COURT OF COMMON PLEAS OF PHILADELPHIA
ORPHANS' COURT DIVISION
O.C. No. 42 DE of 1992
Estate of Joseph Edward Hydock, III, Deceased
Control No. 031630

O P I N I O N

Introduction

Presently pending before this court are preliminary objections filed by Oscar Schermer and his law firm (hereinafter "law firm") to objections filed by Joseph Hydock, Jr., to the account of the former administratrix of his deceased son's estate. The main focus of the preliminary objections is Hydock's request for a surcharge against Schermer and his law firm for the costs and attorney fees Hydock incurred in litigation to set aside his disclaimer to any interest in his son's estate. Although Hydock also seeks to surcharge the former administratrix of the Estate for his fees and costs, no preliminary objections have been filed on her behalf.

The law firm argues that it cannot be surcharged for Mr. Hydock's attorney fees for several reasons: the fee request is untimely; no recovery is possible under the American rule; and there is no statutory or common law basis for this claim. Before these issues can be resolved, however, the factual background of the disclaimer litigation must be briefly outlined based on this court's February 22, 2006 opinion which is incorporated herein.

Background

On December 12, 2002, Danielle Stauffer, as administratrix of the Estate of Joseph Hydock, III, through her counsel, Oscar Shermer filed her father's disclaimer to

an interest in the Estate of his deceased son.[1] Joseph Edward Hydock subsequently filed a petition to set aside this disclaimer. Since his son had died without a will, under the PEF code Joseph Edward Hydock, Jr. was the sole heir to his son's estate.[2] After various pleadings and motions, a hearing was held on March 15, 2005.

At the hearing, it was disclosed that approximately a week after Hydock's son died in a motor vehicle accident on June 14, 2002, a meeting was arranged at the law offices of Oscar Schermer, Esquire that included the decedent's sister, Danielle Stauffer, Shirley and Irving Culp, Cecilia Baum, Mr. Schermer and Mr. Schermer's assistant. The petitioner—Joseph Hydock, Jr.—was not invited. At the meeting, it was agreed that petitioner was not capable of serving as administrator, so Cecelia Baum, as a long time friend, was given a form renunciation document which she presented to the petitioner to sign and renounce his interest to administer his son's estate. The signed renunciation was returned to Mr. Schermer. Hydock testified that when he signed the renunciation, he did not know the value of his son's estate nor its beneficiaries. On July 10, 2002, Danielle Stauffer was granted letters of administration. Mr. Schermer had no recollection of sending to the petitioner the Notice of Beneficial Interest that Pennsylvania Orphans' Court Rule 5.6(a)(3) requires a personal representative to send to all intestate heirs within 3 months of the grant of letters.

In September 2002, petitioner telephoned Mr. Schermer. The testimony as to the subject of that phone call was conflicting. Mr. Hydock stated that he called to ask for his money, while Mr. Schermer and his legal assistant who listened on the speaker phone claimed that petitioner stated that he wanted his daughter to receive the money. Based on

---

[1] 8/1/2003 Hydock Petition to set aside disclaimer, ¶14; 8/15/2003 Stauffer Answer, ¶ 14 ("Admitted").

[2] 20 Pa.C.S. §2103(2). If there is no surviving spouse or issue of a decedent, the entire intestate estate passes to the parent.

the circumstances, demeanor and undisputed testimony that Mr. Schermer had hung up on petitioner during this conversation, this court found petitioner's testimony credible.

Ms. Stauffer went to Mr. Schermer's office on December 5, 2002 to sign an inventory listing a gross estate of $533,993.78, which was the proceeds from the wrongful death action brought on behalf of her brother. At this meeting, a two-page disclaimer was prepared for petitioner to disclaim his interest in his son's estate in favor of his daughter Danielle Stauffer as well as Shirley and Irving Culp who were misidentified as his children. Ms. Stauffer subsequently brought this disclaimer to her father on December 7, 2002, and then had him driven to a Notary Public. Testimony was presented that Hydock who was 54 had a borderline intelligence with an IQ of 72. He had a first grade reading level, and relied on trusted individuals to read documents to him. At no time, however, was the disclaimer read to Mr. Hydock nor was he given a copy so that it might be read by his mother, with whom he resided. Ms. Stauffer testified that she had told her father that it was necessary that he sign the disclaimer so that the state would not receive the estate proceeds. On December 12, 2002, Ms. Stauffer, as adminstratrix of the Estate of her brother, through her counsel Oscar Schermer filed her father's disclaimer. On February 11, 2003, a Notice of Beneficial Interest in the Estate of Joseph Edward Hydock, III was sent to Danielle Stauffer, Shirley Culp and Irvin Culp.[3]

