

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

DEBORAH L. COPELAND,)
)
Plaintiff,)
)
v.) C.A. No. 294-N
) Consolidated
MARSHA KRAMARCK, as guardian of)
Kyle F. Kessler, and KYLE F. KESSLER,)
)
Defendants,)
and)
)
Wilmington Trust Company, Trustee, and)
Sandra Williams-Poplos, as guardian for)
Matthew Luke Williams and Jacob Dean)
Williams.)

MEMORANDUM OPINION AND ORDER

Submitted: December 1, 2006

Decided: December 11, 2006

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LAMB, Vice Chancellor.

On August 23, 2006, this court granted summary judgment in favor of the settlor of a trust in an action challenging its revocation.¹ The settlor of the trust now seeks to recover her attorneys' fees and costs pursuant to 10 *Del. C.* § 5106, 12 *Del. C.* § 3584, and Court of Chancery Rule 11. Her husband, a non-party, has moved separately to recover the attorneys' fees he incurred in responding to discovery. Both of those motions seek to shift fees to the losing parties. A former trustee of the trust seeks to recover its attorneys' fees from the settlor pursuant to 12 *Del. C.* § 3584.

Because the court does not conclude that the challenge to the revocation of the trust was either brought or maintained in bad faith, the court declines to shift fees from the settlor and her husband to the losing parties.² The court also denies the former trustee's motion, in the exercise of its discretion.

I.

A. The Parties

Deborah L. Copeland is the settlor of the now revoked trust which was the focus of this litigation. Mrs. Copeland's husband, Lamnot duPont Copeland, Jr., is not a party, but was required to respond to discovery in the action, both

¹ *Copeland v. Kramarck*, 2006 WL 2521444 (Del. Ch. Aug. 23, 2006).

² As the prevailing party, Mrs. Copeland is entitled to costs pursuant to Court of Chancery Rule 54.

individually and through several businesses owned by him. Wilmington Trust Company is the former trustee of the trust.³

Kyle F. Kessler (“Kyle”) was the contingent beneficiary of the now revoked trust. Marsha Kramarck is Kyle’s mother and was guardian for Kyle during the time the trust was in place.

B. Background⁴

Kyle’s father, Frederick S. Kessler, and Ms. Kramarck were married from 1972 to 1990. Beginning in 1985, Mr. Kessler was employed by Mr. Copeland and developed a close personal relationship with the Copelands. In 1992, Mrs. Copeland spoke to Wilmington Trust about establishing a trust for the purpose of paying for Kyle’s education. Initial drafts of the proposed instrument took the form of an irrevocable trust; however, the trust as finally approved and funded was revocable in form, with Mrs. Copeland as the beneficiary and Kyle as the contingent beneficiary. At Mrs. Copeland’s direction, the trust paid for Kyle’s education through high school. During that time, Mrs. Copeland made several reductions in the benefits available to Kyle. After replacing Wilmington Trust as trustee, she eventually terminated the trust.

³ Sandra Williams-Poplos, as guardian for Matthew Luke Williams and Jacob Dean Williams, both of whom are the Copelands’ grandchildren, was a party to this action, but is not a movant or a respondent in the pending motions for attorneys’ fees.

⁴ A complete recitation of the facts is found in the court’s summary judgment opinion, *Copeland v. Kramarck*, 206 WL 2521444 (Del. Ch. Aug. 23, 2006).

Shortly after the trust was formed, Fred Kessler became seriously ill, a condition that has led to his total physical and mental disability. Neither Kyle nor Ms. Kramarck were kept informed of changes in the terms of the trust.

C. Procedural Posture

On March 5, 2004, Mrs. Copeland filed an action for declaratory judgment against Kyle, Ms. Kramarck, and Wilmington Trust. On March 8, 2004, Kyle and Ms. Kramarck filed their own complaint. Those actions were consolidated on April 5, 2005. On October 25, 2005, Mrs. Copeland filed a motion to dismiss, or, in the alternative, a motion for summary judgment, and Wilmington Trust filed a motion to dismiss. The court issued an opinion on February 10, 2006,⁵ denying the motions to dismiss and continuing the motion for summary judgment to the conclusion of discovery. During the course of discovery, Mr. Copeland moved unsuccessfully to prevent the taking of his deposition. In its August 23, 2006 opinion, the court granted summary judgment in favor of Mrs. Copeland, finding no material issues of fact in dispute.

The Copelands now move for an award of their attorneys' fees pursuant to 10 *Del. C.* § 5106, 12 *Del. C.* § 3548, and Court of Chancery Rule 11.

