

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

IN RE: ESTATE OF MALCOLM CAMPBELL, DECEASED	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
APPEAL OF: SCOT CAMPBELL AND KENNETH GROSS, EXECUTORS OF THE ESTATE OF MALCOLM CAMPBELL, DECEASED	:	
	:	No. 2246 EDA 2012

IN RE: ESTATE OF MALCOLM CAMPBELL, DECEASED	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
APPEAL OF: ELIZABETH HAZEL MURPHY CAMPBELL	:	
	:	No. 2401 EDA 2012

Appeal from the Order Entered June 27, 2012
in the Court of Common Pleas of Montgomery County
Orphans' Court, No(s). 08-X0648

BEFORE: PANELLA, J., ALLEN, J., and PLATT, J.*

JUDGMENT ORDER BY PANELLA, J.

Filed: April 25, 2013

Appellants, Scot Campbell and Kenneth Gross, Executors of the Estate of Malcolm Campbell, deceased, and Elizabeth Hazel Murphy Campbell, wife of the decedent, appeal from the order entered June 27, 2012, by the Honorable Lois E. Murphy, Court of Common Pleas of Montgomery County Orphans' Court. We affirm.

* Retired Senior Judge assigned to the Superior Court.

For a detailed recitation of the facts and procedural history of this case, we direct the reader to the trial court's memorandum opinion. **See** Orphans' Court Opinion, 6/27/12 at 1-8. Briefly, the decedent, Malcolm Campbell, died testate on February 14, 2008. Appellants, Scot Campbell and Kenneth W. Gross were named co-executors of the estate. Following the First Account of the estate, decedent's wife, Elizabeth Hazel Murphy Campbell filed objections. Subsequently, all claims regarding the estate were settled with the exception of a demand for counsel fees. Following a hearing, the trial court granted Mrs. Campbell attorneys' fees and costs pursuant to the terms of an antenuptial agreement, in the amount of \$126,800.00. **See** Orphans' Court Opinion, 6/27/12 at 19. These timely cross-appeals followed.

On appeal, Appellants Scot Campbell and Kenneth Gross raise the following issues for our review:

- I. Did the [c]ourt err in holding that the Estate is bound to pay Claimant's counsel fees pursuant to the terms of an agreement between her and the decedent?
- II. Did the [c]ourt improperly hold that Claimant's legal fees were incurred in an effort to enforce the Antenuptial Agreement?
- III. Were the legal fees awarded pursuant to a hybrid contingent and hourly fee agreement unreasonable?

Appellants' Brief, at 4.

Additionally, Appellant, Elizabeth Hazel Murphy Campbell, raises the following issues:

- I. Was the [c]ourt correct to grant attorneys' fees to a decedent's wife, pursuant to an agreement between the decedent and his wife, where the wife was forced into litigation by the executors of the decedent's estate in order to enforce her rights?
- II. Did the [c]ourt err in reducing the attorneys' fees where the fee agreement at issue was reasonable and where the [c]ourt found it to be reasonable?

Appellant's Brief, at 1.

Our standard of review is as follows:

[a]s to interpretation, enforcement, and remedies, in Pennsylvania, antenuptial agreements are interpreted in accordance with traditional principles of contract law. Moreover, [t]he law of contracts requires contractual terms that are clear and unambiguous to be given effect without reference to matters outside the contract.

Estate of Kendall, 982 A.2d 525, 534 (Pa. Super. 2009) (internal citations and quotes omitted). "[T]he interpretation of the terms of a contract is a question of law for which our standard of review is *de novo* and our scope of review is plenary." ***McMullen v. Kutz***, 985 A.2d 769, 775 (Pa. Super. 2009) (citation omitted).

"The general rule within this Commonwealth is that each side is responsible for the payment of its own costs and counsel fees absent bad faith or vexatious conduct." ***Id.*** "This so-called 'American Rule' holds true 'unless there is express statutory authorization, a clear agreement of the parties or some other established exception.'" ***Id.*** (citation omitted). The trial court may consider whether the fees claimed to have been incurred are reasonable, and to reduce the fees claimed if appropriate. ***Id.*** at 777.

With our standard of review in mind, and after examining the briefs of the parties, the ruling of the trial court, as well as the applicable law, we find that Judge Murphy's ruling is supported by the record and free of legal error. We further find that the Orphans' court ably and methodically addressed Appellants' issues raised on appeal. Accordingly, we affirm on the basis of Judge Murphy's thorough and well-written opinion. **See** Orphans' Court Opinion, filed 6/27/12.

Judgment affirmed. Jurisdiction relinquished.