After a hearing and upon consideration of this record, this court by decree dated February 22, 2006 issued an opinion and order that set aside Mr. Hydock's disclaimer. In addition, petitioner's daughter, Danielle Stauffer was removed as Administratrix of the estate of her brother and ordered to file an account. Daniel L. Glennon was subsequently

[3] The facts are set forth in this court's opinion dated February 22, 2006, which is incorporated entirely within this opinion. See Estate of Hydock, 26 Fid.Rep.2d 209-12 (Phila. O.C. 2006).

appointed Administrator D.B.N. of the Estate of Joseph Edward Hydock, III, on June 14, 2006 by the Register of Wills of Philadelphia County.[4] On May 6, 2006, Ms. Stauffer filed her first account for the Estate of Joseph Edward Hydock which listed Oscar S. Schermer, Esquire as the filing attorney.

The Account listed receipts of $533,993.78, with a disbursement of $55,011.25 in fees and commissions to Oscar S. Schermer & Associates, P.C. Its statement of Proposed Distribution did not list any individuals but instead stated "to be determined by court order." Both the Administrator and Mr. Hydock filed Objections to this Account. Among other issues, they both objected to claim of $18,145.32 and $55,011.25 in attorney costs and fees claimed for Oscar S. Schermer and his firm Oscar S. Schermer & Associates, P.C. In addition, Mr. Hydock asserted a surcharge claim against the former administratrix, Oscar Schermer, Esquire and the firm of Oscar S. Schermer & Associates, P.C. to compensate him for the attorney fees he incurred in his litigation to set aside his disclaimer.[5] Mr. Schermer, through his separately retained counsel, filed Preliminary Objections in which he requested that the court dismiss the objections insofar as they seek to surcharge him and/or his law firm for attorney fees incurred by Mr. Hydock.[6] For the reasons set forth below, the preliminary objections are overruled.

---

[4] 8/8/2006 Administrator's Objections.

[5] 6/23/2006 Hydock Objections, ¶¶ 4-7; 8/8/2006 Administrator Objections, ¶¶ 6-7. The Administrator of the Estate of Joseph Hydock, III, likewise objected to the fees incurred by both the Estate and Mr. Hydock due to Mr. Schermer's role in the diclaimer litigation: "Mr. Schermer's active role as the Estate's attorney during such time as he prepared the disclaimer for Mr. Hydock to sign and the consequences attendant thereto resulted in additional attorney fees and expenses both to the Estate and to Mr. Hydock." 8/8/2006 Administrator Objections, ¶ 9. By agreement of the parties, however, this issue was to be framed by preliminary objections filed by Mr. Schermer with a response by counsel for petitioner. 1/27/2007 N.T. at 14.

[6] Mr. Schermer notes that the Administrator filed a petition that Schermer and his law firm disgorge attorney fees derived from his involvement with the estate. He states that a compromise has been reached as to those fees. 2/28/2007 Schermer Preliminary Objections, ¶11. The exact parameters of that agreement are not clear.

Discussion

Introduction

As a general principle, each party to a litigation is required to pay his own attorney fees. Estate of Wanamaker, 314 Pa. Super. 177, 179, 460 A.2d 824, 825 (1983). Under the American Rule, a litigant cannot recover his attorney fees from the opposing party "unless there is express statutory authorization, a clear agreement of the parties or some other established exception." Mosaica Acad. Charter School v. Bensalem Township, 172 Pa. 191, 206-07, 813 A.2d 813, 822 (2002)(citations omitted). In Pennsylvania, the "American Rule" is embodied in 42 Pa.C.S. § 1726(a)(1) since it provides that taxable costs do not include attorney fees except as provided by 42 Pa.C.S. § 2503. Id.

Schermer and his law firm raise two preliminary objections in the nature of a demurrer to Hydock's objections seeking to surcharge them for the fees he incurred in litigation to set aside the disclaimer: first, Hydock's objections should be dismissed as untimely under the relevant statute, 42 Pa.C. S § 2503 because it was not brought within 30 days of this court's decree setting aside the disclaimer, and; second, Hydock's request for his fees against Schermer and the law firm is precluded under the American Rule.[7] In fleshing out these objections, the law firm claims there is neither a statutory nor a common law basis for the award of the fees claimed. For the reasons set forth below, these arguments are unpersuasive.

