

Lucille Peterman is a ward of this Court. A guardianship for Mrs. Peterman was established after litigation which pitted one of Mrs. Peterman's sons, Harold Peterman ("Jack") and his allies in the family against another son, Donald Peterman ("Donald") and his partisans. At issue in that guardianship contest was which family member was best able to serve as guardian: it was clear that Mrs. Peterman needed a guardian and that issue was not litigated. Mrs. Peterman is in her late nineties and the mother of a very large family. I allowed fees to be paid out of Mrs. Peterman's funds to counsel for both litigants in that phase of this litigation, after finding that the disputes were in good faith and resulted in the Court being able to establish a guardianship that is in the best interests of Mrs. Peterman.

Jack,¹ the original petitioner, raised a second issue in his petition. The issue involved a transaction between Mrs. Peterman and Donald shortly before she was determined to be incompetent. In that transaction, Mrs. Peterman transferred the "home place" properties from herself to herself and Donald, as joint tenants with right of survivorship. Jack sought to have this transaction set aside as the product of undue influence or because Mrs. Peterman lacked capacity to enter into the transaction. Donald, by counter-petition, argued that the transaction was valid but that, in any event, he was entitled to the home place under various trust theories. This matter was subject to extensive pretrial preparation and a hearing. Ultimately, I found that Mrs. Peterman was

¹ I refer to various Petermans by their first names (or nicknames) out of expediency, not disrespect.

incompetent at the time she transferred the property to Donald as joint tenant, and that the trust theories involving an alleged contract to make a will and unjust enrichment were without merit.² The parties now seek to have their legal fees and costs paid from the funds of their mother.

The Law

In general, Delaware follows the American Rule under which each party bears his own costs of litigation. *E.g.* Shapiro v. Healthcare Acquisition, Inc. Del Ch., No. 030-N, Lamb, V.C. (April 20, 2004)(Letter Op.). A number of exceptions exist to this doctrine, one of which involves guardianship litigation, in which parties often litigate, not to vindicate their own rights, but for the benefit of the ward. In a guardianship matter, therefore, the Court may find that where the litigation proceeded in good faith and a reasonable manner, in an attempt to benefit the ward, an allowance of fees against the ward's estate is warranted. Particularly, however, in the case of litigation among family members purportedly for vindication of the rights of a ward, the Court must be vigilant that the prospect of fee reimbursement from the funds of the ward does not become a fuel which fires extensive litigation beyond the interests of that ward. *See, e.g., In Re Griffiths*, Del. Ch., No. 8930-NC, Glasscock, M. (July 23, 2004)(Master's Report) at 5.

²See my Report on the merits of this litigation for a full discussion of the facts.

Discussion

Jack initially engaged counsel on the issue of the transfer of the home place as attorney-in-fact for Mrs. Peterman. Because Mrs. Peterman reposed her trust in Jack as her attorney-in-fact, and because he engaged counsel on her behalf in a matter where there existed a colorable (and ultimately successful) claim that the transfer to Donald was void, I have no basis to disallow payment from the wards funds of fees incurred by Jack on behalf of his mother before the entry of the guardianship. In other words, Mrs. Peterman herself, through her attorney-in-fact, engaged an attorney to vindicate her property rights. Those fees incurred before the guardianship was entered are a legitimate debt of Mrs. Peterman, and should be paid. At the time the guardianship was created, however, the power of attorney became void. 12 Del. Code § 4903(a). I made it clear to all parties that litigation on the home place issue would proceed without any expectation of an award of fees beyond that which was available in any guardianship action as a matter of equity. Thereafter, neither Jack nor his attorney had any contractual expectation of payment for fees in connection with home place issue. Jack now argues that this litigation worked a benefit for his mother and therefore his attorney's fees should be paid from her estate.³ Donald also seeks his attorneys' fees from his mother, contending that

³ Jack's attorney was engaged initially to represent Mrs. Peterman by Jack under the power of attorney. Despite the fact that that arrangement concluded, as described above, upon the establishment of the guardianship, Jack's attorney points out in the fee application that: counsel for the petitioner does not have any fee arrangement with the petitioner, Harold "Jack" Peterman, individually. Rather, the only fee agreement between the petitioner and the counsel for the petitioner concerning this matter provides that any and all fees and costs incurred in the prosecution of the claims stated by

such a shifting of fees is warranted by Jack's bad faith. Donald maintains that Jack pursued this action out of a personal animus towards him.

