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IN THE MATTER
OF THE ESTATE OF
ALBERT SAUER, Deceased

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
BERGEN COUNTY
DOCKET No. BER-P-088-11
CIVIL ACTION
OPINION

Argued: May 18, 2011
Decided: May 19, 2011

Honorable Peter E. Doyne, A.J.S.C.

Cynthia M. Collins appearing on behalf of the Plaintiff, Maria Dolywa (Law Offices of Cynthia M. Collins, attorneys).

Thomas J. Barrett appearing on behalf of the Defendant, Lynne Walmach (Thomas J. Barrett, attorney).

Introduction

Before the court is an order to show cause and a verified complaint filed on behalf of Maria Dolywa (“Maria” or “plaintiff”), co-executrix of the Estate of Albert Sauer (the “Estate” or “decedent”), seeking to compel Lynne Walmach (“Lynne” or “defendant”), co-executrix of the Estate, to show cause why the relief requested in the verified complaint should not be granted including, but not limited to (1) removal of the defendant as a co-executrix; (2) directing the defendant to provide discovery as to the

condition of the Estate; (3) ordering the defendant to provide documentation and invoices for every expenditure she made from the Estate's assets; (4) permitting the plaintiff to complete administration of the Estate as executrix; (5) holding the plaintiff harmless from any liability to the Estate and its beneficiaries as to any actions conflicting with the defendant's fiduciary duty; (6) ordering the defendant to pay restitution to the Estate for all monies distributed from the Estate without the plaintiff's consent; (7) permitting the plaintiff to issue subpoenas on behalf of the Estate on the decedent's last health care facility for healthcare records; and (8) allowing attorney's fees and costs to the plaintiff.

The order to show cause was opposed. Oral argument was entertained on May 18, 2011.

The plaintiff's application is granted in part and denied in part.

Relevant Statement of Facts and Procedural History

The decedent died on January 10, 2010, survived by his three children; Maria, Lynne and Alan M. Sauer ("Alan"). The decedent's Last Will and Testament ("LWT") was executed on September 6, 2001. The LWT bequeathed his entire estate to the decedent's wife, Muriel J. Sauer ("Muriel"). Muriel died on July 17, 2009.¹ The LWT provided if Muriel should predecease the decedent, then the entire estate would go to the three children in equal shares. By way of Article VI of the LWT, in the event Muriel

¹ Although Muriel's will is not before the court, during oral argument defendant's counsel indicated her will bequeathed her estate to the three children. As the court indicated during oral argument, as Muriel's estate is not before the court any reference to her estate is merely for context and is not taken into consideration for the instant application, with the exception of those monies from her estate which flowed directly into the decedent's Estate. Should a companion case be filed for Muriel's estate, then the court would assume jurisdiction of the same.

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who was named executrix of the Estate died, then the decedent's daughters, Maria and Lynne, would be appointed "Co-Executrices."

Prior to his death, the decedent was the subject of a guardianship proceeding brought by way of a two-count verified complaint initially filed on November 6, 2009 in Sussex County by Maria and Alan, and was opposed by Lynne.² Thereafter, the matter was transferred to Bergen County by order of the Honorable Edward V. Gannon, J.S.C. ("Judge Gannon") on December 21, 2009. Prior to the transfer, Judge Gannon appointed Jeffrey M. Patti, Esq. ("Patti") as counsel for the decedent, the then purported incapacitated individual. The guardianship complaint sought to appoint Maria and Alan as co-guardians of the decedent and to transfer the decedent to a different healthcare facility. At the time the decedent was 71 years old and was in the care of the Van Dyk Healthcare Center ("Van Dyk") in Ridgewood, New Jersey. By way of Patti's report, it appears there was a 2001 durable power of attorney and medical directive prepared by Thomas J. Barrett, Esq. ("Barrett") naming Muriel as the decedent's agent and Lynne as the alternate.³ An informal conference with counsel was held on January 7, 2010 and the decedent passed away three days later.

² The guardianship proceeding is not before the court and is recounted solely for context purposes.

³ It should be noted no document providing a power of attorney to the defendant was submitted with the current application. However, upon review of the file for the earlier guardianship proceeding, on September 6, 2001, the decedent executed a General Durable Power of Attorney and Advanced Medical Directive for Healthcare. The attorney preparing both was Barrett. It appears the power of attorney designated Muriel as the decedent's attorney-in-fact and agent and, interestingly, provided it would remain effective notwithstanding the decedent's incapacity, disability, or death. Finally, the power of attorney provided upon Muriel's death, incapacity or resignation, the defendant would then be the decedent's agent and, the plaintiff would be the alternate.