[7] 2/28/2007 Schermer Preliminary Objections.

A. Statutory Analysis

1. The Assertion that Hydock's Surcharge Request Is Untimely Is Without Merit

As a threshold argument, the law firm argues that Hydock's surcharge should be dismissed as untimely because it was not brought within 30 days after this court's February 22, 2006 decree setting aside his disclaimer. This timeliness argument hinges on two cases interpreting the statutory basis for Hydock's claim, 42 Pa.C.S. §2503. The law firm thus asserts that the "Superior Court repeatedly has held that claims for attorneys' fees must be brought in conjunction with the principal claim to which the attorneys' fee relate"[8] and in support cites First National Bank of Northeast v. Gooslin, 582 A.2d 1054, 1056 (Pa. Super. 1990) and Freidenbloom v. Weyant, 814 A.2d 1253, 1255 (Pa. Super. 2003), overruled in part, 589 Pa. 167, 907 A.2d 1051 (2006).

There are two problems with this precedent. First, both opinions were overruled—to some extent--by the Pennsylvania Supreme Court in Miller Electric Company v. Tate Deweese and Just-Mark, 589 Pa. 167, 907 A.2d 1051 (2006), amended, 918 A.2d 114, 2007 Pa. LEXIS 748 (2007) with an extremely subtle rationale. While the Miller "reversal" as a practical matter may merely have refined the scope of Freidenbloom and First National Bank, counsel should have alerted the court to this procedural complexity and explained its significance.[9] Ignoring legal complexity does not make it go away; instead, it festers. More significantly, the facts and procedural contexts of Freidenbloom and First National Bank differ so significantly from the instant case that they offer little guidance.

[8] 2/28/2007 Preliminary Objections, Memorandum at 4.
[9]

The Pennsylvania Supreme Court in Miller Electric Company focused on the timeliness of a motion for attorney fees pursuant to 42 Pa.C.S. §2503(3) and what type of "judgment" triggers the applicable appeal period. Section 2503(3) at issue in Miller, entitles a garnishee "who is found to have in his possession or control no indebtedness due to or other property of the debtor" to collect a "reasonable counsel fee as part of the taxable costs of the matter." Miller, 589 Pa. at 170, 907 A2d at 1053. The appellant in Miller-- Birmingham Bistro, Inc-- filed a petition for attorney fees on February 15, 2002--the day after a court entered a verdict in its favor after a subcontractor brought a garnishment proceeding against it. The subcontractor thereafter filed a post-trial motion on February 26, 2002. When the trial court did not rule on the post-trial motion within the 120 days prescribed by Pa.R.C.P. 227.4, it was deemed denied and Birmingham had a judgment entered on June 27, 2002. On July 10, 2002, the trial court denied Birmingham's fee petition. When Birmingham on August 8, 2002 filed an appeal of the July 10th order denying its February 15th fee petition, the Superior Court quashed the appeal as untimely because it was not brought within 30 days of the "final judgment" of June 27, 2002. The Supreme Court reversed, noting that "[w]e agree that the judgment entered June 27, 2002 was the final judgment in the underlying garnishment action, but we cannot say it was the final order with regard to the motion for fees." Miller, 589 Pa. at 174, 907 A.2d at 1056.

In explaining its reversal, the Pennsylvania Supreme Court in Miller emphasized that the Superior Court had relied on two cases-- Freidenbloom and First National Bank - for the proposition that "because a suit for counsel fees cannot exist apart from the underlying cause of action, appellant's motion for attorney's fees cannot survive beyond