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
ORPHANS' COURT DIVISION

NO. 08-X0648

Estate of MALCOLM CAMPBELL, deceased
(Late of Lower Merion Township)

The First Account of the Estate of Malcolm Campbell, deceased, as stated by the co-executors, Scot Campbell and Kenneth W. Gross, was called for audit on January 5, 2010.¹ At the audit, Elizabeth Hazel Murphy Campbell (hereinafter "Elizabeth Campbell" or "Mrs. Campbell"), through her counsel, filed objections, protesting that the co-executors in their Petition for Adjudication failed to admit and pay any of the various claims that she filed against the Estate. Later, during oral argument on a petition for declaratory judgment, counsel for the co-executors acknowledged the validity of certain claims, subject to determining a dollar value for such claims. *See* Opinion and Order *sur* Accountants' Petition for Declaratory Judgment, pp. 5-6, 16 (filed July 2, 2010). After briefing and argument on the declaratory judgment petition, this Court allowed other claims, subject to a future evidentiary hearing to determine the amount of each allowed claim. *See id.* at pp. 12, 14-15. Thereafter, with one exception, the parties negotiated a settlement resolving other outstanding disputed claims and determining the dollar value of Mrs. Campbell's claims previously acknowledged by the co-executors or allowed by the Court. The parties reduced their settlement to writing and filed a copy with the Clerk of the Orphans' Court on May 17, 2012.

¹The First Account was filed pursuant to a Court Order dated October 22, 2009 directing the co-executors, Kenneth W. Gross and Scot Campbell, to file an accounting of their administration of this Estate by December 2, 2009. The Order was issued by agreement of the parties in response to a Petition filed by Elizabeth Hazel Murphy Campbell to compel the filing of an Account.

The only unresolved claim concerns Mrs. Campbell's request for payment of her attorneys' fees as set forth in Part B, subparagraph 9 of the Notice of Claim and paragraph 10 of the Objections. After briefing, a hearing and argument on this issue was held on December 2, 2011. As the question is now ready for disposition and all other claims have been previously resolved by the parties or by this Court, the matter is now ripe for adjudication.

COUNSEL APPEARED AS FOLLOWS:

MILLER, TURETSKY, RULE & McLENNAN

By: John A. Rule, Esq.

For the Accountants/Co- Executors, Scot Campbell and
Kenneth W. Gross

CARROLL & KARAGELIAN, LLP

By: Stephen Carroll, Esq.

For the Objectant-Claimant, Elizabeth Hazel Murphy
Campbell

COMMONWEALTH OF PENNSYLVANIA

OFFICE OF ATTORNEY GENERAL

By: Lawrence A. Barth, Esq., Senior Attorney General

For The Office of Attorney General as *parens patriae*

Decedent, Malcolm Campbell, died testate on February 14, 2008, leaving his Will dated July 6, 2006 which was duly probated by the Register of Wills of Montgomery County on February 27, 2008, at which time the Register granted Letters Testamentary to the accountants, Scot Campbell and Kenneth W. Gross, as the first-named executors.

Decedent was survived by a spouse and children. Notwithstanding, no one has claimed the family exemption, and the accountants have not indicated that any person is entitled to its payment.

The First Account for this Estate is stated from February 14, 2008 to September 30, 2009. Therein, the accountants report principal receipts of \$6,310,567.54, decreased by a net loss of \$1,267,666.68 on principal conversions, further reduced by principal disbursements of \$581,290.66

and principal distributions of \$2,433,573.00, since increased by income receipts of \$139,151.54, thereafter reduced by income disbursements of \$43.01 and income distributions of \$160,072.00, leaving a combined balance of assets on hand of \$2,007,073.73 as shown on pages 24-25 and the two unnumbered pages inserted between pages 52-53 of the First Account.

Accountants have revalued the assets of this Trust as of September 30, 2009, the Closing Date of the First Account. Pages 24-25 of the First Account and the unnumbered pages inserted between pages 52-53 show that the non-cash principal assets remaining on hand have decreased in value from a fiduciary acquisition value of \$983,520.90 to a current fair market value of \$751,708.70 as of the Closing Date of the First Account. The combined balance of all assets on hand is \$1,775,261.53, as revalued on September 30, 2009, after adjusting for a negative income balance in the amount of \$20,963.47.

In conformity with Orphans' Court Rule 6.3 and Local Rule 6.3A of this Court, all parties having or claiming any interest in this Estate, of whom the accountants have notice, are said to have received written notice of this audit by letter dated December 9, 2009. Although not required by the Rules, accountants' counsel also provided notice to pecuniary beneficiaries whose bequests were fully paid and stated in the First Account.²

All said interested parties are said to be living, of age, and *sui juris*.

The Office of Attorney General, as *parens patriae* for charities, issued a Charitable Gift Clearance Certificate dated December 21, 2009 with respect to the First Account for this Estate.

² The First Account on pages 18 - 23 reflects the distribution of these pecuniary bequests to each named beneficiary. The Rider 8a attached to the Petition for Adjudication indicates that at least five of these named beneficiaries are minors. Item III of decedent's Will requires sums bequeathed to grandchildren under the age of 25 to be held in a Pennsylvania Uniform Transfers to Minors Account until the grandchild attains the age of 25. This Court has been informed by accountants' counsel that the pecuniary bequests to decedent's grandchildren under the age of 25 at the time of his death were not made in accordance with Item III of decedent's Will. Thus, this Adjudication shall confirm the First Account subject to these distributions which are not approved by the Adjudication and for which the co-executors remain liable to these beneficiaries or their *sui juris* representatives for the improper distribution of such assets.

