

DISTRICT OF COLUMBIA BAR
ESTATES, TRUSTS, AND PROBATE LAW SECTION
REVIEW OF RECENT DEVELOPMENTS IN
PROBATE DIVISION LAW
2014 - 2015

Edward G. Varrone
910 17th Street, N.W.
Suite 800
Washington, D.C. 20006
(202) 861-3150
(202) 861-3152 (fax)
edv@varronelaw.com

PART 1 - LEGISLATIVE CHANGES

The City Council passed, and the Mayor signed into law, the "Limitations of Guardianship Amendment Act of 2014." This Act amended several provisions of the Guardianship and Protective Proceedings Act of 1986 ("Intervention Statute.") The most significant changes include the following.

a. Any guardian, prior to appointment, must submit a signed and sworn statement that (s)he has not been convicted of or is on probation before judgment for a list of specified crimes and, within 60 days after appointment, must submit the results of a Metropolitan Police Department criminal history background check conducted not more than 90 before the appointment, and within 180 days after appointment must submit an FBI fingerprint background check conducted not more than 90 days prior to the guardianship appointment.

The sworn statement and the results of the criminal history and background check are made a part of the record of the case.

For a member of the Probate Division Fiduciary Panel, a criminal history check and fingerprint background check issued not more than 3 years before the guardianship appointment is sufficient.

b. The appointment as guardian of an incapacitated individual of an individual convicted of an offense listed in the statute, or "found, pursuant to an investigation by law enforcement or a government agency, to have inflicted harm upon a child, elderly individual, or person with a disability" is presumed not be in the best interests of the incapacitated individual.

c. Counsel for the subject of a guardianship or protected proceeding is required to zealously represent the client's **expressed wishes**. If the subject is unconscious or otherwise wholly incapable of expressing his or her wishes, counsel shall advocate for the least restrictive result in type, duration and scope, consistent with the subject's interests as determined by the guardian ad litem.

d. The task of a guardian ad litem appointed in an intervention proceeding is to assist the subject to determine the subject's **best** interests.

e. The court is required to review existing guardianships every three years. The review is conducted by a "case reviewer", being a social worker appointed by the court to investigate the continued need for the guardian and prepare and file a written report with the court. The report must include the ward's preferences regarding the continued scope and duration of the guardianship and whether a replacement guardian should be appointed.

After the filing of the case reviewer's report, the court must hold a hearing if requested by the ward, or if the case reviewer recommends modification or termination of the guardianship or removal of the currently-serving guardian.

PART 2 - REVIEW OF CASES

NOTE: While published opinions of the Court of Appeals are binding precedent, a ruling or memorandum opinion of a trial judge is not. "Superior Court holdings are never binding authority in other cases, even in the Superior Court itself." Lewis v. Hotel and Restaurant Employees Union, Local 25, 727 A.2d 297, 302 (D.C., 1999). Accord, In re Estate of James, 743 A.2d 224 (D.C., 2000).

Although not binding authority, a memorandum opinion of one trial judge may be persuasive to another judge, or may contain analysis or discussion of precedent that may be helpful in another case with similar facts. Also, on some matters, Probate Division judges do try to be consistent with each other. The practitioner should therefore consider memorandum orders and opinions of Superior Court judges, but should rely on such orders and opinions with caution.

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BLACKWELL v. ROSS & ARRINDELL

Case No. 2009-LIT-000025
10/02/2014 Judge John M. Campbell

GENERAL SUBJECTS:

Will Contest: Review of undue influence

FACTS:

The decedent, Elsie Hamilton, who had no children and no living relatives, executed a will in 1998, naming a long-time friend as the principal beneficiary of her will. Ms. Hamilton's health declined over time and, by November, 2002, she was 91 years old, essentially bedridden, mostly blind, and requiring 24 hour care assistance. Despite this, she continued to live in her own home, which she was determined to stay in until her death. In November, 2002, Ms. Hamilton met Mr. Ross, who was initially supposed to work on Ms. Hamilton's roof. Soon thereafter, Mr. Ross and his wife, Ms. Arrindell, assumed responsibility for Ms. Hamilton's care, and Mr. Ross drafted a power of attorney, naming himself as Ms. Hamilton's attorney in fact. Ms. Hamilton signed the power of attorney. By this time, Mr. Ross and Ms. Arrindell effectively cut off access to Ms. Hamilton by her long-time friends.

