

PHILADELPHIA COURT OF COMMON PLEAS
ORPHANS' COURT DIVISION

Estate of Flora Lee Gregory
An Incapacitated Person
O.C. No. 1265 IC of 2005
Control No. 051035

OPINION

Introduction

The issue raised by the appeal of this court's February 28, 2006 order is whether a retainer agreement for a flat fee of \$11,000 (fees and costs) for an attorney's representation of a 91 year old client in incapacity proceedings is void on the facts and precedent. Based on the record that unfolded in four hearings that contract is void and attorney fees should be calculated instead based on quantum meruit.

In addition to appealing the February 28, 2006 fee order, counsel filed exceptions to a January 23, 2006 order and to the Amended Final Decree of January 27, 2006 adjudicating Flora Gregory an incapacitated person and appointing guardians for her person and estate. Those exceptions in large measure resurrect the issue of lack of jurisdiction which counsel previously raised in a motion to dismiss but then abandoned on the eve of an evidentiary hearing on that motion. Unfortunately, Ms. Gregory died after the exceptions were filed and the issues raised therein are now moot. The appeal of the February 28, 2006 fee order, however, is still pending. This opinion will explain that order's rationale.

Factual Background

On August 9, 2005, the Philadelphia Corporation for Aging ("PCA") filed a petition for the adjudication of incapacity and the appointment of co-guardians for the person and estate for Flora Lee Gregory. The petition stated that PCA had received and

investigated a report that Ms. Gregory was in need of protective services.¹ It stated that Ms. Gregory, who was 91 years old, resided at 2521 North 18th Street in Philadelphia and was “unable to meet essential requirements for her physical health and safety and the management of her finances” because she was suffering from dementia.² PCA proposed naming two nieces and an attorney as Ms. Gregory’s guardians. In response, by order dated August 22, 2005 a citation was awarded directed to Flora Lee Gregory and scheduling a hearing for September 20, 2005.

On September 12, 2005, Ms. Gregory, by her counsel Darlene Snowden, filed an answer in which she admitted that she resided in Philadelphia.³ The answer denied that Ms. Gregory was unable to meet “essential requirements for her physical, health and safety and management of her affairs” or that she suffered from dementia.⁴ The wherefore clause of the Answer also requested a jury trial. An amended answer was subsequently filed September 20, 2005, once again admitting that Ms. Gregory resided at 2521 North 18th Street in Philadelphia.⁵ The amended answer asserted that a healthcare power of attorney had been executed by the “AIP” that nominated as her guardian Basheer Abdul Malik, who resided with Ms. Gregory at 2521 North 18th Street.⁶

Ms. Gregory, and her counsel, subsequently attended a hearing on September 20, 2005⁷ without raising any objection to this court’s jurisdiction. Basheer Abdul Malik a/k/a Jerry Atkinson (hereinafter “Malik”) was not present and did not testify although he

¹ 8/9/2005 Petition, ¶ 5.

² 8/9/2005 Petition, ¶ 2-4.

³ 9/12/2005 Answer, ¶2.

⁴ 9/12/2005 Answer, ¶¶ 3-4.

⁵ 9/20/2005 Amended Answer ¶ 2.

⁶ 9/20/2005 Amended Answer, ¶ 10.

⁷ 9/20/2005 N.T. at 25-26.

had been subpoenaed by PCA.⁸ Counsel for Ms. Gregory raised several preliminary issues, including a request for a jury trial. This request was denied pursuant to the requirements of 20 Pa.C.S. §777.⁹

To establish the necessity of a guardian for Ms. Gregory, PCA presented an expert witness, Dr. Kathryn Woods, Ph.D., to testify at the September hearing on the issue of Ms. Gregory's mental capacity. Although Ms. Snowden initially refused to stipulate to Dr. Woods's expertise in psychology, including geriatric psychology,¹⁰ after Dr. Woods was questioned as to her professional background,¹¹ Ms. Snowden raised no questions or objections to her acceptance as an expert in geriatric psychology.¹²

Dr. Woods testified at length about her clinical interview of Ms. Gregory. Although she usually conducts such interviews at the home of an alleged incapacitated person, this time Dr. Woods conducted her interview in the offices of Ms. Snowden at her insistence and in her presence.¹³ In the course of her clinical interview, Ms. Gregory was given a mini-mental state exam on which she scored a 15 out of a possible 30.¹⁴

⁸ See 9/20/2005 N.T. at 11. Counsel for PCA inquired at the beginning of the hearing whether Mr. Malik was present. When the court inquired of those assembled, there was no response. Ms. Snowden, counsel for the AIP, stated that she had not seen him. *Id.* at 12.

⁹ 9/20/2006 N.T. at 13-14. Ms. Snowden also maintained that some of Ms. Gregory's relatives had not received notice of the hearing. Counsel for PCA responded that when they had previously asked Ms. Snowden to help identify those relatives, she had been uncooperative although she eventually told them about a brother named "Orr" who was in the Albert Einstein nursing facility. 9/20/2005 N.T. at 5-10. In any event, the September 2005 hearing was preliminary in nature and concluded with the plan that the hearing would reconvene in several weeks. At the subsequent October 25, 2005 hearing, Ms. Snowden raised no objection concerning notice to Ms. Gregory's intestate heirs. In fact, two out of state relatives (Gwendolyn Jefferson and Jerome Orr) were called to testify in an effort to determine the most appropriate guardian for Ms. Gregory. See 10/25/2005 N.T. at 76-98.

¹⁰ 9/20/2006 N.T. at 14.

