COURT OF COMMON PLEAS OF PHILADELPHIA
ORPHANS' COURT DIVISION

Estate of Estelle Segal
An Incapacitated Person
O.C. No. 658 IC of 2016
Control No. 181837

OPINION

James M. Tyler, Esquire ("Objector"), administrator of the estate of Estelle Segal, objects to the first and final account of Gloria Byars ("Accountant"), former guardian of the person and estate of Estelle Segal. Objector alleges Accountant failed to properly account for both assets received and expended, made improper expenditures, and engaged in self-dealing. For reasons stated below, the Court sustains the objections.

I. Background

The Philadelphia Corporation for Aging ("PCA") filed a Petition seeking an adjudication of incapacity and appointment of a plenary guardian of the person and estate of Estelle Segal on May 31, 2016, after a report alleging Ms. Segal needed protective services. PCA subsequently nominated Accountant to serve as Ms. Segal's guardian. On August 23, 2016, following a hearing, this Court found Ms. Segal totally incapacitated. Accordingly, the Court appointed Accountant as the plenary guardian of Ms. Segal's person and estate.

In her initial guardian inventory filed on November 15, 2016, Accountant stated Ms. Segal owned two properties in Philadelphia: (1) 7561 Battersby Street ("Battersby Property"), and (2) 9926 Halderman Avenue ("Halderman Property") (collectively, "Philadelphia Properties"). Ms. Segal also owned two properties in New Jersey as well as assets in bank and investment accounts worth a total of (according to the guardian inventory) $236,585.70. On January 20, 2017, Accountant filed a petition seeking leave to sell the Battersby Property for

$158,000.00 and authorization to expend estate principal totaling $53,648.06, including an $8,400.00 to DEPCO, LLC. The Court granted this petition on February 15, 2017. On March 13, 2017, Accountant filed another petition seeking leave to sell the Haldeman Property for $168,000.00 and authorization to expend estate principal totaling $24,502.01. The Court granted this petition on April 7, 2017.

Accountant's tenure as guardian of the person and estate of Ms. Segal ended on August 10, 2017. On that date, this Court, in an unrelated matter, learned of Accountant's undisclosed record of criminal financial misconduct in the Commonwealth of Virginia as well as Accountant's self-dealing by hiring her husband's company, DEPCO, LLC, to clean out wards' homes she sold. Accountant failed to disclose this conflict of interest to the Court. The Court promptly issued a Decree ordering Accountant to file an account of her actions as Ms. Segal's guardian within thirty (30) days of her removal.

On January 30, 2018, Accountant filed an annual guardian report. Not only was the report four months late, it failed to conform to the requirements as outlined in both the Pennsylvania Orphans' Court Rules and the Philadelphia Orphans' Court Rules governing the form and content of such reports. *See* Pa. O.C. Rule 2.1, 2.5; Phila. O.C. Rule 2.4B(6). During her review of the report, Etrusia Gibbs, as guardian investigator for the Court, noticed some troubling discrepancies. Accountant reported the total proceeds from the sale of Ms. Segal's Philadelphia Properties to be $151,000.00. The sales prices less expenditures authorized by the petitions for leave to sell the properties should have totaled $248,349.93. Ms. Gibbs alerted the Court to the potential for misappropriation of estate assets. Following a thorough review of the report and the Decrees approving the sale of the Philadelphia Properties, Ms. Gibbs and other

Court staff determined $104,975.94 remained unaccounted for due to underreported proceeds and unauthorized principal expenditures.

The Court issued a Rule on February 14, 2018, ordering Accountant to show cause why she should not be held in contempt, surcharged, or otherwise sanctioned for the missing estate funds as well as her failure to fully comply with the August 10 Decree. The Rule further directed Accountant to file an answer within twenty (20) days as all factual averments in the Rule would be deemed admitted if she failed to do so. Accountant did not file an answer.

A hearing on the Rule was held April 2, 2018. Accountant was represented by counsel, Sharon Alexander, Esq., but Accountant failed to appear personally.[1] Ms. Alexander stated Accountant's absence was the result of illness but offered no medical documentation to corroborate this claim. Ms. Alexander further stated the underreporting of funds received from the sales of the Philadelphia Properties was a clerical error. Ms. Alexander also disclosed several unauthorized principal expenditures from the estate. Department of Housing and Urban Development settlement documents presented at the hearing showed the Estate received, after closing costs, $144,737.93 from the sale of the Haldeman Property and $116,817.44 for the Battersby Property, a total of $261,555.37 for both properties. Ms. Alexander also presented checks showing Accountant expended $90,784.00 from estate principal on nursing home costs and $7,500.00 more than had been previously authorized for legal fees. Ms. Alexander provided cashier's checks indicating $194,099.96 had been forwarded to Ms. Segal's successor guardian.

