

***COURT OF COMMON PLEAS OF PHILADELPHIA
ORPHANS' COURT DIVISION***

Orphans' Court No. 900 IC OF 1997

Control No. 132464

**IN RE: THOMAS J. CUNNINGHAM, JR.,
An Incapacitated Person**

OPINION PER Pa.R.A.P. No. 1925 (a)

On September 24, 2013, Appellant, Carol L. Wojcik, the Plenary Guardian of the Person and Estate of Thomas J. Cunningham, Jr., appealed this Court's August 28, 2013, denial of her Petition for Allowance.

Facts and Procedural History

On October 30, 1997, Judge Edmund S. Pawelec adjudicated Thomas J. Cunningham, Jr., (the Incapacitated Person), incapacitated and appointed James J. Cunningham, Jr., the Incapacitated Person's first cousin, as the Plenary Guardian of the Person and Estate. The Incapacitated Person was 64 years old and suffering from paranoid schizophrenia at the time of his adjudication. Up until March 14, 2005, when Mrs. Wojcik, the Incapacitated Person's second cousin, petitioned the Court to appoint her as Co-Guardian of the Person and Estate along with her father, James J. Cunningham, Jr., no requests for any payment or reimbursement had been made by James J. Cunningham. The petition to appoint Mrs. Wojcik Co-Guardian was granted on April 6, 2005.

On March 26, 2007, the Co-Guardians filed a Petition to Sell Real Estate, amended on April 11, 2007. Prior to this filing, the Incapacitated Person had been living on his own in the home he inherited from his deceased parents; his mother having passed away in 1992. This home was all the property that the Incapacitated Person owned. At the time, the Incapacitated Person was receiving \$353.41 per month in Social Security and \$275.00 per month from a City of Philadelphia Pensioner's Survivor Benefits. The Incapacitated Person had never married and had no children or siblings.

The Co-Guardians averred in the petition that the expenses related to the Incapacitated Person living alone in the home, as well as the distance the home was from the Co-Guardians, made it necessary to sell his current home and buy one closer to the Co-Guardians. This petition was denied without prejudice on April 20, 2007, because a home for the Incapacitated Person had not yet been found. That flaw was corrected and, on July 17, 2007, this Court granted the Co-Guardian's petition and the home was sold for \$173,360.14.

In addition to the averments made in the Petition to Sell Real Estate, this Court relied on a July 9, 2007, letter from Daniel H. O'Connell, Sr., Esquire, the Co-Guardians' attorney who handled the real estate transactions. The letter stated that the Incapacitated Person's home would be sold for \$173,360.14 and that the purchase price for the new home was \$196,194.28, leaving a \$22,834.14 difference. Mrs. Wojcik and her husband Richard generously paid the difference from their own money. In exchange for making up the difference, Mrs. Wojcik and her husband were to receive a 12% ($\$22,834.14 \div \$196,194.28 = 11.6\%$ rounded up to 12%) ownership interest in the new property as Tenants in Common with the Incapacitated Person who owned the remaining 88%. The Co-Guardians were ordered to file an Affidavit of Compliance with the July 17, 2007, Decree within 90 days. On October 15, 2007, the affidavit was filed. Instead of

showing the 88%/12% split requested in the July 9, 2007, letter and ordered by the July 17, 2007, Decree, the affidavit showed an 84%/16% split. Apparently the Incapacitated Person was only able to pay \$166,175.00 instead of \$174,360.14 and Mrs. Wojcik and her husband paid \$31,413.00 instead of \$22,834.14. No explanation was provided for these differences.

The first Petition for Allowance in this matter was filed on August 25, 2010, amended January 13, 2011. The Petition requested that Co-Guardian James J. Cunningham, Jr., who was 85 years old and in poor health, be allowed to resign and sought to pay the Co-Guardians, as well as Mrs. Wojcik's husband Richard, \$143,253.25 for certain unreimbursed services. The Petition requested that the Co-Guardians be allowed to encumber the Incapacitated Person's new home with an open-ended mortgage to pay for these unreimbursed services as the Incapacitated Person had no property other than the 84% interest in his new home.

