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and First Class Mail*

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Gibson & Nowak, LLP
Spruce Acres, Suite A
110 North Main Street
Camden, DE 19934

Ms. Cynthia M. Lewis
222 Center Street
Camden, DE 19934

Re: Harmon v. Lewis
C.A. No. 1038-VCN
Date Submitted: March 8, 2010

Dear Ms. Lewis and Ms. Gibson:

Petitioner Thomas M. Harmon, Jr. ("Harmon") is the administrator of the estate of his father, Thomas M. Harmon, Sr. (the "Decedent"). One of the Decedent's other children, Respondent Cynthia M. Lewis ("Lewis"), served as the caretaker of their father and as his attorney-in-fact during the last year of his life.

Harmon, in this action, challenges Lewis's conduct under the power of attorney and her handling of the Decedent's affairs. He maintains that Lewis converted funds

belonging to the Decedent for her benefit; he seeks to recover those funds for the benefit of the estate.

This letter opinion sets forth the Court's post-trial findings of fact and conclusions of law.

* * *

The Decedent died, intestate, on November 20, 2001, leaving four children.¹

Approximately one year after the Decedent's death Harmon opened the Decedent's estate (the "Estate").

The Decedent owned, and resided in a dwelling located at 220 Center Street, Camden, Delaware (the "Property"). For purposes of this proceeding, the best valuation of that property as of the date of his death is \$75,000. The Decedent also held three personal bank accounts and a business bank account in the name of T. M. Harmon and Son, Inc.

Shortly before the Decedent's death, Lewis moved into the Property to help care for him. She has continued to live, rent free, in her father's home and has

¹ In addition to the parties, the Decedent was survived by his two other children, Gordon Harmon and Caron Harmon Branch.

expended, after his death, a significant portion of the Decedent's assets to improve the Property.

The debate between the parties was framed as to the disposition of approximately \$112,000 of the Decedent's funds. The evidence is clear that some of the funds were applied by Lewis, as a fiduciary, for her personal benefit. It is also clear that some of the funds were expended for her father's benefit, such as expenditures for food and medicine. In addition, some of the funds were invested in the Property, of which Lewis owns 25%, but of which the other siblings each also own 25%. Although the wisdom of some of the expenditures may be questioned, the Property, eventually to be shared equally by all four children as the intestate heirs, benefited from the expenditures, and there is no rational basis for a fact finding effort allocating the benefit conferred by these expenditures on the Property.

Harmon has proved that Lewis, acting under a power of attorney that made her a fiduciary,² breached her fiduciary duties by using her father's money for her

² Lewis continued to use the power of attorney after her father's death. That, of course, was not proper. The Court is satisfied that she did not fully understand the effect of her father's death on the validity of the power of attorney. As long as the funds were applied for a proper purpose that would benefit his estate or the four children in roughly equal fashion, the Court is reluctant to impose any remedy for such conduct.

personal benefit. Because Lewis was the fiduciary and controlled the bank accounts, the burden is on her to justify her disbursements.³ Up to this point, this case is relatively simple and straightforward.

* * *

Given the shortcomings in the available records, however, any effort to ascertain and distinguish between the funds spent for the Decedent's benefit and those spent for Lewis's benefit is necessarily inexact. Indeed, the records do not show how much Lewis actually spent on improvements to the Property. The problem is further complicated by Lewis's commingling of her assets and her father's assets when she transferred some of her father's assets into a bank account in her name and not one indicating that she held the funds under the power of attorney. It appears that all of the Decedent's funds that were disbursed from this account were disbursed before his death.

³ *In re LeManna*, 1999 WL 350486, at *1 (Del. Ch. May 11, 1999) (placing the burden on the former guardians "as fiduciaries" to justify expenditures made from guardianship assets).

* * *

The Court thus turns to the necessarily inexact effort to ascertain a fair amount for Lewis to reimburse the Estate.⁴

The parties were at one point \$112,585 apart. The difference was reduced to \$92,121.50 based on an acknowledgement that the sum of \$20,463 was used for the Decedent's care. That leaves two classes of disputed funds: some \$45,945.15 for which there is at least some documentation and a balance of \$46,175.35 for which documentation is lacking.

