DISTRICT OF COLUMBIA BAR
ESTATES, TRUSTS, AND PROBATE LAW COMMUNITY
REVIEW OF RECENT DEVELOPMENTS IN
PROBATE DIVISION LAW
2017 - 2018

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PART 1 - LEGISLATIVE CHANGES

Between June 1, 2017 through May 31, 2018, there were no legislative changes that affect practice in the Superior Court Probate Division.

There are several proposed legislation now pending before the City Council. Hearings on these bills were held in June 2017, but the Judicial Committee has not acted on them as of this date.

Revision of Guardianship of Minors and Creation of Supplemental Needs Trust Act of 2017.

This legislation proposes replacing the existing law governing guardianships of minors with an entirely new guardianship law. The manner in which guardians are appointed is changed, bond requirements are optional and flexible, and the manner in which expenditures are made is made easier and more flexible. It provides for different methods of holding property of a minor, including in arrangements which extend beyond age 18. Compensation is changed to fee for services instead of commission-based compensation.

It also proposes a new chapter of Title 21, governing the establishment and administration of supplemental needs trusts.

Consumer Disclosure Act of 2017

This legislation will regulate the sale of structured settlements and similar interests. It provides for more detailed disclosures of the financial consequences of the sale of a structured settlement arrangement and other consumer protections.

Uniform Power of Attorney Amendment Act of 2017

This legislation proposes the adoption of the Uniform Power of Attorney Act in the District of Columbia. It provides for statutory form powers of attorney, interstate recognition of statutory powers of attorney, and mandates acceptance of powers of attorney unless there is a valid reason for withholding recognition of a POA. There are also some protections intended to curb abuse by an agent appointed under a POA.

The ETP Section Steering Committee anticipates submitting a public statement generally supporting the proposed legislation, but recommends certain modifications to reflect specific District of Columbia considerations.

Electronic Signature Act of 2017

This bill establishes that a video recording or other electronic record may be admissible as evidence of the proper execution of a will (whether a U.S. or international will), the intentions and mental capacity of a testator, the authenticity of a will, or other matters relevant to the probate of a will. The bill also provides a method of authentication for electronic signatures.

Uniform Partition of Heirs' Property Act of 2017

This bill governs court-ordered sales of real property held as tenants in common by heirs; an heir being a person who acquires an interest in property from a relative (defined rather broadly in the law). It establishes notice requirements, how fair market value is determined, a right of first refusal for other co-tenants, and other matters. It

also governs partition in kind (although this is unlikely to have much practical effect in the District of Columbia.)

[This bill, as written, does not apply to sales by a personal representative of a decedent's estate, but note the preference for distribution in kind set out in D.C. Code § 20-1102.]

Uniform Fiduciary Access to Digital Assets Act of 2017

This bill identifies an electronic record in which an individual has a right or interest as a digital asset. It establishes procedure for disclosure of contents of electronic communications and other digital assets or a deceased user. It also establishes procedures for disclosure of contents of electronic communications and other digital assets of a decedent or held in trust of by a person who is the ward in a conservatorship. The Bill required that the legal duties imposed on a fiduciary charged with managing tangible personal property also apply to the management of digital assets.

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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DECEDENT ESTATES

ESTATE OF GEORGE S. DRAVILLAS

Unpublished *Per Curiam* Memorandum Opinion
07/19/2017
(Superior Court Case No. 2010-ADM-000351 & 2010-LIT-000010)

GENERAL SUBJECTS:

Execution of Will:

D.C. Code Sec. 18-303 requires that the testator sign the will in the presence of the witnesses, or that the testator's signature be on the will and acknowledged by him to be his will before the witnesses sign as attesting witnesses.

FACTS:

Decedent died in 2010, leaving a sister and children of four predeceased siblings.

A two-page document dated August 1, 2006 was filed along with a petition to admit the document to probate as the decedent's last will. The document had the signatures of two witnesses on lines below their typed names. Appearing above their names was the typed name of the decedent and what was purported to be his handwritten signature on a line below the decedent's typed name. To the left of the column of three signatures was a rubber-stamped version of the decedent's name in stylized, cursive font.

The heirs at law filed a complaint challenging the due execution of the will. The deposition testimony of the two witnesses was that, while the rubber-stamp signature was already on the document when they signed it, the decedent's handwritten signature was not. The witnesses did not observe the decedent sign, or otherwise make any mark on, the document at any time either before or after they signed as witnesses.

The trial court granted summary judgment on the complaint, finding the will was not executed as required by applicable law.

HOLDING:

The Court of Appeals affirmed the trial court's grant of summary judgment.

D.C. Code Sec. 18-103 requires that a will be signed by the testator and attested and subscribed in the presence of the testator by at least two witnesses. The testator must sign in the presence of the witnesses or at substantially the same time as the witnesses.

If either or both of the witnesses did not see the testator sign the will, the evidence must show that the testator's signature was on the will when the witnesses signed and that the testator acknowledged the document as his will. In this case, the uncontroverted testimony was that the testator's signature was not on the will when they signed as witnesses.

A will can be "signed" by a mark or stamp; there is some authority that a typed name can serve as a valid signature. However, the evidence must show that the testator intended that stamp or mark or typewritten name serve as their signature. Here, the fact that the testator purportedly signed the will, in his own handwriting, at some later point showed that the testator intended for his signature, not the stamp, to be his signature.

ESTATE OF PATRICIA REYNOLDS WAKELING

Case No. 2016-ADM-001288; 2016-WIL-000806
07/26/2017; Judge Darlene M. Soltys

GENERAL SUBJECTS:

Presumption of Due Execution of Will or Codicil

D.C. Code Sec. 20-312(b) provides that a will that is signed by the testator and attested in the presence of the testator by two witnesses is presumed valid.

Partial Revocation by Codicil

A testator may revoke all or part of a will by executing a later codicil.