As a result of a D.C. Adult Protective Services investigation, in August, 2003, the court appointed Mr. Ross as guardian and the court-appointed attorney for Ms. Hamilton as conservator. Four days later, Ms. Hamilton executed a will drafted by her court-appointed attorney. In her will, she named Mr. Ross and Ms. Arrindell as sole beneficiaries and the court-appointed attorney as personal representative. The court's detailed review of subsequent events led the court to conclude

that "[T]his was indeed a classic con, perpetrated on an elderly, vulnerable, lonely woman by two plausible but unscrupulous opportunists." The court invalidated the 2003 will and a subsequent will on the basis of undue influence.

HOLDING:

The court reviewed the law for undue influence, noting that a person challenging the validity of a will has the burden of proof to show influence amounting to moral or physical coercion which destroys free agency. Mere influence, or influence gained by kindness or affection, is not undue so long as the will that results is a voluntary act of the testator. However, when a confidential or fiduciary relationship exists between the donor and the beneficiary, the burden of showing undue influence is less heavy, as there is a danger that a special or fiduciary relationship of trust, confidence or authority can be misused. This concern is heightened when the donor is vulnerable and dependent.

DISCUSSION

The court's memorandum opinion includes citations to and discussion of a number of important cases dealing with undue influence.

ESTATE OF YOUNG, Edward L.; TIJUANA YOUNG, et al. v. JEFFREY YOUNG-BEY, et al.

Case No. 2010-LIT-000025
06/16/2014 Judge John M. Campbell

GENERAL SUBJECTS:

Requirements for a valid will include that it be attested to and subscribed by two competent witnesses in the presence of the testator.

Will Contest: The proponent of will bears burden of showing that will was executed in compliance with statutory requirements.

Procedure: Failure to assert lack of personal jurisdiction and insufficiency of service in answer to complaint is waiver of those defenses.

Procedure: Long-arm jurisdiction in decedent estate cases.

Qualification to be Personal Representative: A convicted felon cannot serve as personal representative.

FACTS:

The defendant submitted a purported will of the decedent and a petition for probate seeking to admit will to probate. Because of several deficiencies, the petition was rejected. The plaintiffs filed their own petition for probate and a complaint contesting the purported will. The defendant, incarcerated in Maryland, filed an answer and several other pleadings, and participated in several hearings by telephone. He subsequently filed a motion to dismiss for lack of personal jurisdiction.

The plaintiffs filed a motion for summary judgment. The will lacked an attestation clause, and the two signatures of the purported witnesses were illegible. Neither the defendant, nor anyone else, could provide the names of the witnesses or provide affidavits from the witnesses regarding the execution of the will.

HOLDING:

The defendant's motion to dismiss the complaint for lack of personal jurisdiction was denied. The defendant did not raise lack of personal jurisdiction or insufficiency of process in his answer and therefore, under the applicable Civil Rules, he waived those defenses. His continued participation in the case further supported his waiver of his claim of lack of jurisdiction or insufficiency of process. The court properly exercised long-arm jurisdiction over the defendant as the defendant, by submitting the will for probate and initiating two related civil actions, deliberately and voluntarily exercised the "minimum contacts" sufficient for due process requirements.

The plaintiffs' motion for summary judgment was granted. While one seeking summary judgment must show an absence of genuine issue of material fact, a party seeking summary judgment can rely on the absence of proof of an essential element of the opposing party's claim. Further, once the movant makes an initial showing of an absence of genuine issue of material fact, the burden shifts to the opponent to show that an issue of fact exists. Here, the absence of an attestation clause makes the will deficient on its face, and the defendant's failure to provide any evidence of due execution, including even the names of the witnesses, meant that there were no facts showing due execution.

ESTATE OF WOOTEN, Julia K.; APPEAL OF BARBARA FRANKLIN

Unpublished *Per Curium* Memorandum Opinion
08/29/2014

GENERAL SUBJECTS:

Attorney conflict of interest: An attorney drafting a will may not be able to act as attorney in will contest proceeding.

Ethics: Rule of Professional Conduct 1.7

Compensation: The court may disallowance of compensation when an attorney has a conflict of interest.