the entry of final judgment." Miller, 589 Pa. at 174-75, 907 A.2d at 1056. The Miller court then noted that the requirements for appealable orders set forth in Pa.R.A.P. 301 deleted the requirement that an order be reduced to a judgment "[d]ue to the variety of orders issued by courts in different kinds of case, no single rule can delineate the requirements applicable in all cases." Miller, 589 Pa. at 175, 907 A.2d at 1056 (citing Pa.R.A.P. 301, Official Note). The Supreme Court then concluded that a motion for attorney fees under 42 Pa.C.S. §2503 (3) "is not a separate suit for fees, but rather, a matter that is ancillary to the underlying action," and that the date that triggered the thirty day appeal period was the July 10, 2002 order denying the fee petition that Birmingham had filed on February 15, 2002. In reaching this conclusion, the Miller court stated: "To the extent that Friedenbloom and First National Bank contradict our holding in this regard, they are hereby overruled." Miller, 589 Pa. at 176, 907 A.2d at 1057. While the import of this precedent to cases brought under other subsections of 42 Pa.C.S. 2503 is far from clear, Miller does suggest the need to focus carefully on the exact nature of the claim and relevant procedure before hastily concluding that a claim for attorney fees is untimely. This is especially so for matters brought in Orphans' Court with its unique, and deliberative, procedure for resolving issues involving decedent's estates.

Equally significant are the factual distinctions between the precedent cited by the law firm and the instant case. Freidenbloom, for instance, involved a lawsuit to recover money paid by plaintiff's insurer to have defendant's premises remodeled to accommodate plaintiff's injuries at a time they both shared the same premises. It was a straightforward civil action that merely raised the issue of whether a praecipe for

discontinuance was a final judgment.[10] First National Bank of Northeast v. Gooslin, 399 Pa. Super. 496, 582 A.2d 1054, in contrast, involves an interpleader and a claim as to property that had been levied by a sheriff. Counsel fees in that case were not sought pursuant to 42 Pa.C.S. §2503(5) until three months after a court rendered a judgment in that party's favor. Under those circumstances, the Superior Court concluded attorney fees had been waived by failure to seek them within 30 days of the order. First National Bank, 399 Pa.Super. at 499, 582 A.2d at 1056.

In contrast, the February 22, 2006 decree in the instant case setting aside Hydock's disclaimer of any interest in his deceased son's estate marked the commencement of Hydock's involvement in the administration of that estate. By setting aside the disclaimer, the rights of the sole beneficiary under 20 Pa.C.S § 2103(2) were recognized. A critical element of that decree was the removal of the administratrix and the order that she file an account with a formal audit, where typically claims against the estate by creditors, beneficiaries and other interested parties might be raised. See generally Horner v.First Pennsylvania Banking & Trust Co., 412 Pa. 72, 77, 194 A.2d 335, 338 (1963)(Orphans' court "by custom and experience is exceptionally well qualified to determine claims of creditors, legatees, devisees and next of kin" as well as issues involving distribution and surcharge of fiduciaries). The adjudication of the account would also provide an opportunity for the fiduciary's liability to be discharged. 20 Pa.C.S. §§711(12) & 3184. In setting forth the account, the fiduciary lists receipts, disbursements, and the persons to whom disbursements are made. Pa. O.C.R. 6.1. It is also well established that an Orphans' Court may "decide and dispose of any question

[10] In fact, the Miller court explained that "Freidenbloom stands for the proposition that a praecipe to discontinue constitutes a final judgment, and that a trial court may only act on a motion for fees that is filed within 30 days from final judgment." Miller, 589 Pa. at 172, 907 A.2d 1055.

relating to the administration…of an estate…upon the filing of an account or any other appropriate proceeding." Estate of Albright, 376 Pa. Super. 201, 214, 545 A2d 896, 903 (1988)(citing 20 Pa.C.S. § 762). Fees and commissions are typically listed in the Account and thus provide a forum for objections through the audit of the account. See generally "Model Executor's Account," Pa. O.C. Rule 66 App. (National Fiduciary Accounting Standards Project). For these reasons, Hydock's request for his attorney fees was properly raised in the context of the Account filed for his son's estate. His claim for attorney fees under 42 Pa.C.S. §§ 2503(9) or 2503(7) is not untimely because the February 22, 2006 order setting aside his disclaimer was not a final judgment as to the administration of the Estate of Joseph Hydock, III.[11]

On this score, it is significant that in her Account Danielle Stauffer sought attorney fees for services relating back to June 17, 2002[12] in a total amount of $55,011.25 in fees and $18,145.34 in costs.[13] This request for attorney fees dating back to the beginning of the accounting period in Ms. Stauffer's Account is of course *procedurally* appropriate since the audit provides a process for the comprehensive review of all expenses related to the administration of the estate during the period covered by the account, which in this case is July 10, 2002 through March 16, 2006.[14] Similarly, Hydock's claims for attorney fees relating to the establishment of his standing as a beneficiary fall within this period and cannot be deemed untimely when presented in the context of a fiduciary accounting.