¹¹ Dr. Woods stated that she had a Master's Degree in Social Psychology from Bryn Mawr College, and a Ph.D. in clinical psychology from Ohio University. 9/20/2005 N.T. at 15. She has been licensed as a psychologist in Pennsylvania since 1979, which would include the clinical psychology. Approximately sixty per cent of her evaluations focused on individuals over the age of 60, and she has testified frequently before the Philadelphia Orphans' Court as to the capacity of an alleged incapacitated person. *Id.* at 16.

¹² 9/20/2005 N.T. at 17.

¹³ 9/20/2005 N.T. at 18.

¹⁴ 9/20/2005 N.T. at 19.

Based on this interview, Dr. Woods reached a diagnosis of dementia, probably of the Alzheimer's type.¹⁵ In terms of Ms. Gregory's ability to make decisions regarding living arrangements and medical care, Dr. Woods concluded that Ms. Gregory "would have to rely on others to do that for her."¹⁶ When asked about Ms. Gregory's ability to make decisions concerning her finances, Dr. Woods concluded that her impairment would be total: "She didn't have information about her finances, specifically how much she receives or what bills she has to pay."¹⁷ Dr. Woods also testified as to Ms. Gregory's awareness of her day-to-day routines:

When she was asked, for example, if anybody took care of her, she said nobody regularly stayed with her. At another point, when asked—I believe Ms. Snowden asked the question "Don't you have a girl who stays with you?" and then her memory would be triggered, and she would say, "Oh yes," but she didn't recall the girl's name."¹⁸

Dr. Woods was also asked about the role Malik played in Ms. Gregory's day-to-day life. Although Ms. Gregory's amended answer stated that Malik resided with her at 2521 North 18th Street,¹⁹ Dr. Woods testified that Ms. Gregory did not believe that Malik lived with her although "she knew who he was. When asked specifically about that, she said that nobody lived with her regularly."²⁰ Similarly, Ms. Gregory was not always clear about her relationship with her attorney. When asked whether Ms. Gregory knew who Ms. Snowden was, Dr. Woods stated:

She was not consistent with that. She said—she described her as "That woman that I met," but she wasn't consistent about what her relationship was with Ms. Snowden.

Q: Did know her name?

¹⁵ 9/20/2005 N.T. at 24.

¹⁶ 9/20/2005 N.T. at 24.

¹⁷ 9/20/2005 N.T. at 24.

¹⁸ 9/20/2005 N.T. at 20.

¹⁹ 9/20/2006 Amended Answer at ¶10.

²⁰ 9/20/2005 N.T. at 20-21.

A: No, she didn't know her name.

Q: Did she know she was an attorney?

A: When she was reminded that she was an attorney, she seemed to say, "Oh, yes."

Q: Who did the reminding?

A: Ms. Snowden.²¹

Another issue focused on Ms. Gregory's mental capacity to execute a durable medical power of attorney in April 18, 2005. Dr. Woods offered the opinion that Ms. Gregory would have lacked such capacity "since that was two months before I evaluated her, and that was shortly after the PCA investigation occurred, my opinion would be that she would not be able to do that in a fully informed way."²²

Counsel for Ms. Gregory raised no objections to the substance of Dr. Woods's testimony, nor did she present any expert testimony on this key issue of Ms. Gregory's mental incapacity at the September or any subsequent hearing.²³ She also did not request an independent examination at any of the hearings,²⁴ she did not propose a less restrictive alternative to a guardianship,²⁵ nor did she ever request a continuance to do so.

At the conclusion of Dr. Woods's testimony at the September 2005 hearing, an informal conference with counsel was held to discuss concerns about potential

²¹ 9/20/2005 N.T. at 21.

²² 9/20/2005 N.T. at 23.

²³ At the beginning of the September 20th hearing, Ms. Snowden noted that she had subpoenaed a physician to testify but she did not appear at the hearing. Although counsel had paid a physician to examine Ms. Gregory, she later testified that Dr. Bunya did not respond to a subpoena to appear at the September hearing, because, Ms. Snowden surmised, the doctor "did not want to be called in." 2/6/2006 N.T. at 7. Significantly, **at no time during the September or October 2005 hearings did Ms. Snowden request a continuance so that she could submit expert testimony on the issue of her client's mental capacity.** A written report by Dr. Bunya that was attached to the 9/20/2005 amended answer rendered as a diagnosis for Ms. Gregory of "senility." While the report also stated that "[h]er mental status is fair for her age," it characterized her prognosis as "guarded" and indicated that Ms. Gregory required the support of care givers and a home health agency. The report, therefore, suggests the need for protective services and raises more questions than it answers about Ms. Gregory's mental status. Live testimony on these issues by Dr. Bunya was essential but lacking.

²⁴ 20 Pa.C.S. § 5511(d). Although the wherefore clause of the Answers requested an independent evaluation, counsel did not raise this issue at the hearing.

²⁵ 20 Pa.C.S. § 5512.1 (a)(3).

mismanagement of Ms. Gregory's assets after which this court decided that the best method for determining Ms. Gregory's need for protective services to safeguard her financial well being was to appoint a guardian ad litem, Anne Maxwell, Esquire, to conduct a full investigation of Ms. Gregory's assets. It was further decided that parties would reconvene on October 25, 2005 to focus on the results of Ms. Maxwell's investigations.²⁶ By order dated September 22, 2005, Anne Maxwell, who had not been present at the hearing, was ordered and directed to conduct a complete investigation into the income and assets of Flora Lee Gregory and to report her findings within two weeks to the court, the petitioner and counsel for Ms. Gregory. All accounts and property of Flora Lee Gregory were frozen.