FACTS:

Julia Wooten executed a will in 1999, leaving her estate in trust for her husband, with remainder to her close friend, Ms. Carrington. In September 2004, with Ms. Wooten suffering from dementia and living in a nursing home, Ms. Wooten's niece, Katie Jones, was appointed guardian and conservator. In April 2005, Ms. Jones retained attorney Barbara Franklin to draft a new will for Ms. Wooten. Without meeting with Ms. Wooten and relying only on the representations of Ms. Jones and information provided by a clinical social worker at the nursing home, the attorney prepared a will for Ms. Wooten, which was executed in May 2005. The new will named Ms. Jones as sole beneficiary and personal representative. Ms. Wooten died a month later.

Ms. Jones retained Attorney Franklin to assist with the administration of the estate. Ms. Carrington, the beneficiary of the 1999 will, filed a complaint contesting the validity of the 2005 will, alleging lack of testamentary capacity, undue influence by Ms. Jones, and that the 2005 will was procured by fraud and deceit. Mr. Franklin was served with a copy of the complaint. Ms. Franklin continued to represent Ms. Jones throughout the will contest litigation, until the trial court disqualified Ms. Franklin as counsel on the basis that she would likely be a necessary witness at trial.

The trial court held that the 2005 will was invalid on the basis of lack of testamentary capacity, undue influence, and fraud by Ms. Jones. The 1999 Will was admitted to probate, and Ms Carrington was appointed successor personal representative. The court granted a motion to disallow attorney fees paid to Ms. Franklin, and ordered Ms. Franklin to disgorge fees paid to her

that were related to the conflict of interest; over \$29,000.00. (The court also found that Ms. Franklin was representing Ms. Jones, and not the decedent, Ms. Wooten, when drafting the 2005 will.) The Court of Appeals affirmed.

HOLDING:

Upon being served with the complaint, the attorney should have recognized that there was a conflict of interest between herself and her client, Ms. Jones. The attorney had a personal interest in defending her own conduct relating to the drafting of the 2005 will and, as the complaint alleged fraud and undue influence, her professional judgment on behalf of her client would be, or reasonably may be, affected by the attorney's personal interest. Given the allegations regarding the 2005, there was a clear risk, if not actual likelihood, that the attorney might have been forced to defend her own conduct rather than represent the interests of the attorney's client, Ms. Jones. Under those circumstances, a conflict existed between the attorney's own interests and those of the client. Rule of Professional Conduct 1.7 prohibited the attorney from representing the client and required the attorney to withdraw.

When an attorney violates the attorney's ethical duties to a client, the attorney is not entitled to a fee for that attorney's services. In determining the reasonableness of an attorney's fees, the court is allowed to take into account the fact that services were affected by a conflict of interest.

JOHN MAZOR & WILLIAM MAZOR v. JULIAN MAZOR AND ELIZABETH FARRELL

Case No. 2012-LIT-000019

12/23/2014 Judge Gerald I. Fisher

GENERAL SUBJECTS:

Unjust enrichment and constructive trust arising from breach of fiduciary duty.
Indemnification of one defendant by another.
Res judicata and collateral estoppel.

FACTS:

Esther Mazor died in 1993, leaving behind a son, two grandsons, a very substantial estate and a will that provided for the establishment of two trusts, one for the benefit of her

grandsons (and great-grandsons), and the other for her son during his life, with the remainder paid over into the trust for the grandsons after Julian's death. Her son, the defendant Julian, and her accountant were named as co-personal representatives and co-trustees.

In 1999, Julian married the co-defendant, Elizabeth Farrell. Pursuant to a premarital agreement, Ms. Farrell's home in Georgetown remained as her separate property, but she otherwise brought no assets to the marriage. She did forfeit alimony she was receiving from her first husband. In the premarital agreement, Julian claimed assets exceeding 5 million dollars and also noted, in a footnote, that he was trustee of a "special account" worth 2.1 million dollars and that he could invade the corpus of that "special account" during his life.

The trusts were never established or funded until 2008, 15 years after Esther Mazor's death. In 2010, the two grandsons filed suit against the co-personal representative and co-trustee, Michael Rowan. (Case No. 2010-LIT-000016.) Mr. Rowan did not contest liability but contested the plaintiff's calculation of damages, which they claimed exceeded 3 million dollars. The trial court awarded compensatory damages in the amount of approximately 1.75 million dollars.