---

[11] 3/19/2007 Hydock Memorandum at 5.

[12] See Oscar Schermer & Associates, Professional Services Bill attached to Account.

[13] See Account at 5-6; 6/23/2006 Hydock Objections, ¶ 4 & 5.

[14] As previously stated, both the Administrator of the Joseph Hydock, III, Estate and Mr. Hydock object to this fee and cost request by Mr. Schermer. Mr. Schermer suggests that he has negotiated a settlement regarding the administrator's petition that Schermer disgorge those fees. 2/28/2007 Schermer Preliminary Objections, ¶ 11.

2. Hydock Presents a Viable Claim Against Schermer and his Law Firm for Recovery of Attorney Fees Under 42 Pa.C.S §2503 (7) & (9) Based on the Record of the Disclaimer Litigation

Hydock claims a statutory basis for recovering his attorney fees incurred in setting aside his disclaimer pursuant to 42 Pa.C.S. §2503 (7) & (9). Section 2503 sets forth various scenarios for when a "participant" may recover reasonable counsel fees as part of the taxable cost of a matter. Section 2503 (7) provides for such fees for "[a]ny participant who is awarded counsel fees as a sanction against another participant for dilatory, obdurate or vexatious conduct during the pendency of a matter."[15] Alternatively, Section 2503(9) provides for such fees for "[a]ny participant who is awarded counsel fees because the conduct of another party in commencing the matter or otherwise was arbitrary, vexatious or in bad faith."[16] Hydock argues that both of these provisions apply because Ms. Stauffer, with the assistance of her counsel, committed fraud on her father to deprive him of his inheritance as sole heir of his son's estate before the disclaimer litigation began. He also alleges that this vexatious behavior of Ms. Stauffer and Schermer continued during the pendency of the litigation. A review of the record, as set forth in this court's February 22, 2006 opinion, establishes that even though by intestacy law Joseph Hydock, Jr., as the father of his deceased son, was the sole heir to that estate, the law firm and Ms. Stauffer engaged in the following conduct:

> They participated in a meeting that was arranged by the law offices of Oscar Schermer, Esquire without inviting the sole heir and decided that he was unfit to serve as administrator of his son's estate
>
> They arranged to have Hydock sign a renunciation of his interest to serve as administrator and had the renunciation returned to Oscar Schermer

[15] 42 Pa.C.C. § 2503(7)(emphasis added).
[16] 42 Pa.C.S. §2503(9)(emphasis added).

> The attorney who prepared the papers for the estate had no recollection of sending to Joseph Hydock the Notice of Beneficial Interest required by Pennsylvania Orphans' Court Rule 5.6 within three months of the grant of letters, although this notice was sent to Danielle Stauffer, Shirley Culp and Irvin Culp nearly seven months after letters of administration were granted to Ms. Stauffer.
>
> Danielle Stauffer on July 10, 2002 filed a petition for the grant of letters of administration and listed Joseph Hydock and Edith Ann Baum as the sole heirs of the estate, but since Ms. Baum was deceased, Mr. Hydock in fact was the sole heir.
>
> The attorney testified that he had engaged in a telephone call with Mr. Hydock during which he hung up on him. According to Mr. Hydock, he had asked the attorney for his money at this time which would have been 3 months prior to signing the disclaimer. The attorney, in contrast, testified that Hydock told him he wanted his daughter to receive the money. This court found the testimony of Hydock credible and the testimony of the attorney not credible.
>
> The adminstratrix of the estate, Danielle Stauffer, in the office of her attorney signed an inventory listing the value of the Joseph Hydock, III estate as $533,993.78. At this meeting, a disclaimer was prepared for Joseph Hydock, Jr. to sign renouncing his interest in the estate of his son in favor of the administratrix and two individuals misidentified as his children.[17]

As a practical matter, Danielle Stauffer commenced the present litigation with her father when she, through her attorney, formally filed his disclaimer on December 12, 2002. All of the preceding acts by Ms. Stauffer to deprive her father of his interest in his son's estate were clearly performed in concert with her attorney. The initial meeting after decedent's death to discuss Hydock's renunciation of his interest to administer the estate was held in the attorney's office—without Hydock's presence. Such key documents as the inventory and disclaimer were prepared with the assistance of counsel.

