

PHILADLEPHIA COURT OF COMMON PLEAS
ORPHANS' COURT DIVISION

Antoinette DiStefano, Power of Attorney,
O.C. No. 1356 PR of 2009

Control No. 101004
Control No. 102256

OPINION

Introduction: the April 2010 Fee Petition of Patricia DiStefano

On April 12, 2010, Patricia DiStefano (“Patricia” or “petitioner”) filed a petition seeking reimbursement of the attorney fees and costs she incurred in litigation against her mother, Antoinette or “Lola” DiStefano (hereinafter “Lola”), her siblings and an attorney, Daniel Glennon, over control over her mother’s assets.¹ When this litigation began, Lola was an 89 year old widow who owned 100 % of the Victor Café. She was also the mother of six children including the petitioner. All of Lola’s children had been involved in the operation of the Victor at some point in their lives,² which had been a source of discord within the family. As Patricia stated in her initial petition seeking a declaratory judgment:

Typically, one of Henry’s and Lola’s children would run the restaurant until another child claimed that his or her sibling was acting dishonestly or wastefully or irresponsibly. Then, Lola would remove the purported dishonest child and replace him or her with the child who had brought the alleged dishonesty to her attention. As a result and in succession, The Victor was operated by Gregory DiStefano, Pamela Packard, Claudia Rudner and her husband Jeffrey Rudner, Enrico, and again, Gregory.³

¹ Patricia’s litigation involved both powers of attorney and an irrevocable trust. Those filings appear under two docket headings: O.C. No. 1356 PR of 2009 (power of attorney) and O.C. No. 1450 IV of 2009 (intervivos trust). Because the filings related to Patricia DiStefano’s fee petition under either caption are identical, they will be referred to by indicating the filing’s date and the individual filing party.

² See 11/2/2009 Opinion re Antoinette DiStefano, Intervivos Trust, O.C. No. 1450 IV of 2009 and Antoinette DiStefano, Power of Attorney, O.C. No. 1356 PR of 2009 (hereinafter “11/2/09 opinion”).

³ 9/24/09 Patricia DiStefano Petition for Declaratory Judgment, ¶23.

Patricia filed her fee petition months after hearings were held on her emergency petition to maintain the status quo and after the filing of her petitions for a declaratory judgment to have declared void *ab initio* two powers of attorney, a revocation of her power of attorney and an intervivos trust. In her initial April 12, 2010 fee petition, Patricia sought reimbursement of fees in excess of \$90,000 and costs in the amount of \$2,094.10 from her mother's estate. A few months later, however, she filed a praecipe to increase her request for attorney fees to \$115,786.⁴ The guardian *ad litem* who had been appointed to represent Lola on Patricia's petition filed a motion for summary judgment opposing Patricia's request for reimbursement of fees and costs as a matter of law. Patricia responded, inter alia, by invoking the "undisputed facts," particularly those set forth in this court's November 2, 2009 opinion and order.⁵ The complex facts of the DiStefano litigation are outlined in this previous opinion which, in the interest of judicial economy, is incorporated herein. By Patricia's own admission, moreover, facts relevant to the summary judgment motion filed against her are undisputed.

Background: Patricia's Litigation to Void Two Powers of Attorney and an Irrevocable Trust

Patricia DiStefano had been named as her mother's agent under a Power of Attorney dated February 6, 2007.⁶ On September 10, 2009 the intense litigation began when Patricia's mother, Lola, her five siblings,⁷ and attorney Daniel Glennon, as Agent and Trustee, filed a petition seeking an accounting by Patricia of her actions as her mother's agent. Patricia did not answer this petition seeking an accounting by her. Instead, she filed an emergency petition in which she sought to restrain Daniel Glennon from taking any action based on either a power of attorney dated August 5, 2009 or an irrevocable trust document dated August 18, 2009 that had

⁴ See, e.g., 7/22/10 Patricia DiStefano Praecipe.

⁵ See, e.g. Patricia DiStefano's 9/1/10 Memorandum at 1.

⁶ See 11/2/09 opinion at 1; 9/24/09 Patricia DiStefano Declaratory Judgment Petitions, ¶ 10.