From among expenditures for which records exist, Harmon now seeks an award of \$45,773.39.⁵ The following tabulation sets forth the challenged payments

⁴ It was Lewis's duty as fiduciary to apply her father's funds properly and to maintain appropriate records. She failed, to some significant extent, on both counts. Yet, the Court's function is not to be punitive. This is not a windfall opportunity for the Estate. The accuracy that one typically seeks in performing the judicial function simply cannot be attained. A rough equity is the most that one can plausibly hope to achieve. On the other hand, the Court recognizes that the difficulty in calculating inevitably imprecise damages will sometimes be to the detriment of the fiduciary who has not faithfully discharged her duties. *Gentile v. Rossette*, 2010 WL 2171613, at *11 (Del. Ch. May 28, 2010) (citing *Eastman Kodak Co. of N.Y. v. S. Photo Materials Co.*, 273 U.S. 359, 379 (1927) (“[A] defendant whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by the plaintiff is not entitled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible.”)).

⁵ See Pet'rs' Suppl. to the Record (dated Dec. 15, 2009); JX 5; JX 2. (“Petitioner hereby requests that the sum of \$45,773.39 . . . be found due and owing by Respondent to the estate. . . .”).

from Account No. 00-095788-06. In the first column are amounts which the Court finds were for Lewis's personal benefit and for which she is liable. In the second column are those amounts for which she has provided adequate justification.⁶

Check Number	Payee	Lewis's Personal Benefit ⁷	Adequate Justification ⁸
1016	JCPenneys		\$104.22*
1015	Mobile Communications		50.00
1018	Household Auto Finance	\$260.00	
1019	Conseco Finance	425.00	
1017	Caesar Rodney Rocket Boosters	80.00	
1020	Farm Fresh of Delaware		276.00
1022	Cash	50.00	
1023	Crossroad Christian Church	25.00	
1058	Rite Aid	15.00	
1053	Capital One	144.43	
1054	Capital One	153.64	
1057	Conseco Finance	54.05	

⁶ Lewis concedes that she does not have knowledge as to what many of the expenditures were for. *See Resp'ts' Response to Pet'rs' Suppl. to the Record* (filed Mar. 8, 2010).

⁷ Most of the expenses in this column are, by their very nature, fairly allocated to Lewis. They were personal in nature. The largest one, \$9,172.79 to Beneficial, is allocated to Lewis because there is no credible countervailing explanation. She maintains that these were her funds that had been commingled with her father's funds. Most of the others, such as car payments and payments to a finance company, are fairly viewed as hers.

⁸ Most of these expenses were either for the Decedent or for the Property. The charges to Penneys, Bath Fitters, and Sears are examples of this category. Improvements to the Property account for \$8,757.14 of the expenditure; they are denoted by an asterisk. The largest expenditure, \$7,400 to USAA Savings Bank, was credibly described by Lewis as for a consumer debt of her father. The \$600 entry was for the Decedent's funeral.

1055	Target		176.49*
1070	Cynthia Lewis		600.00
1064	Household Auto Finance	260.00	
1071	Crossroad Christian Church	50.00	
1039	Stoves From Highlights	22.60	
1046	Cynthia Lewis	100.00	
1045	Target		200.00
1044	Target		84.15
1041	Calvary U. Methodist Church	29.00	
1047	Nellie Stokes Cafeteria	9.00	
1049	Slomins	75.40	
1048	Cross County Bank	231.45	
1050	Delmarva Council Pack #297	54.00	
1052	Crossroad Christian Church	10.00	
1091	Comcast Cablevision	16.86	
1099	Household Auto Finance	245.00	
1093	Verizon	24.39	
1100	Capital One		535.49
1095	Conectiv Power		48.20
1101	Majestic Hair	40.00	
1106	Nellie Stokes Cafeteria	3.60	
1094	Chesapeake Utilities		76.75
1108	Gary L. Lewis, Sr.		350.00
1105	JCPenneys		2,930.43*
1109	Kent County Motor Sales	177.11	
1102	Cross County Bank	200.00	
1107	Nellie Stokes PTO	20.00	
1115	Bath Fitters Down Payment (after date of death)		1,090.00*
1116	Jackie Johnson		70.00*
1119	Providian National Bank	100.00	