Donald's fee request

Donald must bear his own fees. The facts of the transaction at issue in this matter are stated more fully in my final report on the merits. An abbreviated version of those facts, however, is helpful in understanding my treatment of the fee applications here. Many years ago, Mrs. Peterman made Donald a joint tenant with right of survivorship of several thousand dollars worth of certificates of deposit. Those funds were not an inter vivos gift to Donald but were meant to be a kind of testamentary device by which, if he survived her with the certificates of deposit still in existence, Donald would receive the proceeds. Subsequently, Donald and his mother decided that rather than receiving the CDs, he should receive the home place upon her death. Accordingly, Donald assigned his interests in the certificates of deposit back to his mother, and she created a will by which he would receive the home place. Many years later, shortly before she became incompetent, Mrs. Peterman created a will under which the home place along with the rest of her property was to be divided equally among her children. Upon learning of this new testamentary scheme (and after attempting to thwart it otherwise), Donald arranged

the petition in this action are to be paid, if at all, from the funds of the disabled person. Hence, whatever fees and costs incurred are not paid from the funds of the disabled person must be absorbed and "written off" by counsel for the petitioner.

to have his mother execute a deed which transferred the property to him as joint tenant with right of survivorship. After a hearing, I found that she was incompetent to make that transaction, and that there was neither an enforceable contract to make a will nor unjust enrichment as a result of Donald releasing his interests in the certificates of deposit. *See* Master's Report on the Merits dated July 17, 2007. Donald points out that Jack is not only a beneficiary of his mother's will who has a personal interest in seeing the home place pass under the will, but that evidence exists in the record indicating that Jack had a personal animus against Donald. He suggests that, without Jack's obsession with damaging Donald, this litigation would not have proceeded so vigorously. It is quite true that there were certain Ahab-like qualities to this litigation, on both sides, although just what represented the white whale varied with the parties. Nevertheless, Donald was clearly representing his own self-interest in this litigation, and his defense and counter-claims worked no benefit on his mother. Therefore, she should not bear his fees and costs.

Jack's fee request

I have found above that Jack's fees incurred with respect to the home place issue should be paid from Mrs. Peterman's funds to the extent those fees were incurred under the power of attorney. Jack argues that fees incurred during the guardianship should also be allowed because of the benefit to his mother: the home place deed was ordered rescinded and the property returned to her. I have examined closely the fee request of the

petitioner. Jack's counsel are first-rate attorneys of sterling reputation who successfully pursued their cause of action. I have no doubt that the hourly rate stated is appropriate and that the time expended advanced Jack's case. Having said that, however, the fees and costs here are staggering. The fees incurred from litigation on Jack's behalf of the home place issues is nearly \$200,000. I make the following findings of fact: 1) Jack's litigation worked a benefit to Mrs. Peterman and increased her estate. 2) Donald, in asserting his counter-claims, was seeking to vindicate a promise which his mother had, in fact, made to him. Ultimately, I found that promise to be neither legally or equitably enforceable in this action. Nonetheless, it did represent Mrs. Peterman's intent when made and up until the numerous will changes she made in the years before this litigation. 3) Jack and the other family members supporting him in this litigation had a financial interest in seeing the home place returned to the estate rather than seeing it pass directly to Donald. It is an inescapable fact, given Mrs. Peterman's already extreme old age, that devolution of that benefit upon Jack and the other beneficiaries of Mrs. Peterman will not be long in coming. 4) I note that, as is not uncommon, unfortunately, in families, there is a personal animus between Donald and Jack vindication of which was another benefit to Jack of the pursuit of this litigation. 5) Finally, I note that a partition action brought on behalf of Mrs. Peterman would have immediately returned half the value of the home place to her, via a summary proceeding without litigation. Therefore, the amount at issue here was really a half-interest in the home place. Since the fair market value of the home place, according to the scant evidence on this issue presented, is about \$170,000, the amount