The grandsons then brought the instant lawsuit against their father (Julian) and stepmother. The grandsons alleged breach of fiduciary duty by, and unjust enrichment of, their father, and unjust enrichment of their stepmother, Ms. Farrell. They sought damages in the total amount of approximately 3.1 million dollars; \$1.43 million from their father and 1.58 million from Ms. Farrell.

HOLDING:

In a very detailed and comprehensive memorandum order, the court first reviewed the question of whether the doctrines of *res judicata* and collateral estoppel limited damages to the amount obtained in the case against the co-personal representative and co-trustee, Michael Rowen. The court held that both doctrines apply. With respect to Julian, the doctrine of *res judicata* applied. The lawsuit against Mr. Rowen involved the same facts and same claim being pursued in the case against Julian; being that damages resulted from the failure to establish and properly administer the two trusts and Julian's wrongful use of the funds that should have been placed in the two trusts. Mr. Rowen and

Julian, as co-personal representatives and co-trustees, were in complete privity with each other. The doctrine of collateral estoppel applied to the claims against Ms. Farrell and therefore the plaintiffs could not enhance their damages by proceeding on an unjust enrichment theory. (It is not clear why the plaintiffs proceeded first against Mr. Rowen and, only after that case was concluded, separately claimed against Julian and Ms. Farrell; the court noted that the plaintiffs could have sued all three at the same time.)

The court then proceeded to review the concept of unjust enrichment, defining unjust enrichment as occurring when a person obtains or retains a benefit (such as money) under circumstances in which, as between two persons, it is unjust for the recipient to retain it and, in justice and equity, the benefit should be paid to the other person. Unjust enrichment does not require fault by the recipient, but the equities must show that the recipient was unfairly or unjustly enriched at the expense of another. A remedy for unjust enrichment is the imposition of a constructive trust, by which the recipient becomes a trustee of the property acquired and hold it for the benefit of the other person.

On the facts, the court found that Julian was liable to the plaintiffs on an unjust enrichment theory of liability. With respect to Ms. Farrell, the court distinguished between unjust enrichment resulting from intentional wrongdoing or negligent misconduct and the receipt of a benefit by "innocent recipient", such as a person who receives a gift of money that was fraudulently obtained by the donor. In a case involving an "innocent recipient", the victim of the fraud has a superior right to the money than the donee of the gift, and restitution, but not resulting damages or consequential gains, is the appropriate remedy. However, if the donee, acting without knowledge, has disposed of and no longer has the money, restitution from the "innocent recipient" will not be required, as the change in circumstances makes it inequitable to require restitution. Applying those principles to the facts of the case, the court held that Ms. Farrell was required to return the value of money Julian contributed to the purchase of a specific parcel of real property or give the plaintiffs an interest in the property equaling that amount. She was also required to return to the plaintiffs the sum of \$21,500.00 she withdrew from a joint bank account when she learned of the lawsuit filed against her and Julian by the plaintiffs. (After the lawsuit was filed, Ms.

Farrell separated from her husband, Julian, and were in the midst of divorce proceedings when the court's order was issued.)

Except for the funds in the joint bank account, the court denied Ms. Farrell's demand for indemnification from Julian.

DISCUSSION:

Issues of unjust enrichment, constructive trust, and indemnification appear reasonably frequently in cases heard in the Probate Division. This memorandum opinion, while specifically applying those principles to the unique facts of this case, includes a detailed review of governing law on those legal principles.

ESTATE OF PINKNEY, Norman Thomas

Case No. 2006-ADM-000095

09/22/2014 Judge John M. Campbell

GENERAL SUBJECTS:

Personal representative's claim for reimbursement denied because the personal representative incurred expenses while having conflict of interest.
Expenses incurred prior to a personal representative's appointment may not be reimbursed.