On April 4, 2018, the Court issued a Decree holding Accountant in contempt for the following reasons: failure to appear at the April 2 hearing; failure to file an answer to the Rule

[1] MK Feeney, Esq., had been appointed by the Court to represent Ms. Segal because the Court believed she was still alive. At the April 2 hearing, Accountant's attorney informed the Court Ms. Segal died roughly two weeks earlier. Ms. Segal's successor guardian, Steven McCloskey, had failed to properly inform the Court of Ms. Segal's death.

issued on February 14, 2018; and failure to file a first and final account of her actions as guardian of the estate of Estelle Segal as ordered by the Court by Decree dated August 10, 2017. Accountant was sentenced to five months in prison to be stayed pending the outcome of subsequent hearings, and surcharged $127,607.04.[2]

Following a second hearing on May 14, 2018, Accountant finally submitted her first and final account.[3] The account, however, was flawed. In all, the account listed principal disbursements totaling $197,618.35. The estate's liquid assets following the sale of the Philadelphia Properties should have totaled $498,141.07. After subtracting the principal disbursements listed in the account, those authorized by the Decrees permitting the sales of the Philadelphia Properties, and the amount of principal forwarded to Accountant's successor, Accountant failed to account for $28,272.69 of estate principal.

Furthermore, certain expenditures have come into question in the wake of Accountant's first and final account. Specifically, Accountant reports paying Tri-State Home Repairs a total of $6,106.06 for work done on the Philadelphia Properties on August 4, 2017—months after both properties were sold. Further, Tri-State Home Repairs is not a registered home improvement contractor in the Commonwealth of Pennsylvania.

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[2] Due to Accountant's failure to file an account as directed, the Court calculated the surcharge amount based on Accountant's various filings and Ms. Alexander's representations. In the initial guardian inventory, Accountant stated Ms. Segal had $236,585.70 in liquid assets with several financial institutions as well as properties in New Jersey with an estimated combined value of $60,000.00. At the April 2 hearing, Accountant's attorney represented to the Court that the combined net profit to the Estate from the sales of the Philadelphia Properties was $261,555.37. After the sale of the Philadelphia Properties, the Estate's liquid assets should have totaled $498,141.07. The Court approved total principal expenditures of $78,150.07 in its Decrees authorizing the sales of the Philadelphia Properties. Ms. Alexander, however, provided the Court with checks showing Accountant expended $90,784.00 of Estate principal without prior court approval in order to pay for Ms. Segal's nursing home care. Moreover, Ms. Alexander stated Accountant expended an additional $7,500.00 in legal fees in her attempts to sell the New Jersey properties, also without prior court approval. Thus, Accountant delivered Estate funds totaling $194,099.96 to her successor. Deducting the authorized and unauthorized expenditures of principal—as well as the funds forwarded to Accountant's successor—from the total liquid assets of the Estate following the sale of the Philadelphia Properties, the Court calculated there remained unaccounted for $127,607.04.

[3] Accountant purged herself of civil contempt by appearing before this Court at the May 14 hearing and by filing her long-overdue account. Therefore, the five month prison sentence imposed by the contempt order is hereby vacated.

The Objector filed objections to Accountant's account on June 6, 2018. Accountant filed an answer on June 26, 2018. A hearing was scheduled for August 7, 2018; however, following negotiations between Objector and Ms. Alexander, Objector withdrew seven of thirteen objections in a letter to the Court dated August 3, 2018. In the same letter, Objector requested a continuance of the August 7 hearing. The Court granted the request and continued the hearing to August 28, 2018. Neither Accountant nor Ms. Alexander appeared at the August 28 hearing. Further, Ms. Alexander neither advised the Court of her inability to appear nor requested a continuance. This Court cannot help but conclude both intentionally absented themselves from the hearing which proceeded in their absence.

At the August 28 hearing, Objector amended several of his objections to Accountant's account, noting numerous inaccuracies and the lack of receipts or invoices necessary to verify certain figures. Further, based on a review of the account, its supporting documentation, and the remaining assets Accountant delivered to Ms. Segal's successor guardian, Objector stated there remained $35,405.12 in unaccounted funds.

The Court has carefully considered the record in this matter and the arguments advanced by the parties. This Opinion is the product of those deliberations.

II. Discussion

Pennsylvania's guardianship system strikes a delicate balance. On one hand, the guardianship system aims to empower incapacitated persons to participate to the fullest extent possible in the decisions that affect them without unduly restricting this participation. 20 Pa.C.S. § 5502. On the other hand, the guardianship system recognizes incapacitated persons often require assistance meeting the "essential requirements" related to their health, safety, and finances. *Id.* It is by no means a perfect system. The present case is proof of that.