Mrs. Copeland bases her entitlement to attorneys' fees on the conduct of Kyle and Ms. Kramarck as being "the very definition of the bad faith exception to

⁵ *Kessler v. Copeland*, 2005 WL 396358 (Del. Ch. Feb. 10, 2005).

the American rule on attorneys' fees."⁶ Mrs. Copeland argues that the countersuit filed by Kyle and Ms. Kramarck was "meritless" and was prosecuted in a "frivolous" manner with "increasing vindictiveness" by Ms. Kramarck.⁷ In her reply brief, Mrs. Copeland argues that the "'intentional wrongdoing' is evident from the instances, many cited by the court, where [Ms. Kramarck] revealed she knew from the inception that her case was baseless."⁸ Furthermore, Mrs. Copeland maintains, this court, in the opinion granting summary judgment, made a "critical finding that [Kyle and Ms. Kramarck] prosecuted this action to the bitter end despite having 'no evidence whatsoever supporting the various theories under which the minor and his mother seek relief.'"⁹

Mr. Copeland filed a joint opening memorandum of law with Mrs. Copeland, but replied separately. Mr. Copeland joins Mrs. Copeland's arguments in their opening brief that the case was frivolous and meritless, but his reply does not go as far as hers in attributing findings of bad faith to the court's summary judgment opinion. Mr. Copeland also argues that, even though he was technically not a party to the case, he was a de facto party and an integral part of the case and should be entitled to his fees.

⁶ Mrs. Copeland's Reply Mem. of Law 2.

⁷ Copelands' Opening Mem. of Law 5; *Id.*

⁸ Mrs. Copeland's Reply Mem. of Law 2.

⁹ *Id.* (citing *Copeland*, 2006 WL 2521444, at *1).

Wilmington Trust also moves for fees based on the argument that, if the trust were still within the control of Wilmington Trust, the court would award its attorneys' fees out of the corpus of the trust pursuant to 12 *Del. C.* § 3584.¹⁰ The motion also seeks the dismissal of all claims against Wilmington Trust with prejudice. Counsel for Kyle and Ms. Kramarck have agreed to stipulate to such an order.

Kyle and Ms. Kramarck respond first that the Copelands' fee applications come too late under Court of Chancery Rule 59(e). Next, they argue that the Copelands' motions are barred by the law of the case, as this court has denied fees at every other stage. Third, they argue there has been no finding of subjective bad faith and that no basis exists on which to rest such a finding. Fourth, they argue the Copelands are not entitled to fees under either Rule 11 or 12 *Del. C.* § 3584. Fifth, they argue Mr. Copeland is not a party to the case and cannot recover fees as a non-party. Finally, they argue the equities of the situation militate against awarding fees to the Copelands.

In response to Wilmington Trust's motion, Mrs. Copeland replies that fees are improper because Wilmington Trust's actions were for its own benefit and it did not align itself with Mrs. Copeland or defend or benefit the trust. These facts, Mrs. Copeland argues, place Wilmington Trust's motion outside the two situations

¹⁰ Wilmington Trust has filed a motion only, without supporting briefs or memoranda of law.

where a trust can recover fees, i.e. “where the attorney’s services are necessary for the proper administration of the trust” or “where the legal services create a benefit to the trust.”¹¹ Therefore, to the extent Wilmington Trust incurred expenses, she says, it should be suing Kyle and Ms. Kramarck for those fees, not her.

II.

The statute addressing an award of costs in judicial proceedings involving a trust provides that “the court, as justice and equity may require, may award costs and expenses, including reasonable attorney’s fees, to any party, to be paid by another party or from the trust that is the subject of the controversy.”¹² An award of attorneys’ fees is also within the discretion of this court,¹³ although, under the American rule, attorneys’ fees are generally borne by the party incurring them. This court departs from the American rule only in cases of bad faith litigation.¹⁴

III.

A. Mrs. Copeland’s Motion For Attorneys’ Fees

The primary foundation on which Mrs. Copeland makes her application for fees is the notion that, in its’s summary judgment opinion, this court found bad faith on the part of Kyle and Ms. Kramarck. This conclusion misapprehends not

¹¹ Mrs. Copeland’s Reply Mem. of Law 7-8 (citing *In re Trust Agmt. of Capaldi*, 870 A.2d 493, 496 (Del. 2005)).

¹² 12 *Del. C.* § 3584.

¹³ *McNeil v. McNeil*, 798 A.2d 503, 514 (Del. 2002).

