal pursuant to Rule 41(b)(2) does not involve the merits of Mr. Malinou’s case.

²⁶ Mr. Malinou also takes time to discuss how he believes the aforementioned guardianship proceedings played a role in Yolanda D’Amore’s death. The Court notes—as it did on the record when Mr. Malinou first broached this subject on October 21, 2014—that such an argument amounts to nothing more than pure speculation and is both irrelevant and inappropriate as it pertains to the instant proceedings.

²⁷ Again, this figure represents the amount of money belonging to the D’Amore sisters that was purportedly being held by Ms. Laferriere on their behalf. Ms. Laferriere later transferred these funds to Mr. Malinou on or about May 10, 2014, rather than to Appellees, despite the fact that they had been appointed the permanent co-guardians for Ida and Yolanda D’Amore by that time.

- (c) Order entered on August 26, 2015 finding that Mr. Malinou had failed to file the requisite accounting previously ordered by the Court and stating that the report that was filed by Mr. Malinou purporting to describe certain legal services rendered woefully failed the Court's clear direction of what was to be provided.
- (d) Order entered November 30, 2015 compelling Mr. Malinou to deposit \$33,107.33 that was missing from his earlier deposit into the Court registry and stating that Mr. Malinou had failed to comply with previous orders and acknowledging the Court's decision to find him in contempt of Court at a hearing on October 23, 2015, which included a penalty of \$100 per day commencing on October 30, 2015 and continuing until the missing funds were deposited into the registry of the Court.

As a result of these numerous failures to comply with this Court's orders, there is ample evidence and reasoning to support a dismissal of these consolidated actions pursuant to Rule 41(b)(2).

Moreover, Mr. Malinou's arguments against dismissing these cases are not persuasive. As an initial matter, this Court finds Mr. Malinou's assertions that Attorney Craven lacks standing to be wholly immaterial. Regardless of Mr. Craven's standing, the issues related to the instant motion for dismissal would nonetheless be before this Court considering that Appellees Neri and D'Amore filed an identical motion. Consequently, the Court finds that it need not determine whether Mr. Craven has standing to present a motion to dismiss at this time, as that question is immaterial to the issues before it.

Moving on to Mr. Malinou's more substantive arguments, the averment that the Court's orders were somehow illegal is misguided. Mr. Malinou is required to comply with this Court's orders regardless of what happened in the Probate Court hearings. See Menard v. Woonsocket Teachers' Guild-AFT 951, 117 R.I. 121, 129, 363 A.2d 1349, 1354 (1976) (explaining that "[i]t has long been recognized that the propriety of a mandate contained in an order decreed by a court having competent jurisdiction cannot be questioned"); see also Matter of Providence Journal Co., 820 F.2d 1342, 1347 (1st Cir.

1986) (stating that “[c]ourt orders are accorded a special status in American jurisprudence. While one may violate a statute and raise as a defense the statute’s unconstitutionality, such is generally not the case with a court order”) Considering this, the merits of the Cranston Probate Court’s decision with regard to the prior guardianship proceedings is irrelevant to the determination of whether Mr. Malinou has violated numerous orders of this Court to return the missing funds in question.

Furthermore, this matter has lingered before the Court for nearly two years, and, over the course of that time, Mr. Malinou has consistently defied Court orders or otherwise caused needless delay of the judicial process. In addition to continuing to be in violation of the four orders mentioned supra, the Court is also mindful of the fact that it saw fit to hold Mr. Malinou in contempt and refer this matter to the disciplinary counsel for his continued indiscretions. Also, this Court continues to be troubled by Mr. Malinou’s obvious lack of forthrightness, most notably demonstrated by his failing to inform the Court until the hearing on May 5, 2015 that some of the missing funds at issue were taken by him, without Court approval—despite having taken funds from the D’Amore sisters as early as April 2013 and despite previously stating multiple times that he had no ownership interest in the funds. Such actions have stalled these cases on the Court’s docket and prevented Appellees from being able to settle the estates of the D’Amore sisters in a timely and expeditious manner. See Gosset, 764 A.2d at 140 (explaining that the Court has an interest in managing its docket and overseeing the expeditious resolution of matters while weighing such concerns against the desire to decide a matter on the merits). In this Court’s opinion, these concerns far outweigh the need to have this case decided on the merits—especially considering that at least three of