The documents indicate that these participants were aware that Mr. Hydock was the sole beneficiary of his son's estate and that the estate had a considerable value of over $500,000. Nonetheless, there is no record that notice of his beneficial interest was ever sent to Hydock despite the requirements of Pennsylvania Orphans' Court 5.6 that such

[17] Estate of Joseph Hydock, 26 Fid. Rep. 2d 209, 209-12 (Phila. O.C. 2/22/2006).

notice be sent within 3 months of the grant of letters of administration. Since letters of administration were granted to Ms. Stauffer by the Register on July 10, 2002, the notice of beneficial interest should have been sent to Hydock no later than mid-October—or 2 months before Hydock's disclaimer was formally filed. Schermer had no recollection of sending the notice to Hydock, yet this notice of beneficial interest was sent to Danielle Stauffer, Shirley Culp and Irvin Culp on February 11, 2003.

Schermer argues that Hydock cannot sustain a claim for his attorney fees based on section 2503 because there "are no record facts indicating that Mr. Schermer or his firm acted in a vexatious or obdurate manner during the disclaimer litigation."[18] This ignores the key fact that the concerted effort by Ms. Stauffer and her counsel to obtain, file—and then defend—the disclaimer by Hydock was purposefully designed to deny the sole intestate heir his interest in his son's estate and as such was inherently "dilatory, obdurate and vexatious" for the purposes of Section 2503(9) in seeking to thwart the estate's beneficary's interest in the estate.

In addition, the record of the ensuing litigation is replete with "dilatory, obdurate and vexatious conduct." Ms. Stauffer with the assistance of her counsel engaged in protracted litigation to defeat Mr. Hydock's petition to set aside the disclaimer, filing petitions for discovery, a motion for summary judgment, as well as an appeal of the adverse ruling[19]--which was subsequently abandoned-- and filing her account months after it was due. Moreover, even in this Account, the former administratrix, with the same counsel listed on the cover sheet, failed to identify Hydock in the Proposed

[18] See 2/28/2007 Schermer Preliminary Objections, Memorandum at 7.

[19] In his Preliminary Objections, Schermer states that Ms. Stauffer did not appeal the February 22, 2006 Decree. The docket indicates, however, that she filed an appeal on March 17, 2006 only to abandon that appeal on April 20, 2006.

Statement of Distribution as the intestate beneficiary of the estate stating, instead, that distribution was "to be determined by the Court Order."[20] This conduct is likewise "dilatory, obdurate or vexatious" under section 2503(7). It cannot be attributed to the administratrix alone, but was clearly facilitated by her counsel. Neither the administratrix nor her counsel can plead ignorance of Mr. Hydock's status as sole beneficiary since the record indicates that he and his son's deceased mother were listed on July 10, 2002 petition for the grant of letters as the sole beneficiaries of the estate.

Moreover, sections 2503(7) and (9) would encompass the actions of the attorney representing Ms. Stauffer since both sections state that "participants" are entitled to reasonable attorney fees as a sanction against the dilatory, obdurate or vexatious conduct of other "participants." A "participant" as defined in 42 Pa.C.S. § 102 of the Judicial Code includes "litigants, witnesses and their counsel." See also Perkins v. TSG Inc., 26 Pa.D & C. 4th 97, 102 (1995)("participant" under section 102 includes "counsel").

Finally, precedent supports the surcharging of the law firm for the fees and costs Hydock incurred in the disclaimer litigation. In the Estate of Liscio, 432 Pa. Super. 440, 638 A.2d 1019 (1994), for instance, attorney fees and costs incurred by an administrator in responding to "dilatory and vexatious" claims by a putative heir of the estate were imposed on both that objector and her attorney under section 2503. As the Liscio court observed, a "court may require a party to pay another participant's counsel fees if the party's conduct in commencing the action was 'arbitrary, vexatious or in bad faith.'" Liscio, 432 Pa. Super. at 444, 638 A.2d at 1021. The objector in Liscio sought to have the administrator removed on the grounds that she was the decedent's natural child. The administrator raised the defense that the objector had been adopted shortly after birth by

[20] See Petition for Adjudication and Statement of Proposed Distribution, ¶ 19.

persons other than the decedent, thereby terminating her interest in his estate. The petition to revoke the letters was eventually withdrawn but the objector subsequently filed objections to an account which led to a hearing during which the objector admitted she had been adopted but not "legally" because her natural father had not been notified. Upon consideration of the record, the Orphans' court concluded that the objector had been legally adopted and dismissed her objections. The objector thereafter filed an appeal. The Orphans' court decree was affirmed, and the Supreme Court denied review. The estate thereafter filed a petition for counsel fees and costs pursuant to 42 Pa.C.S. §2503 against both the objector and her counsel for pursuing a meritless and frivolous claim.