1073	Conectiv Power		214.23
1074	Radio Shack	1,893.83	
1076	Kent County Motor Sales	18.55	
1079	Beneficial	9,172.79	
1072	Conseco Finance	699.42	
1081	Sears		1,400.00*
1080	Sears		2,141.00*
1082	Scholastic Arrow Book Club	185.12	
1056	Big Kmart		100.00*
1086	Lowe's		745.00*
1088	Radio Shack	950.00	
1087	USAA Savings Bank		7,400.00
1092	AT&T		2.88
1025	Cynthia Lewis	200.00	
1024	Cross County Bank	35.00	
1027	Majestic Hair	35.00	
1032	Cub Scout Pack #297	44.80	
1030	Town Point PTA	11.00	
1040	Sound & Spirit	125.00	
1037	Household Auto Finance	492.10	
1034	Conseco Finance	421.05	
1033	Billy Knox	27.00	
1038	Cross County Bank	35.00	
1043	Washington Mutual	187.65	
1042	Washington Mutual	158.00	
1031	Kraft Foods	74.00	
1036	Shore Energy	71.48	
1114	AT&T Consumer Lease	24.81	
Total:		\$17,737.13	\$18,594.84

Thus, for this category, Lewis is liable for \$17,737.13.

* * *

Harmon challenged six transfers from the business account (Account No. 00-982652). Two of the challenges have been withdrawn because the funds were transferred to another one of the Decedent's accounts. Of the others (all totaling \$171.76), two entries—Big Kmart (\$38.45) and Boscov's (\$63.31)—were for home improvements. The others were for a gift and a payment to a truck driver. Lewis is not liable for any funds taken from the business account.

* * *

Next, Harmon challenges certain expenditures that have been characterized as “debit card transactions.”⁹ These were all after the date of the Decedent's death. Payments to Lowe's, Furniture & More, and Sears are accepted as having been for the Property.¹⁰ The payments to Kent Oil Co. was for a bill owed by the Decedent. The following expenditures can only fairly be allocated to Lewis:

⁹ Pet'rs' Suppl. to the Record (dated Dec. 15, 2009); *see also* Resp't's Post-Trial Mem., Ex. A.

¹⁰ These total \$8,069.48.

Payee	Amount
Sears Auto Center	\$1,000.85
Rite Aid	49.23
Home Paramount	92.00
AT&T	24.65
Verizon	27.22
Chesapeake Utilities	77.75
AT&T	21.36
Conectiv Power delivery	61.88
Total:	\$1,354.94

Thus, for this category, Lewis is liable for \$1,354.94.

* * *

That leaves the balance of roughly \$46,175.35 between the expenditures which have been accounted for, in one way or the other, and the total disputed amount. Lewis testified that she spent in excess of \$50,000 of her father's money on improvements to the Property, both before and after his death. As noted, those expenditures, at least to some significant extent, accrued to the benefit of her siblings pro rata. The Court accepts Lewis's testimony to the effect that she spent \$50,000 of her father's money on the dwelling. The expenditures on the Property, noted above,

total \$16,928.38.¹¹ The amount nominally spent on the Property and not charged to her from the documented items listed above would total \$33,071.62.¹² When that number is subtracted from \$46,176.35, the balance of the funds which are in dispute, the difference, \$13,104.73, fairly identifies the balance of Lewis's liability as the result of expenditures for which there are no records.

* * *

When the various categories of damages are combined, Lewis is liable to Harmon, as the administrator of their father's estate, in the amount of \$32,196.80.¹³ In addition, Lewis is liable for interest thereon at the legal rate from January 21, 2005, and court costs.

* * *

That leaves the question of attorneys' fees. Under the American Rule, each party typically bears its attorneys' fees.¹⁴ There are exceptions: for example, bad

¹¹ This is the sum of \$8,757.14 (*see supra* note 8), plus \$101.76 (from the business account), plus \$8,069.48 (*see supra* note 10).

¹² Again this is a rough cut but necessary because of the lack of adequate financial records or proof at trial.

¹³ This is the sum of \$17,737.13, plus \$1,354.94, plus \$13,104.73.

¹⁴ Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate & Commercial Practice in the Del. Ct. of Chancery* § 13.03[a], at 13-6 (2009).

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faith conduct.¹⁵ The Court is satisfied that the conduct of Lewis, whether in terms of acting as a fiduciary or in maintaining a defense of this action, was not in bad faith. Especially with respect to her conduct as a fiduciary, many of the questioned expenses and much of the recordkeeping shortfalls are fairly attributed to her lack of understanding and not to any malicious intent.

Thus, the burden of attorneys' fees will not be shifted in this matter.

* * *

An implementing order will be entered.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K

¹⁵ See, e.g., *Arbitrium (Cayman Islands) Handels AG v. Johnson*, 705 A.2d 225, 231 (Del. Ch. 1997), *aff'd*, 720 A.2d 542 (Del. 1998).