FACTS:

The decedent's will was admitted to probate and the personal representative nominated in the will was appointed as P/R of the estate. Subsequently, the personal representative discovered a codicil to the will and filed a petition to admit the codicil to probate. The petitioner explained that the codicil was found in the decedent's file maintained by a law firm. The codicil significantly altered the will; most notably, by changing the residuary legatee.

The codicil was regular on its face; having the testator's signature, signature of two witnesses, and recital of the facts of due execution.

The Court scheduled a hearing on the petition, with notice to all interested persons.

HOLDING:

The codicil effectively revoked the provisions of the will which were changed by the later-executed codicil. D.C. Code Sec. 18-109(a)(1); *In re Estate of Creech*, 989 A.2d 185 (D.C. 2010). The codicil clearly set out the testator's changed intentions, and a court is required to construe a will to determine and give full effect to the testator's intentions.

As the codicil appears regular on its face, the reason for its after-discovery was reasonable, and in light of the statutory presumption that due execution is presumed, the Court admitted the codicil to probate.

ESTATE OF MURIEL M. THORNE

Case No. 2018-ADM-000178
03/28/2018; Judge Gerald I. Fisher

GENERAL SUBJECTS:

Service of Notice of Standard Probate:

Upon a showing that a notice requirement would be unduly burdensome and disproportionate to the distributive shares of those having an interest in the matter, the Court may modify the notice requirements.

Guardian ad Litem:

The Court may appoint a guardian at litem to represent the interest of an unascertained person or a person whose identity or address is unknown.

FACTS:

In 1999, the decedent, Muriel Thorne, executed her will that she drafted herself. The will contained more than 40 bequests of specific items of tangible personal property, 7 specific bequests of cash to individuals and institutions (university, church, and other charities), and a residuary clause.

Approximately 12 years later, Ms. Thorne contacted an attorney to discuss making a new will. She brought a photocopy of the 1999 Will. That copy showed numerous changes and cross-outs of names or specific items, such that most of the specific bequests were either altered in some manner or were deleted. The attorney retained the photocopy and had a subsequent telephone discussion with Ms. Thorne, but she never followed up to arrange for the preparation of a new will. She died several months later.

Despite a diligent search of her apartment, neither the original signed 1999 will nor a new will was found.

Ms. Thorne was survived by an elderly sister and five nieces and nephews, being children of Ms. Thorne's predeceased brother and sister. Her estate consisted of approximately $160,000 cash and tangible personal property of average quality and value located in her modest two-bedroom apartment. The surviving sister and one of her adult children (and Ms. Thorne's nephew), acting with the consent of the other heirs, prepared to file a petition for abbreviated probate, seeking appointment of the son as personal representative. When the petitioner's attorney attempted to file the petition for probate, it was learned that the attorney with whom Ms. Thorne had consulted had filed with the Register of Wills the photocopy of the altered will which Ms. Thorne had left with the attorney prior to her death.

The petitioner was able to gather addresses for many, but not all, of the persons listed in the 1999 will. Further, several of the persons listed in the 1999 will had died after the will was executed but before Ms. Thorne's death. As her self-prepared will did not have a contrary provision, the "anti-lapse" provision of D.C. Code Section 18-308 required that descendants of any predeceased legatee would succeed to that legatee's interest and become interested persons. The petitioner did not have a ready means to determine which of the approximately 50 legatees had predeceased Ms. Thorne and who the descendants of those legatees were.

After learning of the existence of the photocopy of the altered 1999 will, the petitioner filed a petition for standard probate, seeking a declaration that Ms. Thorne died intestate. The petitioner asserted that, as the original will was not found and its loss could not be explained, the presumption of revocation, particularly in light of the evident and extensive

alternations that were shown on the copy of the 1999, should apply. The petitioner also filed a motion to modify the requirements for service the petition and notice of standard probate to permit first class mailing to the legatees named in the 1999 will, and appointment of a guardian ad litem to represent the interests of those legatees for whom current addresses were not available.

HOLDING:

Ordinarily, a petition for standard probate and the notice of standard probate must be mailed to all interested persons by registered or certified mail, restricted delivery, with return receipt requested. The petitioner seeking standard probate must file a verified statement "evidencing" that a copy of the notice was timely mailed or, if the address of an interested person could not be ascertained, the diligent efforts made to ascertain the address. Probate Rule 403(7) and (8).

Superior Court Probate Rule 4(b) provides that the Court may modify the requirements of notice under these rules when the parties and affected persons are very numerous and it appears that the time, labor, and expense of complying will be disproportionate to the distributive shares of those having an interest in the matter.

Applying Probate Rule 4(b), the Court granted the petitioner's motion. Th Court required that the heirs at law receive notice of the petition for probate, (including the memorandum in support of the argument that the presumption of revocation of a lost will should apply required by Probate Rule 403(a)(6)), and the notice of standard probate, served as required by Rule 403(a)(7).

However, for those persons listed as legatees in the 1999 will, the Court ruled that those persons whose addresses were known to the petitioner or which could be ascertained by the petitioner by reasonable inquiry could be served, by first class mail, with the petition for standard probate, notice of standard probate, photocopy of the altered 1999 will, and the Court's order.

Finally, the Court appointed a guardian ad litem, who was tasked to conduct an independent inquiry to determine whether there is any factual or valid legal basis for a non-frivolous claim that the copy of the 1999 document purporting to be the

decedent's last will should be admitted to probate. The GAL was ordered to file a response to the petition for standard probate not later than 30 days after the appointment. The Court further ordered that, if the GAL determined that there is a valid legal basis to admit the copy of the 1999 will to probate, that guardian must file an appropriate pleading and prosecute that non-frivolous claim.

ESTATE OF SUZANNE E. SZABO

Case No. 2012-ADM-000322
06/14/2017; Judge Gerald I. Fisher

GENERAL SUBJECTS:

Priority for Appointment as Personal Representative

D.C. Code Sec. 20-303 does not permit the priority of a deceased person to be transferred or assumed by that decedent's personal representative.