⁷ See 9/10/09 Antoinette DiStefanoPetition (O.C. No. 1356 PR of 2009). The siblings who joined in this petition included Pamela DiStefano Packard; Claudia Di Stefano Rudner; Alfred DiStefano; Enrico DiStefano; and Gregory DiStefano.

been executed by Lola. In addition, she filed two declaratory judgment actions to have these documents declared void *ab initio* as well as a July 17, 2009 revocation of Patricia's February 5, 2007 power of attorney. In these petitions, and subsequent amendments, Patricia asserted that these documents should be deemed void because of Lola's lack of capacity and undue influence.⁸ In filing these petitions, Patricia acknowledged her intent to restore her control over her mother's assets: "[a]though Lola's mental impairment may yet require a legal guardianship, a declaration that the July 17, 2009 Revocation and August 5, 2009 Power of Attorney are void *ab initio* would resuscitate a February 6, 2007 Power of Attorney which names Your Petitioner (i.e. Patricia) as Lola's agent."⁹

As this court emphasized in its November 2, 2009 opinion, three days of hearings were held that focused "narrowly on the issues raised by the emergency petition."¹⁰ The emergency petition was granted and to preserve the status quo, Daniel Glennon, as trustee and agent, was restrained from taking any further action under the August 18, 2009 Irrevocable Trust Agreement, the August 5, 2009 Power of Attorney and a September 15, 2009 Power of Attorney.¹¹

After obtaining this emergency relief, Patricia filed a petition on January 6, 2010 to disqualify the law firm Cozen O'Conner and to appoint a guardian *ad litem*. By decree dated February 17, 2010, this court granted the petition and appointed Paul Heinz, Esquire, as guardian *ad litem* for Lola. Subsequently, the guardian *ad litem* and Patricia's counsel agreed to the entry of declaratory judgment that the Revocation of the 2007 Power of Attorney, the various powers of attorney signed by Lola in August/September 2009 and the August 18, 2009 irrevocable trust

⁸ See, e.g., Patricia DiStefano 9/24/09 Declaratory Judgment Petitions ¶3.

⁹ 9/24/09 Patricia DiStefano Declaratory Judgment Petition, O.C. No. 1356 PR of 2009 at ¶ 5 (emphasis added).

¹⁰ 11/2/09 Opinion at 2.

¹¹ 11/2/09 Opinion at 25.

are void *ab initio*.¹² Patricia thereafter filed her fee petition, and its amendment, seeking reimbursement of \$115,786 in fees and \$2,094.10 in costs from Lola's estate. The guardian *ad litem* vigorously opposed this petition, and filed a motion for summary judgment pursuant to Pa.R.C. P. 1035.2. In that motion, the guardian *ad litem* argues that under the Estate of Tose, 482 Pa. 212, 393 A.2d 629 (1978) there is no legal basis for reimbursing Patricia's attorney fees because she did not create a fund benefiting her mother, and she incurred the attorney fees essentially to preserve her own interests."¹³ Finally, the guardian *ad litem* argues that no attorney fees should be reimbursed to Patricia because to do so would encourage further litigation among the various members of the DiStefano family since "[a]ll five of Petitioner's siblings have questioned what the Petitioner has done with Lola's assets and the income of the Café as agent pursuant to the 2007 Power of Attorney and how the net earnings have been used to benefit Lola."¹⁴

Patricia responds that her attorney fees and costs should be reimbursed under Estate of Tose based on her preservation of a fund for the benefit of Lola. She suggests, for instance, that she had succeeded in establishing at a final hearing that Lola had signed the documents at issue under the undue influence of her daughter, Pamela, and that Lola had not understood key elements of the documents she signed. Moreover, Patricia asserts that she prevented the sale of the The Victor upon terms that would have grossly rewarded the agent, Dan Glennon. She highlighted the substantial financial benefits Glennon would have enjoyed under the documents: an annual fee based on the original market value of principal at the rate of 1.5% of the first million and 1% of the balance of the trust; compensation at an hourly rate of \$325 with a

¹² 4/13/10 Patricia DiStefano Fee Petition, ¶11; 8/12/10 Guardian *ad litem* Summary Judgment Motion, ¶9.