After the September hearing, Flora Gregory was removed "on or about October 3, 2005" from Pennsylvania and taken to South Carolina by Malik, ostensibly to attend a family funeral.²⁷ By order dated October 7, 2005 Ms. Maxwell, as guardian ad litem, was given authority to secure the safe-keeping of the person and estate of Flora Lee Gregory in light of information she had received from Ms. Gregory's sister-in-law that that Ms. Gregory had been removed to South Carolina.²⁸

On October 25, 2005, counsel for all parties reconvened for a hearing. Prior to this October hearing, Ms. Snowden filed a motion to dismiss the PCA petition to appoint a guardian based on lack of jurisdiction after Ms. Gregory "left the Commonwealth of Pennsylvania" to attend the funeral of her brother in South Carolina.²⁹ Because this

²⁶ 9/20/2005 N.T. at 26-27.

²⁷ See generally 10/20/2005 Motion to Dismiss, ¶ 5; 2/27/2006 Memorandum in Support of Exceptions, ¶ 8.

²⁸ Ms. Maxwell explained at the subsequent October 25 hearing that after she learned Ms. Gregory had been removed from Philadelphia, she requested authority to secure the house. 10/25/2005 N.T. at 10-11.

²⁹ 10/20/2005 Motion to Dismiss, ¶ 5.

motion raised issues of law and fact, opposing counsel was given an opportunity to file a written response and an evidentiary hearing was scheduled for November 1, 2005 to give Ms. Snowden an opportunity to present facts in support of her motion. That motion contained conflicting factual explanations as to Ms. Gregory's intentions in leaving Pennsylvania.³⁰ For instance, Paragraphs 4 and 5 of the Motion to Dismiss stated that Ms. Gregory left Philadelphia because of a "personal family matter" to attend her brother's funeral in South Carolina, while Paragraph 6 averred that she had no intention of returning.³¹ The November evidentiary hearing never took place, however, because Ms. Snowden by letter dated November 1, 2005³² stated her intent to withdraw her motion to dismiss. In response, the following order dated November 7, 2005 was issued, to which no response was filed by Ms. Snowden:

And Now, this 7th day of November, 2005, upon consideration of the motion to dismiss and the petitioner's request to withdraw the motion, it is hereby ORDERED and DECREED that the motion to dismiss is DISMISSED as moot.

During the October 25 hearing, however, testimony on the issue of Ms. Gregory's intent to change her domicile from Pennsylvania was presented. Dr. Woods, for instance, was asked to give an opinion within a reasonable degree of certainty as to whether Flora Gregory could have formed the intention to change her domicile to South Carolina. Dr. Woods stated: "It's my opinion that she would not be able to form that kind of—make that kind of informed decision to move to South Carolina or anyplace else or to change her domicile."³³ Moreover, Jerome Orr, Ms. Gregory's nephew from South Carolina, was questioned about Flora Gregory's habitation with his family in South

³⁰ 10/25/2005 N.T. at 46-47, 54 & 58.

³¹ See 10/20/2005 Motion to Dismiss.

³² This letter is attached as an addendum to the opinion.

³³ 10/25/2006 N.T. at 67.

Carolina. Mr. Orr testified as follows when asked by Ms. Snowden whether Ms. Gregory intended to stay down in South Carolina:

Like I said, in her condition, she doesn't know exactly where she intends to remain, so I'm saying we're trying to provide her someplace to be at, you know, cause, like I said, she hasn't mentioned, you know, and that's a process.³⁴

When asked to elaborate, Mr. Orr stated that his Aunt thought she could live in her home in Philadelphia, and that "[s]he thought she was down on a trip."³⁵ To clarify this issue, the following colloquy took place:

THE COURT: Now, in conversation with your aunt, she's indicated that she thinks of coming back to Philadelphia; is that correct?

THE WITNESS (Jerome Orr): Right.³⁶

The issue of any potential mishandling of Ms. Gregory's finances was also addressed at the October 25, 2005 hearing through the report of the guardian ad litem, Anne Maxwell.³⁷ Due to the personal nature of the assets at issue, Ms. Maxwell's report for the period 2004-2005³⁸ was given to the court and counsel for both parties in camera but transcribed for the record. At no point did Ms. Snowden object to the substance or propriety of giving this report. Ms. Maxwell emphasized that her findings were preliminary due to the need for additional documentation and research but she suggested that there appeared to be \$50,000 missing from Ms. Gregory's accounts.³⁹ She was also

³⁴ 10/25/2005 N.T. at 91.

³⁵ 10/25/2006 N.T. at 90.

³⁶ 10/25/2005 N.T. at 93.

³⁷ As a general matter, Ms. Maxwell expressed reluctance to "drag" Flora Gregory back to Pennsylvania to testify for the November hearing on the motion to dismiss since her views could be learned by deposition in South Carolina. 10/25/2005 N.T. at 59. In contrast, Ms. Snowden, in her memorandum in support of the exceptions, makes the unsupported claim that an effort was made to initiate extradition proceedings to force Ms. Gregory back to Philadelphia. No such efforts were initiated with this court, nor does Ms. Snowden present any record to support her assertion. 2/27/2006 Exceptant's Memorandum of Law, ¶ 10.

³⁸ 10/25/2005 N.T. at 33.