FACTS:

Decedent died with a will, and with the decedent's major asset being real property, encumbered by a first and second mortgage. The initially appointed personal representative (one of the residuary legatees) failed to complete unsupervised administration and pursuant to D.C. Code Sec. 20-1301, the estate was closed three years after appointment of the P/R. Thereafter, he died. One of the mortgage companies filed to reopen estate and for appointment of a personal representative from court's fiduciary panel. The petition and granted and an attorney was appointed.

Shortly before the mortgage company filed to reopen Ms. Szabo's estate, the former personal representative's aunt, Ms. Guffey, filed to be appointed personal representative of his estate, and her petition was granted. She then sought removal of the attorney appointed as successor personal representative of Ms. Szabo's estate, claiming that the creditor's petition was defective because it failed to name as person having priority for appointment the P/R of the estate of the nominated personal representative.

Ms. Guffey claimed that, for purposes of priority under D.C. Code Sec. 20-303, the personal representative of the estate of a person having priority takes that deceased person's priority.

HOLDING:

The Court denied the petition to remove the successor personal representative, holding that the priority listed in 20-303 is personal and cannot be transferred to a successor in interest or representative.

Analyzing both the statute and case law in other jurisdictions, the Court noted that the statute does not provide for transfer of priority to one's personal representative or other representative (such as a conservator, or the guardian or custodian of a minor child). The Court further stated that Section 20-303 sets out priorities based on a decedent's expressed intentions (first priority is person named in will) or an assumption of what a decedent would have preferred; surviving spouse, then adult children, then other relatives in order of intestacy, with the largest creditor and "other persons" having lowest priority. Giving a personal representative, or other representative, of a person with priority does not reflect that purpose; a personal representative of the estate of a deceased person nominated in a will would unlikely be favored over a surviving spouse or adult child.

The Court acknowledged that previously-issued orders of Superior Court judges reflect differences of opinion on this point, with two orders allowing transfer of priority and two orders holding the opposite result. The one Court of Appeals opinion that reviewed the predecessor to Section 20-303, *In re Estate of Shorter*, 444 A.2d 954 (D.C. 1982), supports the holding of Judge Fisher in this *Szabo Estate* matter.

Finally, the Court noted that Section 20-303(d) permits a court to appoint someone of lower priority for good cause. Even if Ms. Guffey had priority, the Court found that there was good cause to keep the successor personal representative in place.

The petition to remove the court-appointed successor personal representative was denied.

(Ms. Guffey also argued that the successor personal representative should be removed because he had a conflict of interest as defined in D.C. Rule of Professional Conduct 1.7; specifically, the attorney appointed as successor P/R had handled a number of foreclosure cases in which the lender was represented by the same attorney as the lender in the Szabo Estate and as a

result was professionally acquainted with counsel for the lender. Judge Fisher rules that, as the court, and not the lender, appointed the personal representative, and because the appointed P/R never had an attorney-client relationship with the lender or its attorney, no conflict of interest exists.)

ESTATE OF OTHELLO WAYNE POULARD

Case No. 2017-ADM-000087
07/31/2017; Judge Alfred S. Irving, Jr.

GENERAL SUBJECTS:

Common Law Marriage:

A common law marriage requires proof of an express mutual agreement to be married, followed by cohabitation as husband and wife.

Common Law Marriage:

Claims of common law marriage, particularly when made after the death of one of the parties, are closely scrutinized.

Removal of Personal Representative:

Removal of a personal representative may be appropriate if the P/R has no interest in an estate and there is animosity between the personal representative and beneficiaries.

FACTS:

Barbara Burge, claiming to be the decedent's common-law wife, filed a petition for probate and was appointed personal representative of the decedent's estate. One of the decedent's children filed a petition for removal of the personal representative, contesting Ms. Burge's claimed status as the decedent's surviving spouse.

In a very detailed memorandum opinion, the Court reviewed the pleadings and facts adduced at a hearing on the petition, the most important of which are as follows.

The decedent, Othello Poulard, twice married, met Barbara Burge, a widow, in 2000 and began dating in 2001. Ms. Burge testified that Mr. Poulard proposed to her in 2004. She claimed that Mr. Poulard had researched common law marriage and they decided that a common law marriage approach was appropriate for them. Ms. Burge claimed that, on Saturday, April 15, 2006, she

and Mr. Poulard went to a chapel at Howard University and exchanged wedding vows, with one of the divinity students present serving as officiant. They did not inform Mr. Poulard's children or anyone else of this event, nor were there photographs or other extrinsic evidence of it.

The parties maintained separate bank accounts and, while Ms. Burge spent a great deal of time at Mr. Poulard's residence in the District of Columbia and had some of her personal effects there, she maintained her own residence in Yorktown, Virginia, as she was employed by the U.S. Defense Department there. The parties maintained separate financial assets and filed separate income tax returns. There was no evidence that either party claimed "married, separate" tax filing status. There was very little documentary evidence of marriage.

Mr. Poulard's children testified that, while the parties spent a great deal of time together and that Mr. Poulard told them that Ms. Burge was "his lady," he told the children that he and Ms. Burge were not married and that he did not intend to marry her.

HOLDING:

The Court set out the elements of common law marriage as (1) cohabitation as husband and wife, (2) following an express mutual agreement, (3) in words of the present tense. Noting that there are few, if any, impediments to statutory marriage and that ceremonial marriage is readily available, claims of common law marriage should be closely scrutinized.

The party claiming the existence of a common law marriage must prove its existence by a preponderance of evidence; the evidence may be direct evidence and circumstantial evidence. In addition to direct evidence of an agreement to be married, the general reputation regarding the parties' relationship may be weighed as circumstantial evidence on the issue.

The Court found that there was sufficient evidence to show that the parties cohabited, finding that cohabitation does not prevent parties from maintaining separate residences for employment or professional purposes or separate financial arrangements. However, the Court found that there was insufficient evidence to show that there was an express mutual agreement to be married, and further that there was insufficient evidence that the parties wanted to be married for all purposes.