The unreimbursed services included the following requests:

1.	Actual out-of-pocket expenses	\$26,594.00
2.	Time Expense (2,999.35 hours @ \$20/hour)	\$59,987.00
3.	Mileage	\$5,316.54
4.	Deferred Rent (for the 16% of the property owned by Mrs. Wojcik and her husband)	\$9,792.00
5.	Interest (compounded at 6%)	<u>\$41,563.71</u>
		\$143,253.25

On April 8, 2011, this Court issued a Decree accepting the resignation of James J. Cunningham, Jr., as Co-Guardian of the Person and Estate and appointing Mrs. Wojcik Plenary Guardian of the Person and Estate. The Decree also denied the request to encumber the Incapacitated Person's home as compensation for the unreimbursed services.

Mrs. Wojcik filed Exceptions to the April 8, 2011, Decree and, on May 10, 2011, the Exceptions were sustained, the April 8, 2011, Decree was vacated and an evidentiary hearing on the Petition for Allowance was scheduled for June 30, 2011. The Court then appointed a

guardian *ad litem* for the Incapacitated Person who filed a report on June 22, 2011. The report recommended that James J. Cunningham, Jr., be allowed to resign and that encumbering the Incapacitated Person's home to pay the Co-Guardians would not harm his best interests as long as he was allowed to retain \$10,000.00 of an ownership interest in the home. The Guardian *ad litem* also declared that the changes in the ownership percentages were just harmless errors made by guardians unfamiliar with legal proceedings, even though the guardianship had existed for a decade by then.

The hearing was held on June 30, 2011. During the hearing, this Court specifically asked Mrs. Wojcik whether she would have performed the same work for the Incapacitated Person even if the Incapacitated Person had no assets and she replied "[y]es." (N.T. June 30, 2011, 22:17 – 23:2). Following up, Mrs. Wojcik's attorney then asked:

Q. If Tom didn't have any assets, would you have put out \$26,000 plus dollars of your own money to help him?

A. I guess not.

(N.T. June 30, 2011, 23:5-8).

On August 25, 2011, an Amended Decree was issued on the original Petition for Allowance. The Amended Decree again allowed James J. Cunningham, Jr., to resign as Co-Guardian. This time, however, an allowance was granted in the amount of \$86,581.00, which constituted the total out-of-pocket and time reimbursement requests. The requests for mileage, deferred rent and interest were denied.

At this point, Mrs. Wojcik and her husband Richard owned 16% of the value of the home plus an additional lien worth 52% of the Incapacitated Person's remaining ownership interest in the Incapacitated Person's home ($\$86,581.00 \div \$166,175.00 = 52\%$).

On August 19, 2013, Mrs. Wojcik filed another Petition for Allowance. The Petition sought to further reduce the Incapacitated Person's remaining \$79,594.00 worth of ownership interest in his home via a lien. The amount requested was \$17,015.00. There was no claim for any out-of-pocket expenses, mileage, deferred rent or interest. Rather, the claim was for 320 hours at \$22/hour and 399 hours at \$25/hour for work done between January, 2011, and June, 2013.¹

On August 28, 2013, this Petition was denied as this Court felt it was not in the best interests of the Incapacitated Person to further reduce his ownership interest in the only property that he owned. On September 24, 2013, Mrs. Wojcik appealed the denial of the Petition for Allowance. On October 16, 2013, this Court issued a Decree pursuant to Pa. R.A.P. §1925(b) directing Mrs. Wojcik to file a Concise Statement of Errors Complained Of On Appeal, which she did on October 31, 2013. Mrs. Wojcik contends that this Court erred and abused its discretion in denying her Petition for Allowance for the following reasons:

1. The work done by Mrs. Wojcik has allowed the Incapacitated Person to remain in the community;
2. Placing the Incapacitated Person in a nursing home would be more expensive than paying Mrs. Wojcik;
3. This Court previously allowed a lien to be used in lieu of cash payment;
4. The Petition was decided without a hearing;
5. A lien against the Incapacitated Person's home was requested as payment, not cash; and
6. Denying the request for a lien will prevent Mrs. Wojcik from being reimbursed from the property because of a potential Medicaid lien against the same property.²

¹ This is a \$2 and \$5 per hour increase from the previous Petition for Allowance filed in January, 2011.

² Errors 1, 2, 3 and 5 are all based on the same alleged error and abuse of discretion, that is, that the Petition for Allowance was improperly denied, and will be combined into one general discussion.