Decedent, by his Will, bequeathed his tangible personal property to his wife, Elizabeth Campbell, and made various pecuniary bequests to a church, his children, and his grandchildren. Decedent then devised his residuary estate to The Campbell Family Foundation. Decedent made no other provision for his wife, but he did expressly direct his executors to comply with the terms of an agreement that he had with his wife, dated May 12, 2005 and amended on March 31, 2006.

This agreement was a pre-nuptial agreement that was amended and modified after decedent and Mrs. Campbell married; hereinafter, the agreement and its amendment shall be referred to collectively as the "Agreement". The Agreement provided *inter alia* for the purchase of a residence owned jointly with rights of survivorship (hereinafter the "marital residence") and apportioned between decedent and Mrs. Campbell the costs of acquiring the marital residence. Additionally, in the Agreement, the decedent also agreed to pay certain childcare expenses and to pay a monthly sum to Mrs. Campbell as a replacement for her salary that was decreased when she, in exchange, agreed to reduce her professional employment schedule.

With one exception, the Estate's obligations under this Agreement have been resolved by agreement of the parties or in accordance with the determination by this Court in its Opinion and Order issued July 2, 2010 *sur* Accountants' Petition for Declaratory Judgment. Following this Court's decision, the parties thereafter agreed upon dollar amounts representing the value of each claim that the Estate is obligated to pay to Mrs. Campbell. These amounts have been memorialized in a Stipulation signed by Mrs. Campbell as the claimant and the two co-executors, Scot Campbell and Kenneth Gross. An executed copy of this Stipulation was filed with the Court on May 17, 2012. In a letter dated May 3, 2012, the Attorney General sent Mrs.

Campbell's counsel a letter of no objection; counsel forwarded a copy of the Attorney General's letter to this Court in correspondence dated May 16, 2012.

Given this Stipulation and the Attorney General's no objection letter, this Adjudication will approve disbursement of \$345,750.93 to Wells Fargo Bank, N.A. to extinguish the mortgage on the marital residence, approve various disbursements to Mrs. Campbell totaling \$318,033.75 in satisfaction of several of her claims under the Agreement, and will authorize future payments to her through July 14, 2014 in accordance with the Stipulation and pursuant to subparagraph 5(b) of the Agreement.

The only unresolved issue concerns Elizabeth Campbell's claim for attorneys' fees, which is based upon an interpretation of subparagraph 8(a) of the Agreement. Subparagraph 8(a) reads as follows:

8. Support/Alimony/Counsel Fees/Costs

(a) In the event of a divorce or separation, each party hereby waives and relinquishes any right or claim he or she may have against the other and/or the other's estate for spousal support and/or separate maintenance, alimony pendente lite, alimony and/or counsel fees, interim or otherwise and legal costs *except for an application for counsel fees relative to the enforcement of any provisions of this Agreement.*

At the hearing and argument on December 2, 2011, Elizabeth Campbell testified that within weeks of decedent's death, she promptly communicated in writing to the co-executors by an e-mail dated February 26, 2008 the amounts that she claimed were due and owing by the Estate to her under the terms of the Agreement. For almost a year, she received no definitive response from the co-executors regarding their intentions to pay her claims. In an e-mail dated July 31, 2008, Mrs. Campbell listed for Kenneth Gross, one of the two co-executors, her outstanding financial expenses and inquired whether she needed to hire a lawyer to pursue payments that she claimed were due to her under the Agreement. Mr. Gross promptly responded

by e-mail the next day, dissuading her from retaining an attorney and assuring her that he and his fellow co-executor were attempting to get "things wrapped up."

Unbeknownst to Mrs. Campbell, the co-executors had made all sixteen specific pecuniary bequests, totaling \$2,433,573.00, between March 18, 2008 and March 31, 2008, almost within a month after receiving letters testamentary. Except for receiving the benefit of mortgage payments on the marital residence³, Mrs. Campbell did not receive any funds from the Estate to satisfy any of her claims.

In September and again in October of 2008, Mrs. Campbell wrote to the co-executors emphasizing her financial woes and explaining that the Agreement was created, in part, because decedent wished her to decrease her workload, thereby forfeiting her full-time tenured professorship, and consequently foregoing half of her salary and losing certain pension benefits, financial aid, and job security. Even after these letters, Mrs. Campbell heard and received nothing from the co-executors. Mrs. Campbell's claims included a claim for payment of her salary replacement amounts, as provided for in the Agreement, and a claim for payment of the outstanding mortgage on the marital residence in accord with the Agreement.