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Thereafter, following the decedent's death, correspondence was exchanged between plaintiff's counsel, Cynthia M. Collins, Esq. ("Collins") and Barrett concerning administration of the Estate and payment of counsel fees, as set forth herein.

By letter dated January 15, 2010, Barrett, inquired whether Collins would be representing the plaintiff as the "Alternate Co-Executrix" of the Estate. He further noted the defendant would be providing all of the decedent's account information necessary to render an informal accounting of the Estate starting from the time period the defendant began acting as the parents' "attorney-in-fact." Subsequently, by letter dated January 22, 2010, Barrett advised a renunciation could be prepared for the plaintiff if she did not intend to serve as a co-executrix.

By way of an order dated January 28, 2010, the guardianship matter was dismissed as a result of the decedent's death. The order provided the Estate's fiduciaries were to pay Patti \$4,590 as soon as practicable for his services in the guardianship proceeding.

Thereafter, under cover of February 4, 2010, Barrett informed Collins he was compiling the information concerning the Estate's assets and was attaching a letter dated January 29, 2010 from the defendant to Collins apparently written in response to an earlier letter from Collins, which was not provided. In her letter, the defendant insisted there was nothing in the circumstances surrounding the decedent's death to suggest the healthcare facility was negligent and the facility was only obligated to inform the defendant of the decedent's medical treatment as she held his power of attorney. As such, the defendant asserted the plaintiff's allegations of negligence by the healthcare

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facility were baseless. Subsequently, by letter dated February 5, 2010, Barrett provided a copy of the January 28, 2011 order to Collins and Patti and indicated an Estate account would be set up in three to four weeks from which Patti would then be paid.

The LWT was admitted to probate on February 23, 2010 and letters testamentary were issued appointing the plaintiff and the defendant as “co-executrixes” of the LWT. On the same date, Collins authored a letter to Barrett concerning the payment of attorney’s fees to Barrett, Patti, and herself for the guardianship proceeding. Collins noted her fees were approximately \$5,000. She further advised Barrett the Estate checking account should be set up in a bank with a branch in Sussex County and listed the names of several banks. Lastly, Collins requested to be provided with information regarding the parents’ accounts and preliminary and final accountings of Muriel’s estate.

By letter dated March 26, 2010, Patti informed Barrett he had not yet been paid.

Under cover of April 21, 2010, Collins advised Barrett the defendant’s issuance of checks without first providing notice to the plaintiff was contrary to her fiduciary duty. Collins asserted each executrix need only notify the other through her attorney regarding the check amount and the reason for the same to fulfill her fiduciary role. She further provided the plaintiff was still waiting for an accounting of the decedent’s accounts for the month of and the month after his death which should be simple to provide as the only payments which should have been made from the Estate’s monies were for Patti’s services.

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It appears the Estate account was established on June 21, 2010 at Hudson City Savings Bank (“Hudson Bank”) with an initial balance of \$25,000.⁴ By letter dated July 30, 2010, Barrett informed Collins the \$25,000 used to open the Estate account were monies from a joint account established by Muriel prior to her passing for which the defendant was the “trustee” for the decedent and Muriel. Barrett noted the joint account was used to pay the decedent’s expenses and upon his passing, the balance became part of the Estate.

Under cover of September 30 2010, Barrett informed Collins of the Estate’s assets and their value as follows: (1) \$13,053 in a JP Morgan Chase (“Chase”) joint checking account decedent held with his wife, (2) \$31,927 in a Chase traditional IRA account, (3) \$100,189 from the Acacia life insurance policy, (4) \$2,852 from 200 shares of Hudson Bank stock, (5) \$29,173 from an account entitled “Beneficiary of Mrs. Sauer’s JP Morgan Chase IRA,” (6) \$199,490 in a “trust” account at the Hudson Bank, and (7) a 2000 Nissan Maxima with no value indicated. He advised Collins the defendant would be closing the joint account and depositing the proceeds into the Estate account, selling the stock and depositing the proceeds into the Estate account, the “trust” account would remain at Hudson Bank, and, lastly, the defendant wanted to take the automobile as a partial distribution from the decedent’s Estate valued at or about \$5,085. Barrett also indicated the beneficiary IRA account could not be distributed until a tax waiver was received and both the traditional IRA account and the insurance policy proceeds were already paid out to the beneficiaries. Finally, he noted the defendant already began

⁴ Upon review of the defendant’s exhibits containing the informal accountings, it appears the Estate account was established on June 21, 2010 with a beginning balance of \$25,000 which was transferred from the “Lynne Walmach, Trustee for Albert Sauer and Muriel Sauer” account.

preparing an informal accounting starting from the time the defendant was paying her parents' bills.