¹³ 8/12/10 Guardian *ad litem* Memorandum at 15-16.

¹⁴ 8/12/10 Guardian *ad litem* Memorandum at 17.

minimum annual fee of \$20,000; an additional 2% of the gross sales price for the sale of the Victor Café.”¹⁵

Finally, Patricia argues that the guardian’s suggestion that she is acting to protect her own self-interest to preserve her inheritance is speculation that cannot provide a basis for summary judgment. She suggests, for instance, that “had Patricia’s sole motive been the preservation of an inheritance, she would have sought to have Lola declared incapacitated, as opposed to the more nuanced approach of challenging Lola’s capacity to execute the specific documents at issue.”¹⁶

Legal Analysis

The standard for a summary judgment motion is set forth in Pennsylvania Rule of Procedure 1035.2 which provides:

After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law

(1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or

(2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Pa.R.C.P. 1035.2

Under this rule, therefore, summary judgment is properly “supported by a record that (1) shows the material facts are undisputed or (2) contains insufficient evidence of facts to make out a *prima facie* cause of action or defense. Rohrer v. Pope, 2007 Pa. Super. 43, 918 A.2d 122, 127 (2007). The purpose of the summary judgment procedure “is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for a trial.” Ertel v. The Patriot News Co., 544 Pa. 93, 100, 674 A.2d 1038, 1042 (1996).

¹⁵ 9/1/10 Patricia DiStefano Memorandum at 10-12 & 6.

¹⁶ 9/1/10 Patricia DiStefano Memorandum at 14.

In disputes involving attorney fees, it is well established that an attorney seeking payment of his fees from an estate has the burden of establishing facts that the fees claimed are reasonable based on the record. Conti Estate, 8 Fid. Rep. 2d 272, 273-74 (Phila. O.C. 1988). Typically, this raises a fact issue that necessitates a hearing. See, e.g., LaRocca Estate, 431 Pa. 542, 246 A.2d 337 (1968). In the instant case, however, the guardian *ad litem*'s motion for summary judgment raises as an issue of law whether Patricia DiStefano may recover from her mother the attorney fees Patricia incurred in the litigation over the petitions she filed against her mother, her siblings, and attorney Daniel Glennon as trustee and agent. This litigation involved, inter alia, several days of hearings that resulted in a November 2, 2009 opinion that Patricia maintains sets forth "the undisputed facts."¹⁷ The guardian *ad litem* nonetheless bears the initial burden of establishing that Patricia has no legal basis for her claim for reimbursement of her attorney fees and costs from the estate of her mother, Antoinette DiStefano.

The legal principles concerning the payment of attorney fees and costs from an estate or adverse party have been invoked by both parties. As a general rule, "each party to adversary litigation is required to pay his or her own counsel fees." Estate of Wanamaker, 314 Pa. Super. 177, 179, 460 A.2d 824, 825 (1983). Unless there is a statutory basis for the award of attorney fees in a particular lawsuit, attorney fees are recoverable only in exceptional cases. One well recognized exception is where an attorney through his efforts creates a fund for the benefit of others. Id., 314 Pa. Super. 179, 460 A.2d at 825. As the Pennsylvania Supreme Court cautioned in denying attorney fees in the Estate of Tose, 482 Pa. 212, 223, 392 A.2d 629, 634 (1978), "[t]hose few cases which have allowed counsel fees under this theory involve situations where

¹⁷ 9/1/10 Patricia DiStefano Memorandum at 2.

due to one litigant's efforts a fund was brought before the court or a fund already before the court was augmented by new assets.”