Legal Analysis

The Orphans' Court is charged with the mandatory exercise of jurisdiction over the estates of incapacitated persons. 20 Pa.C.S. §711(10). This jurisdiction also extends over “[t]he administration and distribution of the real and personal property of the estates of incapacitated persons.” *Id.* Once adjudicated incapacitated, the Incapacitated Person “is in effect the ward of the court, and his estate is *in custodia legis*.” *Com. ex.rel. Flowers v. Flowers*, 326 Pa. 138, 140. (Pa. 1940).

As such, it falls to the Orphans Court to decide Petitions for Allowance that request a payment, from either principal or income, for the care, maintenance or education of the Incapacitated Person “for cause shown and with only such notice as it considers appropriate in the circumstances...” 20 Pa. C.S. §5536(a).

The following standard of review applies to the Orphans' Court:

In reviewing the Orphans' Court's findings, our task is to ensure that the record is free from legal error and to determine if the Orphans' Court's findings are supported by competent and adequate evidence and are not predicated upon capricious disbelief of competent and credible evidence.

When the trial court has come to a conclusion through the exercise of its discretion, the party complaining on appeal has a heavy burden. *Paden v. Baker Concrete Construction, Inc.*, 540 Pa. 409, 412, 658 A.2d 341, 343 (1995). “It is not sufficient to persuade the appellate court that it might have reached a different conclusion if, in the first place, charged with the duty imposed on the court below; it is necessary to go further and show an abuse of the discretionary power.” *Id.* “An abuse of discretion is not merely an error of judgment, but if

in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will, as shown by the evidence [of] record, discretion is abused.” *Id.* A conclusion or judgment constitutes an abuse of discretion if it is so lacking in support as to be clearly erroneous. *Id.*

[...]

We will reverse any decree based on “palpably wrong or clearly inapplicable” rules of law. *Horner by Peoples National Bank of Central Pennsylvania v. Horner*, 719 A.2d 1101, 1103 (Pa.Super.1998). Moreover, we are not bound by the chancellor's findings of fact if there has been an abuse of discretion, a capricious disregard of evidence, or a lack of evidentiary support on the record. *Id.* If the lack of evidentiary support is apparent, “reviewing tribunals have the power to draw their own inferences and make their own deductions from facts and conclusions of law.” *Id.* (quoting *Union Trust Company of New Castle v. Cwynar*, 388 Pa. 644, 649, 131 A.2d 133, 135 (1957)). Nevertheless, we will not lightly find reversible error and will reverse an orphans' court decree only if the orphans' court applied an incorrect rule of law or reached its decision on the basis of factual conclusions unsupported by the record. *Estate of Harrison*, 745 A.2d at 681.

In re Paxson Trust I, 893 A.2d 99, 112-113 (Pa.Super. 2006).

Alleged Error #1

Mrs. Wojcik alleges that this Court erred and abused its discretion by not allowing her to take out an additional \$17,015.00 lien against the remaining \$79,594.00 worth of ownership interest that the Incapacitated Person owns in his home for what Mrs. Wojcik considers

reasonable and necessary fees for the Guardian services she provided between January, 2011, and June, 2013.

The reasonableness of guardianship fees has not yet been explicitly addressed by our courts.³ Our Supreme Court has, however, provided guidance on the reasonableness of attorney fees charged against an estate. *In re LaRocca's Trust Estate*, 246 A.2d 337, 339 (Pa. 1968). The issues and circumstances surrounding attorney fees and guardian fees charged to an estate are often so similar and entwined, that the elements for determining the reasonableness of attorney fees are instructive when attempting to determine the reasonableness of guardian fees.

The Pennsylvania Supreme Court has plainly stated that:

By now it is hornbook law that the reasonableness of the fee is a matter for the sound discretion of the lower court and will be changed by an appellate Court only when there is a clear abuse of discretion.

Id. at 547.

Certain factors should be used to determine the reasonableness of a fee charged against an estate including the amount and type of work performed, the difficulty of the problems involved, the amount of money or property involved, the results obtained and, most importantly, the ability of the estate to pay a reasonable fee for the services rendered.⁴ *Id.* at 546.