Upon finding that the Ms. Burge and the decedent were not married, and therefore that Ms. Burge did not have an interest in the estate, the Court removed Ms. Burge as personal representative. Citing D.C. Code Section 20-526(c)(3), which provides that a personal representative may be removed if the court finds that the personal representative "is unable, for any reason, to discharge the duties and powers effectively," the Court stated that the hearing "undoubtedly" generated animosity and therefore there was good cause to remove her and appoint a successor personal representative from the Fiduciary Panel.

ESTATE OF CARTER McKINLEY SMITH, JR.

Case No. 2014-ADM-001325
01/05/2018; Judge Alfred S. Irving, Jr.

GENERAL SUBJECTS:

Forfeiture of Benefits Provision of Will

A clause in a will providing that a beneficiary who contests the will forfeits the bequest to that beneficiary is enforceable.

Forfeiture of Benefits Provision of Will

A forfeiture of benefits clause will apply only to a contest to the will, and not to litigation of other issues with respect to the estate administration.

FACTS:

Carter McKinley Smith, Jr. died intestate on August 6, 2010, survived by his wife, Mariah Smith, and Shadid Abdul-Latif his son by a prior relationship. Mr. Smith's estate consisted of the house on Florida Avenue, N.E., which his wife, Mariah, continued to occupy until her death.

After Mr. Smith's death, Mariah Smith executed a will. Her will provided that her interest in the Florida Avenue property would pass to Mr. Abdul-Latif, and that her residuary estate would pass to several friends, including Charles Hall. The will also included the following "Forfeiture of Benefits" provision:

> Should any beneficiary under this Will become an adverse party in a proceeding for its probate, such beneficiary shall forfeit its entire interest hereunder and its interest shall be divided proportionately among the other beneficiaries of the residue.

Mariah Smith died on December 10, 2014. The next day, Mr. Abdul-Latif filed a petition for probate of the estate of his father, Carter Smith, Jr. In his petition, Mr. Abdul-Latif stated that the decedent was not survived by a spouse, so neither Mariah Smith nor the Estate of Mariah Smith was listed as an interested person. Mr. Abdul-Latif was appointed as personal representative.

Mr. Abdul-Lafit soon thereafter entered into a listing contract for sale of the Florida Avenue property. On February 6, Abdul-Latif filed a complaint against Charles Hall for tortiously interfering with the contract to sell by refusing Abdul-Latif access to the property, which opened case number 2015-LIT-000004. Mr. Hall was subsequently appointed personal representative of Mariah Smith's estate, and her will was admitted to probate.

Thereafter, Mr. Abdul-Latif was removed as personal representative of the Carter Smith estate; the court finding that Mr. Abdul-Latif's statement in the petition for probate that Carter Smith was not survived by a spouse and that he was Mr. Smith's only heir was a material misrepresentation. (D.C. Code Sec. 20-526(a)(1).) Mr. Abdul-Latif then dismissed the LIT case.

Mr. Hall, as personal representative of the Mariah Smith Estate, contended that, by asserting that Carter Smith was not survived by a spouse, Mr. Abdul-Latif implicitly attacked the validity of Mariah Smith's will and therefore forfeited Ms. Smith's bequest to him. Mr. Hall further contended that Mr. Abdul-Latif's statement in his complaint filed in the LIT case that he owned the property outright was an attack on Mariah Smith's ownership interest the Florida Avenue property and also triggered the forfeiture of benefits clause.

HOLDING:

The Court held that a forfeiture of benefits clause is valid in the District of Columbia and will be enforced, even if a contest to the will was filed in good faith and with probable cause.

However, the misstatements in the petition for probate filed in the Carter Smith Estate, and the litigation over the property, was not a contest over the probate of Mariah Smith's will. The forfeit of benefits clause was therefore not applicable to the misstatements in the petition for probate or the litigation over the real property.

As the bequest to Mr. Abdul-Latif remained in force, the Court ordered that the successor personal representative of the Carter Smith Estate should distribute the proceeds of sale entirely to Abdul-Latif, after deduction necessary and appropriate expenses. [The Court implicitly recognized that, as the Florida Avenue property was the subject of a specific bequest, expenses of the Mariah Smith's estate would be paid out of the residuary of that estate.]

SUNTRUST BANK V. RONALD J. FOULIS, Jr., et al.

Case No. 2016-LIT-000024
07/05/2017; Judge Russell F. Canan

GENERAL SUBJECTS:

Will Interpretation - Intent of Testator

A testator's intention is determined by the court putting itself in the position of the testator at the time the will was drafted.

Will Interpretation - Adopted Child

Absent specific indication of a contrary intent, a will defining children as including adopted children does not include an adoptee adopted as an adult.

FACTS:

Maxine Foulis' will created a trust for the benefit of her child, Ronald Foulis, Jr. The will also provided that, upon the death of the beneficiary of the testamentary trust, the trust assets are to be paid to or for the beneficiary's issue. The will included a clause which stated that "for all purposes of this, my will, adopted children (and their issue whether or not adopted) are to be treated in all respects the same as natural children or their issue." The trust further provided that, if, on the death of the decedent's last surviving child, there are no other persons authorized to take under the will, the trust assets are to be divided between Washington University Law School and the American Bar Endowment.

Ronald Foulis, met Evan Branin, his personal trainer, when Mr. Foulis was 71 years old and Mr. Branin was 35 years old. Mr. Foulis subsequently adopted Mr. Branin. Mr. Foulis's testimony at the adoption hearing made clear that the purpose of the adoption was, at least in part, intended to enable Mr. Branin to get the proceeds of the trust upon Ronald Foulis' death. (Mr.

Foulis testified that "There's another trust involved that's giving [the two institution beneficiaries] more than their share, so this is for [Mr. Branin]. It will be very nice.")

HOLDING:

The Court determined that the plain language of the will suggested that the decedent did not intend to include, in the definition of "adopted children," adoptees adopted as adults.