³⁹ 10/25/2005 N.T. at 21-23.

concerned about discrepancies in the signatures on various checks.⁴⁰ A check for \$11,000 had been made out to Ms. Snowden⁴¹ as well as several checks to Mr. Malik for tuition and insurance. In addition, there had been cash withdrawals of \$900 and \$4,000.⁴²

Following this in camera financial report, two of Ms. Gregory's relatives testified as to their willingness to serve as guardians of her person: Gwendolyn Jefferson, a grand niece from Maryland, and Jerome Orr, her nephew from South Carolina. Although both relatives were willing to care for their Aunt, Jerome Orr seemed the better choice as guardian of Ms. Gregory's person since he lived close to where she was residing in South Carolina, even though, as Mr. Orr observed, "it's undecided, you know, where she should really live, but I think she deserves the proper care."⁴³ At that point, Ms. Gregory was residing with Mr. Orr's parents but, as previously noted, Mr. Orr testified that she thought she was coming back to Philadelphia.⁴⁴

Based on this record, the court by interim decree dated October 25, 2005 concluded that there was no question that Ms. Gregory was totally incapacitated due to dementia and an inability to make decisions regarding her finances or health. Anne Maxwell was appointed guardian of the estate on a temporary basis so that she could continue the financial investigations regarding property and accounts located within Pennsylvania; Jerome Orr was appointed guardian of her person, also on a temporary basis.⁴⁵

⁴⁰ 10/25/2005 N.T. at 23-24.

⁴¹ 10/25/2005 N.T. at 25.

⁴² 10/25/2005 N.T. at 24 & 27.

⁴³ 10/25/2005 N.T. at 88.

⁴⁴ 10/25/2005 N.T. at 93.

⁴⁵ 10/25/2005 N.T. at 105. See 10/25/2005 Interim Decree.

At the January 23, 2006 hearing, Counsel for PCA reported that Ms. Gregory was still residing in South Carolina with her family and PCA investigators had concluded that she was receiving necessary services.⁴⁶ Ms. Maxwell gave her financial report. Most significantly, she had solved the mystery of the \$50,000 missing from Flora Gregory's accounts. An annuity had been purchased in the amount of \$50,000 naming Malik and his wife as beneficiaries. Instead of "having it undone," Ms. Maxwell changed the name of the beneficiary to the Estate of Flora Lee Gregory because she did not want to incur a redemption penalty.⁴⁷ She also wrote to Darlene Snowden, requesting an accounting of the \$11,000 flat fee she was paid for representing Flora Gregory. Although Ms. Maxwell had attempted to contact Malik to initiate legal proceedings against him, he could not be located. Finally, Ms. Maxwell had filed an inventory for the Estate of Flora Lee Gregory.⁴⁸

Ms. Snowden was given an opportunity to testify. She noted that she had drafted a will for Ms. Gregory, which named Malik as beneficiary. Although Malik had brought Ms. Gregory to Ms. Snowden's office to have the will executed, he was not present during the actual execution. Ms. Snowden, however, did not retain a copy of the original will nor had she been in recent contact with Malik.⁴⁹

Ms. Snowden also presented time sheets in support of her fee. In so doing, she conceded that she had not kept contemporaneous time records.⁵⁰ Instead, in explaining how the time sheet had been prepared, she stated: "What I did was I reviewed my file and basically from the letters that I have in the file did a backwards chronology of the

⁴⁶ 1/23/2006 N.T. at 3.

⁴⁷ 1/23/2006 N.T. at 5.

⁴⁸ 1/23/2005 N.T. at 6-7.

⁴⁹ 1/23/2006 N.T. at 11-13.

⁵⁰ 1/23/2006 N.T. at 26.

work that I had done in the case.”⁵¹ Moreover, she claimed from the vantage point of January 23, 2006 to have an independent recollection of the work she performed on such discrete and distant dates as April 7, 2005.⁵² When asked whether the record of three hours for the hearings in October and September was accurate, she conceded that she lacked an independent recollection and at least some of the time claimed may have been overestimated.⁵³ She did not add up the time claimed on her time sheets to present a total fee figure, but Ms. Snowden nonetheless asserted that it would have exceeded her claimed flat fee of \$10,000 and \$1,000 advance for expenses.⁵⁴ Because of this inconclusive record, another hearing was scheduled to focus on the fee issue.⁵⁵

The January 2006 hearing did not close, however, until testimony from Ms. Gregory’s guardian of the person, Jerome Orr, was presented. He affirmed that he was willing to continue serving as Ms. Gregory’s guardian and that she was comfortable at home with his parents in South Carolina. He stated that he was aware that Ms. Maxwell had filed a petition to sell Ms. Gregory’s Philadelphia residence and had no objections to that sale.⁵⁶

Following this hearing, by order dated January 23, 2006, a hearing was scheduled for February 6, 2006 to consider the attorney fee issue and the motion to rescind the April 28, 2005 retainer agreement. By order dated January 27, 2006, Jerome Orr was appointed plenary guardian of the person of Flora Lee Gregory while Anne Maxwell was appointed plenary guardian of her estate. After the February 6, 2006 hearing on the

⁵¹ 1/23/2006 N.T. at 25.

⁵² 1/23/2006 N.T. at 26-27.

⁵³ 1/23/2006 N.T. at 29.

⁵⁴ 1/23/2006 N.T. at 36.

⁵⁵ 1/23/2006 N.T. at 38.

⁵⁶ 1/23/2006 N.T. at 41-42.

retainer agreement and attorney fees, the petition to void the retainer agreement was granted and Ms. Snowden was awarded fees on a quantum meruit basis in the amount of \$3,018.75 by order dated February 28, 2006. She was also ordered to refund to the Estate of Flora Gregory all sums in excess of \$3,018.75 plus \$515.00 in advanced expenses. She subsequently filed the instant appeal of that order.