It must be stated at the outset of any discussion regarding the reasonableness of her fees, that Mrs. Wojcik is to be lauded for her services to the Incapacitated Person and that any decision this Court made was, in no way, an indictment of the wonderful work she has done for

³ Although, a 1940 Pennsylvania Supreme Court case involving a guardian *ad litem* fee generally did hold that “it was important that fees of such guardians shall not be unduly large.” *In re Hallstead's Estate*, 12 A.2d 912 (Pa. 1940).

⁴ The non-applicable attorney-specific elements were not included in this list.

the Incapacitated Person. This Court, however, must have as its paramount concern the best interests of the Incapacitated Person.

With that view in mind, this Court must reconcile Mrs. Wojcik's request for payment in the amount of \$17,015.00 with the following facts: the Incapacitated Person is an 80 year-old paranoid schizophrenic with no diagnosed life-threatening illnesses (he has asthma and glaucoma) who could easily live for another 5-10 years; the Incapacitated Person's 84% ownership interest in his home was already reduced by more than 50% to pay Mrs. Wojcik in 2011; if the Petition for Allowance was granted, the Incapacitated Person would only be left with a \$62,579.00 (37.6%) ownership interest in his home; and Mrs. Wojcik testified that she would have done the work for free if the Incapacitated Person didn't have any assets.

There exist an infinite number of possible scenarios where the Incapacitated Person may need to access the remaining value that he owns in his home and, given that he may live for several more years, this Court felt it was not in his best interests to further reduce that value.

If the Incapacitated Person's situation changes or if he needs to be placed in a nursing home, then this issue may be revisited. As it stands currently, this Court believes it was in the best interests of the Incapacitated Person to deny the Petition for Allowance and, therefore, did not err or abuse its discretion when it did so.

Mrs. Wojcik also claims that this Court erred and abused its discretion when it denied the Petition for Allowance because a similar request was previously granted and because the request was for a lien against property and not cash. Simply stated, just because a payment previously qualified as being in the best interests of the Incapacitated Person in the past, it does not qualify it as being in the best interests of the Incapacitated Person forever, or even one more time. There are too many variables in life that make this view unworkable. Further, it is of no moment that

the previous payment was in the form of a lien and not cash because the Incapacitated Person has no cash. This is especially so given that Mrs. Wojcik has never asked for cash. She cannot now claim error and abuse of discretion for this Court's failure to grant a request that was never made.

Alleged Error #2

Mrs. Wojcik believes that this court erred and abused its discretion by deciding the instant Petition for Allowance without a hearing and prior to the reply date. As stated above, the Orphans' Court decides Petitions for Allowance "for cause shown and with only such notice as it considers appropriate in the circumstances..." 20 Pa. C.S. §5536(a).

This Court receives several Petitions for Allowance every week and decides them as a matter of routine. Waiting another few days would have done nothing to change the outcome of the decision. Additionally, this Court was very familiar with the circumstances of this particular Incapacitated Person having previously decided another Petition for Allowance in this matter, as well as Exceptions and conducted a full evidentiary hearing.

Therefore, because this Court fully understood the underlying issues involved in the Petition for Allowance and determined that neither a hearing nor any additional time were appropriate, it did not err or abuse its discretion by deciding the Petition for Allowance in the time and manner that it did.

Alleged Error #3

Finally, Mrs. Wojcik alleges this Court erred and abused its discretion in denying the

Petition for Allowance because her ability to obtain compensation against the Incapacitated Person's home may be impaired if the home is eventually subject to a Medicaid lien. This Court is cognizant that Medicaid may attempt to recover certain monies that were expended on behalf of the Incapacitated Person during his lifetime and, since the Incapacitated Person had no assets other than his home, Medicaid may be forced to assert a lien against the property. While remaining cognizant of this fact, the Court is still constrained to place the best interests of the Incapacitated Person over all others.

This Court did not feel it was in the best interests of the Incapacitated Person to further reduce the remaining \$79,594.00 worth of ownership interest he has in his home simply to ensure that Mrs. Wojcik's can get her bills paid before Medicaid does.

Conclusion

Therefore, for all of the above stated reasons, this Court did not err or abuse its discretion when it denied Mrs. Wojcik's August 19, 2013, Petition for Allowance.

Dated: _____

O'KEEFE, ADM. J.

Robert M. Slutsky, Esquire
for Petitioner

Keelin S. Barry, Esquire
for Thomas J. Cunningham, Jr.

Mark J. Newell, Esquire
for Pennsylvania Dept. of Public Welfare