In early January, 2009, Mrs. Campbell consulted an attorney, and she informed Mr. Gross of this fact in a letter dated January 12, 2009. Within a week, Mrs. Campbell received a letter from Estate counsel, acknowledging that the Estate would reimburse her for car damage caused by decedent, provided that she provide the Estate with proof of her out-of-pocket costs. As for all other claims, counsel stated that the Estate was not responsible or was without sufficient information to make a payment on the claims at that time.

³At one juncture, the mortgage payments were in arrears because the co-executors closed an account in decedent's name and failed to establish pre-authorized automatic withdrawals from the Estate account to pay the monthly mortgage amount. This failure resulted in late fees and damage to Mrs. Campbell's credit. The issue eventually was resolved by the co-executors.

Mrs. Campbell then retained her current counsel on February 10, 2009. Due to her financial constraints, Mrs. Campbell could not employ her counsel at the rates customarily charged by that firm. She thus negotiated and entered into an engagement and fee agreement using a hybrid method to determine counsel's fee: time expended would be charged at one-half of the customary rates for counsel, his associate, and his paralegal and an additional portion of the fee would be based upon a 20% contingency computed on any amounts received and a discounted, present interest rate for any amounts to be received in the future. *See Memorandum of Law in Support of Claimant's Application for Attorney Fees, Exhibit A (Letter to Hazel Murphy Campbell, dated February 10, 2009).*

In pursuit of Mrs. Campbell's claims, counsel filed a formal notice of claim with the Clerk of the Orphans' Court on February 17, 2009. In the fall of 2009, counsel filed a petition seeking discovery and to have the claims adjudicated. He shortly thereafter filed a routine petition to compel an accounting by the co-executors, which resulted in an Order directing the co-executors to file the First Account that is the subject of this Adjudication. *See fn. 1, supra.* In their Petition for Adjudication, the co-executors denied all of Mrs. Campbell's claims and her counsel consequently filed objections.

After a conference in chambers, the parties agreed that a declaratory judgment petition would efficiently present the questions concerning the interpretation of the Agreement to the Court for resolution. Counsel for the co-executors prepared a declaratory judgment petition, and Mrs. Campbell's counsel prepared a response and supporting brief. Counsel for both parties appeared before the undersigned to argue the merits of their respective positions. Subsequent to the Court's decision on that petition, counsel for both parties engaged in intensive settlement negotiations to resolve the other outstanding claims and to affix dollar amounts to the claims

permitted by the Court in its Opinion and Order *sur* the Accountants' Petition for Declaratory Judgment.

Under the terms of the fee agreement between Elizabeth Campbell and her counsel, referenced above, counsel requests total fees of \$179,408.86. Because of the "hybrid" nature of the engagement and fee agreement, this amount represents the following three components: (1) \$25,540.10 computed based upon the time expended, (2) \$239.93 in costs incurred, and (3) \$153,868.76, representing 20% of the amount that counsel claims Mrs. Campbell recovered or will recover from the Estate in settlement of her claims. *See* Memorandum of Law in Support of Claimant's Application for Attorney Fees, Exhibit B.

The co-executors argue that, as fiduciaries, they do not stand in the same position as the decedent; and therefore, they cannot be held to have breached an agreement that bound the decedent. Following from this argument, the co-executors assert that Mrs. Campbell's objections to the First Account do not qualify as an action for enforcement of the Agreement.⁴ Lastly, the co-executors assert that the portion of counsel's requested fee derived from the 20% contingency fee arrangement is unreasonable and should not be permitted in this case.

In order to resolve the dispute under subparagraph 8(a) of the Agreement, this Court must answer the following questions: (1) Can an estate be bound to pay a claimant's counsel fees pursuant to the terms of an agreement between the decedent and a third-party? (2) Were Mrs. Campbell's legal fees incurred in an effort to enforce the provisions of the Agreement? (3) If so, are the attorneys' fees sought by Mrs. Campbell's counsel reasonable under the circumstances?

⁴ Although subparagraph 8(a) primarily concerns the limitations and rights of the parties in the context of a divorce or separation, neither the co-executors nor the Office of the Attorney General has argued that the provision providing for the recovery of legal fees is limited to a divorce or separation proceeding and therefore inapplicable in this context. All parties, including the Attorney General, have conceded that the Agreement provides for an application for counsel fees if either party is required to hire an attorney to enforce any provision of the Agreement.

The first two questions can be quickly answered in the affirmative. Although case law is sparse, the few reported cases are unanimous. In the first reported case and the only one from an appellate court, the question was framed in the following manner:

There is no question of the right of mortgagee to recover attorney's commissions where the employment of counsel is necessary, when so provided in the mortgage, in the court of common pleas, but has he that right in the orphans' court?

Rowe's Estate, 22 Pa. Super. 597 (1903). In a *per curiam* opinion, the Superior Court affirmed and found "no occasion for . . . dissenting in any way from the conclusions reached" by the court below. According to the lower court's decision and analysis, when an agreement provides for attorneys' fees and the obligee finds it necessary to employ counsel, then the fees charged by the obligee's counsel becomes part of the debt, "and there is no reason apparent why one amount should be found due in the common pleas and a lesser amount in the orphans' court." *Id.* The decision in *Rowe's Estate* was cited and followed in *Visco Estate*, 24 Fiduc. Rep.2d 51 (O.C., Phila. Co., 2000).