On November 15, 2010, Barrett authored a letter to Collins providing summaries, which were not submitted to the court, of the various accounts owned by either the decedent or Muriel or both. Barrett noted he was waiting for tax waivers filed on October 5, 2010 for Muriel's estate, which usually required three months to process, and, thereafter, Muriel's IRA proceeds, which named the decedent as the beneficiary, could be transferred to the Estate.

Under cover of December 3, 2010, Barrett informed Collins the plaintiff would be bearing all storage costs for the personal property she wanted starting on December 4, 2010, such costs would be deducted from her share and the amount would be distributed equally between the defendant and Alan.⁵ In response, by letter dated December 6, 2010, Collins requested Barrett to provide the plaintiff with the parents' bank account statements from February 1, 2009, the backs of all checks made out to "cash" and a copy of the lease agreement for the parents' residence. Collins further indicated the personal

⁵ It should be noted several letters were exchanged concerning the sale of the parents' home and the items of personal property from the home. On October 29, 2009, the defendant authored a letter to the plaintiff and Alan indicating she had potential buyers for the parents' home and to advise her within five days if either of them wanted to purchase the home. On November 2, 2009, Barrett authored a letter to Collins advising if Maria or Alan wanted any items from the home, to let the defendant know to either set those aside or to make arrangements with the defendant to visit the home. By letter dated July 14, 2010, Barrett informed Collins and Alan as the defendant decided it would be "in the best interests of the Estate to rent Mrs. Sauer's home . . ." and she would be entering into a two year lease beginning on August 15, 2010, she would need to be advised of any personal property desired by Maria or Alan. [Df.'s Cert., Apr. 5, 2011, Ex. K.] Under cover of July 30, 2010, Collins advised Barrett her clients, who it appears were the plaintiff and Alan, informed her to place the items in storage with the Estate paying the cost until the matter could be resolved. Collins also noted the reimbursement for attorney's fees in the guardianship proceeding should be worked out by consent and if not Collins would file a complaint. On August 11 and August 30, 2010, correspondence was exchanged by counsel concerning the storage of the personal property and delivery of the same to the plaintiff's home. Thereafter, on October 5, 2010, correspondence was again exchanged wherein Barrett indicated the personal property was to be removed from storage and Collins responding the same could be delivered to the plaintiff's home.

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property would stay in storage “for a while” as “given the amount of money which had been spent” the Estate could afford \$100 per month. [Df.’s Cert. Ex. N.] Lastly, Collins noted she would bill for her time expended on the Estate and expected to be paid from the Estate account as Barrett was being paid. Thereafter, by letter dated December 10, 2010, Barrett responded indicating the accounting provided by the defendant was from the issuance of the first check on March 23, 2009 pursuant to the defendant’s power of attorney, however, he would also be obtaining the February 2009 statements from the defendant. He noted a copy of the lease agreement was attached, which was not provided to the court. Barrett reiterated the plaintiff was responsible for the storage costs as, apparently, there was no reason the items could not have been delivered to her earlier.

On January 7, 2011, Barrett authored a letter to Collins enclosing the items previously requested by Collins, including copies of the checks from the Chase accounts.

By letter dated January 26, 2011, Barrett advised Collins a check was enclosed in the amount of \$2,222 notwithstanding Collins’ request to be paid in full for her invoices as a result of the defendant being “not comfortable in doing that.” [Plf.’s Cert., Mar. 2, 2011, Ex. M.] The letter indicated the defendant deducted the services rendered by Collins for the guardianship proceeding and the “Muriel Sauer Estate.”

On March 2, 2011, a verified complaint was filed by Collins on behalf of the plaintiff. By way of the same, the plaintiff essentially alleged the defendant was acting as the sole executrix of the Estate to the exclusion of the defendant, breaching her fiduciary duty to the beneficiaries, dissipating and inappropriately using the Estate’s assets without the plaintiff’s consent and utilizing the Estate’s assets to pay personal expenses without

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the consent or knowledge of the plaintiff. Plaintiff sought full restitution to the Estate by the defendant, to have the defendant removed as a co-executrix, and to name the plaintiff as the sole executrix of the Estate. By way of the same complaint, plaintiff also sought to subpoena all health and medical records from the last two facilities providing care for the decedent prior to his death premised upon the plaintiff's suspicions negligent care was provided by the facilities. Lastly, plaintiff requested payment of counsel fees and costs.

