

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3538-13T4

IN THE MATTER OF
SYLVIA H. FISHBEIN,
an alleged incapacitated
person.

IN THE MATTER OF THE
FISHBEIN REVOCABLE FAMILY
TRUST.

Argued September 22, 2015 – Decided October 9, 2015

Before Judges Fisher, Espinosa and
Rothstadt.

On appeal from Superior Court of New Jersey,
Chancery Division, Probate Part, Middlesex
County, Docket Nos. 241040 and 241041.

Michael Confusione argued the cause for
appellant Eugene Warshaw (Hegge &
Confusione, LLC, attorneys; Mr. Confusione,
of counsel and on the briefs).

Alexander J. Kemeny argued the cause for
respondent Leslie E. Fishbein (Kemeny, LLC,
attorneys; Mr. Kemeny and Robert J. Jones,
on the brief).

Michael Keefe argued the cause for
respondent The Estate of Sylvia Fishbein.

PER CURIAM

The cases involving the guardianship complaint for Sylvia H. Fishbein (Sylvia)¹ and the appointment of a successor trustee in the Fishbein Revocable Trust were consolidated for discovery and trial. The facts pertinent to these cases, including the estate planning and documents executed by Sylvia and her late husband, Hyman, are set forth in the written opinion by Judge Frank M. Ciuffani, and need not be repeated at length here.

Briefly stated, in 1994, Sylvia and Hyman executed the Fishbein Revocable Family Trust (the Trust), which they amended in 1995. Upon the death of one of them, the Trust estate was allocated to two separate trusts, the Surviving Spouse's Trust and the Family Bypass Trust. The surviving spouse had continued control to revoke or amend the Surviving Spouse's Trust. As for the Family Bypass Trust, it became "irrevocable and nonamendable" upon the death of either Hyman or Sylvia.

Hyman died in 1998. Sylvia executed a second amendment to the Trust that instructed how the proceeds of the Surviving Spouse's Trust should be distributed upon her death. She provided for sums ranging from \$2500 to \$5000 to be distributed to individual family members and the balance to be given to

¹ Because surnames are shared by more than one person mentioned in the opinion, we employ first names for clarity.

specific charities, all either in Israel or with Jewish affiliations.

In 2005, Sylvia executed a second amendment to the Fishbein Revocable Trust, a pour over will, an advanced directive for health care and a power of attorney (POA). She chose her stepdaughter, Leslie Fishbein, as her health care representative. In the POA, she appointed her nephew, Eugene Warshaw, to serve as her attorney-in-fact in the event she became incapacitated.

Sylvia fell on October 31, 2011, and fractured her hip. It is undisputed she became incapacitated thereafter. Leslie and Eugene failed to establish a cooperative working relationship regarding Sylvia's interests and this litigation followed.

In I/M/O/ Sylvia H. Fishbein, Leslie asked the court to find Sylvia mentally incapacitated; grant Leslie letters of guardianship; revoke the powers conferred by Sylvia upon Eugene; declare an advanced directive for health care and medical power of attorney signed by Eugene in 2012 (the 2012 health care directive) void ab initio; direct Eugene to provide an accounting; and award her counsel fees. In I/M/O/ The Fishbein Revocable Family Trust, Leslie asked to be appointed the trustee of the Trust.

Following a bench trial, the trial judge entered an order, accompanied by a written opinion, that adjudicated Sylvia to be an incapacitated person and appointed a "professional guardian" of her person and estate. The order revoked the POA and adjudged the 2012 health care directive void ab initio. Eugene was directed to provide an accounting and was removed as co-successor trustee under the Trust. The order also imposed a constructive trust upon all assets Eugene transferred from Sylvia to himself.

Eugene appeals from this order and asks this court to restore the authority granted to him under the POA, vacate the constructive trust, remove the "professional guardian," direct the trial court to appoint him Sylvia's guardian and direct the trial court to award him counsel fees and costs. After reviewing Eugene's arguments in light of the record and applicable principles of law, we affirm, substantially for the reasons set forth in Judge Ciuffani's written opinion, and add only the following.

Eugene's principal argument is that the trial judge erred by failing to give full effect to the language of the governing instruments, specifically the POA. He contends the POA authorized him to take action that would lead to Medicaid eligibility for Sylvia. He also urges that the discretion

granted to him permitted him to choose what charities would benefit from her charitable funds and to revoke Leslie's health care proxy.² We disagree.

As Sylvia's attorney-in-fact, Eugene had statutorily mandated fiduciary obligations "to the principal, and to the guardian of the property of the principal if the principal has been adjudicated an incapacitated person, to act within the powers delegated by the power of attorney and solely for the benefit of the principal." N.J.S.A. 46:2B-8.13(a) (emphasis added). Therefore, while the POA granted certain powers to Eugene, they were to be exercised solely for Sylvia's benefit. The depletion of Sylvia's assets for the stated purpose of making her eligible for Medicaid could only be accomplished if the distribution of her assets satisfied all five criteria adopted in In re Keri, 181 N.J. 50, 59 (2004). We agree with Judge Ciuffani that the distributions made by Eugene failed to meet those criteria in several respects. Moreover, the discretion granted to Eugene by the POA was not unfettered. The language of the POA required him to exercise his discretion to make distributions that were "appropriate, considering the

² Eugene also argued that the trial court erred in failing to appoint him as Sylvia's guardian, instead choosing to appoint a "professional" guardian. As Sylvia is now deceased, this issue is moot.

welfare of [Sylvia's] estate and the persons whom [she] would have favored to benefit from [her] estate." As Judge Ciuffani noted, the distributions made by Eugene left her without funds to meet her own needs and benefitted Eugene and charities with which he had a personal connection to a degree that is inconsistent with Sylvia's expressed intent. We also agree with Judge Ciuffani's reasoning and conclusion that Eugene exceeded the scope of the POA in removing Leslie as Sylvia's health care representative and replacing her with himself. His findings have adequate support in the record.

Eugene also contends the trial judge abused his discretion in two respects: removing him as attorney-in-fact and in denying him counsel fees. We find no merit in either argument.

Contrary to Eugene's argument, it was not necessary for the judge to find that he acted dishonestly or in bad faith in order to remove him. Pursuant to N.J.S.A. 3B:14-21(c) the court may remove a fiduciary from office if the fiduciary "misapplies any part of the estate for which the fiduciary is responsible, or abuses the trust and confidence reposed in the fiduciary." There was adequate evidence in the record to support Judge Ciuffani's decision to remove Eugene as attorney-in-fact pursuant to this statute. His decision was a proper exercise of

his discretion, which we will not disturb. Wolosoff v. CSI Liquidating Trust, 205 N.J. Super. 349, 360 (App. Div. 1985).

Finally, Eugene contends the trial judge abused his discretion in failing to award him counsel fees pursuant to Rule 4:86-4(e). That rule permits but does not require attorney's fees in guardianship actions. Because Judge Ciuffani's decision not to award counsel fees did not constitute an abuse of discretion, Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 386 (2009), we will not disturb that ruling.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION