

**COURT OF CHANCERY  
OF THE  
STATE OF DELAWARE**

DONALD F. PARSONS, JR.  
VICE CHANCELLOR

New Castle County Courthouse  
500 N. King Street, Suite 11400  
Wilmington, Delaware 19801-3734

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Michael L. Sensor, Esq.  
Perry & Sensor  
704 N. King Street, Suite 560  
P.O. Box 1568  
Wilmington, DE 19899-1568

Robert G. Gibbs, Esq.  
Wilson Halbrook & Bayard  
107 West Market Street  
P.O. Box 690  
Georgetown, DE 19947

Mr. Benjamin Wiltbank  
Ms. Juanita Wiltbank  
203 Apollo Lane  
Milton, DE 19968

Ms. Claudia Wiltbank-Johnson  
406 St. Paul Street  
Lewes, DE 19958

Re: *Kathleen Brown v. Benjamin Wiltbank II, et al.*  
Civil Action No. 2170-MA

Dear Counsel:

Kathleen<sup>1</sup> has filed a petition asking this Court to assess fees and expenses in the amount of \$47,242.50 for attorneys' fees, rent payments, funeral expenses, and trustee's fees against Claudia's portion of the proceeds of the sale of the disputed property owned by their deceased father, Arlington Wiltbank, located at 406 St. Paul Street, Lewes,

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<sup>1</sup> For the sake of clarity and consistent with previous opinions in this matter, I refer herein to some of the parties by their first names and intend no disrespect.

Delaware (the “Property”). After the deduction of various taxes and expenses associated with the sale, the net proceeds available for distribution totaled \$155,119.61. Claudia’s equal one-third share of those proceeds would total \$51,706.54. Kathleen contends, however, that this Court should award the lion’s share of that amount to Kathleen to reimburse her for fees and expenses she incurred as a result of, among other things, Claudia’s alleged misconduct in connection with this litigation.

Defendants Homeowners Loan Corp. (“HLC”) and Mortgage Electronic Registration Systems, Inc. (“MERS”) also have requested an assessment of attorneys’ fees and rent payments against Claudia’s share of the proceeds on similar grounds. This Letter Opinion contains the Court’s rulings on these petitions.<sup>2</sup>

### **I. BACKGROUND<sup>3</sup>**

Kathleen commenced this action in May 2006 by filing a complaint seeking the partition by sale of the Property and distribution of the proceeds to the three cotenants, herself, Claudia, and Benjamin or his successor in interest. At the time, Claudia occupied the Property and contended that her father, Arlington, had granted her a life estate in the Property in appreciation for her caring for him full-time near the end of his life. In

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<sup>2</sup> For the sake of brevity, I refer to Kathleen, HLC, and MERS, collectively, herein as “Petitioners.”

<sup>3</sup> Most of the background facts recited here are either undisputed or were adjudicated previously. Therefore, only findings that reasonably could be considered to be still in dispute are accompanied by citations to the evidentiary record.

November 2007, Claudia filed a counterclaim and cross-claim against Kathleen, Benjamin, his wife, Juanita, HLC, and MERS for, among other things, a declaratory judgment that she had a life estate in the Property. In February 2010, Court of Chancery Master Kim E. Ayvazian issued a final Master's Report in favor of Kathleen and her request for a partition of the Property. On October 13, 2011, after Claudia filed an exception to the Master's Report and this Court conducted an additional evidentiary hearing, the Court ruled: (1) that Claudia had not met her burden of proof to demonstrate that she was granted a life estate; and (2) that the Property should be sold via public auction, with the profits being distributed equally among the cotenants.

Thereafter, Claudia, who is representing herself, continued to file numerous documents objecting to, and appealing from, the Court's ruling on various grounds, including racial discrimination, civil rights violations, and lack of subject matter jurisdiction. After considering the first few of those submissions, I entered a Final Order and Decree in this matter on January 25, 2012. At that time, I appointed a trustee to oversee the sale of the Property by auction, including appraising the Property, preparing the Property for sale, and ultimately selling it. Claudia again challenged those orders and refused to vacate the Property. This hindered the efforts of the trustee to prepare the Property for auction. Consequently, on March 15, 2012, I entered a further Order directing Claudia to vacate the Property within one month and ordering her to pay rent for that month.

Subsequently, the trustee finally succeeded in evicting Claudia, but only with the help of the City of Lewes Police Department. Claudia left behind, however, items of personal property and household furnishings that needed to be removed to enable the trustee to prepare the Property for sale at auction and to seek the highest appraisal value for the Property. Therefore, the Court entered an Order on April 26, 2012 authorizing the trustee to retain a moving company to remove all of Claudia's personal items and the household furnishings from the Property, and to arrange to have them stored in a commercial storage facility in Sussex County. The Court also ordered the trustee to charge all costs associated with the moving and storage of the items, up to and including June 30, 2012, against Claudia's share of the proceeds of the sale of the Property. The Court relieved the trustee of all responsibility for paying for storage after that date, and, upon notice to Claudia, allowed the trustee to dispose of the items as he considered appropriate.

Kathleen seeks reimbursement of \$47,242.50 for the following items: (1) \$20,140.46 for her attorneys' fees and costs; (2) \$12,410.96 in rent payments; (3) \$6,223.28 for funeral expenses; and (4) \$8,467.60 for the trustee's fees and costs.<sup>4</sup> HLC

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<sup>4</sup> Kathleen also has requested that the Court make an award of \$1,777.84 in her favor and against Benjamin for costs awarded by this Court in connection with a previous litigation, *In re Purported Last Will and Testament of Wiltbank*, 2006 WL 156843 (Del. Ch. Jan. 17, 2006). No such claim, however, has ever been a part of this action. Moreover, HLC and MERS have claims against Benjamin from other proceedings for more than the full amount of what would have been his

and MERS seek reimbursement for an unspecified amount of attorneys' fees and \$12,410.96 in rent payments.

## II. ANALYSIS

### A. Attorneys' Fees and Costs<sup>5</sup>

Kathleen, HLC, and MERS assert that Claudia should be accountable for their attorneys' fees dating back to the commencement of this action in May 2006. "Although this Court has discretion to award attorneys' and expert witness fees, under the 'American Rule' courts do not award attorneys' fees to a prevailing party absent some special circumstance."<sup>6</sup> One of these "special circumstances," commonly referred to as the "bad faith exception," is "where the court finds that the litigation was brought in bad faith or that a party's bad faith conduct increased the costs of litigation."<sup>7</sup>

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one-third share of the proceeds at issue here. Therefore, I decline to consider this belated aspect of Kathleen's petition.

<sup>5</sup> Claudia filed at least two responses to the petitions currently before me, disputing her liability to the petitioners. While the arguments contained in these submissions, which were filed on August 24 and 31, are difficult to comprehend, I have reviewed them and find that the arguments made in them are either not relevant to the pending petitions or are unpersuasive, and therefore warrant no further discussion.

<sup>6</sup> *Arbitrium (Cayman Is.) Handels v. Johnson*, 705 A.2d 225, 231 (Del. Ch. 1997).

<sup>7</sup> *Id.*

“To award fees under the bad faith exception, the party against whom the fee award is sought must be found to have acted in *subjective* bad faith. A finding of bad faith involves a higher or more stringent standard of proof, *i.e.*, ‘clear evidence.’”<sup>8</sup> Applying this standard, the Court has awarded attorneys’ fees to the prevailing party where, for example, the opposing party admitted to bringing an action with ulterior motives unrelated to the merits of the claim<sup>9</sup> and where the losing party “acted contrary to substantial legal authority.”<sup>10</sup>

Petitioners argue that this case falls under the “bad faith” exception because Claudia’s sole intent throughout the course of the action was to harass the litigants and delay a final disposition, so she would not have to vacate the Property. That does not appear to have been true initially, but Claudia’s conduct in the latter stages of this action does amount to bad faith or vexatious activity.

During the period before the hearing I held on March 8, 2011, I do not consider Claudia’s actions to have been in subjective bad faith. I acknowledge, however, the various difficulties that Kathleen’s counsel experienced in moving the action forward during that period. Nevertheless, I find that Claudia genuinely believed that she had a

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<sup>8</sup> *Id.* at 232 (emphasis in original).

<sup>9</sup> *See Abex, Inc. v. Koll Real Estate Grp., Inc.* 517 A.2d 653, 656 (Del. Ch. 1986).

<sup>10</sup> *See Judge v. City of Rehoboth Beach*, 1994 WL 198700, at \*5 (Del. Ch. Apr. 29, 1994).

legal right to a life estate in the Property, and therefore legitimately objected to Kathleen's claim to force a partition sale of the Property. Although Claudia also refused numerous times to be deposed, she credibly asserted that this was due to her medical condition and not because of a desire to delay the litigation.

Since March 8, 2011, however, Claudia's actions have been vexatious and in bad faith. Claudia's repeated failure to adhere to Court instructions, her multiple, rambling, and often incomprehensible filings, and her interference with the orderly progress of the July 14, 2011 hearing, all had the effect of needlessly prolonging this litigation. This caused Kathleen, HLC, and MERS to incur additional attorneys' fees and other harm.

Based on the itemized list of fees submitted by Kathleen's counsel, I have determined that she incurred \$5,035.54 of additional attorneys' fees due to Claudia's bad faith conduct since March 8, 2011. Therefore, I will assess that amount against Claudia's share of the proceeds from the sale of the Property and award it to Kathleen.

HLC and MERS also requested their attorneys' fees, but did not file an itemized list of their fees and expenses. Accordingly, upon receipt of appropriate documentation, I will award them their reasonable attorneys' fees and expenses, if any, incurred after March 8, 2011.<sup>11</sup>

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<sup>11</sup> Additionally, HLC and MERS request that the Court award attorneys' fees for expenses they incurred due to Claudia's allegedly frivolous motions in *Homeowners Loan Corp. v. Benjamin Wiltbank II*, C.A. No. S10J-05-058, a Superior Court case to which Claudia was not even a party. Because HLC and

## B. Rent

Next, Petitioners claim that they each are entitled to one-third of the fair rental value of the Property, from the date of the commencement of this action on May 19, 2006, through July 31, 2012, when the first of the petitions was filed, inasmuch as Claudia resided in the Property against their wishes without paying rent. In a somewhat different context, the rental value was recently assessed at \$500 to \$600 a month by a Court-approved broker.<sup>12</sup> Petitioners used the lower end of this assessment in calculating the amount that they claim is owed to them. They base their claim on the following legal principles:

At common law a cotenant who occupies a cotenancy without a legal ouster of his cotenant is not required to account to the cotenant for his use of the premises . . . . Delaware, however, has corrected the unfairness of the common law by the enactment of 25 *Del. C.* § 702 which grants a cotenant not in possession a right of action against the cotenant in possession for the rental value of the premises.<sup>13</sup>

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MERS failed to raise this claim until now, I hold that they have not given Claudia fair notice of the claim and, therefore, may not pursue it in this action.

<sup>12</sup> The broker assessed the rental value in connection with the Court's January 25, 2012 Order, directing Claudia to vacate the Property by February 15, 2012.

<sup>13</sup> *Stevanov v. O'Conner*, 2009 WL 1059640, at \*14 (Del. Ch. Apr. 21, 2009) (citing *Carradin v. Carradin*, 1980 WL 268076, at \*2 (Del. Ch. Sept. 22, 1980)).

Thus, under Delaware law, a cotenant who owns a property in joint tenancy and enjoys exclusive use and occupation of that property is obligated to pay rent to the other cotenants for their share of the property, even where there is no ouster.

“An ouster of one co-tenant by another can, of course, be shown under some circumstances indicating a clear denial of the co-tenant’s rights.”<sup>14</sup> Here, the evidence supports the finding of an ouster. Claudia openly denied the rights of Petitioners to a partition by claiming that she was granted a life estate in the Property and refusing to leave voluntarily. Claudia, therefore, is responsible to account to Petitioners for the fair rental value of the Property under both the common law and 25 *Del. C.* § 702.

Petitioners, however, did not raise the issue of rent in their pleadings; instead, they only requested that the Court order a partition by sale of the Property. Because Claudia had no notice, throughout most of this litigation, that Petitioners intended to demand rent payments for her occupation of the Property, Petitioners effectively have waived their right to seek such rent payments during the pre-notice period.

Beginning in March 2011, however, Petitioners began to object on the record to the fact that Claudia was occupying the Property rent-free, while allegedly intentionally delaying the final resolution of this action. At the March 8, 2011 hearing, Kathleen’s counsel, Michael Sensor, expressed concern that Claudia essentially had been enjoying a life estate in the Property due to the prolonged litigation and that she had every incentive

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<sup>14</sup> *Smith v. Lemp*, 63 A.2d 169, 170 (Del. Ch. 1949).

to continue to delay the proceedings. Even after that objection, Claudia continued to draw out the litigation by engaging in vexatious behavior. As an equitable matter, therefore, I hold that Petitioners can recoup their portion of the fair rental value of the Property beginning on March 8, 2011. Consequently, I will assess one-third of the fair rental value for the period from March 8, 2011, until the date specified below in favor of Kathleen, and one-third in favor of HLC and MERS, collectively against Claudia's share of the Property sale proceeds. Although Petitioners requested rent payments through July 31, 2012, I hold Claudia responsible for paying rent only through April 11, 2012, the day that she vacated the Property. On that basis, I award \$2,166.66 in rent to each of the two sets of Petitioners.<sup>15</sup>

### **C. Funeral Expenses**

Kathleen further argues that inasmuch as Claudia considered herself the executrix of Arlington's estate, she should be responsible for the entire funeral cost, totaling \$6,223.28, which Kathleen paid. She therefore requests that the Court assess this amount against Claudia's proceeds.