By way of her certification, the plaintiff essentially argued the defendant, as a co-fiduciary, required the consent of the other co-fiduciary prior to taking any actions concerning the Estate and even then only after the letters testamentary were issued and through the Estate account. However, the defendant was purportedly rendering payments prior to the issuance of the letters testamentary and establishment of the Estate account. Specifically, the plaintiff alleged the defendant had maintained a joint account for their parents referenced as a "trust" account, however, as there were no documents appointing her as a trustee and as she only held a power of attorney, the defendant's continued use of the joint account after the decedent's death was improper. The plaintiff urged the defendant's treatment of the account as her "personal slush fund" was detrimental to the Estate and the beneficiaries.

The plaintiff urged the defendant utilized in excess of \$65,000 for personal expenses without the plaintiff's knowledge or consent and prior to the letters testamentary being issued for "her attorney, her son, a car repair service, pharmacy, florists, edible arrangements for hospitals, cash to herself, auto insurance . . . , [and] donations to scholarship funds" [Plf.'s Cert. ¶ 2.] In support of her assertion, the

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plaintiff appended the aforementioned September 30, 2010 letter from Barrett identifying the value of the “trust” account at \$199,490 and a Hudson Bank statement of the account dated September 17, 2010 showing a balance of \$133,875. She also appended a copy of the informal accounting of the “trust” account which apparently indicated payments were rendered as early as July 19, 2009 through September 30, 2010, including funeral expenses, expenses for the decedent’s care while he was alive and payments to Barrett all totaling over \$88,000.

The plaintiff further asserted the defendant had paid Barrett for his services from the “trust” account in excess of \$25,000 for the Estate and the guardianship matters from January 14, 2010 to September 12, 2010 while “objecting” to paying attorney’s fees to plaintiff’s counsel. Specifically, it appears Barrett was paid \$12,659 for his services in the guardianship proceeding on January 14, 2010 and \$4,211 on March 14, 2010. For his services with the Estate, it appears Barrett was paid (i) \$1,497 on March 6, 2010, (ii) \$1,986 on May 4, 2010, (iii) \$2,141 on June 15, 2010, (iv) \$1,626 on July 12, 2010, (v) \$853 on August 11, 2010, and (vi) \$287 on September 12, 2010, or a total of \$8,390. The plaintiff understandably lamented the defendant’s attorney was being paid with Estate monies without her consent as the co-executrix while her own attorney’s fees were rejected by the defendant.

On March 28, 2011, an answer was filed on the defendant’s behalf admitting in part and denying in part the allegations set forth in the complaint.

Opposition to the order to show cause was filed on April 5, 2011 with appended exhibits which clarified certain aspects of the Estate and Muriel’s estate. The exhibits

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included (i) copies of the informal accountings updated through March 15, 2011 for Muriel's accounts, Muriel's estate accounts, the decedent's and his wife's joint accounts, the "trust" account, and the Estate account, (ii) copies of financial statements, checks and checkbook entries to support the informal accounting, and (iii) copies of correspondence between the parties' attorneys. The informal accounting appended to the defendant's certification indicated both parents left substantial estates. It appears, as of March 15, 2011, Muriel's estate checking account had \$262,318, her estate savings account had \$20,213, and the decedent's Estate account had \$68,683. Other assets appear to include the "trust" account held by the defendant as trustee in the amount of \$128,714, the Hudson Bank stock with a value of \$2,852 and the automobile valued at \$5,000.

By way of her certification, the defendant asserted she acted in the interests of the Estate, had not misappropriated any funds and had not used the same for personal purposes. She indicated she had been handling her parents' financial affairs since March 2009 at her mother's request, which included the creation of the "trust" account at Hudson Bank. The defendant asserted she closed the accounts in her mother's name at her mother's request and consolidated the funds into one account in the defendant's name. The purpose was allegedly to provide the defendant with access to the funds for payment of the parents' bills and other expenses, including funds for the decedent's care while his eligibility for Medicaid was pending. As the defendant was apparently "uncomfortable" in opening the account in her name alone, she instead opened it in her

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name as trustee for her parents, which she alleged was commonly referred to as a “Totten trust.”⁶ [Df.’s Cert. ¶¶ 7 & 11.]