spent litigating this matter was out of all proportion to Mrs. Peterman's interest in that litigation.

Implicitly recognizing these factors, Jack's attorneys, to their credit, have not asked for the entire amount of their fees and costs to be paid but only a fraction of the total: they seek \$62,600 from Mrs. Peterman's funds. Giving Mrs. Peterman's age, it is evident to me that this guardianship litigation was in reality far more of a proxy for estate litigation than a bonafide attempt to vindicate Mrs. Peterman's own rights. It is not appropriate for Mrs. Peterman to bear all costs of Jack's litigation, therefore. While I am cognizant of the fact that Jack's attorneys represent that they have no manifest right of recovery against Jack for legal services, the fact that they were willing to go forward in this matter under such an unusual fee arrangement does not justify Mrs. Peterman herself paying all fees and costs. Mindful of the extent of the benefit worked on Mrs. Peterman's behalf, Jack's own interests in that result, the reputation of his counsel and the type and number of issues litigated and the fee arrangement under which counsel proceeded, it is clear to me that the amount of fees and costs Jack and his counsel should receive from Mrs. Peterman's funds should not exceed one-third of what was recovered on her behalf.

Jack argues that that recovery must included the value of Tim Peterman's renunciation of a property transferred from Mrs. Peterman to him. While this result was sought in Jack's petition, I find that Tim quickly renounced any interest in "his" property upon learning of this litigation, and that he did so out of familial loyalty and love for his

grandmother, the ward, and not out of fear of litigation. In other words, that result could have been obtained absent the litigation, and should play no part in the fee calculation. Jack also contends that the record evidence of the value of the home place is a stale estimate of value produced by Mrs. Peterman's realtor, Herb Wheatley, in 2005. Jack suggests that a substantial amount be added to that estimate to get the "true" value recovered. I note, however, that 1) no other evidence of value exists, 2) the real estate market has not shown growth in value recently, and, most importantly 3) the Wheatley estimate was made shortly before this litigation began and was necessarily the estimate of value against which the parties made litigation decisions. Therefore, use of the Wheatley valuation is appropriate in considering Jack's fee application. Finally, Jack argues that the true value of the home place exceeds the Wheatley estimate because a small piece of that property, which had been taken by the State of Delaware in the past, was sold back to Mrs. Peterman and included in the deed to Donald, but not included in the Wheatley estimate. Mrs. Peterman paid \$1000 for this small parcel in 2005, and there is no evidence that the value of the home place was increased more than that. Therefore, for purposes of setting an upper limit on fees and costs assessed to the ward, I find the value of the home place to be the Wheatley valuation, \$170,000, together with the price paid for the small additional area, \$1000. Because the deed that I have set aside transferred only a joint interest to Donald, the value of its return to her was \$85,500. The largest amount of litigation expense which may equitable be imposed upon Mrs. Peterman is one-third of the latter amount. Because the costs of litigation exceeded this amount, the total amount

which shall be transferred from the funds of Mrs. Peterman to Jack and his counsel for pursuit of the home place litigation is \$28,500. This amount includes those fees incurred pursuant to the power of attorney and those incurred after the guardianship was created.

Conclusion

Once this report becomes final, the petitioner shall submit a form of order allowing his fees and costs in the amount of \$28,500 to be to be paid from guardianship funds.

Master in Chancery

oc: Register in Chancery (KC)