Guardians of incapacitated persons are fiduciaries vis-à-vis their wards. 20 Pa.C.S. § 102 (defining "guardian" as "a fiduciary who has the care and management of the estate or person of . . . an incapacitated person"). As Justice, then Chief Judge, Benjamin Cardozo noted, fiduciaries are "held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive . . . ." *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928). That punctilio of honor requires all fiduciaries, including guardians, to act in the principal's best interests and manage the principal's estate with the prudence of an ordinary person engaged in the management of their own estate. *See In re Estate of Rosengarten*, 871 A.2d 1249, 1255–56 (Pa. Super. Ct. 2005). Fiduciaries must also abstain from "self-dealing." *In re Noonan's Estate*, 63 A.2d 80, 83 (Pa. 1949). Self-dealing is a type of conflict of interest that occurs where the fiduciary has a personal interest in an estate transaction so substantial it may have materially affected their judgment. *Id.* The prohibition on self-dealing is inflexible and absolute as self-dealing constitutes a gross violation of a fiduciary's most basic duty. *Id.* at 84.

When a fiduciary breaches any of their duties resulting in a loss to the principal's estate, a surcharge is the appropriate remedy. *See In re Estate of Scharlach*, 809 A.2d 376, 384 (Pa. Super Ct. 2002). A surcharge is a penalty for failure to exercise common prudence, skill, and caution in the performance of one's fiduciary duty and compensates the estate for losses due to the fiduciary's lack of due care. *In re Miller's Estate*, 26 A.2d 320, 321 (Pa. 1942). Normally, the proponent of the surcharge bears the initial burden of proof and must show the fiduciary breached their duty to the principal. *See In re Estate of Maurice*, 249 A.2d 334, 336 (Pa. 1969). Accordingly, if no evidence is presented that would support a finding the fiduciary failed to exercise the requisite level of care, there can be no surcharge. *In re Greenwalt's Estate*, 21 A.2d 890, 894 (Pa. 1941). If the proponent of the surcharge does meet their initial burden, then the

burden of proof shifts to the fiduciary who must show they used due care in the performance of their duties. *Greenwalt's Estate*, 21 A.2d at 894. However, the burden will shift to the fiduciary automatically to present exculpatory evidence—and thus avoid the surcharge—where either a "patent error" appears in the account, *In re Estate of Ellis*, 333 A.2d 728, 730 (Pa. 1975), or when a "significant discrepancy appears on the face of the record." *In re Estate of Geniviva*, 675 A.2d 306, 311 (Pa. Super. Ct. 1996). In such circumstances, the fiduciary's errors are so obvious that without more a surcharge would be warranted.

Further, an accountant bears the burden of "vouching" their account. In particular, a fiduciary seeking compensation from an estate has the initial burden of establishing facts which show the reasonableness of their fees. *In re Strickler's Estate*, 47 A.2d 134, 135 (Pa. 1946). "Proper vouchers or equivalents must be produced in support of such credits." *Id.* The reasonableness of a fiduciary's fees "depends on the extent and character of the labor and the responsibility involved." *Id.* These determinations are left to the sound discretion of the presiding Orphans' Court judge. *Id.*

Here, Objector seeks to surcharge Accountant for losses to Ms. Segal's estate due to missing funds totaling $35,405.11. In addition, Objector seeks to surcharge Accountant for the $8,400.00 payment to DEPCO, LLC, the $6,106.06 payment to Tri-State Home Repairs, and $2,250.00 in guardianship fees already collected. This Opinion will deal with each of these surcharges in turn.

A. The Missing $35,405.11

By Objector's calculations, based on Accountant's first and final account and supplementary documentation produced by Objector, $35,405.11 of Ms. Segal's estate remains unaccounted for. This is a significant discrepancy on the face of the record. The fact these funds

are missing at all is inexcusable and evinces an utter failure on Accountant's part to exercise the sort of common prudence one expects from a guardian in the management of their ward's estate.

Viewed in light of Accountant's other shortcomings—the sheer number of errors, inconsistencies, and omissions in Accountant's account as well as Accountant's lack of documentation or plausible explanation for said errors, inconsistencies, and omissions—the missing $35,405.11 is not surprising but no less troubling. Consequently, this discrepancy is so significant as to require a shift in the burden of proof requiring Accountant to offer exculpatory evidence suggesting she exercised the proper level of care expected of a guardian. The Court heard no such evidence since neither Accountant nor her counsel appeared at the August 28 hearing on these objections.

Therefore, Accountant did not meet her burden, and Objector prevails on this objection. As it stands, Accountant's mismanagement of Ms. Segal's estate has caused a loss to the estate of $35,405.11. Surcharging Accountant to recoup this amount is the appropriate remedy.