The Court reviewed applicable law providing that the testator's intent controls the disposition of the estate, that the court must discern the testator's intent from the four corners of the will, and, in doing so, must place itself in the position of the testator at the time the will was drafted. The Court noted that the will used the language "adopted children" instead of the more general "adopted persons." Applying the principle of interpretation of *expressio unius est exclusio alterius* [the expression of one thing is the exclusion of another], and noting the Black's Law Dictionary definition of "child" has five alternatives, with only one not being age-specific, the Court determined that the most reasonable and natural construction of the term "adopted children" did not include persons adopted as adults. The Court stated that the decedent, when drafting her will, could not have anticipated that her son, at age 71, would adopt a 35 year old male as his child.

In support of this interpretation of the testator's intent, the Court cited the general rule, stated in *Read v. Legg*, 493 A.2d 1013 (D.C. 1985), that inclusion of adopted children for inheritance purposes is limited to children who were adopted at a relatively young age and reared by the adoptive parents. This rule prevents (a) the conscious use of adoption to upset a testator's normal expectations by the adoption of an adult solely to provide an heir or class beneficiary, or (b) use of adoption for financial gain. Thus, the Court of Appeals, in *Read v. Legg* and *O'Connell v. Riggs National Bank*, 475 A.2d 405 (D.C. 1984), has held that adoptions undertaken in bad faith to defeat a testator's intent will not be recognized in the District of Columbia.

The Court therefore ruled that Evan Branin is not a qualified beneficiary of the trust created by Maxine Foulis' will.

ESTATE OF SHARON R. DEANE

Case No. 2007-ADM-001016
02/16/2018; Judge Alfred R. Irving, Jr.

GENERAL SUBJECTS:

Adoption:

Adoption

FACTS:

The petitioner asked to be included as an heir of the decedent. The decedent was the petitioner's biological mother but the decedent was adopted by another couple.

HOLDING:

Adoption replaces a person's parent-child relationship with their biological parents with the parent-child relationship with the adoptive parents, with the adopted child becoming the legal heir of the adoptive parents. D.C. Code Sec. 16-312. The petition was therefore denied.

ESTATE OF FRANCES WALKER v. STEFAN

160 A.3d 1165 (D.C. 2017)

GENERAL SUBJECTS:

Multi-Party Bank Account:

Unless the terms of the account explicitly provide that a jointly-titled bank account is without right of survivorship, on the death of one account-holder, the account presumed to pass to the surviving joint holder(s) by right of survivorship.

Multi-Party Bank Account:

The court will examine the intent of the person establishing the account only if the account documents (the account agreement and contract of deposit) are not the statutory forms or substantially similar to those forms.

FACTS:

Ms. Walker's bank account, jointly titled with her friend Stanley Stefan, has troubled both the Superior Court and the Court of Appeals for several years.

Ms. Walker's bank account was opened in July, 1998 in the name of Ms. Walker and her long-time friend, Mr. Stefan, using only Ms. Walker's funds. Ms. Walker died in September 1999. After the first remand from the Court of Appeals [891 A.2d 216 (D.C. 2006)], the trial court and the parties concluded that the Uniform Nonprobate Transfers on Death Act applied to Ms. Walker's bank account, and the trial court concluded that the Act created a presumption of a right of survivorship in multi-party accounts which would apply if there was no express disclaimer of a right of survivorship. On the second remand, the trial court was instructed to make findings as to the parties intent in establishing the account.

On the second remand, the trial court determined that the clear weight of evidence was that Ms. Walker intended the fund in the account to pass to Mr. Stefan upon her death. The personal representative of Ms. Walker's estate appealed.

HOLDING:

The Court of Appeals affirmed the trial court. The Court held that, under the Act, bank accounts are classified as a single party account or multiple party account, and either with or without right of survivorship, with statutory forms used to determine how to classify the account. The Court of Appeals went on to state that, under D.C. Code Sec. 19-602.12(a), unless otherwise provided in the Act, upon the death of one party to a multiple party account, the account belongs to the survivor. Section 19-602.12(c) provides that if an account, "by the terms of the account", is without right of survivorship, the amount in the account to which the decedent was entitled [the funds traceable to the funds the decedent deposited into the account] will be part of the decedent's estate.

Given that construction of the statute, the Court explicitly rejected the argument that Section 19-602.12(c) allows the court to consider the absence of a designation of survivorship or other circumstances in determining the "terms of the account." In the absence of an explicit provision in the terms of the account that the account does not pass by right of survivorship, Section 19-602.12(c) does not apply.

Here, as the account documents were not substantially similar to the statutory forms, Section 19-602.04(b) requires that Ms. Walker's intent be determined in order to decide whether the account was an account with or without right of survivorship.

The trial court's review of the evidence was that Ms. Walker did intend for Ms. Stefan to receive the funds upon her death, and the Court of Appeals affirmed the trial court's determination.

Given that the trial court found that "the clear weight of the available evidence" showed that Ms. Walker intended the Mr. Stefan receive the funds in the account upon her death, the Court of Appeals did not decide the question of which party bears the burden of proof, and whether the standard is clear and convincing evidence, when it becomes necessary to determine the depositor's intent as to the type of account that was created.

Finally, in a footnote, the Court of Appeals elected not to clarify whether Section 19-602.12(a) -- "except as otherwise provided in this subchapter, on death of a party funds on deposit in a multiple-party account belong to the surviving party or parties" -- creates a default rule or presumption, and also did not entirely clarify the relationship between Section 19-602.12(a) and Section 19-602.04(b).

ESTATE OF CARL BARBEE, SR.

Case No. 1995-ADM-001206
09/12/2017; Judge Alfred S. Irving, Jr.

GENERAL SUBJECTS:

Sale of Real Property of Decedent

Prior to April 1995, sales of real property of a decedent's estate require prior court approval.

Distribution to Post-Deceased Heirs

The Court will require that the shares of a post-deceased heir be distributed to the personal representative of the estate of that post-deceased heir, and not to the heirs of a post-deceased heir.

FACTS:

Carl Barbee died in 1994 without a will, and with the decedent's major asset being real property. He was survived by his wife and seven children. All eight beneficiaries were appointed co-personal representatives. The real property was not administered. Mr. Barbee's wife subsequently died, as did one of the seven children. The post-deceased child left one adult child as her surviving heir.