Indeed, in Montgomery County, the Orphans' Court has held the Estate liable pursuant to a clause in a nursing home admissions contract that provided for the recovery of attorneys' fees incurred in the course of a collection action, albeit in that case, the Court reduced the claimed fees to an amount that it found to be reasonable under the circumstances. *Longo Estate*, 1 Fiduc. Rep.3d 266, 269 (O.C., Mont. Co. 2011). Only where the Estate is insolvent has this Court refused to enforce a contractual clause providing for the recovery of attorney fees in a collection action. *Butcher Estate*, 14 Fiduc. Rep.2d 17 (O.C., Mont. Co. 1993).

Thus, here, where the Estate is solvent, subparagraph 8(a) of the Agreement is a valid provision and the Estate may be liable for reasonable attorneys' fees incurred by Mrs. Campbell in the enforcement of this Agreement against the Estate.

Next, this Court must determine whether Mrs. Campbell's legal fees were incurred in an effort to enforce the provisions of the Agreement. As to this question, this Court cannot agree with the co-executors' assertion that the underlying proceeding was not an enforcement action.

The Agreement expressly provides that "[a]ny payments required under the AGREEMENT as modified by the AMENDMENT will be made by Malcolm's estate if he dies before the required payments are completed." As a result, upon decedent's death, the co-executor stood in the shoes of the decedent with respect to honoring and fulfilling the terms of the Agreement. In addition to the obligation under the Agreement, the executors are expressly directed in decedent's Will, wherein decedent provides "I direct my executors to comply with the provisions of my agreement, as amended, with my wife, Elizabeth Hazel Murphy Campbell." See Decedent's Will, Item IX. Except for *de minimis* claims that will be addressed later, all of the claims asserted by Mrs. Campbell in her Notice of Claim arise pursuant to the provisions of the Agreement. Every subparagraph of Section B of the Notice of Claim starts by referencing a particular provision of the Agreement.

In response, the co-executors suggest that they owed a different and greater duty to the Estate's beneficiaries than that which they owed to Mrs. Campbell as a claimant. They asserted that their primary fiduciary responsibility is to the beneficiaries of the Estate and that creditors are not parties to whom fiduciary obligations are owed. On this score, the co-executors are unequivocally wrong.

A personal representative is obliged to pay the legitimate claims of the estate, including those claims arising from lifetime obligations entered into by the decedent. The executors of a solvent estate owe a fiduciary responsibility equally to the estate's creditors as well as the

estate's beneficiaries. *Hines Estate*, 22 Fiduc. Rep.2d 1 (O.C., Mont. Co. 2001). As was so succinctly expressed by the Honorable Calvin S. Drayer, Jr. in *Hines Estate*:

In a solvent estate, it is the duty of a personal representative to inquire into the validity of claims and if it is determined "that the claims are correct in amount and due by the estate, ... to proceed at once ... to the payment of all of decedent's proper debts." *Remick's Pennsylvania Orphans' Court Practice*, § 16.01. Only if there is any legitimate doubt about a claim should that claim not be paid but be submitted to the Court at audit for determination. 22 Fiduc. Rep.2d at 1-2.

Almost a year after their appointment as personal representatives, the co-executors here had not determined the validity of Mrs. Campbell's claims, except for one claim concerning damage to her car caused by decedent. Although counsel for the co-executors correctly notes that the Probate, Estates and Fiduciaries Code provides a procedure for determining the validity of claim through an account and audit, the co-executors never acted to begin such a process.

Instead, when counsel corresponded with Mrs. Campbell for the first time on January 19, 2009, eleven months after decedent's death, counsel stated that the co-executors still were not in a position to determine the validity of her claims. Notwithstanding their professed uncertainty, the co-executors still did not file an account or petition for declaratory judgment to have these allegedly uncertain claims submitted to the Court for resolution. Instead, the co-executors waited another ten months, forcing Mrs. Campbell's counsel to file a petition to compel an account, after which they agreed to file an account and a Court Order requiring the filing of an Account was issued. *See Order* dated Oct. 22, 2009.

Almost two years after decedent's death, the co-executors, in their Petition for Adjudication, persisted in denying all of Mrs. Campbell's claims. However, at oral argument on the petition for declaratory judgment on May 24, 2010, counsel for the co-executors conceded that the Estate was liable for the following: real estate taxes accruing prior to decedent's death

under subparagraph 5(c) of the Agreement; major repairs to the marital residence under this same subparagraph of the Agreement, provided that Mrs. Campbell established what those repairs were and the costs; and nanny and childcare expenses under subparagraph 5(e) of the Agreement, again provided that Mrs. Campbell could establish that she had custody and responsibility for children who needed such services and the costs of those services.