FACTS:

Joseph Thomas was acting as personal representative of the estate of the decedent's wife, Mary Alice Pinkney. Mr. Thomas, as personal representative, deeded real property on Hunter Place, S.E. to himself personally. Upon learning that other members of Norman Pinkney's family were claiming an interest in that property, he got himself appointed personal representative of Norman Pinkney's estate. He was later removed as personal representative of the estate, on the basis that he had a conflict of interest in acting as personal representative of the Norman Pinkney estate. (The court also found that he acted improperly and engaged in self-dealing by distributing the Hunter Place property to himself.)

Joseph Thomas sought reimbursement of his expenses incurred with respect to, and compensation for his services in opening, the Norman Pinkney estate, and also sought reimbursement for his

claimed payment of real property taxes. Those requests were all denied.

HOLDING:

The requests for reimbursement and compensation were entirely unsupported by documentation or records. More importantly, because Mr. Thomas had a "disabling conflict of interest" in opening the Norman Pinkney estate, his expenses incurred in opening that estate would not be reimbursed.

In addition to the court's finding that the documentation supporting the claim for reimbursement for real property taxes was disorganized and unexplained, the court questioned whether Mr. Thomas could seek reimbursement for payment of property taxes made prior to his appointment as personal representative.

ESTATE OF ABRAMS, Selena

Case No 2013-ADM-000022

10/03/2014 Judge Erik P. Christian

GENERAL SUBJECTS:

Civil Contempt: Penalty for failure to comply with a court order can include incarceration.

FACTS:

The decedent's home was occupied by an heir of the decedent, Alicia Perry. The personal representative sought and obtained a court order for access to the premises for purposes of inspection and conducting an inventory of the contents of the house. Several orders were entered setting dates for the inspection, and the personal representative traveled to the District of Columbia for the scheduled inspections, but Ms. Perry continued to deny access. The court entered another order, with Ms. Perry present in court when the order was entered, and she acknowledged understanding the order. Nevertheless, she again did not allow access and the inspection as ordered. The personal representative filed a motion for sanctions and contempt.

HOLDING:

The court found Ms. Perry in contempt of court, ordered her arrest, and ordered her to pay the personal representative's costs and reasonable attorney fees.

Civil contempt can be used to coerce compliance with a court's order, or to compensate the complainant for losses sustained as a result of the violation of the court's order, or both. The person seeking contempt must show, by clear and convincing evidence, that the alleged contemnor was subject to a court order and violated that order. The only defenses to an allegation of civil contempt are substantial compliance or inability to comply with the court order. In this case, the personal representative met her burden of proof and Ms. Perry, despite having notice of the court hearing, failed to appear and offer any defenses.

The court has broad discretion to fashion appropriate remedial measures for civil contempt. Incarceration can be ordered, provided that incarceration allows the contemnor to purge the contempt by complying with the court order. The court's order in this case provided for a hearing after Ms. Perry was incarcerated, which gave her the opportunity to satisfy the court that she would comply with the court's order.

ESTATE OF WAUGH, Reuben E.

2008-ADM-000696

05/01/2015 Judge John M. Campbell

GENERAL SUBJECTS:

Procedure: Review of compensation and review of distribution plan.

Audit of and objections to accounting.

Estate administration continues despite appeal, unless the trial court's order is stayed.

FACTS:

After litigation, the trial court found that the decedent had a common law and appointed the wife, and an attorney, as co-personal representatives. Subsequently, the co-personal representatives filed an accounting, which included attorney fees incurred by the attorney supporting the claim of the common law wife, both at the trial and on appeal. The other heir objected to the accounting and appealed the denial of his objection. The heir also objected to the second and final account, and more specifically, the manner in which the in-kind distribution of the assets of the estate would be made. The objecting heir did not

file a petition to review compensation, did not object to the co-personal representatives' proposed distribution plan, sent pursuant to D.C. Code Sec. 20-1102(d), and did not file a stay pending appeal of the court's orders approving the two accountings.

HOLDING:

1. The court ruled that, in order to obtain a review of compensation of a personal representative or the attorney for the personal representative, it is necessary to file a petition for review of compensation. Filing an objection to the account is not sufficient to obtain a review of compensation.

2. If a personal representative serves a proposal for distribution pursuant to D.C. Code Sec. 20-1102(d), and no person having a right to object to the proposed distribution does so within the 30 day period set out in the statute, the right to object to the distribution plan is waived. A subsequent objection to the personal representative's accounting which reflects the distribution plan will not prevent the distribution of the estate assets as provided in the proposal for distribution.

3. A personal representative has a duty to administer and close a decedent's estate, and that duty continues even if a trial court order is appealed unless the appellant obtains a stay of the trial court's order.

DISCUSSION:

The court's memorandum opinion included interesting language regarding the process of auditing an account filed in supervised administration, as follows:

If an account balances, receipts and disbursements are documented and the account is otherwise in order, the account is then submitted to the court for review and approval. Auditors have no authority to make decisions or recommendations to the court concerning an interested person's objection to personal representative or attorney fees contained in an account. . . . [T]he Probate Division's auditing process, including the audit of an account by an auditor and the court's approval of a account, does not include a review of whether compensation paid to personal representatives, their attorneys or other

employees or agents employed by the personal representatives and contained in the account was reasonable.

Coupled with the court's holding that a petition for review is required in order for the court to review compensation, this language suggests, perhaps, a more constrained process for reviewing compensation, at least in estate administration matters.

IN RE COLLIER, Edward D.; APPEAL OF MARGARET A. CHAMBERS

Unpublished Memorandum Opinion and Judgment
12/01/2014

GENERAL SUBJECTS:

Trial court's award of compensation to an attorney guardian after objection by successor guardian and conservator (the daughter of the ward) was reversed for abuse of discretion because the trial court failed to specifically set out its review of the objections and address the substance of her objections, which the trial court overruled.

The "lodestar method" of determining compensation is presumptively reasonable.

DISCUSSION:

The Court of Appeals did not discuss the details of the attorney-guardian's request for compensation or the objections filed by the appellant-daughter, but rather reviewed in detail the standard for abuse of discretion and emphasized the need for the trial court to set out its reasoning in awarding attorney fees.

The Court of Appeals, while noting that a trial court may consider many factors in determining an award of compensation, stated that the "lodestar method" of determining compensation - time reasonably expended multiplied by a reasonable and customary hours rate - is presumptively reasonable.

IN RE WEBB, Cecil

Case No. 2004-INT-000289

05/01/2015 Judge John M. Campbell

GENERAL SUBJECTS:

Late filing of requests for compensation require showing of "excusable neglect" and equitable consideration of a variety of factors.

FACTS:

The ward's guardian, an attorney, filed a request for compensation covering a six year period of time along with a motion for leave to late file the petition for compensation. The request for compensation did not break down the services on an annual basis but instead was a cumulative listing of services spanning seven years. The reason given for not timely filing annual requests for compensation was that the attorney was "heavily involved in major litigation" involving her own real property and performing unspecified work for clients.

HOLDING:

The court granted the motion for leave to late file the petition for compensation, but approved an amount of compensation severely reduced from that requested.

The court, citing prior appellate decisions, defined "excusable neglect" as lateness caused by "inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control." The court also stated that the determination of "excusable neglect" requires equitable consideration of a number of factors, including prejudice to other parties or the ward, the length of delay, the potential impact on judicial proceedings, the reason for the delay, whether the reason was within the party's control, and good faith. The court suggested that delay occasioned by pursuing one's own private interests at the expense of obligations to the court would be negatively considered.

Because of the extreme lateness and the lack of reasonable excuse, the court reduced compensation on a sliding scale, with increasing percentage reduction applied to each year's service, with the court entirely denying compensation for services rendered in the oldest years.

ESTATE OF JOHNSON, Emma O.; APPEAL OF BARBARA J. HARGROVE

Unpublished Memorandum Opinion and Judgment

08/29/2014

GENERAL SUBJECTS:

Appellate Procedure:

- Only a final order can be appealed, and an order awarding attorney fees is final only when the court orders payment of a specific amount of attorney fees.

- The time for filing a notice of appeal is tolled only by the filing of an appropriate motion for reconsideration within **ten days** of the order for which reconsideration is requested.

- A motion for reconsideration not filed within ten days is considered a motion filed pursuant to Rule 60(b), and the Court of Appeals will review only for abuse of discretion.

- Appellate review is limited to issues that were presented first to the trial court.

- Once an appeal is filed, the trial court loses jurisdiction over the case, and therefore cannot consider motions relating to the matter on appeal filed after the appeal is filed.