Petitioner does not contend that her efforts created or augmented a fund for the benefit of many. Instead, she asserts that her efforts preserved a fund and prevented the sale of the Victor on terms that would have grossly rewarded the agent.¹⁸ The petitioner is correct that in Tose the Pennsylvania Supreme Court recognized the general principle that “where the fund before the court is ‘in jeopardy’ and an interested party’s litigation protects the fund from this jeopardy, counsel fees may be allowed to the litigant out of the fund.” Estate of Tose, 482 Pa. at 222, 393 at 634. The exact parameters of what constitutes “jeopardy” to a fund, however, were not defined in light of the record analyzed by the court. In Tose, for instance, the Pennsylvania Supreme Court concluded that the “preservation of fund” exception did not apply to the facts before it where a pecuniary legatee challenged a tax assessment resulting in an increased distribution for the pecuniary legatees generally. A fund would be “in jeopardy,” the Tose court suggested, when threatened by fraud or illegal claims. Id., 482 Pa. at 221-22, 393 A.2d at 633-34.

In fact, courts have emphasized that attorney fees are awarded for preserving a fund “only in those cases involving *exceptional circumstance*; otherwise the litigant is responsible for the fees of counsel employed.” Ogden Estate, 69 Pa. D & C 2d 627, 630 (Del. O.C. 1974)(denying attorney fee for services that benefited the client rather than the estate). In fact, many of the cases invoked by petitioner either are factually distinguishable¹⁹ or did not, in fact,

¹⁸ 9/1/10 Patricia DiStefano Memorandum at 11.

¹⁹ See generally 9/1/10 Patricia DiStefano Memorandum at 10-11. Bennett Estate, 366 Pa. 232, 77 A.2d 69 (1951), for instance, focused on whether executors who defended a will in a will contest could charge their fees to the estate and concluded that although generally an executor could not charge an estate for defending a will, those attorney fees were recoverable where the sole beneficiary acquiesced to the executors’ efforts. In contrast to petitioner, the

allow attorney fees based on a “preservation of fund” theory. In Hammer v. Crain Bros., 10 Pa. D & C 3d 197 (Allegheny CP 1979), for instance, the court concluded that an attorney was not entitled to recover the fees he sought from an adverse party. Moreover, the language petitioner quotes from Hammer does not support her general position since that court stated that counsel fees may be recoverable where the attorney’s services result in the preservation of a fund for the benefit not just for his client but for others as well:

It is well settled in Pennsylvania law that where the services of an attorney are instrumental in the creation or preservation of a fund which inures to the benefit not only of his client but others, he may be allowed counsel fees from the fund so created.²⁰

In the instant case, the guardian persuasively demonstrates that Patricia’s litigation was directed, inter alia, against all of her five siblings and mother to preserve her own control over her mother’s assets; it did not preserve a fund from jeopardy.

I. The Ultimate Goal of Patricia’s Litigation Was to Maintain Her Control Over Her Mother’s Assets and Not to Protect a Fund from Jeopardy

In Patricia’s initial petition for a declaratory judgment, she clearly expressed her ultimate goal in seeking citations against her mother, her siblings and attorney Glennon. As she stated:

Your Petitioner files this Petition under the Declaratory Judgment Act, 42 Pa. C.S.A. §7531 *et seq.* and as a “less restrictive” alternative to guardianship. Although Lola’s mental impairment may yet require a legal guardianship, a declaration that the July 17,

executors had no interest or stake in the outcome of the litigation. Miller v. Myers, 300 Pa. 192, 150 A. 588 (1930) is factually distinguishable since it deals with claims of a creditor under the Bulk Sales Act; moreover, the award of attorney fees is premised both on the producing of a fund and its protection. Finally, petitioner cites two cases dealing with fees recovered in cases where a guardian is appointed for an incapacitated person, which are clearly recoverable and distinct from the issues raised in the adversarial litigation initiated by Patricia. See e.g., McCracken’s Case, 45 Pa. Super 229, 1911 Pa. Super. LEXIS 28 (1911) (attorney fees recoverable against a decedent’s estate for “lunacy” proceeding initiated during his lifetime); Vassaluzzo Estate, 22 Fid. Rep. 47 (Phila. O.C. 1971) (attorney awarded reduced fee for services in having Ms. Vassaluzzo adjudicated “incompetent” and a guardian appointed). As petitioner notes, she did not bring such an action on behalf of her mother. 9/1/10 Patricia DiStefano Memorandum at 14 (“As a final note, had Patricia’s sole motive been the preservation of an inheritance, she would have sought to have Lola declared incapacitated, as opposed to the more nuanced approach of challenging Lola’s capacity to execute the specific documents at issue”).