In 2014, Alice Love, one of the remaining heirs, filed a petition to reopen estate administration. The Court appointed her successor personal representative, but at the hearing at which the appointment was made, Ms. Love (and her attorney) were reminded that the law in force in 1994 -- D.C. Code Sec. 20-742(b), and Superior Court Rule 112(b)-- required prior court order in order to sell real property.

Notwithstanding the discussion at the hearing in which she was appointed, Ms. Love sold the property without prior court order and distributed the sale proceeds equally to the six remaining children. Ms. Love did not recognize the need to distribute shares owed to the estate of the post-deceased surviving spouse and to the heir of the post-deceased child of the decedent. With Ms. Love having failed to file a final account, and with her attorney conceding that she failed to properly administer the estate, the matter was referred to the Auditor-Master.

The Auditor-Master determined the net proceeds of sale and approved administrative expenses, and the amount of the net estate to be distributed to Mr. Barbee's heirs. The Auditor-Master calculated the distributions to which each heir was entitled, taking into account the distribution that should have been made to the estate of the surviving spouse. The Auditor-Master recommended that the sale be ratified, but that judgment be entered against Ms. Love for the amount owed to the estate of the predeceased child, and recommended judgment against the remaining five siblings for the amount they received in excess of the amount to which the Auditor-Master calculated they were properly entitled. Finally, the Auditor-Master recommended that the estate be closed despite irregularities. The Auditor-Master did not make any findings about whether there were any unpaid creditor of the estate of Mr. Barbee's post-deceased spouse and post-deceased child.

HOLDING:

Expressing concern that the proper process for administering the estate was not followed, including making distributions to the estates of the post-deceased heirs and ensuring that creditor claims are properly protected, the Court ratified the report of the Auditor-Master only in part. The Court removed Ms. Love as personal representative, appointed a successor personal representative, and entered judgments against Ms. Love (a) in

favor of the estate of Mr. Barbee's post-deceased spouse and (b) in favor of the estate of the post-deceased child.

INTERVENTION PROCEEDINGS

IN RE YIGAL RAPPAPORT

Case No. 2016-INT-000438
01/30/2018; Judge Darlene M. Soltys

GENERAL SUBJECTS:

Capacity to Contract

A contract made by a person who is mentally incapacitated is voidable.

Tenancy of Employee

A person permitted to occupy premises as an incident of providing services is not a tenant.

FACTS:

Confronted with a foreclosure proceeding involving a property owner whom the judge was concerned was suffering from dementia, the judge in the civil foreclosure action appointed an attorney as guardian ad litem for the property owner. The attorney soon after filed a petition for appointment of a guardian and conservator for the property owner. After a hearing, the Court appointed the attorney as guardian and conservator for Mr. Rappaport.

The ward owned two parcels of valuable real property, both of which were the subject of foreclosure proceedings. Both properties were occupied by tenants. The conservator filed show cause petitions with respect to two purported tenants of rental units; one for each property. The two respondents claimed to be tenants pursuant to leases, but the conservator argued that the leases were voidable contracts because the ward lacked capacity when the leases were signed.

The court heard extensive testimony about the ward's condition in the years immediately prior to the appointment of the conservator, his tangled business and financial affairs, and also about the relationships between the ward, Dolline Miller (a woman who had been employed by the ward as his receptionist and personal assistant and who later took over managing his real estate holdings), Timothy Murphy (an occupant of one of the

properties), and Arthur Shepard, a nephew of Ms. Miller (an occupant of the other property).

A review of the record suggests that there was serious question as to whether valid written leases were ever executed for one apartment, but there was dispute over whether valid oral tenancies were created.

HOLDING:

The Court cited the rule set out in Restatement 2nd of Contracts, Section 15, that a contract is voidable if, by mental illness or defect, (a) the contracting party is unable to understand in a reasonable manner the nature and consequences of the transaction, or (b) he is unable to act in a reasonable manner in relation to the transaction and the other party has reason to know of the contracting party's condition. That standard was adopted by the Court of Appeals in *Hernandez v. Banks*, 65 A.3d 59 (D.C. 2013). After reviewing in great detail the evidence, the Court found that the conservator had shown, by clear and convincing evidence, (a) that the ward, Mr. Rappaport, was incapacitated at the time the leases or rental agreements were made, and (b) that the other parties knew of the ward's condition.

With respect to one of the purported tenants, there was some argument that he was excused from paying rent because he was employed to perform services for the ward's rental properties. The Court cited *Anderson v. William J. Davis, Inc.*, 553 A.2d 648 (D.C. 1989), in which the Court of Appeals held that a maintenance person who was permitted to occupy an apartment as that person's compensation was not a tenant, as the occupancy was an incident to the services provided. With respect to the other tenant, the court noted that his aunt, the alleged business manager for the ward's property, had made the lease arrangements and that the lease arrangement was on very favorable terms. Finally, the court found that all three individuals knew of the ward's dementia and incapacity and took advantage of him.

The Court concluded that the conservator had shown, by clear and convincing evidence, that the tenancy arrangements, to the extent that a tenancy existed at all, were voidable.

TRUSTS

SUGAR V. SILVER

Case No. 2017-LIT-000049
01/23/2017; Judge Darlene M. Soltys

GENERAL SUBJECTS:

Trust Terms Govern:

The intent and purpose of the settlor is the law of the trust.

Interpretation of Trust:

Absent any ambiguity, the intentions of the settlor is found within the four corners of the trust instrument.

Discretionary Trust:

A trustee of a discretionary trust cannot be compelled to make a distribution to a beneficiary.