Legal Analysis

The April 28, 2005 Retainer Agreement Between Ms. Snowden and Ms Gregory Was Void due to Ms. Gregory's Incapacity So That Counsel Fees Were Properly Awarded on a Quantum Meruit Basis by the Order of February 28, 2006

Since its inception, the “dangers of the incompetency statute” have been recognized by Pennsylvania courts because it bestows on a court the great “power to place total control of a person’s affairs in the hands of another.” In Re Rosengarten, 871 A.2d 1249, 1255 (Pa. Super. 2005) (citations omitted). Accord Myers Estate, 395 Pa. 459, 462, 150 A.2d 525, 526 (1959). For this reason, an attorney representing an allegedly incapacitated person is charged with a great responsibility. In fact, courts have considered the representation of such persons by attorneys as a “necessary” legal service, compensable on a quantum meruit basis according to the relevant facts.⁵⁷

In the instant case, the attorney-client relationship between Flora Lee Gregory and her counsel, Darlene Snowden, was formalized by a written retainer agreement dated

⁵⁷ See, e.g. Weightman's Estate, 126 Pa. Super. 221, 227-28, 190 A. 552, 555 (1937)(where attorney represented a mental patient in a habeus corpus action as to his detention in a mental hospital, “services of the kind here involved , rendered from a proper motive and under circumstances indicative of good faith, may, in the exercise of a sound discretion by an auditing judge, be considered necessities properly chargeable in a reasonable amount to the estate of the mental patient”); Carver Estate, 5 Pa. D. & C. 3d 743 (Adams Cty. O.C. 1977)(legal services rendered prior to an adjudication of incapacity were properly awarded on a quantum meruit basis where contract for legal services was unenforceable due to incapacity).

April 28, 2005. By its terms, the retainer agreement was for representation in a litigation involving “competency:”

RETAINER AGREEMENT

I, Darlene Snowden, Esquire, agree to represent Mrs. Flora Lee Gregory with regard to PCA and any resulting litigation involving competency. I agree to a flat rate retainer in the amount of (\$10,000) ten thousand dollars with an additional \$1,000.00 advance for fees and costs for services such as mental exams by physicians, etc.

This retainer does not include any appeals or other litigation.

Date: 4/28/2005

Ex. R-2

Upon learning that Ms. Gregory had paid her attorney a flat fee of \$11,000, her guardian questioned the propriety of this arrangement for good reason. Not only did she seek an accounting for the services rendered,⁵⁸ but she joined with PCA in a motion to set aside the fee agreement due to Ms. Gregory’s incapacity and to award attorney fees instead on a quantum meruit basis.⁵⁹ Testimony regarding the counsel fees claimed was presented at the January 23, 2006 hearing as well as at a February 6, 2006 hearing specifically convened to consider counsel fees. On review of the record as a whole, a threshold issue is whether the April 28, 2005 retainer agreement is enforceable in light of the October 25, 2005 interim decree adjudging Flora Lee Gregory a totally incapacitated person due to dementia.

Section 5524 specifically addresses the “Effect of determination of incapacity” and provides:

A partially incapacitated person shall be incapable of making any contract or gift or any instrument in writing in those specific areas in which the person has been

⁵⁸ 1/23/2006 N.T. at 5-7, 9, 13-14; 2/6/2006 N.T. at 48.

⁵⁹ 1/23/2006 N.T. at 45-46.

found to be incapacitated. A totally incapacitated person shall be incapable of making any contract or gift or any instrument in writing. . . .
20 Pa.C.S. § 5524

Generally, an adjudication of incapacity has prospective effect only “to protect a person... ‘weak-minded, against his own improvidence thereafter.’” Myers Estate, 395 Pa. at 469, 150 A.2d at 529-30(citations omitted). Courts interpreting the implications of section 5524 conclude that it creates a presumption that the incapacitated person is incapable of entering into an enforceable contract, which may be rebutted by proponents of a writing if they can show that the maker in fact had capacity at the time of its execution. Fulkroad v. Ofak, 317 Pa. Super. 200, 203, 463 A.2d 1155, 1156 (1983). In the instant case, based on testimony at the October 2005 hearing, Flora Lee Gregory was adjudged a totally incapacitated person by order dated October 25, 2005. This October order was denominated an interim order, however, because the guardians of the estate and person were appointed “until further order of this court.” The final decree appointing permanent guardians based on Flora Gregory previously determined total incapacity was dated January 27, 2006.

An overriding consideration in the adjudication of incapacity is “to protect and conserve the incompetent’s property,” and this “overriding consideration may in the rare case give an adjudication of incompetency a retrospective effect.” In re Gaydos, 13 Pa. D & C. 3d 560, 569-70 (Cambria Cty. O.C. 1980)(invalidating a deed of transfer by a person subsequently adjudicated incapacitated). There are several reported cases in which contracts or gifts entered into prior to an adjudication of incapacity were voided on the grounds of incapacity. In Walker, an Incapacitated Person, 23 Fid. Rep. 2d 98 (Mont. Cty. O.C. 2003), for instance, Judge Stanley Ott voided an agreement for sale for

property that an incapacitated person entered into prior to his adjudication of incapacity where the record showed that he lacked the capacity to enter into that agreement.