the five consolidated appeals appear to be moot (discussed infra), and also because the Court is unconvinced that any negative practical effect would follow from allowing the Wills of the D'Amore sisters to be probated in Cranston rather than Providence, as there is no dispute regarding the disposition of assets according to the Wills. Id.

Additionally, Mr. Malinou's contention that Rule 81(a)(1) makes Rule 41(b)(2) inapplicable to the instant action misinterprets Rhode Island law. Rule 81(a)(1) states that "[t]hese rules do not apply during the process and pleading stages to the following proceedings. . . ." (emphasis added). The clear language of this rule states that the Rhode Island Rules of Civil Procedure do not apply to the process and pleading stages of probate proceedings. All five of these consolidated probate appeals are clearly well past the process and pleading stages. Section 33-23-1 outlines the steps an aggrieved party must take during the process and pleading stages to properly seek an appeal from an order of the Probate Court. In this case, it is not disputed that Mr. Malinou abided by the requirements of § 33-23-1 when he brought these appeals before this Court. As such, these proceedings have moved well beyond the point where Rule 81(a)(1) would make the Rhode Island Rules of Civil Procedure inapplicable.²⁸

Accordingly, Mr. Malinou's various appeals may properly be dismissed by this Court pursuant to Rule 41(b)(2). Consequently, considering Mr. Malinou's repeated failures to comply with various orders from this Court and his conduct that has prevented the expeditious resolution of this litigation, Appellees' motion to dismiss is granted.²⁹

²⁸ It should also be noted that no subsequent section of Chapter 23 suggests that the Rhode Island Rules of Civil Procedure are inapplicable in this matter.

²⁹ It is also noteworthy that while Mr. Malinou has at times averred that he does not have the ability to comply with the Court's orders, given the facts and circumstances of this case, Mr. Malinou's inability to comply does not justify his noncompliance. In addition,

B

Mootness

Also at issue regarding the three appeals brought by Mr. Malinou concerning the guardianship of the D'Amore sisters is mootness. Mootness is a threshold issue of justiciability. See Boyer v. Bedrosian, 57 A.3d 259, 271-72 (R.I. 2012) (where the Supreme Court explained that “[a]lthough the parties did not raise mootness before the Superior Court, this Court nonetheless considers it as a threshold issue of justiciability”). “A case is moot if there is no continuing stake in the controversy, or if the court’s judgment would fail to have any practical effect on the controversy.” Id. at 272. The Supreme Court has “consistently held that a case is moot if the original complaint raised a justiciable controversy, but events occurring after the filing have deprived the litigant of a continuing stake in the controversy.” Id.

Although Appellees fail to articulate this argument in their instant motion to dismiss, the Court is cognizant of the fact that they have previously raised the issue of mootness with regard to the guardianship appeals brought by Mr. Malinou. See Hr’g Tr. 27:4-10, Oct. 23, 2015. The Court also recognizes that mootness is a threshold issue to be considered prior to hearing the merits of any action. See Boyer, 57 A.3d at 272. Moreover, Mr. Malinou himself has conceded on the record that there is no outstanding issue as it relates to the guardianship of Yolanda D’Amore because she has passed away.

he has provided no affidavit or other supporting evidence to substantiate such a claim. Furthermore, as discussed supra, Mr. Malinou more than once indicated to the Court that he was in possession of at least the \$133,137.33 in question, if not more, of the D’Amore sisters’ money. Considering this, the Court believes that Mr. Malinou’s failure to follow its clear directives amounts to willful noncompliance, and not inability, to perform. As such, the Court finds Mr. Malinou’s argument that inability to perform should be a complete defense to be without merit. See Hr’g Tr. 9:7-25; 12:18-20; 18:19-19:4, May 5 and 26, 2015.

