

PHILADELPHIA COURT OF COMMON PLEAS  
ORPHANS' COURT DIVISION

Estate of Jessica Lundy, A Minor  
O.C. No. 511 MI of 1996  
Control No. 085784

Sur First and Final Account of Peter Listino and Catherine T. Lundy, Co-Guardians  
of the Estate of Jessica Lundy, a Minor

The Account was called for audit    November 3, 2008    By: **HERRON, J.**

Counsel appeared as follows:

Jack W. Coopersmith, Esquire – for the Accountant, Peter Listino  
William Labkoff, Esquire- for the Objectant  
Stanton Dubin, Esquire – for the Objectant

ADJUDICATION

**Procedural Background**

Jessica Lundy (hereinafter “Jessica”) was born on December 21, 1986. When she was 9 years old, her father Gerald Lundy died, leaving his daughter Jessica as the beneficiary of \$161,500 in life insurance benefits.<sup>1</sup> It was therefore necessary to appoint a guardian for her estate. By decree dated April 26, 1996, Peter C. Listino was appointed co-guardian of the estate of Jessica Lundy, a Minor, by Judge Frank O’Brien along with the minor’s mother, Catherine Lundy. In lieu of security, the co-guardians were ordered to purchase savings certificates or certificates of deposit in the amount of \$70,000 from Meridian Bank and in the amount of \$70,000 from PNC Bank. They were further ordered to deposit the balance of the funds totaling \$21,500 in a restricted account in the name of the co-guardians with the notation that these funds not be withdrawn before December 21, 2004 except for the payment of certain specified sums to an attorney, a

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<sup>1</sup> 11/12/08 N.T. at 4-5 (Jessica Lundy).

funeral home and the “payment of federal, state and local income taxes on the interest earned by the certificates and the account or on Order of Court.”<sup>2</sup>

When Jessica turned eighteen, she attempted to retrieve the funds that had been deposited on her behalf from PNC bank, but it refused to cash any check without the signature of her co-guardian, Peter Listino.<sup>3</sup> Mr. Listino, however, refused to sign the check because Jessica and her mother lacked court documents or “records.”<sup>4</sup> In July 2007, Jessica Lundy filed a petition seeking the filing of an account by Peter Listino, which was granted by decree dated August 13, 2007. On October 10, 2008, Mr. Listino filed an account and shortly thereafter, Jessica Lundy filed objections. A hearing was thereafter scheduled for November 12, 2008.

### *Legal Analysis*

Section 5161 of the PEF code provides that a guardian of a minor’s estate shall file an account of his administration when ordered to do so by a court. 20 Pa. C.S. § 5531. Under the PEF code, the provisions relating to accounts filed for minors are generally the same as those for fiduciaries of a decedent’s estate or guardians of an incapacitated person. 20 Pa.C.S. §§ 5163 & 5533. As a general rule, those objecting to an account have the burden of proving that the fiduciary failed to meet the standard of care owed to the estate and should thus be surcharged. Rodish Estate, 11 Fid. Rep. 2d 161, 166 (O.C. Somerset Cty. 1990).

In the present case, the primary dispute among the parties involves Jessica Lundy’s claim that the \$47,850.37 in fees claimed by Peter Listino as co-guardian of her

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<sup>2</sup> 4/26/96 Order by Judge O’Brien, attached as an Exhibit to 10/10/08 Account.

<sup>3</sup> 11/12/08 N.T. at 6-8 (Jessica Lundy)

<sup>4</sup> 11/12/08 N.T. at 46-47 (Listino).

minor's account are excessive, unwarranted and unearned.<sup>5</sup> Where a guardian has been appointed for a minor by court order, a court will analyze the reasonableness of the fees claimed. See, e.g., Angstadt, Minor, 22 Fid. Rep.2d 3, 5 (O.C. Lehigh Cty. 2001). In determining whether guardian or legal fees are fair and reasonable, courts consider "a host of other factors including but not limited to, an examination of the amount of work performed, the character of the services rendered and the complexity of the problems involved." Lewis, Incompetent, 18 Fid. Rep. 2d 211, 215 (O.C. Mont. Cty. 1998), quoting LaRocca Estate, 431 Pa. 542, 246 A.2d 337 (1968). The party seeking the fees has the burden of establishing their reasonableness. Kornberg Estate, 25 Fid. Rep. 2d 203, 206 (O.C. Phila. 2005).

Courts have repeatedly emphasized that when dealing with the estates of incapacitated persons, the fees charged should be moderate. See, e.g., Lewis, Incompetent, 18 Fid. Rep. 2d at 215; Williams Estate, 9 Fid. Rep. 681 (O.C. Allegh. Cty. 1959). The same principle should apply to guardians seeking fees related to the administration of a minor's estate, which ends when the minor reaches majority. In fact, courts have penalized guardians where they failed to turn over a minor's assets in a timely fashion. See, e.g., Giese's Estate, 119 Pa. Super. 232, 180 A. 711 (1935)(a guardian of the estate of a minor cannot retain his assets after he reaches majority without minor's consent); Angst, Minor, 22 Fid. Rep. 2d 3, 4 (O.C. Lehigh Cty. 2001)(because court concluded that the administration of the minor's estate reasonably should have been concluded within 6 months after the minor attained majority, all compensation claimed for after that date was disallowed).