The co-executors' concessions at oral argument, after the filing of an account, objections, a petition for declaratory judgment with its accompanying responsive pleading and briefing, does not refute or diminish Mrs. Campbell's assertion that she was required to hire an attorney and bring an action in Court to enforce the provisions of the Agreement. In fact, the co-executors' course of conduct beginning with prolonged silence, followed by a "blanket denial", and then a partial capitulation before this Court at oral argument suggests that Mrs. Campbell was only going to receive payment from this Estate if she retained counsel and pursued litigation to enforce the Agreement.

The co-executors erred in assuming that their sole responsibility was to the beneficiaries, to the exclusion of a legitimate creditor. They compounded their error by assuming that inaction with respect to Mrs. Campbell's claims would best protect the Estate's assets and the interests of the residuary beneficiary. To the contrary, by delaying a decision on Mrs. Campbell's claims, the co-executors shirked their fiduciary responsibility and provoked extensive litigation, resulting in attorneys' fees payable by the Estate and causing Mrs. Campbell to incur significant attorneys' fees as well. The co-executors' reluctance to pay Mrs. Campbell's claims is hard to square with the promptness with which the co-executors paid the preresiduary bequests.

Having affirmatively answered the first two of its three questions, this Court must now assess whether the legal fees requested by Mrs. Campbell's counsel are reasonable. The

Supreme Court of Pennsylvania has held that counsel fees recoverable by the non-breaching party under the terms of a contract are reviewable by the Court for reasonableness regardless of whether the contract authorizing the award of counsel fees uses the verbiage of “reasonableness.” *McMullen v. Kutz*, 603 Pa. 602, 985 A.2d 769 (2009). Affirming the decisions of the courts below, the Pennsylvania Supreme Court held that “the trial court may consider whether the fees claimed to have been incurred are reasonable, and reduce the fees claimed if appropriate.” *Id.* at 615, 985 A.2d at 776. Here, both parties agree that, in accord with the decision of *McMullen v. Kutz*, *supra*, this Court may review for “reasonableness” the fees being claimed by Mrs. Campbell’s counsel.

Separate and apart from this case law, the Orphans’ Court always has a duty and obligation to review for reasonableness the fees requested by counsel. *Estate of Thompson*, 426 Pa. 270, 232 A.2d 625 (1967); *Estate of Geniviva*, 450 Pa. Super. 54, 68, 675 A.2d 306, 313 (1996), *appeal denied* 546 Pa. 666, 685 A.2d 545 (1996); *Longo Estate*, 1 Fiduc. Rep.3d 266 (Montg. 2011).

The seminal case of *LaRocca Estate*, 431 Pa. 542, 546, 246 A.2d 337, 339 (1968) sets forth the following facts and factors to be considered in determining whether a fee is reasonable:

the amount of work performed; the character of the services rendered; the difficulty of the problems involved; the importance of the litigation; the amount of money or value of the property in question; the degree of responsibility incurred; whether the fund involved was “created” by the attorney; the professional skill and standing of the attorney in his profession; the results he was able to obtain; the ability of the client to pay a reasonable fee for the services rendered; and very importantly, the amount of money or the value of the property in question.

In *Ballard Estate*, 30 Fiduc. Rep.2d 480, 482 (O.C., Phila. Co. 2010), the Orphans’ Court of Philadelphia County Counsel succinctly, but thoroughly, considered and analyzed each one of

these factors in assessing the reasonableness of the counsel fees and executor's commissions being claimed in that case. This Court will attempt to provide a similar analysis.

To establish the amount of work performed, Mrs. Campbell's counsel introduced copies of his billing statements into evidence at the hearing on December 2, 2011. These records reflect a total of 165.45 hours of time spent by counsel, an associate and a paralegal. The co-executors do not dispute or challenge the amount of time expended by Mrs. Campbell's counsel. If Mrs. Campbell had been able to retain this firm and counsel at its usual and customary hourly rates, without adjusting for any increase in hourly rates during the period of the engagement, the resulting fees would be \$51,080.20 plus costs of \$239.93.

In this case, the difficulty of the problem involved and the character of the services rendered are interrelated. In its simplest form, the problem involved herein was one of contract interpretation, interpreting the provisions of the Agreement and determining which ones survived decedent's death. The procedural path to resolution would have been less circuitous if the co-executors simply had filed an account or a petition for declaratory judgment as soon as it was clear that there was ambiguity in the interpretation of the Agreement's provisions. Instead, the burden was placed primarily upon Mrs. Campbell's counsel who had to prepare and file a claim, two petitions, objections, an answer, and a supporting memorandum of law. Counsel also was before this Court on at least five occasions, for conferences, oral argument and a hearing. In addition, counsel was involved in organizing the documents supporting his client's claims as well out-of-court negotiations with the co-executors' counsel. In sum, counsel performed many and varied services for his client in the process of resolving the dispute as to the validity of her claims.

The importance of the litigation was paramount to his client. Without the continuation of payments under the Agreement, Mrs. Campbell faced financial distress. Her stress was still evident when she testified at the hearing on December 2, 2011.

