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IN THE MATTER OF THE ESTATE OF LILLIAN SCHMIDT, Deceased.

DOCKET NO. A-0210-11T2

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

2012 N.J. Super. Unpub. LEXIS 1649

May 21, 2012, Submitted

July 11, 2012, Decided

NOTICE: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

PRIOR HISTORY: [*1]

On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Bergen County, Docket No. P-461-06.

COUNSEL: Walsh & Walsh, attorneys for appellant Loel Welch (John K. Walsh, Jr., of counsel and on the briefs).

Reeve & Van Horne, attorneys for respondent John Teagno (John L. Van Horne III and Nima Ameri, of counsel and on the brief).

JUDGES: Before Judges Grall, Alvarez and Skillman.

OPINION

PER CURIAM

Loel Welch appeals from a December 10, 2010 judgment approving the account provided by John Teagno, who held a Power of Attorney (POA) for decedent Lillian Schmidt, of his management of decedent's funds from the date of the issuance of the POA until her death. Welch also appeals the July 27, 2011

order denying her counsel fees, court costs, and the cost of a private investigator retained by her attorney. For the reasons that follow, we affirm.

Decedent's date of death was November 30, 2004. Welch filed her verified complaint to compel an accounting and for other relief on October 31, 2006. Teagno provided an informal accounting in 2007, and no further proceedings were conducted until February 24, 2009, when Welch, apparently dissatisfied with the information Teagno provided, filed a motion to enforce [*2] litigant's rights related to the accounting. In March 2010, Welch acknowledged that the only real dispute was over Teagno's management of decedent's affairs prior to her death, not the administration of her estate.

Judgment was rendered after the Probate Part judge conducted a hearing approving Teagno's accounting except for \$8036, which he ordered be paid into the estate. Plaintiff then filed the unsuccessful motion seeking \$48,345 in counsel fees, \$5740.13 in costs, and \$12,146.36 in fees owed to a private investigator.

Decedent was Welch and Teagno's aunt, a sister to Teagno's mother. She moved in with Teagno and his mother in 2001 after she broke her arm, and never left. By that time, decedent had stopped driving. She executed the POA on March 27, 2001. Decedent did not pay rent to Teagno's mother but maintained her former apartment until the fall of 2003. She could not be left alone or with only her sister, which meant any time Teagno was absent,

a home health aide had to be present. As time passed, decedent became incontinent and could not cook for herself.

Teagno, an admittedly poor recordkeeper, provided copies of decedent's bank records, including cancelled checks, by way of [*3] documentation for his management of decedent's funds. He and Welch both received cash gifts from decedent. In addition to often paying for her expenses in cash, Teagno also borrowed funds from decedent which he then repaid, with the exception of the \$8036 the trial judge found was owed to the estate. During the trial, the court heard testimony from: Welch, Teagno, Teagno's accountant, Welch's private detective, a friend of Teagno who had spent time at his home and had known decedent, the former occupant of a garden apartment at Teagno's mother's home who had also spent time with the family and by virtue of physical proximity, observed the manner in which decedent was cared for in Teagno's home, one of the home health aides, and a branch manager at the bank where decedent maintained her account.

Decedent's will named Martha Teagno as the residuary beneficiary,¹ and made bequests of \$20,000 each to Teagno and Welch. Teagno contended that as a result Welch had no standing to challenge his administration of decedent's affairs prior to her death due to her limited interest in the estate. Welch took the position that because Teagno had declined to reimburse her substantial attorney's fees [*4] and expenses for her investigation into his wrongdoing, she was entitled to proceed to attempt to establish that wrongdoing in order to recoup her expenditures. The court allowed Welch to proceed on the theory that if she could prove that decedent's funds were misappropriated in some fashion, it might result in her entitlement to reasonable attorney's fees and costs regardless of her limited interest in the assets of the estate.

1 Teagno's mother died at some point prior to the hearing. As a result, Teagno became the sole beneficiary of decedent's estate because he is the sole heir of his mother's estate.

In reaching its ultimate decision, rendered orally from the bench, the court found the relevant proofs were limited to Teagno's management of decedent's NVE bank account in Englewood during the three years and eight months in which he acted as her attorney-in-fact. He observed that Teagno kept poor records, that he made

checks out to cash, including in payment of home health aides, and that although he spent the funds for the benefit of decedent, by writing checks payable to cash, he unwittingly raised the specter of misappropriation of the funds.