Similarly, in The First National Bank of Honey Brook v. Bingaman, 30 Chester Cty. Rep. 371 (Chester. Cty. O.C. 1982), a conveyance of property and bank accounts to a daughter by a mother subsequently adjudged incapacitated was set aside where the court concluded that the mother lacked the mental capacity to make such transfers

Legal fees for services rendered to a mentally incapacitated person raise special concerns that have been specifically addressed by several cases. A key case dealing with legal fees for the representation of incapacitated persons is Weightman's Estate, 126 Pa. Super. 221, 190 A. 552 (1937). In Weightman's Estate, the Pennsylvania Superior Court chastised a lower court for its peremptory refusal to recognize a claim for legal fees incurred by a mental patient who sought to bring a habeus corpus action as to the propriety of his detention in a mental institution. The legal fees sought, the court emphasized, were not premised on a contract but on quantum meruit. As such, evidence should have been heard as to the validity of the claims and “[w]hether they should or should not be paid out of this incompetent’s estate cannot be judicially determined until all the circumstances under which the services were rendered have been established in due course of law.” Id., 126 Pa. Super. at 226, 190 A. at 554-55.

Cases in which there is a contract for legal fees raise a different issue: whether the contract is enforceable. In Feely Estate, 173 Pa. Super. 441, 449, 98 A.2d 738, 741 (Pa. Super. 1953), the Superior Court concluded that contracts for the provision of legal services by an “incompetent prior to the adjudication of incompetency are voidable upon a proper showing that the party was in fact incompetent at the time of the contract.”

While legal fees would then be determined on a factual quantum meruit basis, the Feely court emphasized that it is “essential to show that the legal services rendered were reasonably necessary for the welfare of the incompetent before a recovery therefore on the theory that they are necessities will be allowed.” Id., 173 Pa. Super. at 450, 98 A.2d at 742 (precluding payment on a contractual basis but allowing a quantum meruit calculation).

The methodology suggested by Weightman’s Estate and Feely Estate was carefully applied in Carver Estate, 5 Pa. D. & C. 3d 743 (Adams Cty. O.C. 1977). The Carver court was asked by the guardian of an adjudicated incapacitated person to invalidate claims for legal fees premised on a contract entered into prior to the adjudication of incapacity. First, the court addressed the issue of the contract’s enforceability. It concluded that the legal contract, entered into one month prior to the adjudication of incapacity, was unenforceable where testimony had been presented that the client lacked the capacity to enter into such a contract. The next inquiry was whether the services rendered by the attorney were “necessary” as defined by relevant precedent. The Carver court concluded that legal services rendered during the incompetency hearing were “necessary” and-- upon analysis of the facts—compensable on a quantum meruit basis. This careful approach was necessary, the court cautioned, “to protect the ward’s estate from depletion, notwithstanding counsel’s good faith.” Id. at 749.

In the present case, evidence was proffered at the October 25, 2005 hearing as to the mental capacity of Flora Lee Gregory to enter into a contract in late April 2005. Dr. Woods was asked to give an opinion based on a reasonable degree of certainty whether Flora Lee Gregory could have had the capacity to execute a power of attorney for

healthcare on April 18, 2005. In unrebutted testimony, she replied that “[i]t would be my opinion that she would have great difficulty executing any such document. She would not, because of her memory loss and her impaired judgment, she would not be able to fully understand what that meant in my opinion.”⁶⁰ Since the retainer agreement was dated April 28, 2005, this court concludes that agreement was unenforceable due to Ms. Gregory’s lack of mental capacity.

It is therefore necessary to analyze the facts of record to determine the appropriateness of the legal fees claimed by Ms. Snowden on a quantum meruit basis. It is a “fundamental” principle that “an attorney seeking compensation from an estate has the burden of establishing facts which show that he or she is entitled to such compensation.” Estate of Sonovick, 373 Pa. Super. 396, 400, 541 A.2d 374, 376 (1998). Guidelines for making a determination of appropriate attorney fees in the absence of a contract have been set forth by the Pennsylvania Supreme Court in LaRocca Estate, 431 Pa. 542, 246 A.2d 337 (1968),⁶¹ which emphasized that the appropriateness of attorney fees is “one peculiarly within the discretion of the court of first instance” due to its unique opportunity for judging “the exact amount of labor, skill and responsibility involved.” Id., 431 Pa. 548, 246 A.2d at 340. As the LaRocca court suggested, a detailed explanation for the determination of attorney fees in this case will be given based on the record.

⁶⁰ 10/25/2005 N.T. at 68-69.

⁶¹ More specifically, the LaRocca court suggested that the following be considered when determining a fair and reasonable attorney fee: “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.” Id., 431 Pa. at 546, 246 A.2d at 339 (citations omitted).

Since the legal services provided to Flora Gregory were rendered in the context of an incapacity hearing they would fall within the general category of a necessary service. Nonetheless, in the interest of protecting the incapacitated person's estate from depletion, a careful analysis of factual basis for the hours claimed was necessary in the context of an evidentiary hearing that was scheduled for February 6, 2006 after unsettling testimony on this issue during the January 23, 2006 hearing.

When counsel was asked to explain her fees at the January 2006 hearing, she presented time sheets consisting of three pages for a period spanning April 5, 2005 through November 1, 2005. She admitted that these time sheets were not contemporaneous with services performed but “[w]hat I did was I reviewed my file and basically from the letters that I have in the file did a backwards chronology of the work that I had done on the case.”⁶² Upon questioning, counsel asserted that she had an independent recollection of services performed on specific dates as remote as April 5, 2005 or April 30, 2005, and could remember whether it was two and a half versus two hours.⁶³ This claim of recollection strains credulity—especially when she was confronted with the anomaly that while the retainer agreement was dated April 28, 2005 the time sheets contained entries beginning April 5, 2005⁶⁴ but PCA did not begin its investigations until April 15, 2005.⁶⁵ Equally disturbing was counsel's failure to add up the hours on her time sheet to give a total at her billable rate of \$250.⁶⁶ At one point, in

⁶² 1/23/2006 N.T. at 25-26.

⁶³ 1/23/2005 N.T. at 26-27.