FACTS:

Sandra Sugar's will provided for a testamentary trust for her daughter, Andrea Sugar. The trust provided for distributions of a specific sum when the daughter reached specified ages, and also provided that the co-trustees had discretion to make additional distributions to Andrea of "such sum or sums as the Trustees shall deem necessary or proper to provide for her suitable support, education, health, and maintenance. . . . "

Separately, the will of Marvin Sugar, Andrea's father, established a trust for Andrea. Like Sandra's trust, Marvin's testamentary trust provided for distributions of a specific sum when Andrea reached specific ages, and further authorized the trustees to make distributions to Andrea "in the Trustee's absolute discretion for her best interests and general welfare," and "[i]n making such distributions the Trustees shall consider the standard of living to which Andrea is accustomed . . . ." The Will defines a distribution in a 'beneficiary's best interest and general welfare' to include "assets available for the beneficiary's support in reasonable comfort;" and for entertainment, travel, and vacations; to purchase and furnish a residence; or to purchase, start, or invest in a business.

Andrea filed a petition seeking an order directing the trustees to make a distribution in the amount of $20,000 for Andrea to retain counsel to represent her in litigation regarding

the trust. In response, the trustees argued that the trust gave the trustee's discretion to make distributions in the best interests and general welfare of the beneficiary and, under that standard, they had discretion to deny Andrea's request.

HOLDING:

The Court reviewed the terms of the trust and determined that, under the terms of the trust, the trustee must make the mandatory distributions prescribed but after those distributions are made, the trustee has absolute discretion to determine whether a distribution is in the trustee's best interests and general welfare. The trustee can determine that pursuing litigation is not in the best interest and general welfare of the beneficiary, as defined by the trust. Therefore, the Court will not force the trustee to make the distribution requested by the beneficiary.

In response to the beneficiary's argument that she has a right to counsel, the Court did not dispute that, but held that her right to counsel is not violated if she does not obtain funds from the trust to do so.

SUNTRUST BANK v. LITTLE

Case No. 2015-LIT-000019
09/07/2017; Judge Gerald I. Fisher

GENERAL SUBJECTS:

Court Audit of Trustee's Account:

In the absence of a claim of trust mismanagement of a private (as opposed to court-supervised) trust, the court has discretion to deny a trustee's request for court audit and approval of the trustee's account.

FACTS:

SunTrust Bank, co-trustee of the Henry Lockwood Strong Trust of May 9, 1969, filed a lawsuit against the co-trustee and the beneficiaries of the trust in order to obtain court approval of its resignation as co-trustee. The defendants filed a counterclaim, alleging violations of the D.C. Consumer Protections Procedure Act relating to SunTrust's efforts to obtain the defendants' consent to its resignation. The Court granted declaratory judgment in favor of SunTrust with respect to its resignation and denied judgment on the defendant's counterclaim.

SunTrust then filed a "Motion for Audit, Adjudication and Approval of its Interim Account . . . . and Upon Approval of that Account, a Release and Discharge from All Claims and Liabilities. . . . During That Accounting Period." In support of its motion, SunTrust relied on D.C. Code Sec. 19-1302.01, which provides that the court **may** intervene in the administration of a trust to the extent its jurisdiction is involved by an interested person, and that a judicial proceeding involving a trust may relate to any matter involving the trust's administration.

HOLDING:

The Court stated that, with the disposition of SunTrust's request for court approval of its resignation as co-trustee and the disposition of the defendants' counterclaim, there was no direct claim regarding trust management before the Court. The counterclaim did not alleged mismanagement or improper administration of the trust.

The Court stated that Section 19-1302.01 is discretionary; the statute uses the term "may" intervene in the administration of the trust. Noting the limited resources of the Auditing and Appraisal Branch of the Office of the Register and Wills, and the availability of use of an independent CPA to conduct an audit of SunTrust's account as an alternative to use of court personnel for that purpose, the Court denied SunTrust's motion for a court audit of its accounting.

OTHER MATTERS

IN RE THELMA ANDERSON

Case No. 2015-INT-000041
08/09/2017; Report of Auditor/Master

GENERAL SUBJECTS:

Gift:

The recipient of a purported gift has the burden of proving a valid gift.

Gift / Joint Bank Account:

Adding a person's name to a bank account, without more, is not evidence of a gift of the funds in that account to the joint account holder.

Undue Influence:

Undue Influence must be proven and cannot be presumed from the existence of a trust relationship or the fact that a person is aged or infirm.

FACTS:

On petition filed by Adult Protective Services, an attorney was appointed conservator for the elderly and incapacitated Thelma Anderson. The attorney discovered that three of the ward's four adult children withdrew money from the ward's bank accounts, and one of the children's name was added to the ward's bank account prior to the appointment of the conservator.

The conservator, believing that the ward's funds were misappropriated by the three adult children, requested referral of the matter to the Auditor-Master.

The Auditor-Master obtained and reviewed in detail the ward's bank records and found that the three children had financially exploited their mother. However, because the children were no longer in Washington, D.C., they were not served with notice of the hearing and the Auditor-Master held that he did not obtain jurisdiction over them and therefore could not recommend entry of a judgment against the three children.

HOLDING:

For *inter vivos* gifts, the burden is on the party asserting the gift to prove: donor's intention to make a gift, delivery, and absolute disposition of the subject of the gift (completed gift). *Duggan v. Keto*, 554 A.2d 1126 (D.C. 1989). Failure of the recipient of funds to show donor's intention to make a gift results in finding that no gift occurred.

Under D.C. Code Sec. 19-602.11(b), funds in a joint bank account belong to the parties in proportion to their respective contributions to the account. Adding a person's name on a bank account is not, by itself, evidence of an *inter vivos* gift to that person, nor is adding money to that account after it was made a joint account. *In re Estate of Blake*, 856 A.2d 1151 (D.C. 2004). In the absence of proof of intent to make a gift -- allowing the joint account-holder to use the account for their own purposes -- withdrawals from the account beyond the amount (if any) contributed by the joint account-holder is misappropriation, with the joint-account holder liable for the amount of the misappropriation.

Undue influence must be proven. Undue influence cannot be presumed from the existence of a trust relationship, even when one of the parties is aged or ill. *In Re Ingersoll Trust*, 950 A.2d 672 (D.C. 2008).