The defendant argued once the account was established the monies thereafter expended from the account were for the payment of funeral expenses, final bills for the decedent’s nursing home and medical care, and payments to the defendant’s attorney. The defendant asserted she provided all the financial information concerning both parents’ estates including copies of all the account statements and both sides of checks. Interestingly, the defendant asserted the fees for the decedent’s guardianship proceeding amounted to \$19,879 and the fees paid for the Estate matter were \$10,056, of which \$3,300 was allegedly unnecessarily expended as a result of the plaintiff’s purported “lack of cooperation.” [Df.’s Cert. ¶ 11.]

Furthermore, the defendant asserted her “attorney is the only attorney who has done anything to administer both my father’s estate as well as my mother’s estate

⁶ The defendant’s certification was silent as to the reason the monies held in the “trust” account have remained in the defendant’s name, which apparently would explain the plaintiff’s inability to access information from the bank concerning this account. Furthermore, while the Estate account was set up in June 2010, the defendant persisted in paying the Estate’s expenses from the “trust” account. The defendant referred to the account as a “Totten Trust.” The courts define a “Totten” or “tentative” trust account as:

[A] revocable savings account trust, in which the named beneficiaries possess a mere expectancy in the trust proceeds prior to the death of the depositor. . . . Where the beneficiary survives the depositor, the trust terminates and title to the funds vests in the beneficiary. . . . On the other hand, when the depositor survives the beneficiary, "the trust shall terminate and title to the funds shall continue in the depositor free and clear of the trust."

Chicago Title Ins. Co. v. Ellis, 409 N.J. Super. 444, 458–59 (App. Div. 2009) (citing Geyer v. Kaspar, 672 N.Y.S.2d 428, 429 (N.Y. App. Div. 1998)). It appears from the defendant’s certification, the account established by the defendant at the direction of her mother was not a “Totten” trust account, but rather an account the defendant could use pursuant to her power of attorney to pay the parents’ expenses and was not intended to pass solely to the defendant upon the parents’ death, but instead was to become part of the parents’ estates. However, the issue need not be addressed as the defendant did not dispute the “trust” account was part of the Estate and, furthermore, at oral argument Barrett asserted the monies held in the “trust” account have already been transferred to the Estate account.

[h]e deserves to get paid.” [Df.’s Cert. ¶ 17.] On the other hand, the defendant alleged plaintiff’s counsel should not be paid from the Estate’s funds and instead should be paid by the plaintiff personally as the guardianship action was “unnecessary,” the motion for attorney’s fees made by Collins in connection with the guardianship was “improper,”⁷ and as the defendant was the sole executrix of Muriel’s estate, the plaintiff was not entitled to attorney’s fees in connection with the mother’s estate.⁸

In response to the plaintiff’s request to subpoena the decedent’s records, the defendant asserted the plaintiff may subpoena any records or pursue a lawsuit for negligence premised upon her power as a co-executrix of the Estate, however, the defendant would not partake in the plaintiff’s actions.

Finally, the defendant asserted with the exception of selling the Hudson Bank stock and transferring the funds from Muriel’s brokerage account to the decedent’s account, the Estate’s administration was almost finalized. Accordingly, the defendant argued there would not be any administrative matters for the plaintiff to handle.

On April 21, 2011, the plaintiff filed a reply certification essentially reiterating and embellishing her earlier arguments. By way of the same she asserted the defendant had not acknowledged or understood she was in breach of her fiduciary duty as a result of expending funds from the Estate without providing notice to the plaintiff co-executrix. The plaintiff lamented she should have been included in every expenditure decision made

⁷ Specifically, the motion for \$3,063 for attorney’s fees for the guardianship proceeding was allegedly “improper” as it was “dismissed on notice to . . . [her] sister’s attorney, in January 2010, after . . . [her] father’s passing.” According to the defendant, the same was later withdrawn by Collins. [Df.’s Cert. ¶16.]

⁸ Upon review of the appended exhibits, it appears Barrett was paid over \$14,000 for his services from Muriel’s estate’s checking account as of March 15, 2011 in addition to the aforementioned \$25,000 from the “trust” account. By way of the same, Collins was reimbursed once from the Estate checking account in the amount of \$2,222 and Patti was reimbursed \$4,590 from the same account.