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<sup>5</sup> 1/23/09 Lundy Brief at 1.

At the evidentiary hearing on November 12, 2008, the following facts were established. The minor's accounts were created on behalf of Jessica Lundy out of proceeds of a life insurance policy following he father's death on September 20, 1995. Together with interest and principal, the minor's account initially consisted of \$168,110.29. The principal of the account was utilized to purchase two \$70,000 certificates of deposit, one from Wachovia Bank and the other from PNC Bank. The balance of \$28,110.29 was deposited in a PNC savings account. All bank statements were forwarded to Jessica's mother, Cathy Lundy.<sup>6</sup>

From April 1996 until early 2005, the minor's account remained in tact and Listino took no active role in the minor's accounts.<sup>7</sup> When Jessica turned 18 on December 21, 2004, she and her mother contacted the banks involved but they were denied access to the funds in the absence of a court order or involvement of the co-guardian Listino. They then contacted and subsequently met with Listino in March 2005. Jessica and her mother requested Listino to cooperate in efforts to have the balance of the minor's account paid over to Jessica. Listino, however, refused to do so when he learned that Jessica's mother had failed to file and Federal or Pennsylvania tax returns on the minors' account, had failed to file the annual reports required of a guardian and had failed to maintain any records concerning the minor's account.<sup>8</sup>

Listino became concerned that he had a legal responsibility as co-guardian for neglecting his fiduciary duties and began efforts to reconstruct the bank records so that the could both prepare a final account and address the failure to file timely tax returns as

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<sup>6</sup> 11/12/08 N.T. at 23-27 (Listino).

<sup>7</sup> 11/12/08 N.T. at 45 (Listino)

<sup>8</sup> 11/12/08 N.T. at 5-7 & 12 (Jessica Lundy); 11/12/08 N.T. at 39-40, 46-48 (Listino).

well as begin preparation of a final account.<sup>9</sup> He maintained detailed time records reflecting an expenditure of approximately 240 hours of his time devoted to this process. He also communicated with Jessica and her mother regarding requests for disbursements from the accounts and other information.<sup>10</sup>

At the hearing Listino introduced into evidence 1,000 e-mails reflecting considerable communication between the parties.<sup>11</sup> In addition, during the period February 2005 through June 20, 2007, Listino wrote checks to Jessica representing disbursements of principal she requested for various needs. Ms. Lundy does not challenge these distributions which totaled \$152,423.14.<sup>12</sup>

On June 5, 2007, as Jessica persisted with her demands for the balance of her minor's accounts, Listino wrote Jessica an e-mail which stated, among other things: "I do expect a modest bill for the closing process of your account. Additionally, I have spent over 230 hours of my own time during the past twelve years and will not be requesting any custodial commission."<sup>13</sup> The parties now dispute not only the meaning of this e-mail, but also whether Listino is entitled to retain any portion of the \$47,850.37 fee he paid himself.

Listino agrees with Jessica that no fees for his services were ever directly discussed.<sup>14</sup> He claims, however, that a fee was implied when Jessica and her mother on a number of occasions asked if the work involved in administering the minor's account was going to be costly.<sup>15</sup> Listino acknowledges that he never gave a direct answer but at

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<sup>9</sup> 11/12/08 N.T. at 47-51 (Listino).

<sup>10</sup> See Exs. P-5 & L-1; 11/12/09 N.T. at 57-60 (Listino); 3/2/09 Listino Brief at 5.

<sup>11</sup> See Ex. L-1.

<sup>12</sup> See Account at 6-9; 10/27/08 Objections.

<sup>13</sup> Ex. P-2.

<sup>14</sup> 11/12/08 N.T. at 33, 36-37 (Listino).

<sup>15</sup> 11/12/08 N.T. at 60-61 (Listino).

the same time he maintains that he never indicated that no fee would be charged.<sup>16</sup> The key—but controversial—June 5, 2007 e-mail is explained by Listino as indicating only that he would not be charging a commission based on a percentage of the minor’s funds.<sup>17</sup> But, he claims, he always intended to charge for the 230 hours of his time and, in fact, had already disbursed \$47,850.37 to himself prior to sending the e-mail. Significantly, Listino failed to inform Ms. Lundy in the e-mail that he had already paid himself this fee.<sup>18</sup> The question for determination is whether he is entitled to a fee, and if so, on what basis the fee should be calculated.