Furthermore, counsel conducted himself professionally throughout this litigation, which was in keeping with his reputation and standing in the legal community.⁵

The amount of money or value of the property in question and the results that counsel was able to obtain can be addressed in tandem. In monies currently paid, counsel recovered \$663,784.68 for Mrs. Campbell. Counsel also succeeded in having the co-executors honor their obligation under the Agreement to make future salary augmentation payments to Mrs. Campbell until July 14, 2014. Counsel prevailed on almost every part of the claim that he prepared on behalf of Mrs. Campbell. Mrs. Campbell abandoned only her claim for the accounting of all marital property and conceded that payment of real estate taxes was being made contemporaneously with mortgage payments such that there was no accrued amount of real estate taxes outstanding at the time decedent's death.

Executors argue that certain of Mrs. Campbell's claims were for reimbursement and not related to enforcement of the Agreement. It is true that certain modest, discrete claims did not arise under the Agreement, such as bills amounting to \$3,067.00 for repairs to Mrs. Campbell's car and the marital residence due to damage caused by the decedent during his lifetime and a reimbursement claim in the amount of \$9,058.00 for decedent's nursing home expenses personally paid by Mrs. Campbell. The claims unrelated to the Agreement amount to approximately \$12,000 out of a total of \$663,784.68 already paid to or for the benefit of Mrs. Campbell with additional payments continuing for another twenty-six months. In other words, less than 2% of the funds currently recovered on behalf of Mrs. Campbell are unrelated to the

⁵ As no fund was created in this litigation, this factor is not being addressed.

Agreement. Overall, upon a review of the Notice of Claim, the Petition for Adjudication and the co-executors' declaratory judgment petition, it is evident that the vast majority of the time and effort expended by Mrs. Campbell's counsel relates to efforts to enforce the provisions of the Agreement.

Next, this Court will consider together the degree of responsibility incurred and the ability of Mrs. Campbell to pay a reasonable fee for the services rendered. Ms. Campbell testified that, at the time she sought to engage an attorney in February of 2009, she was under financial strain as nearly a year had passed since decedent's death, during which time she had received no payments from the Estate. Ms. Campbell and her counsel entered into a "hybrid" fee agreement, whereby she would be billed for time expended at one-half of the firm's normal hourly rates, with counsel being entitled to additional compensation calculated at 20% of any recovery. Thus, Mrs. Campbell, individually, was unable to pay a reasonable fee at the law firm's customary hourly rates when she most needed legal services to enforce the Agreement that she had entered into with her late husband. Nevertheless, Mrs. Campbell's counsel agreed to represent her and he took a risk that he would receive only one-half of his customary billing rate. He thus incurred a lot of responsibility for pursuing this litigation on behalf of Mrs. Campbell and creatively negotiated a fee arrangement that Mrs. Campbell could afford.

Lastly, this Estate has sufficient resources to bear the fees requested herein. Initially, the Estate had principal receipts that exceeded \$6,000,000.00. Notably, the co-executors have claimed and received \$90,000.00 of commissions from the Estate, indicating their view that at least this sum is a reasonable administrative expense given the size of the Estate and seeking this Court's approval of this sum.

After distribution of the pecuniary bequests and disbursement of significant estate administration expenses, and after accounting for the amounts that the co-executors have disbursed to the mortgagor, Wells Fargo Bank, N.A., and presently have paid to Mrs. Campbell under the terms of the Stipulation, the Estate still holds a net combined balance of approximately \$1,343,300.00 that would be available for distribution to the residuary beneficiary, The Campbell Family Foundation. Recognizing that the accountants revalued the non-cash principal assets of this Estate as of the closing date of the First Account, September 30, 2009, showing a decrease in value of \$231,722.20, the amount available for distribution to The Campbell Family Foundation may be closer to \$1,120,000.00. If this Court were to award Mrs. Campbell's counsel all of his requested counsel's fees, the Foundation still would receive nearly \$1,000,000.00 depending upon the current value of the Estate's holdings.

In light of this analysis, this Court must evaluate whether the attorneys' fees requested are reasonable under all of the circumstances. The proposal to charge Elizabeth Campbell on the basis of a hybrid fee agreement, partly at 50% of regular hourly rates and partly on the basis of a contingent agreement to pay additional fees equal to 20% of the amount recovered was a creative way to address Mrs. Campbell's situation. While it is rare for an Orphans' Court to approve the payment of legal fees by an Estate based upon a contingent fee agreement, an agreement to pay a contingent fee in estate litigation has been recognized as permissible and appropriate in some cases. See *Thompson Estate*, 426 Pa. at 280-81, 232 A.2d at 630; *Craig Estate (No.3)*, 10 Pa. D. & C.3d 154 (Somerset Co. 1978). In *Thompson Estate*, the Pennsylvania Supreme Court recognized that "[w]hile contingent-fee agreements between counsel and fiduciaries may be entered into, any such agreement is always subject to approval by the Court. . . . Court approval

and review of contingent-fee agreements is even more appropriate where a fiduciary is involved.” 426 Pa. at 280-81, 232 A.2d at 630.