FACTS:

This case dealt with two separate orders requiring a former personal representative, an attorney, to pay the fees of the successor personal representative. The first order was based on the former personal representative's failure to comply with the court's order to turn over estate records, and the second order was based on the report of the Auditor-Master, who recommended that the former personal representative pay the fees of the successor personal representative.

The Court of Appeals' memorandum opinion does not include a discussion of the basis of the court's decision to award fees or its determination of the amount of the attorney fee award. It does, however, review in some detail the procedure for appealing an award of attorney fees, including the time requirements.

The former personal representative did not object to the Auditor-Master's report or the successor personal representative's calculations of his requested fees. Therefore, the former personal representative's efforts to make, on appeal, arguments that should have been first made to the trial court were rejected.

IN RE SMITH, Edward T.; APPEAL OF BRUCE E. GARDNER

99 A.3rd 714 (D.C. 2014)

GENERAL SUBJECTS:

Payment of compensation from the Guardianship Fund for a fiduciary (conservator or committee) appointed pursuant to pre-Guardianship and Protective Proceedings Act.

FACTS:

The ward, Edward Smith, was civilly committed in 1958 and, under law existing at that time, had a "committee" appointed for him. Essentially, a committee was a person having "guardianship of the person and estate of one who has been adjudged a lunatic."

After several intervening appointments, attorney Bruce Gardner was appointed successor "conservator" of Mr. Smith's estate. In July 2010, in the course of reviewing whether the conservatorship should be terminated, the court determined that a guardian should be appointed to make medical decisions for the ward. At the suggestion of the deputy Register of Wills who attended the hearing, the court appointed Mr. Gardner "conservator of the person of Edward T. Smith." Mr. Smith's funds were exhausted in 2011 and the conservatorship of the estate was terminated, but the conservatorship of the person continued. Mr. Smith died in 2013.

Mr. Gardner's efforts to obtain compensation under the Guardianship Fund were denied on the basis that the Guardianship Fund was applicable only to appointments made pursuant to the 1986 Guardianship and Protective Proceedings Act and not "old law" appointments.

HOLDING:

The Court of Appeals, after a detailed review of the various amended, repealed, superceded, and replacement laws enacted since

1958, determined that Mr. Gardner could not be compensated for his services as "conservator" of the estate of Mr. Smith; indeed, the Court of Appeals determined that Mr. Smith may have actually been serving as successor "committee", but that was not entirely clear.

However, the Court of Appeals determined that Mr. Gardner's 2010 appointment as "conservator of the person" was most likely appointment of a guardian under the 1986 Guardianship Act (the "current" law). Although the appointment was perhaps made in a procedurally deficient manner, Mr. Gardner performed the duties of a "current law" guardian and acted in good faith under the directives of the court. Citing an *In re Orshansky* opinion found at 952 A.2d 199 (D.C. 2008), the Court of Appeals stated that even if a fiduciary was appointed in error, services performed in good faith pursuant to the order of the probate court are compensable.

DISCUSSION:

As the number of "old law" conservatorships continues to decline, this case increasingly will have limited utility. However, read in conjunction with *Sullivan v. District of Columbia*, 829 A.2d 221 (D.C. 2003), which dealt with whether a guardian *ad litem* appointed pursuant to Civil Rule 17 could be compensated from the Sec. 21-2060 Guardianship Fund (he could not), the Court of Appeals has made clear that only persons appointed, or could deem to have been appointed, under the terms of Chapter Twenty of Title 21 can be paid from the Guardianship Fund. Attorneys should therefore be careful that the basis of an appointment be made clear by the court.

IN RE BABER, George

106 A.3rd 1072 (D.C., 2015)

GENERAL SUBJECTS:

- Attorney Discipline: Various violations relating to representation of personal representative in decedent estate administration, including false statements to the court.
- Attorney Discipline: The sanction for serious and protracted dishonesty and lying to the court is disbarment.
- Compensation: Seeking compensation on a percentage basis without explaining services rendered and time expended may be found to be charging an unreasonable fee.