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after the decedent's death and no funds should have been expended prior to establishing an Estate account and transferring monies from Muriel's accounts into the Estate account. She urged she had not even received any statements concerning payments to Barrett, whose fees were apparently double the rate plaintiff's counsel charged and who was paid on a regular basis. The plaintiff argued the antagonistic relationship she has with the defendant was the reason two attorneys were necessary and both should have been paid. Lastly, she requested the defendant be directed to reimburse the Estate for any "cash" expenditures or any loss of income or interest the Estate may have had as a result of the defendant's actions.

On the same date of April 21, 2011, Alan, as the "third beneficiary" of the parents' estates, submitted a notarized "certification" or letter in support of the plaintiff's verified complaint and order to show cause.⁹ By way of the same, Alan asserted he was represented by plaintiff's counsel, Collins. He requested removal of the defendant as co-executrix, to have the defendant pay for the attorney's fees, reimburse the Estate for "cash" expenditures and to account for the parents' "missing" personal property, which should either be returned to the marital residence or placed into storage. He asserted the defendant had failed to provide him with financial information regarding both parents' estates, failed to provide an accounting of Muriel's estate, and failed to provide any copies of the rent checks from the tenant residing in the marital home.

The order to show cause was set to return on April 29, 2011. At counsel's request, this matter was adjourned to today's date.

⁹ As will be discussed herein, Alan's submission cannot be properly considered as he is not a party to the action.

Analysis

An executor is required to settle and distribute an estate as expeditiously and efficiently as is consistent with the best interests of the estate. N.J.S.A. 3B:10-23. Executors have the non-delegable duty to collect and preserve the estate assets, to supervise the administration of the estate and to exercise the care that an ordinary, prudent person would employ in like matters of his or her own. See In re Mild's Estate, 25 N.J. 467, 480 (1957); N.J.S.A. 3B:10-26. When and if an executor fails to act in the best interests of the estate, then he or she may be discharged. See N.J.S.A. 3B:14-21.

An executor has a fiduciary duty to act in the best interests of all the beneficiaries under the will. Branch v. White, 99 N.J. Super. 295, 306 (App. Div. 1968). The most fundamental duty owed by an executor to the beneficiaries is the duty of loyalty, see, e.g., Wolosoff v. C.S.I Liquidating Trust, 205 N.J. Super. 349 (App. Div. 1985), and the executor is obligated to deal impartially with all beneficiaries, In re Koretzky's Estate, 8 N.J. 506, 530 (1951). The executor of the estate must, at all times, act with the best interests of the estate in mind, Taylor v. Errion, 137 N.J. Eq. 221 (Ch. Div. 1945), aff'd 140 N.J. Eq. 495 (1947), and must attempt to ensure that the estate is distributed according to the decedent's wishes. In re Duke, 305 N.J. Super. 408, 439 (Ch. Div. 1997). It is beyond peradventure that an executor cannot use his/her position to further his/her own personal interests. Taylor, supra, 137 N.J. Eq. at 225-227.

The removal of an executor is controlled by N.J.S.A. 3B:14-21 which provides the court may remove a fiduciary from office when:

- a. After due notice of an order or judgment of the court so directing, he neglects or refuses, within the time fixed by

the court, to file an inventory, render an account or give security or additional security;

b. After due notice of any other order or judgment of the court made under its proper authority, he neglects or refuses to perform or obey the order or judgment within the time fixed by the court;

c. He has embezzled, wasted or misapplied any part of the estate committed to his custody, or has abused the trust and confidence reposed in him;

d. He has removed from the state or does not reside therein and neglects or refuses to proceed with the administration of the estate and perform the duties and trust devolving upon him;

e. He is of unsound mind or mentally incapacitated for the transaction of business; or

f. One of two or more fiduciaries has neglected or refused to perform his duties or to join with the other fiduciary or fiduciaries in the administration of the estate committed to their care whereby the proper administration and settlement of the estate is or may be hindered or prevented.

The power to remove a fiduciary appointed by a Last Will and Testament is to be exercised sparingly and cautiously. Braman v. East Central Hanover Bank and Trust Co., 138 N.J. Eq. 165, 197 (1946). Executors may be removed in instances of fraud, breach of trust, or for acts which diminish or endanger the trust. Clark v. Judge, 84 N.J. Super. 35, 62 (Ch. Div. 1964), aff'd, 44 N.J. 550 (1965). The court most certainly has the authority to and should remove an executor who engages in self-dealing. See Id.