B. The $8,400.00 Payment to DEPCO, LLC

Accountant's decision to enlist DEPCO, LLC to clear out the Battersby Property is patent self-dealing. DEPCO, LLC is owned and operated by Accountant's husband. Accountant secured the services of DEPCO, LLC with $8,400.00 from her ward's estate. This transaction presents a situation where Accountant's personal interest (by way of her husband) in the outcome of the transaction was so substantial that it may have materially affected her judgment in deciding to procure DEPCO, LLC's services. In fact, it almost certainly did. Moreover, Accountant conveniently elided the fact her husband owned DEPCO, LLC. This non-disclosure connotes deception. The payment to DEPCO, LLC is completely at odds with Accountant's

fiduciary duty as Ms. Segal's guardian. The decision to use DEPCO, LLC was in the best interest of Accountant, not her ward.

Thus, the $8,400.00 payment to DEPCO, LLC constitutes self-dealing. This error is so glaring as to require an immediate shift in the burden of proof to Accountant to offer some semblance of exculpatory evidence. Since neither Accountant nor her counsel attended the August 28 hearing on these objections, Accountant offered no such evidence. Therefore, Objector prevails on this objection. Accountant's self-dealing resulted in a loss of $8,400.00 to Ms. Segal's estate. Surcharging Accountant to recoup this amount is the appropriate remedy.

C. The $6,106.06 Payment to Tri-State Home Repairs

Call it patent error or a significant discrepancy on the face of the record, but the payment to Tri-State Home Repairs is most peculiar. Accountant sold the Battersby Property and Haldeman Property in February and April of 2017, respectively. Nevertheless, Accountant's first and final account reveals the estate paid Tri-State Home Repairs for services performed on both properties totaling $6,106.06 in August 2017—nearly four months after the Haldeman Property sold and six months after the Battersby Property sold. Such a payment is irregular in the extreme. The details of how it came about ought to have been put forth and scrutinized—especially since Tri-State Home Repairs is not a registered home improvement contractor in the Commonwealth of Pennsylvania. The chicanery here is palpable. Under these circumstances, the estate's payment of $6,106.06 to Tri-State Home Repairs is a discrepancy so substantial as to require a shift of the burden of proof to Accountant to show the payment was necessary and proper. Accountant, however, did not appear at the August 28 hearing. As such, the payment could not be vetted to this Court's satisfaction.

Therefore, Accountant did not meet her burden, and Objector prevails on this objection as well. Accountant's inexplicable payment to Tri-State Home Repairs resulted in a loss of $6,106.06 to Ms. Segal's estate. Surcharging Accountant to recoup this amount is the appropriate remedy.

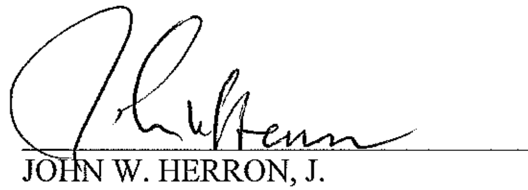
D. Guardianship Fees

Accountant is not entitled to keep the $2,250.00 in fees she collected while the guardian of Ms. Segal's person and estate. In order to retain those fees, Accountant bore the burden of proving they were just and reasonable in light of the services she rendered as guardian. Accountant made no such offering of proof. In fact, given Accountant's sloppy accounting, mismanagement of the estate, and self-dealing, surcharging Accountant $2,250.00 for the fees she collected as Ms. Segal's guardian is more than justified. To allow Accountant to retain such fees would allow Accountant to profit from her misconduct. Thus, the $2,250.00 in fees are unreasonable and if not disgorged would work an injustice against Ms. Segal's estate. Therefore, surcharging Accountant to recoup the guardianship fees is the proper remedy.

III. Conclusion

For the reasons stated above, the objections are SUSTAINED. Accountant is surcharged as follows: $35,405.11 for the unaccounted principal expenditures from Ms. Segal's Estate; $8,400.00 for payments made to DEPCO, LLC; $6,106.06 for payments made to Tri-State Home Repairs; and $2,250.00 for guardianship fees collected while the guardian of Ms. Segal's person and estate. Thus, the total surcharge is $52,161.17 and should be paid to the administrator of Ms. Segal's estate forthwith. Further, it is hereby ORDERED and DECREED that Accountant's first and final account as guardian of Ms. Segal's estate is herewith returned to the Clerk of Orphans' Court UNAUDITED.

BY THE COURT:



JOHN W. HERRON, J.

Dated this 10th day of September, 2018

James M. Taylor, Esquire, Objector
Sharon Alexander, Esquire, counsel for the Accountant