In addition to the factors enumerated in *LaRocca Estate* to consider in determining the reasonableness of attorneys’ fees, many courts and the Rules of Professional Conduct specify an additional factor that was not mentioned by the Supreme Court in *LaRocca Estate*: “whether the fee is fixed or contingent.” See, e.g. Pennsylvania Rules of Professional Conduct, Rule 1.5; *Eckell v. Wilson*, 409 Pa. Super. 132, 597 A.2d 696 (1991); *Craig Estate, supra*. The reason the type of fee is a relevant consideration in determining the reasonableness of the fee charged was well set forth by the lower court in *Craig Estate (No. 3)*:

Where the attorney receives nothing for his services if he loses, a much higher award is justified if he wins; in such case, he must be compensated not only for his services, but for sharing with the client the risks of losing and getting nothing The higher fee is particularly justified if the attorney’s services play a substantial role in creating or putting into the client’s hands a fund or property which he otherwise would not have had and from which the fee can be paid.” 10 Pa. D. & C.3d at 164.

In this case, while Mrs. Campbell’s counsel bore some of the risk of losing, he was not at risk of receiving no payment; his fee agreement with Mrs. Campbell provided, win or lose, for a reduced payment of attorneys’ fees in the amount of one-half of the law firm’s customary hourly rates multiplied by the hours expended. Moreover, Mrs. Campbell’s counsel seeks payment from the Estate pursuant to an Agreement between the decedent and Mrs. Campbell, rather than seeking payment from the funds recovered by Mrs. Campbell in this proceeding.

However, the circumstances that compelled Mrs. Campbell to enter into the hybrid agreement with her counsel – and that, indeed, required her to hire counsel to enforce her claims – were created by the co-executors who ignored and unconscionably delayed responding her repeated requests for payments in accord with the terms of the Agreement.

“What is a fair and reasonable fee is sometimes a delicate, and at times a difficult question.” *LaRocca Estate*, 431 Pa. at 546, 246 A.2d at 339. Having carefully considered all of the factors enumerated in *LaRocca Estate*, as well as the circumstances that compelled Mrs. Campbell to seek an attorney and enter into this hybrid fee agreement, this Court concludes that a reasonable attorney fee for Mrs. Campbell’s counsel is the total of the law firm’s usual and customary hourly rate for its counsel, associates, and paralegals, namely \$51,560.07, enhanced by an additional fee based upon the hybrid agreement of \$75,000.00, for a total in fees of \$126,560.00, plus \$239.93 in costs.

No other question requiring adjudication is before the Court.

Subject to the views expressed in this Adjudication, including approval of the disbursement to Wells Fargo Bank, N.A. to extinguish the mortgage, and disbursements made and payments to be made to Elizabeth Hazel Murphy Campbell in accordance with the terms of the Stipulation filed with this Court on May 17, 2012, and subject to distributions heretofore properly made, the improper distributions to decedent’s grandchildren under the age of 25 at the time of his death, and to any Pennsylvania inheritance transfer tax that may properly be due, the co-executors, Scot Campbell and Kenneth W. Gross, shall forthwith disburse to Stephen Carroll, Esq. the sum of \$126,800.00 as the Estate’s payment for his counsel fees and costs incurred on behalf of Mrs. Campbell in this matter. The co-executors shall thereafter retain, manage and administer the net ascertained balance of principal and income in order to complete the administration of this Estate, making any additional disbursements and distributions and filing any subsequent court accountings as they deem necessary.

Power and authority are given the accountants to make any necessary transfers and assignments of any unconverted investment securities in satisfaction of the disbursements herein approved and ordered.

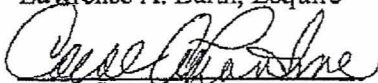
AND NOW, this 27th day of June, 2012, the First Account for the Estate of Malcolm Campbell is **CONFIRMED** subject to the improper distributions on pages 18-23 of the First Account to decedent's grandchildren under the age of 25 at the time of his death, and it is hereby **ORDERED** and **DECREED** that the co-executors forthwith shall pay the disbursements herein approved under the terms of the Stipulation, disburse the sum herein ordered to be paid by the Estate to Stephen Carroll, Esq. and his law firm, and retain and administer the balance of the Estate's assets as herein provided until completion of the administration of this Estate

Exceptions to this Adjudication may be filed within twenty (20) days from the entry of the Adjudication. An appeal from this Adjudication may be taken to the appropriate appellate court within thirty (30) days from the entry of the Adjudication. *See*, Pa. O.C. Rule 7.1, as amended, and Pa.R.A.P. 902 and 903.

BY THE COURT:


LOIS E. MURPHY J.

Copies of the above mailed
June 27, 2012, to:
John A. Rule, Esquire
Stephen Carroll, Esquire
Lawrence A. Barth, Esquire


Secretary