FACTS:

An attorney was retained by the daughter of the decedent to represent her in the administration of the decedent's estate. The retainer letter set out an hourly rate of compensation of \$125.00 per hour, but upon learning that the decedent held property worth almost \$200,000, the attorney sought to change the terms of his compensation to 5 percent of the estate's interest in the property if the property was sold, explaining to the client that it was "too burdensome" to document the time spend on work relating to that property. The client requested an accounting of the attorney's time so that she could pay him at the hourly rate originally agreed, and the attorney refused to do so but instead withdrew from the representation. The attorney threatened to sue the client if she failed to pay him to percentage compensation fee he demanded. The client requested that the attorney turn over the case file to the client, but he refused to do so.

The attorney missed several deadlines and requirements for estate administration. At a summary hearing, the attorney misrepresented the reason for failing to timely file the verification and certificate of notice, falsely blaming the client for the late filing. The attorney's motion to withdraw as counsel included several false accusations against the client, including that the client committed fraud on the court. The attorney's accusations caused prejudice to the client in the estate administration proceeding. The attorney also filed a lawsuit against the client, again making false accusations against the client. The attorney subsequently withdrew the lawsuit and the accusations against the client but, when the client filed her disciplinary complaint, the attorney responded by repeating the accusations made in his filings to the court.

The Hearing Committee found that the attorney violated several provisions of the Rules of Professional Conduct, most seriously by knowingly making false statements to the court and engaging in conduct that seriously interfered with the administration of justice. The Hearing Committee recommended disbarment. The Board of Professional Responsibility agreed with the Hearing Committee's findings of fact and conclusions regarding violations of the Rules of Professional Conduct. However, the BPR concluded that the attorney's conduct did not constitute flagrant dishonesty because the attorney's misrepresentations were limited just to the case at issue, that he withdrew the complaint that contained the false accusations,

and he did not resist the client's request that the court order dismissing the case include a statement protecting her reputation. The BPR also noted that the attorney had no prior disciplinary record. The BPR recommended a suspension of three years. Bar Counsel appealed the BPR's recommended sanction.

HOLDING:

The Court of Appeals held that the attorney failed to competently represent his client, pressured his client to pay an excessive fee different than the compensation she agreed to pay, improperly used confidential information provided by his client to make false accusations against the client, and lied to the court and in the disciplinary process. The Court of Appeals held that the dishonesty was aggravated and prolonged, and involved a protracted series of knowingly false statements made to the client, the court (both orally and in writing), and in a written submission to Bar Counsel. An aggravating factor was that the repeated dishonesty was to the detriment of the client ("[The attorney] basically 'threw his client under the bus'.") and was driven by a desire for personal gain. Another aggravating factor was that the attorney showed no remorse during the disciplinary process and failed to accept responsibility. The Court of Appeals held that disbarment was the appropriate sanction.

DISCUSSION:

The appellate opinion includes an extensive and instructive discussion about an attorney's obligations of honesty in the practice of law, with that duty being owed both to the court and to clients. The opinion also discusses the implications of dishonesty causing prejudice to a client.

IN RE MERRITT-BAGWELL, Andrea

Per Curiam opinion D.C. Court of Appeals
May 14, 2015

GENERAL SUBJECTS:

Attorney Discipline: An attorney who was guardian of a minor committed misappropriation when the attorney paid herself fees without prior court approval.

Attorney Discipline: The mandatory sanction for intentional or reckless misappropriation is disbarment.

Attorney Discipline: Disbarment is stayed and the attorney placed on supervised probation when the misconduct would not have occurred but for a mental illness for which the attorney has been treated and continues to receive treatment. ("Kersey defense.")

FACTS:

An attorney was serving as guardian for a minor child. The attorney failed to timely file mandatory reports to the court and paid herself fees without prior court approval. The payment of fees without prior court approval was intentional or reckless misappropriation, the sanction for which is normally disbarment. The attorney admitted the violations but sought mitigation under the Kersey doctrine on the basis that she was suffering from a serious mental illness and that the misconduct would not have occurred but for the mental illness. The attorney had received psychotherapy treatment and was substantially recovered as a result.

The Board of Professional Responsibility recommended disbarment, but that disbarment be stayed in favor of three years of supervised probation, with the conditions including continued therapy and a practice monitor after resuming practice.

Neither Bar Counsel or the attorney objected to the report and recommendations of the BPR.

HOLDING:

The Court of Appeals accepted the report and recommendation of the Board of Professional Responsibility.

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