In concluding that the award of counsel fees was proper, the Liscio court emphasized that the aim of the rule under section 2503 (7) and (9) "is to sanction those who knowingly raise, in bad faith, frivolous claims which have no reasonable possibility of success for the purpose of harassing, obstructing or delaying the opposing party.'" Liscio, 432 Pa. Super. at 446, 638 A.2d at 1022. The court was especially critical of the objector and her counsel for pursuing a meritless claim, for prolonging the litigation and for delaying distribution of the estate which cost the estate thousand of dollars in attorney fees. Id., 432 Pa. Super. at 447, 688 A.2d at 1022. Similarly, Ms. Stauffer and her counsel sought to defend the disclaimer despite the obvious subterfuges used to obtain it, thereby prolonging litigation, delaying distribution of the estate assets and costing the sole beneficiary thousands of dollars in attorney fees. Even with her final account, the former administrator fails to acknowledge her father's claim to the distribution.

In another case attorney fees incurred by the opposing party were imposed pursuant to 42 Pa.C.S. § 2503 (7) and (9) against the lawyer rather than his client where the court concluded the attorney's alleged good faith effort to serve the opposing party was in fact a sham. Perkins v. TSG Inc., 26 Pa. D & C. 4th 97 (Mont. Cty. Common Pleas 1995). The court concluded that it would be unjust to impose the attorney fees upon the clients because they were unaware of their attorney's actions. In the instant case, in contrast, the record reflects cooperative efforts by both Ms. Stauffer and the law firm.

A final case cited by Hydock is factually inapposite. In Estate of Albright, 376 Pa. Super. 201, 545 A.2d 896 (1988), the court concluded that the counsel fees incurred by an heir who sought review of the estate administrator's actions should be charged against the estate's prior attorneys pursuant to 42 P.C.S. §2503(7), because those attorneys had commingled estate funds and given improper priority to their own expenses in disbursing estate funds. Hence, in Albright the attorneys had essentially victimized their client, the estate, while in Liscio, Perkins, and the instant case, attorney and client had worked together in a vexatious and dilatory fashion to the unfair detriment of an opposing party--Mr. Hydock. Consequently, Hydock's claim to recover his attorney fees from Schermer and his law firm is valid under 42 Pa.C.S. §2503 (7) & (9).

3. Hydock Fails to Present Precedent to Establish that His Attorney Fees Would be Recoverable from Schermer and His Law Firm Under Common Law

As an alternative basis for recovering his attorney fees, Hydock argues "there is numerous common law support" for this recovery.[21] It is, of course, well established that the Orphans' Court has authority for supervising decedents' estates and in so doing may surcharge a fiduciary for breach of his fiduciary duty or the estate's counsel for breach of

[21] 3/19/2007 Hydock Amended Answer, Memorandum at 8.

the standard of care. Estate of Westin, 2005 Pa. Super. 158, 874 A.2d 139, 144-46 (2005). None of the cases cited by Hydock, however, establish the reach of a surcharge to recover his attorney fees from Schermer or his law firm.[22]

In Weiss Estate, 4 Fid. Rep. 2d. 71 (Phila.O.C. 1983), for instance, Judge Shoyer concluded that a widow/beneficiary could be surcharged for the attorney fees incurred by the estate in dealing with her vexatious actions; he did not, however, conclude that the beneficiary's law firm should likewise be surcharged. While it is true that in Scott Estate, 12 Fid. Rep. 2d 359 (Phila. O.C. 1992) the objecting beneficiaries were able to recover their attorney fees in challenging the executor's administration of the estate, their recovery was from the residue of the estate and not from the estate attorney. Moreover, the court hinged this result on its conclusion that the objectors had created a fund, which is not an argument Hydock propounds.

Similarly, in Birely Estate, 30 Fid. Rep. 522 (Chester Cty. O.C. 1980), the executor and his attorney were surcharged, inter alia, for failing to invest funds, but the court did not address the issue of whether the objectors could recover their fees from the estate attorney. Instead, it concluded that both attorney and executor could be surcharged for the loss of interest by the estate due to failure to invest estate funds. The exact relevance of the Pew Trust, 16 Fid. Rep. 2d 73 (Mont. Cty. O.C. 1995) to this issue is unclear; unfortunately, this case is merely cited without explanation.