The executor has certain duties which include, but are not limited to, complying with the orders of the court and preserving the contents of the estate consistent with his/her fiduciary obligation. A party seeking removal of an executor must provide

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evidence of misconduct, or prove the estate or trust is at risk. In re Estate of Hazeltime, 119 N.J. Eq. 308, 316–17 (Prerog. Ct.), aff'd 121 N.J. Eq. 49 (E.&A. 1936).

Removal, while an extraordinary remedy, is one that falls within the court's discretion. N.J.S.A. 3B:14-21. If the executor acts in "good faith with ordinary discretion and within the scope of his powers," his role as executor will ordinarily be preserved by the courts. Connelly v. Weisfeld, 142 N.J. Eq. 406, 411 (E.&A. 1948). In the instant matter, the pivotal issue is not whether the defendant misappropriated funds or utilized the same in a way which was harmful to the Estate. Rather the troubling aspect is the defendant's unbridled belief she could act unilaterally in administering the decedent's Estate without the need for consent from the co-executrix. The defendant's certification was replete with assertions suggesting she knew what was best in administering the Estate. As the court understands it, she urged her involvement with her parents' finances justified her actions in excluding the other co-executrix. Such a position is disconcerting given the law generally requires mutuality of action between the co-fiduciaries. Here, the defendant issued numerous checks for various Estate expenses and no consent was sought for any of the expenditures. As the court in In re Greim's Will made clear, "[i]t is, of course, elementary that co-executors are regarded in the law as an individual fiduciary in the administration of the estate entrusted to them." 140 N.J. Eq. 183, 186 (Prerog. Ct. 1947) (citing Shreve v. Joyce, 36 N.J.L. 44, 48 (1872)). Accordingly, absent circumstances requiring an executor to bring an action against the other executor, the executors are required to act in concert. Id. at 187. Moreover, executors have a "duty to participate in the administration of the estate and each had the duty to use reasonable care

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to prevent the others from committing a breach of trust.” In re Koretsky, supra, 8 N.J. at 524 (citing 2 SCOTT ON TRUSTS, § 184, p. 972).

Although the reason for not transferring the “trust” account into the Estate account before proceeding to pay the Estate’s expenses is unclear, it appears, at least at first blush, the defendant has not misappropriated any of the funds and has kept records of the expenditures paid with the Estate’s monies.¹⁰ However, the essential problem is the neglect or refusal to join with the other co-executrix amounting to a breach of the defendant’s fiduciary duty which may be cause for her removal. See N.J.S.A. 3B:14-21(f) (refusal to join in administering estate is grounds for removal). The defendant may be the sole executrix of the mother’s estate, however, she must nevertheless maintain the balance between her exclusive role in administering the mother’s affairs and her need to notify and obtain consent from the co-fiduciary for administering the decedent’s Estate.

Furthermore, although a durable power of attorney may have provided the defendant with the authority to handle the financial affairs of her parents, the authority to exclusively conduct their affairs terminated upon the decedent’s death. A power of attorney is an “instrument in writing whereby one person, as principal, appoints another as his [or her] agent and confers authority to perform certain specified acts or kinds of acts on behalf of principal.” D.D.B. Interior Contr., Inc. v. Trends Urban Renewal Ass’n, 176 N.J. 164, 168 (2003) (citing BLACK’S LAW DICTIONARY 1171 (6th ed.1990)); see also N.J.S.A. 46:2B-8.2(a) (defining power of attorney as “written instrument by which an individual known as the principal authorizes another individual . . . known as the

¹⁰ At oral argument, defendant’s counsel indicated the “trust” account had been transferred into the Estate account. He further provided as Muriel’s will bequeathed her estate to the three children, the assets in her estate’s checking and savings accounts will not be transferred into the Estate account.

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attorney-in-fact to perform specified acts on behalf of the principal as the principal's agent"). Although a review of New Jersey case law provides no direct authority a durable power of attorney terminates with the death of the principal, pursuant to N.J.S.A. 46:2B-8.5(a), an agent acting in reliance on an executed written power of attorney, durable or otherwise, may continue to act on that power in good faith only until receipt of actual notice of the principal's death. See also 1-12 LEXISNEXIS PRACTICE GUIDE NEW JERSEY ELDER LAW § 12.39 ("A power of attorney terminates upon the death of the principal.") Moreover, the fiduciary appointed by a will shall proceed with his or her duty while exercising "good faith and reasonable discretion." N.J.S.A. 3B:14-23. In other words, once the agent has notice of the principal's death, utilization of the power of attorney may constitute bad faith and overreaching which is contrary to the duty an executor owes to an estate and its beneficiaries. As such, although it appears the 2001 durable power of attorney provided it was to survive the decedent's death, New Jersey law provides utilization of the power subsequent to the principal's death may constitute bad faith. Presently, as it does not appear the defendant's actions were in bad faith and as the defendant does not assert she has the authority to administer the Estate based upon her power of attorney, this violation, in and of itself, neither necessitates nor suggests removal, but the same should be subject to the caveat if the defendant further persists to unilaterally administer the Estate then removal may be warranted.