²⁰ Hammer v. Crain Bros., Inc., 10 Pa. D & C 3d 197 (Alleg. Ct. Com. Pleas 1979), as quoted by Patricia DiStefano, 9/1/10 Memorandum at 10.

2009 Revocation and August 5, 2009 Power of Attorney are void *ab initio* would resuscitate a February 6, 2007 Power of Attorney which names Your Petitioner as Lola's agent.²¹

After several hearings on her emergency petition, this court in its November 2, 2010 opinion did not reach a final determination as to whether the powers of attorney or irrevocable trust document were void *ab initio*, but instead, to maintain the status quo it restrained any action pursuant to those documents. This conclusion was based on the preliminary record presented at the hearings. As the guardian *ad litem* properly notes, the court did not conclude that a "fund" was in jeopardy. The documents at issue would have transferred control of Lola's assets to Daniel Glennon as a fiduciary and not in his individual capacity. As such, he would have been bound by all the attendant fiduciary duties and subject to a surcharge if he deviated from the proper standard of care. Even if Glennon had negotiated a sale of the Victor Café, as a fiduciary he would have been obligated to maintain any funds obtained in a sale for Lola's benefit. In fact, at the hearing, Lola expressed conflicting views as to whether the Victor should be sold.²² Significantly, in her fee petition Patricia makes no allegation that Daniel Glennon in any manner mishandled the assets at issue, engaged in fraud or illegal claims²³ which courts suggest might serve as a basis for a claim of protecting a fund from jeopardy. See, e.g., Estate of Tose, 482 Pa. at 221, 393 A.2d at 633 ("jeopardy" to a fund typically consists of fraud or illegal claims); Smaltz' Trust Estate, 142 Pa. Super. 463, 17 A.2d 455 (1940)(an action brought against a fiduciary for neglect or misconduct "is what is normally meant by 'preserving a fund' as the phrase is used in the cases").

Patricia's litigation must also be seen in the context of the entire record of family discord as set forth in the pleadings. This litigation began when Lola, joined by all five of Patricia's

²¹ 9/24/09 Petition for Declaratory Judgment, O.C. No. 1356 PR of 2009 ¶5.

²² 8/12/10 Guardian Ad Litem Memorandum at 14.

²³ See, e.g., 4/13/10 Patricia DiStefano Fee Petition, ¶¶1-16.

siblings filed a petition seeking an accounting of Patricia's actions pursuant to the February 6, 2007 power of attorney. Patricia has yet to answer that petition. While Patricia is correct that the guardian's suggestion that her actions were motivated to "preserve her right to inherit the Café upon her mother's death" is speculation,²⁴ Patricia's own pleadings underscore her intent to maintain control over her mother's assets. See generally, Harrison's Estate, 221 Pa. 508, 510, 70 A. 827, 828 (1908)(where objectant did not increase fund but merely protected her own interests she cannot recover attorney fees from the fund even if others benefited); Conti Estate, 8 Fid. Rep. 2d at 275 (where the contest is who shall be personal representative of the estate, there was no benefit to the estate and it should not bear the legal costs of the contest); Ogden Estate, 69 Pa. D & C 2d 627 (Delaware Cty. Common Pleas 1974)(attorney fees could not be charged to an estate where his services primarily benefited his client rather than the estate). Such actions do not entitle Patricia to reimbursement for the fees she incurred in this adversarial litigation.

Conclusion

For all of these reasons, the Guardian *ad litem*'s motion for summary judgment is granted and Patricia DiStefano's fee petition is denied. This opinion in no manner reflects on the reasonableness of the total charges claimed by Patricia's counsel. It merely concludes that the fees may not be charged to Lola, or her estate and the general rule applies that "a litigant is responsible for the fees of counsel employed by him." Ogden Estate, 69 Pa. D. & C.2d at 630.

Date: _____

BY THE COURT:

John W. Herron, J.

²⁴ 8/12/10 Guardian *ad litem* Memorandum at 16; 9/1/01 Patricia DiStefano Memorandum at 13.