See Hr’g Tr. 22:5-11, Oct. 21, 2014. During the pendency of this litigation, Ida D’Amore has also passed away, and it follows that at this point no outstanding issues remain for this Court to decide regarding her guardianship as well. Further, Mr. Malinou’s appeals from the Cranston Probate Court’s decision to disqualify him as the D’Amore sisters’ attorney-in-fact and to appoint Appellees D’Amore and Neri temporary, and then eventually permanent, co-guardians of the D’Amore sisters also no longer appear to be relevant issues in this case. Considering this, this Court finds that these appeals—Case No. PP-14-3436, Case No. PP-14-3437, and Case No. PP-15-1580—have been rendered moot, as deciding them would fail to have any practical effect on these proceedings. See Boyer, 57 A.3d at 272.³⁰

In addition, Case No. PP-15-1580 is an appeal of a discovery order issued by the Cranston Probate Court. It is well settled in this jurisdiction that discovery orders issued by a Probate Court cannot be appealed to the Superior Court. Burford v. Estate of Skelly, 699 A.2d 854 (R.I. 1997). Accordingly, Case No. PP-15-1580 is dismissed on that basis as well.

³⁰ The Court recognizes that in narrow instances an exception to mootness exists where an issue is one of “extreme public importance capable of repetition yet evading review.” Boyer, 57 A.3d at 280. “Issues of extreme public importance usually ‘implicate important constitutional rights, matters concerning a person’s livelihood, or matters concerning citizen voting rights.’” Id. at 281 (internal citation omitted). “A case is ‘capable of repetition yet evading review’ if there is a ‘reasonable expectation that the same complaining party would be subjected to the same action again.’” Id. In the instant matter, there is no reasonable expectation that Mr. Malinou—as the complaining party—would again be subjected to the action of being removed as power of attorney for the D’Amore sisters, since both have passed away. Thus, the narrow exception to mootness is inapplicable here, despite his contentions to the contrary.

C

Appellees' Motion to Transfer Probate Records

In addition to the dismissal of Mr. Malinou's consolidated appeals, Appellees also seek the transfer of the probate records of the D'Amore sisters from the Providence Probate Court to the Cranston Probate Court.³¹ According to Appellees, the Probate Judge who heard these matters will not transfer the Wills currently on file in Providence Probate Court without an order from this Court. Considering this, Appellees argue that this Court should grant such an order because it is obvious that jurisdiction and venue rest with the Cranston Probate Court for these matters, as evidenced by the fact that at the time of their deaths both the D'Amore sisters resided at Cedar Crest Nursing Home in Cranston and had been there since 2009. Further, Appellees point out that the guardianship hearings that predate their deaths were both brought before the Cranston Probate Court.

Mr. Malinou has objected to Appellees' motion to transfer these records and argues that it should be a jury who decides, *inter alia*, where the D'Amore sisters were domiciled at the time of their respective deaths, since the answers to such questions are factually based. Additionally, Mr. Malinou contends that an order transferring the record to the Cranston Probate Court will moot the probate appeals taken by Mr. Malinou and thus deprive him of his constitutional and statutory right to appeal under § 33-23-1. According to Mr. Malinou, he is an aggrieved party with the right to a trial *de novo* by

³¹ The records sought are currently filed in the Providence Probate Court under Docket No. 2014-337 (the estate of Yolanda D'Amore) and Docket No. 2015-239 (the estate of Ida D'Amore).

this Court, which he would be denied if the Court were to transfer the files to the Cranston Probate Court.