The judge also found that decedent and [*5] Teagno's mother were close, and although decedent maintained her apartment for some time, she lived exclusively in Teagno's home from mid-2001 until the time of her death. Teagno's mother needed a walker, but was otherwise in good health, in contrast to decedent, who was forgetful and unable to be left alone safely by 2001. Decedent required the presence of a third party round-the-clock to provide assistance in the event she fell or became disoriented, but Teagno worked full-time and spent most weekends at his shore home. It was actually at Welch's urging that Teagno retained health care aides to assist when he was not present.

The court found the proofs did not support Welch's position that the home health care aides were also retained to assist with the care of Teagno's mother. Although they occasionally did so, they were retained exclusively because of the level of care decedent required. When Teagno was present in the home he cared for decedent, a fact corroborated by the home health care aide who testified and by his other witnesses. The judge concluded Teagno was guilty of fulfilling his role under the POA "in an amateurish fashion[.]" but that his failings were the product of [*6] carelessness and convenience, "and not for purposes of evasion or deceit." The court considered Teagno to be a credible witness, who expended his aunt's funds for her benefit.

Teagno acknowledged borrowing money from decedent, but those transactions were made with her knowledge and consent. When Teagno used decedent's funds for his own business expenses, the bank records demonstrated repayment of those sums close in time to when the withdrawals were made. The difference between loans Teagno made to himself and repayments, the only discrepancy, totaled \$8036. The court therefore accepted the accounting he provided subject to an \$8036 adjustment.

After Welch filed her application for counsel fees, costs, and private investigator charges, the court entered a detailed written decision denying the request pursuant to *Rule 4:42-9(a)(2)*, finding that Teagno kept poor records but Welch was aware of his management of decedent's

funds during her lifetime, including the fact that he paid substantial sums for home health aides in cash. The judge reiterated that Teagno borrowed from his aunt for his business ventures but repaid all but \$8036 close in time to when the loans were made: "[t]here was [*7] an amateurish discharge of authority by Teagno, under the [POA], but this lack of expertise worked no loss to the estate, beyond the fairly de minimis [\$8036], which had not yet been repaid as of [decedent's] death." As the judge said, Welch "sought to capitalize" on Teagno's poor recordkeeping and utilization of cash for the extensive health care assistance required by decedent. Ultimately, "Teagno was put to his proofs, and was able to convince the court that he used the funds to care for his aunt, exceptant's allegations notwithstanding." As a result, the court reasoned that Welch should not be compensated for her failed effort to prove misappropriation of the funds. As he stated,

She challenged in the litigation the cash payments to health aides, while she had been unopposed to the practice at the time it was being implemented. She alleged that Teagno had failed to account for significant assets of the aunt, but no credible evidence of this surfaced whatsoever. She charged that Teagno had depleted the aunt[']s overall wealth while she was alive by consuming her assets for his own purposes, but this was not borne out by the evidence. Welch advocated for [herself] -- there should [] [*8] have been more in the estate of which, in the event of intestacy, she was to receive one-half.[] The estate was not at all enhanced by the years' long unsuccessful litigation effort.

As a result, the court denied the application.

Welch raises a number of points on appeal:

POINT I

THE PROPER STANDARD OF REVIEW IS DE NOVO

I. DEFENDANT'S ADMITTED BREACH OF DUTY

II. DEFENDANT'S CONCESSION OF IMPROPER USE OF LILLIAN'S MONEY TO BENEFIT HIS MOTHER

III. DEFENDANT'S UNCORROBORATED TESTIMONY

POINT II

THERE IS INSUFFICIENT CREDIBLE EVIDENCE IN THE RECORD TO SUPPORT THE DECISION OF THE TRIAL COURT

POINT III

THE COURT SHOULD HAVE AWARDED INTEREST FOR DEFENDANT'S PERSONAL USE OF THE PRINCIPAL'S ASSETS

POINT IV

THE DEFENDANT BREACHED HIS DUTY TO MAINTAIN ACCURATE BOOKS AND RECORDS

POINT V

DEFENDANT'S LIABILITY SHOULD BE ABSOLUTE AND PERSONAL

POINT VI

THE TRIAL COURT ERRED IN FAILING TO SURCHARGE DEFENDANT FOR THE NAPOLITANO "LOANS"

POINT VII

THE TRIAL COURT ERRED IN DETERMINING THAT PLAINTIFF WAS NOT ENTITLED TO COUNSEL FEES

I. TRADITIONAL ELEMENT OF DAMAGE

II. FUND IN COURT

We affirm essentially for the reasons stated by the judge as to both applications.