[22] Two cases cited by Hydock to establish a common law basis for recovery of his attorney fees, in fact, allowed such recovery under 42 Pa.C.S. § 2503: Estate of Albright and Estate of Liscio. See 3/14/2007 Hydock Amended Answer, Memorandum at 4. In Estate of Westin, the Superior court concluded that counsel for the estate could be surcharged for losses incurred by the estate due to embezzlement of its funds by an employee of the law firm. That case, however, did not focus on whether the Estate's counsel could be surcharged for the opposing party's counsel fees.

Since such cases as Estate of Liscio and Perkins v. TSG Inc. provide a basis for awarding Mr. Hydock's claim to recover his attorney fees and costs from Mr. Schermer and his firm based on section 2503, it is not necessary to forge uncharted common law precedent on this issue. But while the common law precedent that was cited by petitioner did not extend as far as Hydock's claim to recover his attorney fees from the former administratrix's counsel, the same is not true for the potential liability of the adminstratrix. Unfortunately, in arguing to protect Schermer and his law firm from Hydock's attorney fees, counsel for Schermer notes that "Orphans' courts have awarded attorneys' fees against a party whose actions are at issue in the litigation."[23] In Gonder Estate, 23 Fid. Rep. 2d 326, 330 (Mont. Cty. O.C. 2003), for instance, Judge Drayer surcharged an executor (but not the executor's attorney) for one-half of an objector's attorney fees, observing that the "court agrees with the late Judge Shoyer's observations in Weiss Estate, 4 Fid. Rep. 2d 71 (O.C. Phila. 1983) 'that the orphans' court, as a court of equity, has always had the power to surcharge a party for counsel fees when it is apparent that the conduct of a party has been the cause of additional legal expenses.'" To buttress this surcharge of attorney fees against the executor for delay in making distributions to the objector, the court also invoked section 2503 as supplementing the Orphans' court's inherent equitable powers.

This conflicting outcome for the attorney and the executor raises the delicate question of who is representing the former administratrix, Denise Stauffer, as to this surcharge claim. Although Oscar Schermer is listed as counsel of record to the Account she filed, he retained his own attorney for the filing of the instant preliminary objections

[23] 3/26/2007 Schermer Memorandum at 4(citing Weiss Estate, 4 Fid. Rep. 2d 71, 77 (O.C. Phila. 1983).

to Hydock's efforts for repayment of attorney fees. Ms. Stauffer did not likewise file any preliminary objections even though Hydock seeks to recover his fees from her too.

Finally, buried in a final footnote to the Memorandum of Law in support of his Preliminary Objections, Schermer asserts that this court may not impose attorneys' fees against him because he was not a party to the litigation. While he may not have been a party to the litigation, he was placed on notice about the attorney fee request after both the administrator and Hydock sought a citation against him. By decree dated August 14, 2006, this court order that a citation issue against Oscar Schermer to show cause why he should not disgorge himself of attorney fees "derived from his involvement in the Estate of Edward Hydock III and pay related attorneys costs and fees consequent to his action." Moreover, there is an alternative basis for jurisdiction. As the Superior Court observed in Estate of Albright, 376 Pa. at 213 n.5, 545 A.2d at 902 n.5, where an attorney and his firm were acting as counsel for an administrator served with a citation, the attorney's "liability cannot be contested for actions taken within the scope of this agency relationship."

Hydock has also filed a cross-petition for summary judgment on the issue of the surcharge to which neither the law firm nor Ms. Stauffer have filed a response. The summary judgment motion seeks an award from Oscar Schermer and Danielle Stauffer of $11,668.90 in costs and $70,362.50 in counsel fees. Although Hydock argues that there is no issue of fact presented by his motion, the reasonableness of the fees claimed necessarily implies a fact issue. The award of attorney fees falls within the discretion of this court, which must make a factual determination as to the reasonableness of fees

incurred. LaRocca Estate, 431 Pa. 542, 246 A.2d 337 (1968). A hearing must therefore be held, unless the parties can reach a stipulation as to the reasonableness of fees claimed.

BY THE COURT:

Date: _____ _____
John J. Herron, J.