As a practical matter, this Court again questions what negative impact it would have for the Cranston Probate Court to hear Mr. Malinou's Petitions to Probate the Wills of the D'Amore sisters as opposed to the Providence Probate Court. There is no contest regarding the disposition of the decedents' estates. In addition, the Court notes that the initial guardianship proceedings in this case were heard and decided by the Cranston Probate Court, and there is no indication that Mr. Malinou challenged that Court's jurisdiction at that time. It was only after receiving adverse judgments in Cranston that Mr. Malinou sought to probate the Wills of the D'Amore sisters in Providence. Considering this, it is noteworthy that both the Providence Probate Court, as well as this Court, have expressed concerns that Mr. Malinou was simply forum shopping. See Probate Hr'g Tr. 3:16-24, Sept. 9, 2014; Hr'g Tr. 16:1-8, May 6, 2016. At the hearing before this Court on May 6, 2016, Mr. Malinou stated on the record that he was seeking probate in Providence because the Cranston Probate Court has "trampled all over the rights of my clients" and "[i]f I can avoid that court, I will." Hr'g Tr. 16:1-8, May 6, 2016. The Court questioned whether Mr. Malinou was forum shopping by refusing to simply allow the Wills of the D'Amore sisters to be probated in Cranston. Id.

It should also be noted that the only issue before either Probate Court—other than jurisdiction—regarding admission of the D'Amore sisters' Wills is the appointment of the fiduciary. The D'Amore sisters had listed each other as executrix for their wills. Both also named Mr. Malinou as alternate executor. Given Mr. Malinou's failure to deliver and account for over \$33,107.33 of the D'Amore sisters' funds, it is highly unlikely that he

would qualify as executor. Furthermore, it appears to this Court that Mr. Malinou is delaying the prompt administration of these estates for purely self-centered considerations: that is, seeking his appointment as executor of the D'Amore sisters' estates.

Accordingly, because it has already been determined that Mr. Malinou's appeals should be dismissed pursuant to Rule 41(b)(2) and based on grounds of mootness—and considering the aforementioned concerns regarding Mr. Malinou's apparent forum shopping in these matters and also the fact that the Providence Probate Court has twice determined that it lacks jurisdiction—this Court sees no reason not to order the transfer of the probate records of the D'Amore sisters from the Providence Probate Court to the Cranston Probate Court. In the Court's opinion, failing to do so would continue to needlessly delay what has already been a long and vexing process.

VI

Conclusion

Upon review of the record before it, this Court finds that Mr. Malinou has consistently and continuously failed to comply with numerous Court orders, despite being given ample time and opportunity to do so. Considering this, the Court finds it appropriate to grant Appellees' motion to dismiss pursuant to Rule 41(b)(2). The Court additionally finds that the three appeals brought by Mr. Malinou pertaining to the guardianship proceedings involving the D'Amore sisters have been rendered moot by their deaths. Accordingly, all five of Mr. Malinou's consolidated appeals are dismissed, and the records being held by the Providence Probate Court are ordered to be transferred

to the Cranston Probate Court. Counsel for Appellees' shall prepare the appropriate order(s).³²

³² Given that Mr. Malinou continues to be in contempt of court for failing to deposit the missing funds in question, the Court has opened PM-2016-3454 in order to monitor the status of his contempt. The Court hereby orders that the funds belonging to the D'Amore sisters and deposited into the Court registry regarding PP-2014-3437 be transferred to PM-2016-3454. The transfer of funds shall be included in the order. Any motion to retrieve said funds shall be filed under that heading.



RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE: **Ida D'Amore, et al. v. Neri, et al., consolidated with Yolanda D'Amore, et al. v. Neri, at al., consolidated with Malinou v. Neri, et al., consolidated with Malinou v. Neri, et al., consolidated with Malinou v. Neri, et al.**

CASE NO: **PP14-3437; PP14-3436; PP14-4885; PP15-1580; PP15-4333**

COURT: **Providence County Superior Court**

DATE DECISION FILED: **September 2, 2016**

JUSTICE/MAGISTRATE: **Van Couyghen, J.**

ATTORNEYS:

For Plaintiff: **Martin S. Malinou, Esq.**

For Defendants: **Jodi M. Gladstone, Esq.
Frank S. Lombardi, Esq.
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