It is the duty of an executor or administrator to bury the deceased in a manner suitable to his degree and the circumstances of the estate; and if this duty is performed by the personal representative, or indeed by another not

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<sup>15</sup> This amount represents the fair rental value of the Property for the time period of March 8, 2011 through April 11, 2012, at a rate of \$500 per month, *i.e.*, 13 months x \$500 ÷ 3.

officially but from necessity, the law implies a promise of reimbursement out of the assets of the estate for the reasonable expenses incurred and paid . . . .<sup>16</sup>

Thus, it is the estate, not Claudia as the executrix, that is liable for reasonable funeral expenses. These expenses usually are paid from the estate funds before they are distributed among the heirs, resulting in each of the heirs equally sharing in the expenses. Because Kathleen paid the funeral expenses out-of-pocket,<sup>17</sup> she is entitled to reimbursement from the estate for anything she paid more than her share.

Here, the funeral expenses totaled \$6,223.28,<sup>18</sup> with each heir responsible for one-third of these expenses. Consequently, I assess \$2,074.47 of the funeral expenses against the Property sale proceeds payable to Claudia and direct that they be paid to Kathleen.<sup>19</sup>

#### **D. Trustee's Fees**

Kathleen lastly requests that the Court assess \$8,467.60 in trustee's fees against Claudia's proceeds, claiming those fees were occasioned by Claudia's refusal to comply

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<sup>16</sup> *Smolks v. James T. Chandler & Son*, 20 A.2d 131, 134 (Del. Ch. 1941).

<sup>17</sup> Pl.'s Pet., Ex. C.

<sup>18</sup> *Id.*

<sup>19</sup> HLC and MERS, as holders of a mortgage on the Property that Benjamin issued, step into Benjamin's shoes and are his successors in interest in the Property. The record is devoid of any claim by Kathleen against HLC and MERS, individually or collectively, to recover one-third of the funeral expenses from them as Benjamin's successors in interest. Therefore, this claim is waived.

with the Court order to vacate the Property. The trustee has submitted an affidavit detailing these fees.

Having carefully reviewed the record, I find that Claudia is responsible for a portion of the trustee fees claimed by Kathleen. The Court explicitly ordered the trustee to seek a rental appraisal of the Property, to take the necessary measures to permanently evict Claudia from the Property if she remained in it after a date specified by the Court, and to move Claudia's personal items and home furnishings into storage after that date, at her expense. These actions were rendered more difficult and more costly by Claudia's failure to comply promptly with earlier orders of the Court.

The amount Kathleen seeks to charge as reimbursable trustee fees against Claudia's proceeds of the sale of the Property, however, is too high. The trustee sold the Property for \$185,000.<sup>20</sup> The total amount of fees payable to the trustee upon Order of the Court is \$30,440.13,<sup>21</sup> resulting in net proceeds from the sale of the Property of \$155,119.61.<sup>22</sup> The \$30,440.13 in fees payable to the trustee, however, includes the fees and costs incurred as a result of Claudia's refusal to vacate the Property. Thus, Claudia already has been charged for matters as to which the net proceeds are split equally among

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<sup>20</sup> Trustee's Return of Sale ¶ 5.

<sup>21</sup> Pl.'s Pet., Ex. D.

<sup>22</sup> *Id.* ¶ 2. This amount may need to be adjusted slightly to account for the final expenses and fees of the trustee and related orders of the Court.

the three cotenants. Each cotenant in essence has paid for one-third of those additional fees and Kathleen is entitled to reimbursement for only the one-third of those fees that were charged to her. Therefore, I will assess one-third of the additional trustee's fees, or \$2,822.53, against Claudia's proceeds and award it to Kathleen.

### **III. CONCLUSION**

For the foregoing reasons, I assess the following fees against Claudia's portion of the sale proceeds of the Property and award those amounts to Kathleen: (1) \$5,035.54 for attorneys' fees; (2) \$2,166.66 in rent payments; (3) \$2,074.47 for funeral expenses; and (4) \$2,822.53 for Trustee's fees, for a total of \$12,098.20.

I also award \$2,166.66 in rent payments to HLC and MERS. With regard to HLC and MERS's request for reimbursement of attorneys' fees, those parties shall submit an itemized list of fees incurred as a result of Claudia's behavior that was found herein to be vexatious or in bad faith within ten days from the date of this Letter Opinion or be deemed to have waived any claim to such fees. Any objection to the itemized fees must be filed within ten days after the filing of that list.

**IT IS SO ORDERED.**

Sincerely,

*/s/ Donald F. Parsons, Jr.*

Donald F. Parsons, Jr.  
Vice Chancellor

DFP/ptp