¹⁴ *Rice v. Herrigan-Ferro*, 2004 WL 1587563, at *1 (Del. Ch. July 12, 2004).

only the language of the opinion, but also its tone and intent. At all stages of this litigation up to summary judgment, Kyle and Ms. Kramarck prevailed. However, at the end of the day, after discovery was completed, Mrs. Copeland prevailed because the record did not support the conclusion that a material issue of fact was in dispute. This court's opinion contained no other conclusions and certainly did not include a finding that the positions advanced by Kyle and Ms. Kramarck were frivolous, or in any way prosecuted in bad faith.¹⁵

As is discussed in the summary judgment opinion, the central question was whether or not Mrs. Copeland "unequivocally promised [Mr. Kessler] that she would pay for Kyle's education until he was 27 years old."¹⁶ Ms. Kramarck believed this to be the case, based on a conversation she had with Mr. Kessler in 1992, as well as on statements Mr. Kessler made to the Family Court in connection with their divorce. Nevertheless, at the stage of summary judgment, the court concluded that there was not admissible evidence from which the court could infer that any such unequivocal promise had ever been made. Instead, the discovery record showed that, while Mrs. Copeland did initially intend to support Kyle's education in this manner, she made no irrevocable promise to do so and, after a

¹⁵ On the contrary, the court has no doubt that this unfortunate litigation was brought in a good faith belief that Mrs. Copeland's decision to cease funding Kyle's educational expenses violated Kyle's legal rights. The litigation was difficult and unpleasant for all parties. Ultimately, the court concluded that, however capricious Mrs. Copeland's action may have seemed to Kyle and his mother, Mrs. Copeland had the right to change her mind and revoke the trust.

¹⁶ *Copeland*, 2006 WL 2521444.

period of time, changed her mind. Given the lack of information given over the years to Ms. Kramarck, Kyle's custodial parent and natural guardian, about the actual written terms of the trust, it is not surprising that she and Kyle misunderstood those terms or harbored a good faith belief that a breach of trust had occurred.

The court need not reach the argument advanced by Kyle and Ms. Kramarck that the motion for fees is untimely and that Mrs. Copeland is attempting to reopen a judgment in violation of Rule 59(e). Nor is it necessary to address the dispute as to the application and effect of 12 *Del. C.* § 3584 to the extinguished trust. Every theory Mrs. Copeland advances to recover her attorneys' fees, depends, ultimately, on the interests of justice and equity, as determined by the court in its sound discretion. In this case, the court has no doubt that those interests would not be served by an order shifting fees to Ms. Kramarck and Kyle.

B. Mr. Copeland's Motion For Attorneys' Fees

The majority of the fees Mr. Copeland seeks to recover were incurred in prosecuting two unsuccessful motions to prevent the taking of his deposition. That deposition was found to be necessary and appropriate to the discovery in this action. Thus, the court will not award fees for those motions. Moreover, Mr. Copeland is not a party to this action, and has not articulated any basis for the recovery of his counsel's fees as a non-party. His involvement in the discovery

taken in this litigation was necessary because both he and the corporations owned by him had relevant and discoverable information. No abuse of that discovery process was shown to have occurred. Thus, there is no basis on which to award fees.

C. Wilmington Trust's Motion For Attorneys' Fees

Wilmington Trust's motion for attorneys' fees is based on the argument that, if the trust were still in existence, the court would award fees out of the corpus of the trust pursuant to 12 *Del. C.* § 3584. Because the trust was revoked before the litigation began, Wilmington Trust seeks fees from Mrs. Copeland on the theory that Section 3584 authorizes awards of fees against "any party" to the proceeding, and she is both a party and the person in possession of the monies that were the trust corpus.

As previously noted, Section 3584 is permissive rather than mandatory and depends on a finding by the court that "justice and equity may require" an award of fees. In this regard, the court agrees with Mrs. Copeland that in defending itself in this litigation Wilmington Trust acted for its own benefit and did not align itself with Mrs. Copeland or benefit the trust. No doubt it had good and sufficient reasons for doing so. Nevertheless, the court cannot find that either justice or equity require that Mrs. Copeland pay for that separate defense. In this regard, the court notes that Wilmington Trust does not rely on any written contractual

undertaking by the settlor to indemnify it against expenses in litigation of this sort, either out of the trust or Mrs. Copeland's separate assets.

IV.

For the foregoing reasons, all pending motions for attorneys' fees are DENIED. IT IS SO ORDERED.