"The scope of appellate review of a trial court's fact-finding [*9] function is limited. The general rule is that findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence." *Seidman v. Clifton Sav. Bank, S.L.A.*, 205 N.J. 150, 169, 14 A.3d 36 (2011) (quoting *Cesare v. Cesare*, 154 N.J. 394, 411-12, 713 A.2d 390 (1998)). We conclude that the court's factual findings with regard to Teagno's management of decedent's funds were supported by adequate, substantial, credible evidence. Decedent required full-time care essentially from the moment she first moved in with Teagno and his mother, and payment of home health care aides, medical expenses, and other items for decedent's benefit consumed the majority of her funds. Teagno credibly demonstrated that the expenditures he made as decedent's attorney-in-fact were for her benefit, except for the sum charged back to the estate. See *Gallo v. Gallo*, 66 N.J. Super. 1, 5, 168 A.2d 228 (App. Div. 1961).

With regard to the claim that there is insufficient credible evidence in the record to support the decision of the trial court, we note that Teagno's testimony was corroborated by several witnesses whom the judge found to be credible, including friends, a former tenant, and a home health aide. Hence the [*10] judge's decision was "supported by adequate, substantial, credible evidence." See *Seidman*, *supra*, 205 N.J. at 169 (quoting *Cesare*, *supra*, 154 N.J. at 412).

Insofar as Welch's claim that the decision not to award interest was an error, such decisions are subject to review pursuant to an abuse of discretion standard. See *In re Estate of Lash*, 169 N.J. 20, 34, 776 A.2d 765 (2001) (quoting *Ditmars v. Camden Trust Co.*, 10 N.J. 471, 491-92, 92 A.2d 12 (1952)). We do not "interfere unless [the decision] is palpably unfair." *Ibid.* (quoting *State ex. rel. Matthews v. Nat'l Sur. Corp.*, 17 N.J. Super. 137, 142, 85 A.2d 534 (App. Div.), *certif. denied*, 9 N.J. 287, 88 A.2d 39 (1952)).

Given that the trial judge found that Teagno used decedent's funds for her benefit, the equities do not require that interest be charged. This balancing of the equities makes sense in light of Teagno's relationship with, and efforts on behalf of, decedent. The trial court described Teagno as "tr[ying] his level best to see that his aunt was carefully attended to, in his mother's home,

throughout the last three years of [her] life." The court's decision not to award interest, even on the \$8036 he charged back to the estate, is therefore not "palpably unfair" or an abuse [*11] of discretion that warrants reversal.

Unquestionably, *N.J.S.A. 46:2B-8.13(b)* requires attorneys-in-fact to "maintain accurate books and records of all financial transactions." Teagno failed to do so, however, the judge was satisfied that his accounting was nonetheless accurate. There is no statutory obligation upon Teagno to do more than he did since the only funds he managed consisted of a bank account for which records were automatically maintained.

Welch did not establish any breach of fiduciary duty. In support of her position that she is nonetheless entitled to fees and costs, Welch relies upon *Lash*. The case is inapposite, however, because there the administrator of the estate misappropriated funds. *Lash*, *supra*, 169 N.J. at 24. See also *In re Estate of Vayda*, 184 N.J. 115, 122, 875 A.2d 925 (2005) (noting that *Lash* is "limited . . . to attorney breach of fiduciary duty malfeasance only"). In this case, however, a non-lawyer who acted honestly and in good faith was the person who kept poor records of account. Attorney's fees and costs are therefore inappropriate.

Welch alternatively requested that her fees and costs be paid from a fund in court. *R. 4:42-9(a)(2)*. Generally, a fund in court is utilized [*12] if it would be unfair to impose the sole financial responsibility on an individual who, as a result of litigation, creates a benefit for others. It applies "where a party's actions have 'created, preserved or increased property to the benefit of a class of which he is a member.'" *Trimarco v. Trimarco*, 396 N.J. Super. 207, 215, 933 A.2d 621 (App. Div. 2007) (quoting *Sarner v. Sarner*, 38 N.J. 463, 467, 185 A.2d 851 (1963)). Here, the only potential beneficiary of the litigation, if any benefit can even be said to have resulted, was Welch herself. The estate was not enhanced by years of litigation. Welch did not gain from Teagno's obligation to reimburse \$8036 to the estate, however, as Teagno represented throughout there were sufficient funds in the estate to satisfy her legacy regardless. Accordingly, we agree with the judge's determination that no fees should be paid at all.

Affirmed.