The record establishes that Listino rendered services for which he should be compensated. Before awarding any fee, however, it is necessary to carefully review the only written reference to a fee in Listino’s June 5, 2007 e-mail. That e-mail states that Listino expects to charge “...a modest bill for the closing process of your account”<sup>19</sup> while failing to disclose that he had already taken \$47,850.37 in fees from the account. According to the account he paid himself \$10,190.37 (on July 14, 2006), \$5,040 (on August 7, 2006), \$690 (on September 8, 2006), \$5,270 (on September 26, 2006), \$5,270 (on November 6, 2006), \$5,270 (on December 4, 2006), \$2,655 (on December 21, 2006), \$5,712 (on January 8, 2007), \$1,190 (on February 7, 2007), and \$6,562.50 (on March 6, 2007).<sup>20</sup>

The deceptive nature of the June 5, 2007 e-mail is inexplicable. Moreover, Listino’s attempt to characterize the fee as “modest” is outrageously disingenuous. According to his own testimony, Listino totally abdicated his responsibilities as co-

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<sup>16</sup> 11/12/08 N.T. at 33, 36-38 (Listino).

<sup>17</sup> 11/12/08 N.T. at 68-71 (Listino).

<sup>18</sup> 11/12/08 N.T. at 68-70 (Listino).

<sup>19</sup> Ex. P-2.

<sup>20</sup> Account at 2-3.

guardian, and exercised no independent judgment or oversight of the minor's estate for 10 years. He admitted at the hearing that he only took an active interest when the minor reached 18 and he discovered her mother's neglect and failures to address tax issues and other fiduciary duties.<sup>21</sup> It thus appears that the only motivating factor in Listino's involvement as of early 2005, after Jessica turned 18, was to rectify her mother's mistakes and omissions so as to avoid sanctions against himself.

In these circumstances, this Court finds that the fees charged to the minor were in large measure required as a result of Mr. Listino's own failures to participate actively as a co-guardian. Although Mr. Listino graduated from Villanova University and subsequently obtained a certified financial planning degree and a chartered financial consulting degree, none of this experience or qualifications was required or utilized in the management of the minor's accounts. Instead, the investment of Jessica Lundy's life insurance proceeds consisted solely of certificates of deposit and a money market account as required by Court Order. Listino is clearly not entitled to a fee for any professional services rendered by an accountant which were paid for out of the minor's account. Accordingly, this court reduces Listino's hourly fee of \$200 to \$ 50, resulting in a total fee of \$11,962.59, and directs that Listino be surcharged the sum of \$ 35,887.78 together with 6% interest from March 6, 2007<sup>22</sup> until the present time.

It is further Ordered and Decreed that the following objections are supported by the evidence and will be confirmed by this court:

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<sup>21</sup> 11/12/08 N.T. at 45-52 (Listino).

<sup>22</sup> In his 3/2/09 Brief, Listino states that he was paid a fee of \$47,850.37 for work that totaled 240 hours, which is an approximate hourly rate of \$200 per hour. See id. at 1 & 5. The March 6, 2007 date was chosen for computing interest because according to the Account at 3, March 6, 2007 was the last date listed for "[i]nvoice for use of office personnel in administering the estate."

- (1) The accountant is charged with receiving \$168,110.29 and not the misstated amount in the Account of \$154,000;<sup>23</sup>
- (2) The \$7,500 loan to Catherine Lundy is misstated in the Account as \$14,391.69 with interest included<sup>24</sup> but in fact should be reported as a disbursement by the estate because Jessica forgave her mother the amount of the loan according to testimony presented,<sup>25</sup> and;
- (3) The accountant's claim of a loan to Catherine Lundy of \$2,275.55 should have been itemized as a disbursement in the amount of \$2,200.

The remaining objections are dismissed as either withdrawn<sup>26</sup> or dismissed for lack of evidence (the last three objections under paragraph 4). Finally, objectant's requests for counsel fees and expenses are denied for failure to offer any evidence.

AND NOW, this \_\_\_\_\_ day of April 2009, the account as modified by this Adjudication to, inter alia, impose a surcharge of \$ 35,887.78 together with 6% interest from March 6, 2007 on Peter Listino, as co-guardian, is confirmed absolutely.

Exceptions to this Adjudication may be filed within twenty (20) days from the date of the issuance of this Adjudication. An Appeal from this Adjudication may be taken to the appropriate Appellate Court within thirty (30) days from the issuance of the Adjudication. See Phila. O.C. Rule 7.1.A and Pa. O.C. Rule 7.1 as amended, and Pa.R.A.P. 902 and 903.

BY THE COURT:

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John W. Herron, J.

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<sup>23</sup> Account at 1, Schedule A, "Cash."

<sup>24</sup> Account at 1.

<sup>25</sup> 11/12/08 N.T. at 75 (Jessica Lundy).

<sup>26</sup> 11/12/08 N.T. at 19 (Labkoff)(withdrawing first four objections under paragraph 4).



