NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5249-10T2

IN THE MATTER OF
THE ALLEGED WILL OF
ALLAN C. SCHENECKER, Deceased.

Argued April 18, 2012 - Decided August 7, 2012

Before Judges Waugh and St. John.

On appeal from Superior Court of New Jersey, Chancery Division, Probate Part, Monmouth County, Docket No. P-67-09/S#219523.

James M. Nardelli argued the cause for appellant Joan Bennett-Schenecker (Parsons & Nardelli, attorneys; Mr. Nardelli, on the briefs).

Thomas J. Clarke argued the cause for respondent Stephanie Godfrey.

PER CURIAM

Joan Bennett-Schenecker,[1] widow of Allan C. Schenecker, appeals from the May 26, 2011 order of the Probate Part denying her application for counsel fees pursuant to Rule 4:42-9(a)(3). Following our review of the arguments on appeal, in light of the record and applicable law, we affirm.

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[1] For ease of readership, we refer to appellant as Bennett.

I.

Bennett was married to Schenecker in August 2008. Approximately five months later, Schenecker died. He had executed a will on November 29, 2006, but the original could not be located. Schenecker's daughter, Stephanie Godfrey, filed a complaint seeking to admit a photocopy of Schenecker's will to probate. Bennett opposed the application, alleging that Schenecker had destroyed the will before his death.

On December 22, 2009, after a two-day trial, the trial judge found by clear and convincing evidence[2] that Schenecker did not destroy or revoke his 2006 will. Underpinning the basis of her holding, the judge did not find credible Bennett's testimony that Schenecker had destroyed the will. The judge found, however, that Schenecker's testamentary intent, as evinced by the proffered photocopied will and the testimony at trial, was to bequeath Bennett the Tinton Falls marital residence and for Godfrey to receive the remainder of the estate. The photocopy of the 2006 will was subsequently admitted to probate. Following the trial, Bennett's application for counsel fees in the amount of $67,020.61 was denied.

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[2] "Clear and convincing" evidence is evidence "'so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the precise facts in issue.'" In re Perskie, 207 N.J. 275, 290 (2011) (quoting In re Seaman, 133 N.J. 67, 74 (1993)).

Bennett appealed, arguing the trial judge erred in denying her counsel fees, and finding that the 2006 will had not been destroyed. We affirmed the order admitting the will to probate but remanded for further consideration on the issue of counsel fees and estate administration costs. In re Estate of Schenecker, No. A-4161-09 (App. Div. March 10, 2011) (slip op. at 23), certif. denied, 207 N.J. 189 (2011).

Following her appeal, Bennett filed another motion seeking $29,593.17 in additional counsel fees pursuant to Rule 4:42-9(a)(3) and Rule 2:11-4(a). On remand, in a May 23, 2011 oral opinion, and memorialized in a May 25, 2011 order, the judge denied Bennett's request for trial and appellate counsel fees and costs. The judge also denied Bennett's application for fees related to her service as temporary administratrix.

In support of her decision to deny counsel fees to Bennett, the trial judge reiterated her previous finding that Schenecker did not destroy the will because neither the testimony of Bennett nor that of her witnesses was credible to suggest otherwise. She elaborated, "I did not find [Bennett] to be credible for a number of reasons, one of which was that she called [Schenecker's attorney] right after [] Schenecker died and wanted to know where the will was, so she assumed there was a will." The judge also noted that Bennett's witnesses provided

either inadmissible hearsay testimony or testimony that lacked probative value. Additionally, she found "that [Bennett] . . . did have a weak case, [and] she should have known that . . . I will deny the application for counsel fees on that ground."

II.

On appeal, Bennett argues the court abused its discretion in denying her application for counsel fees to be paid from the estate because she had a reasonable basis to contest the admission of the photocopied will to probate. We disagree.

At the outset, we note the standard governing our review on appeal. "Findings of the trial judge are considered binding on appeal when supported by adequate, substantial and credible evidence." Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974). We also defer to the trial court's credibility determinations. In re Taylor, 158 N.J. 644, 659 (1999). Governed by this standard, we find the trial judge's findings were amply supported by credible proof.

We recognize "'fee determinations by trial courts will be disturbed only on the rarest of occasions, and then only because of a clear abuse of discretion.'" Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 444 (2001) (quoting Rendine v. Pantzer, 141 N.J. 292, 317 (1995)). Rule 4:42-9(a)(3) permits the court to award counsel fees in probate actions to be paid out of the

estate if the contestant had reasonable cause for contesting the validity of the will. To satisfy the "reasonable cause" requirement, petitioners seeking an award of counsel fees must provide the court with "'a factual background reasonably justifying the inquiry as to the testamentary sufficiency of the instrument by the legal process.'" In re Probate of the Alleged Will and Codicil of Macool, 416 N.J. Super. 298, 313 (App. Div. 2010) (quoting In re Caruso, 18 N.J. 26, 35 (1955)). In order to award counsel fees to be paid out of the estate,

> there must . . . be a showing that the validity of the will was not only questionable but there was reasonable cause for actually contesting it, related to the practical effect of a successful contest, the size of the estate and the probable expenses of litigation, and the reasonably anticipated result.
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> [Caruso, supra, 18 N.J. at 33 (internal quotation marks and emphasis omitted).]

Additionally, the trial judge must "exercise . . . sound discretion to prevent misuse of the judicial process and the mulcting of the estate" in awarding counsel fees in probate. Id. at 36.

Here, the judge heard extensive testimony propounded on behalf of Bennett, which she found to be incredible, inadmissible, or lacking probative value with regard to whether Schenecker destroyed the will. The judge also found that

Bennett's testimony belied her assertion that she knew the will was destroyed. It is well settled that counsel fees will be awarded from the estate so long as the contestant had reasonable cause for contesting the validity of the will. R. 4:42-9(a)(3); Macool, supra, 416 N.J. Super. at 313.

Considering testimony revealed that Bennett possessed knowledge at the outset that the will was not destroyed, coupled with testimony which failed to establish a factual background justifying her challenge, we decline to disturb the trial judge's decision. Accordingly, Bennett failed to demonstrate a reasonable cause to contest the will such that her trial and appellate counsel fees should be paid from the Schenecker estate.

The trial judge's denial of attorney fees did not constitute an abuse of discretion, let alone a clear abuse of discretion. The order will not be disturbed.

Affirmed.