SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1096-15T3

IN THE MATTER OF THE ESTATE OF ALICE JOYCE GRAFER, DECEASED.

Submitted November 3, 2016 – Decided January 24, 2017

Before Judges Lihotz and Hoffman.

On appeal from Superior Court of New Jersey, Chancery Division, Probate Part, Warren County, Docket No. P-10-183.

Russo Law Offices, LLC, attorneys for appellant Robert Grafer, Jr. (Brad M. Russo, on the brief).

Respondent Laura Brawner has not filed a brief.

PER CURIAM

Appellant Robert Grafner, Jr. (Robert), executor of the estate of his late mother, appeals from the October 13, 2015 Probate Part order denying his motion for counsel fees. On appeal, Robert argues the judge improperly imposed his own "policy considerations to arbitrarily deny" his "otherwise legally justifiable application." We have considered this argument in

light of the record and the applicable legal principles. We affirm.

We discern the following facts from the record. Alice Joyce Grafer (the decedent) died on January 22, 2010, survived by two adult children, Laura Brawner (Laura) and Robert. On April 21, 2010, her Last Will and Testament was admitted to probate. The Will divided her estate between Robert and Laura, "in equal shares."

At the time of her death, the decedent's probate estate consisted of a house (appraised value of $190,000), a mutual fund account (approximate value of $40,000), and an automobile (approximate value of $6,900). The decedent also held various non-probate assets, all listing Robert as joint tenant or beneficiary. These non-probate assets totaled $183,815.05.

According to Robert, soon after their mother's death, Laura expressed a desire to "cash out" her interest in the estate as soon as possible. She was not interested in maintaining any interest in the house as an investment property, while Robert was interested in owning the house as a long-term investment.

Between March 8, 2010 and August 27, 2010, Robert made three distributions to Laura totaling $115,000. According to Robert, these transfers were made to satisfy Laura's interest in the house and the estate. However, the record contains no evidence of any

estate administration formalities accompanying these distributions, such as an accounting, an appraisal, or the execution of refunding bonds and releases.

In December 2014, Laura filed a verified complaint in the Probate Part to compel Robert to provide an accounting of estate assets. Laura alleged Robert "has refused to provide an accounting of the estate assets . . . despite reasonable and repeated demands."

On February 17, 2015, Robert filed an answer denying all allegations of impropriety. He also filed his own verified complaint, alleging he had an agreement with Laura to purchase her interest in their mother's house, and further asserting Laura was overpaid her interest in the estate. Robert alleged the "net residual estate equals $211,848.68," and as a one-half beneficiary, Laura's "inheritance equals $105,924.34;" since Laura had already received $115,000, she "was overpaid by $9,075.66." Robert also filed an accounting with the Warren County Surrogate.

The court eventually held a two-day plenary hearing to address the issues raised by the parties and Robert's accounting. At the conclusion of the hearing, the court entered an order, which stated:

> 1. The accounting submitted by the Executor is approved in part and rejected in part.

2. There is a residual estate remaining in the amount of $20,965.81

3. The house has been removed from the accounting as it was transferred by a separate and binding agreement between the parties.

4. Counsel may submit application for counsel fees, if they wish, to be considered by the Court.

Counsel for both parties submitted requests for counsel fees. Robert's counsel submitted a request for $15,317.25 and Laura's counsel submitted a request for $7,790. After noting the remaining residual estate was $20,965.81, the court explained its reasons for denying both application:

> Both requests exceed the value of the residual estate. Both parties were responsible for the protracted litigation, which [Laura] eventually admitted that she knew all along that the house was purchased from her pursuant to an agreement with [Robert].
>
> [Robert] reluctantly agreed that he had not been as forthcoming as he could have been providing information to his sister and perhaps if he had, the court feels that his sister probably would have resolved the matter without the necessity of a suit.
>
> Since I can find that both parties in some respect share responsibility for the litigation which proceeded, it would be unjust and unfair to award counsel fees for either party, as the amount of success obtained by the extensive litigation is minuscule compared with the attorney's fees. Therefore, the Court will impose the American rule and each party shall bear their own expenses.

We review a trial judge's decision to award attorneys' fees under an abuse of discretion standard. Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 443-44 (2001). "Trial courts have considerable latitude in resolving fee applications." Grow Co., Inc. v. Chokshi, 424 N.J. Super. 357, 367 (App. Div. 2012). A reviewing court "will disturb a trial court's award of counsel fees only on the rarest of occasions, and then only because of a clear abuse of discretion." Litton Indus. v. IMO Indus., 200 N.J. 372, 386 (2009) (citations and internal quotation marks omitted). Rule 4:42-9(a)(3) provides for the discretionary award of counsel fees in probate actions.

In awarding attorneys fees in probate the trial judge must "exercise . . . sound discretion to prevent misuse of the judicial process and the mulcting of the estate." In re Will of Caruso, 18 N.J. 26, 36 (1955)

Robert argues the motion court improperly applied its own "policy considerations" in denying his application, in contravention of our holding in In re Probate of the Alleged Will and Codicil of Macool, 416 N.J. Super. 298 (App. Div. 2010). In that case, we held that the Probate Part could not reduce an attorney's fee request by fifteen percent in accordance with the judge's personal policy of "discouraging or 'deterring'" fee-shifting cases. Id. at 314.

Robert correctly states our holding in Macool, that a trial judge's award of counsel fees could not be based on the judge's personal policy. Id. at 313. We conclude, however, such considerations did not motivate the judge in this case, as the judge identified specific factors supporting his decision.

> Robert was fairly sloppy in his performance of work as an executor and felt that he had no obligation to explain to his sister what the assets of the [E]state were and what had happened with the Estate's expenses and disbursements from the estate. Robert never cooperated in the filing of an accounting until [Laura] filed her complaint demanding in accounting and other relief.

An executor, in performing the duties assumed, "must generally act with the care and skill which a [person] of ordinary prudence would exercise under the circumstances." In re Estate of Bayles, 108 N.J. Super. 446, 453-454 (App. Div. 1970). Robert's lack of cooperation, causing Laura to file litigation to receive the accounting she should have received long ago, clearly fell short of the ordinary prudence standard.

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.