⁶⁴ 1/23/2006 N.T. at 32 & 26.

⁶⁵ 2/6/2006 N.T. at 36-37. Ms. Snowden explained the discrepancies as “typos,” which nonetheless does not instill great confidence as to the accuracy of the proffered time sheets. Moreover, entries for April 7, counsel observed, should have been for April 17. *Id.* at 37.

⁶⁶ 1/23/2006 N.T. at 30.

fact, counsel admitted that she may have overestimated the time charged for the hearing on September 20, 2005 by 1.5 hours.⁶⁷

During the February 6, 2006 hearing, counsel was given an opportunity to testify at length about the hours charged to Ms. Gregory and the legal services rendered to her. Prior to this testimony, the guardian of the estate computed the adjusted time set forth on the time sheet (i.e. 29.75 hours) multiplied by an hourly rate of \$250 to come up with a total fee based on hours of \$7,437.50.⁶⁸ In the course of her testimony, counsel indicated costs of \$200 for the examination by Dr. Bunya, \$150 in filing fees, \$75 for incidental fees for a total of \$425.⁶⁹ When pressed as to what she believed the quantum meruit value of her services would be, counsel initially insisted \$10,000,⁷⁰ but then conceded, “Okay, let me just say \$8,000 is a more reasonable amount. Plus expenses and the excessive expenses.”⁷¹

The amount of time spent on representing Ms. Gregory was not the only issue. In addition, the quality of that time and whether it was “necessary” to assure the client’s welfare must be analyzed. An analysis of the record as a whole suggests many of these efforts were of no benefit to Ms. Gregory and, more significantly, there was no general strategy to assure that the client’s best interests would be served.

The Statute for the Adjudication of Incapacity and Appointment of a Guardian, 20 Pa.C.S. § 5511 et seq. imposes a substantial burden on a petitioner seeking a determination of incapacity. Section 5518, for instance, requires proof not only of “the nature and extent of the alleged incapacities” but also evidence “as to why no restrictive

⁶⁷ 1/23/2006 N.T. at 29.

⁶⁸ 2/6/2006 N.T. at 4.

⁶⁹ 2/6/2006 N.T. at 5-6.

⁷⁰ 2/6/2006 N.T. at 43.

⁷¹ 2/6/2006 N.T. at 46.

alternatives would be appropriate.” There was therefore considerable leeway for an effective attorney to offer the court alternatives to the appointment of a guardian. Counsel for Flora Gregory unfortunately did not seize the opportunity to provide realistic or adequate alternatives. In the amended answer, for instance, there was an assertion that there was a person--Basheer Abdul Malik-- who was living with the alleged incapacitated person. The amended answer further asserted that Malik assisted Ms. Gregory in her daily affairs and had been granted a healthcare power of attorney that nominated him as her guardian.⁷² Despite this assertion, counsel never called Malik to testify as to his intent and qualifications to serve as Ms. Gregory’s guardian. In fact, when asked to testify as to whether Malik had been or might serve as a caretaker of Ms. Gregory, counsel responded:

On the one hand I got information that he lived there, on the other hand there was information that he didn’t live there. So I had no idea as to whether or not he lived there or he didn’t live there. It just seemed as though there was a presence there and he was someone that she had trusted and he had made arrangements for her.

It was my impression that if she didn’t have someone to assist her, since she was in her nineties, that she would not have been able to stay at home on her own.⁷³

Counsel thus made two striking admissions: (1) her client needed assistance without which she was not able to live at home on her own, and (2) she, as counsel, had no information as to the reliability or availability of Malik as a potential caretaker. Nonetheless, in both the amended answer that she filed to PCA’s petition and the voluminous exceptions to the January 27, 2006 decree adjudicating Ms. Gregory an incapacitated person and appointing two guardians, counsel persists in insinuating that

⁷² 9/20/2006 Amended Answer, ¶¶ 4, 10.

⁷³ 2/26/2006 N.T. at 17 (emphasis added).

Malik was the proper caretaker for her client.⁷⁴ This cavalier attitude is compounded by the failure of Malik to appear before the court if he was, in fact, agreeable to serve as a guardian.

Equally perplexing is that in explaining some of the time spent in representing Ms. Gregory, counsel expressed a concern about preventing any potential conflicts between Malik and PCA. For instance, when asked why she felt it necessary to be present for 2.5 hours in April and 3 hours in September 29 during a meeting with PCA representatives at Ms. Gregory's home, counsel responded that "there was a clash with Malik and I wanted to try to facilitate."⁷⁵ Counsel conceded, however, that Ms. Gregory had not asked her to attend these meetings with PCA.⁷⁶ This solicitude towards Malik is very troubling in light of counsel's ostensible acceptance of the report by Ms. Gregory's guardian that \$50,000 had been missing from Ms. Gregory's accounts and that Malik had used that money to purchase an annuity naming himself and his wife as beneficiary.⁷⁷ In light of this record, counsel's persistence as late as February 2006 in suggesting Malik as a guardian for Flora Gregory is inexplicable.⁷⁸

Another serious general concern was counsel's failure to present witnesses as to her client's mental capacity as well as her cavalier attitude in assessing that capacity. Counsel admitted that while she paid for a doctor's examination, she was unable to convince the doctor to testify at the hearing despite a subpoena because "it was my

⁷⁴ See, e.g., 2/27/2006 Memorandum in Support of Exceptions, ¶ 7. Otherwise, counsel conceded that she never presented the court with an alternative to the adjudication of incapacity nor did she present Malik as a witness as to a durable power of attorney of healthcare. 2/6/2006 N.T. at 22-23.

⁷⁵ 2/26/2006 N.T. at 16. See also 2/26/2006 N.T. at 18-20 (re the September 29 meeting).

⁷⁶ 2/26/2006 N.T. at 20.

⁷⁷ 10/25/2005 N.T. at 21-23 (report that \$50,000 appeared to be missing from Ms. Gregory's accounts); 1/23/2006 N.T. at 5 (report that the mystery of the missing \$50,000 was solved; an annuity had been purchased naming Malik and his wife as beneficiaries). Ms. Snowden has raised no objections to this report.

⁷⁸ See 2/27/2006 Memorandum of Law in Support of Exceptions at ¶¶ 7 & 8.

impression she did not want to be a witness. She did not want to be called in.”⁷⁹

Moreover, counsel admitted that she did not consider asking the doctor to fill out the standard form of deposition published by the Orphans’ Court and available on the website.⁸⁰ Although a report prepared by Doctor Banya was attached as an exhibit to the amended answer, no effort was made to introduce it as evidence at the hearing. One possible reason is that, as a practical matter, this report raised serious issues concerning Ms. Gregory’s mental capacity since it renders a diagnosis of “senility.” Moreover, counsel was unable to explain the significance of the doctor’s notation that Ms. Gregory had scored 20 on the mini mental status test. Instead, counsel responded: “I have to be honest, I am not a doctor, and whatever that score means, that’s what it means. But my impression of her mental status was fair.”⁸¹

Finally, counsel’s representation of Ms. Gregory in the incapacity litigation was admittedly inadequate as exemplified in the aborted motion to dismiss that was filed. October 20, 2005, counsel for Ms. Gregory filed a motion to dismiss the PCA petition for lack of jurisdiction after Flora Gregory was taken to South Carolina by Malik and then left with her brother’s family. Counsel conceded that she was not aware whether her client knew about the motion to dismiss.⁸² Counsel’s failure to discuss this motion to dismiss with her client is shocking since the central legal issue raised would be the intent of Flora Gregory to change her domicile from Philadelphia to South Carolina.⁸³ Only

⁷⁹ 2/6/2006 N.T. at 7.

⁸⁰ 2/6/2006 N.T. at 34.

⁸¹ 2/6/2006 N.T. at 9.

⁸² 2/6/2006 N.T. at 20. After Ms. Gregory was removed to South Carolina, Ms. Snowden believed she had spoken with her twice though that was not indicated on her time sheets. 2/6/2005 N.T. at 22.

⁸³ See, e.g., the analysis of the Pennsylvania Supreme Court in Coulter Estate, 406 Pa. 402, 407, 178 A.2d 742, 745 (1965)(citations omitted):

The domicile of a person is the place where he has voluntarily fixed his habitation with a present intention to make it either his permanent home or his home for an indefinite future. To effect a

through careful discussions with her client could counsel have learned the true nature of Ms. Gregory's intent.

Perhaps not surprisingly, counsel by letter dated November 1, 2005 withdrew the motion to dismiss on the eve of an evidentiary hearing scheduled for November 1. Her reason for abandoning the motion, she later explained, was that after the testimony of Ms. Gregory's nephew, Jerome Orr, she had no witnesses so that any effort to support that motion would have been futile.⁸⁴ Despite her admission of an inability to create a factual basis for this motion to dismiss due to lack of jurisdiction, counsel subsequently filed exceptions based on this same grounds of lack of jurisdiction in response to the order dated January 27, 2006 adjudicating Flora Lee Gregory an incapacitated person and appointing guardians of her person and estate. In any event, the 3 hours in fees regarding the motion to dismiss claimed for October 10, 20, 31 and November 1 were properly disallowed.

Finally, the request for a jury trial in the amended answer filed on September 12, 2005 was untimely under 20 Pa.C.S. § 777. Section 777(d) provides that a jury trial is waived unless the request is made in writing "at least ten days prior to the initial hearing." The initial hearing in this case was September 20, 2006 and it had been scheduled by order dated August 22, 2005. Moreover, section 777 provides for a jury

change of domicile, there must be a concurrence of the following factors: (a) physical presence in the place where domicile is said to have been acquired, and (2) an intention to make it his home without any fixed or certain purpose to return to his former place of abode (emphasis added). Moreover, once domicile has been shown to exist, as in the existing case where Ms. Gregory's answers admitted residence in Philadelphia, "it is presumed to continue until another domicile is affirmatively proven." Estate of McKinley, 461 Pa. 731, 733, 337 A.2d 851, 853 (1975). Significantly, "the burden of proving a change in domicile rests upon the party asserting it." In re Coulter, 406 Pa. at 407, 178 A.2d at 745.

⁸⁴ 2/6/2006 N.T. at 31-32 (conceding, "I could have argued the motion but it would have gone nowhere").

trial in Orphans' Court when a determination of incapacity is at issue. In this case, counsel for Ms. Gregory presented no evidence at the hearing on that key issue.

For all of these reasons, by order dated February 28, 2006 the retainer agreement was voided and counsel was awarded fees on a quantum meruit basis in the amount of \$3,018.75. She was also ordered to refund to the estate of Flora Lee Gregory all sums in excess of \$3,018.75 plus \$515.00. The specific basis for the calculations as set forth in the February 28, 2006 Order are incorporated herein as well as this court's judgment that counsel took undue advantage of an elderly and incapacitated person by charging a clearly excessive and unconscionable nonrefundable retainer fee of \$10,000 (plus \$1,000 for expenses) which vastly exceeds the usual and normal fees claimed by experienced practitioners in the representation of incapacitated persons.

BY THE COURT:

John W. Herron, J.