The other troubling aspect of this matter is the disparity in the reimbursement of attorney's fees paid to Barrett and Collins. First, the payments to Barrett were all made without providing any notice to or seeking consent from the plaintiff co-executrix.

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Barrett was paid in excess of \$25,000 for both the guardianship proceeding and administration of the Estate subsequent to the decedent's date of death for which no approval was sought from the plaintiff. In comparison, the plaintiff's attorney was compensated \$2,222. The defendant's assertion she was "uncomfortable" with paying Collins' fees is not only unwarranted as the defendant does not have the exclusive control over the Estate's matters, but is similarly unsupported by law. Executors have the power to "employ and compensate attorneys for services rendered to the estate or . . . to a fiduciary in the performance of his [or her] duties." N.J.S.A. 3B:14-23. Furthermore, in a guardianship proceeding, the party seeking guardianship may obtain compensation for their counsel to be paid out of the estate of the alleged incapacitated person if approved by the court. See R. 4:86-4(e).

The rules clearly provide executors may employ their own attorneys and seek compensation for their services in assisting with the performance of the executors' duties. It is not uncommon in probate matters for executors of an estate to be related and have less than a discourteous relationship thereby necessitating separate counsel for each to act on their behalf and to then expect compensation for the services rendered. Furthermore, even if the defendant had not realized she was in breach of her duty by failing to seek consent and provide notice for each Estate expense, her attorney should have been aware of the wrongfulness of the defendant's actions as he had no right to unilaterally pay himself considering all the correspondence going back and forth and the substantial monies paid for his services. Defendant's counsel was neither appointed nor approved as the Estate's exclusive counsel and his compensation should not be more deserving than

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plaintiff's counsel's despite the defendant's belief. Accordingly, either both executrixes are entitled to receive compensation for their attorney's services, or neither are.

For the foregoing reasons, dispositive relief would be premature. Accordingly, plaintiff's request for removal of the defendant co-executrix is denied, at this time.

Henceforth, no checks shall be issued on behalf of the Estate unless jointly signed by both executrixes, or agreed upon by counsel, in writing. The same will not apply to checks issued by the defendant executrix on behalf of Muriel's estate.

Counsel are requested to either resolve the issue of attorney's fees by way of an agreement as to what each counsel should be paid, which would then be memorialized in the order, or absent agreement on counsel's respective fees, the court will direct both Barrett and Collins to disgorge the fees paid to date concerning the decedent's Estate and the guardianship proceeding and return the same to the Estate account. It is difficult to conjure why one attorney should be paid in excess of \$25,000 while denying another attorney any compensation beyond \$2,000, given the facts presented. It should be noted the disgorgement, if any, would not apply to the payments received by defendant's counsel from funds in Muriel's estate accounts and would only apply to those monies which were part of the decedent's Estate.

As the defendant does not object to the subpoena of the decedent's medical records, it appears the plaintiff, as the executrix of the Estate, may bring a separate cause of action for negligence and then issue a subpoena on behalf of the Estate. See N.J.S.A. 2A:31-2 (providing executor may bring action for wrongful death for negligent medical care and treatment); see also Higgins v. Thurber, 205 N.J. 227 (2011) (noting medical

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malpractice action may be brought in probate proceeding); Schueler v. Strelinger, 43 N.J. 330, 349 (1964) (stating cause of action for pecuniary loss may be brought by executor).

The plaintiff's requests for restitution to the Estate and to be held non-labile to the Estate are premature and shall be subject to further discovery.

All other requests not specifically referenced are also denied as premature.

It should be noted Alan's letter does not constitute an answer and according to the complaint he is not a party to the instant matter. As such, plaintiff's counsel shall advise him he may seek to intervene should he wish to be heard on the issues presented.

A case management conference is scheduled for June 1, 2011 at 3:00 p.m.

Plaintiff's counsel shall prepare and submit the appropriate order pursuant to the five day rule.