ESTATE OF MYRTLE BINGHAM

Case No. 2016-ADM-000695
02/14/2018; Report of Auditor-Master

GENERAL SUBJECTS:

Power of Attorney: Gifts

A general grant of authority to an agent under a power of attorney does not authorize the agent to make gifts of the property of the principal.

Power of Attorney: Self-Dealing

A general grant of authority to an agent under a power of attorney does not authorize the agent to make gifts to the agent.

FACTS:

Myrtle Bingham died with a will. She was survived by three children. The beneficiaries named in her will were LaTanya Thomas, who was the legatee of the specific bequest of real property, and three residuary legatees who were not heirs at law. LaTanya Thomas was named as personal representative in the will, and, prior to the decedent's death, served as agent under the decedent's power of attorney.

Prior to the decedent's death, Ms. Thomas, acting pursuant to the power of attorney, changed the decedent's bank accounts to include "pay on death" designations to herself and children of the decedent. Thus, only a very small amount of money was left for the residuary estate.

The residuary beneficiaries challenged the actions of the personal representative and the matter was referred to the Auditor-Master to determine the assets of the estate and prepare an accounting for Ms. Thomas.

HOLDING:

An agent under a power of attorney is a fiduciary and therefore must act for the benefit of the principal who appointed the agent and the principal's successors in interest. Therefore,

absent a specific grant of authority, an agent under a POA does not have authority to make gifts of the principal's assets, and specifically does not have authority to make gifts to themself. The Auditor-Master held that Ms. Thomas did not have specific authority to change accounts to P.O.D. accounts, as that resulted in a gift of Ms. Bingham's property. The bank accounts held by the decedent as of the date of her death were therefore estate assets.

Expenses incurred to protect and preserve property of the decedent are legitimate expenses of estate administration, and therefore one who pays such expenses can be reimbursed from estate assets. These expenses include utilities for the real property, but do not include cable or telephone service. Ms. Thomas was therefore credited with payment of utility expenses for the property prior to her appointment as personal representative, but not for payment of Verizon and Comcast billings.

Lemp v. Keto, 678 A.2d 1010 (D.C. 1996), provides that expenses for real property of the decedent, including liens secured by such property, are payable from the residuary estate unless there is a clear expression to the contrary in the decedent's will; commonly referred to as "exoneration." The decedent's will provided:

> I direct my personal representative to pay all my legal debts, exclusive of any debt secured by a Deed of Trust or mortgage on real estate not due at the time of my death or becoming due during the period of administration of my estate. . . .

The Auditor-Master gave this provision a very expansive reading and held that this provision reflected the decedent's intent that NO expenses relating to the decedent's real property should be paid from the estate but instead should be borne by the legatee of the specific bequest of the real property. Thus, Ms. Thomas would be responsible for all expenses relating to the real property after appointment of the personal representative.

[DIGESTER'S NOTE: There is significant question as to whether this expansive interpretation of the exoneration clause is correct.]

ESTATE OF WAYNE HAMILTON

Case No. 2015-ADM-000322
08/08/2017, Judge Alfred S. Irving, Jr.

GENERAL SUBJECTS:

Real Property:

Absent agreement, after divorce, parties hold real property as tenants in common, not as tenants by the entireties.

Subsequent remarriage does not convert the ownership back to tenants by the entireties.

COMPENSATION

IN RE SYLVIA C. GRIFFIS

Unpublished *Per Curiam* Memorandum Opinion
02/09/2018
(Superior Court Case No. 2014-INT-000196)

GENERAL SUBJECTS:

Compensation for work seeking compensation

An attorney may be entitled to compensation for work performed with respect to seeking compensation.

FACTS:

An attorney was appointed as counsel for the subject in an emergency guardianship proceeding. The attorney sought compensation from the Guardianship Fund, stating that the subject had no known assets. The petition was rejected by the clerk because the attorney failed to serve all of the interested persons. The attorney asserted that he did not become aware of the rejection for several months and, by the time he re-filed his petition, the attorney had learned, from a petition filed by a guardian ad litem appointed for the subject in another proceeding, that the subject had real property which, if sold, would have a net cash value of between $400,000 and $600,000. The guardian ad litem in that other case requested compensation at his normal hourly rate, to be paid if and when the property was sold. Therefore, in his re-filed petition for compensation, the attorney asked for compensation either from the guardianship fund or, in the alternative, at his normal hourly rate if the court determined that the ward had sufficient funds to pay compensation.

There then ensued a back-and-forth series of petitions and orders, focusing first on the need for the attorney to request leave to late file his re-filed petition for compensation and then whether the attorney would be paid from the guardianship fund or the ward's assets when the property was sold and whether the attorney would be paid at the Guardianship Fund rate or his normal hourly rate. Also, the ward's daughter filed an objection to the attorney's fee request and to payment from the ward's assets. Each time the attorney filed a petition, he increased the compensation requested by adding the time incurred to prepare the new pleading and requested reimbursement for additional costs, so that the original request for compensation for 8.1 hours ended up being a request for 22.7 hours, plus filing fees, to be paid from the ward's estate.

The Court ruled that the attorney would be paid from the Guardianship Fund for the original 8.1 hours and costs incurred for the original petition. The attorney appeals.

HOLDING:

The Court of Appeals affirmed the trial court's ruling that the attorney should be paid from the Guardianship Fund. The trial court accepted the ward's daughter's assertion that the costs for the ward's assisted living residence exceeded her income and the conservator's statement that the assets from the sale of the property had already been expended. As the attorney presented no contrary evidence, the Court of Appeals had no basis to question the trial court's finding. The trial court properly made its determination with respect to the source of compensation based on the information it had before it when it made its decision, and the decision was not patently wrong.

However, the Court of Appeals remanded the matter to the trial court on the issue of the attorney's entitlement for time spend amending his fee petition and whether the attorney's compensation should accordingly be redetermined. The Court of Appeals stated that the language of D.C. Code Sec. 21-2060(a) authorizing compensation for services rendered "in connection with a guardianship or protective arrangement" has absolutely no limiting language or restrictive terms other than the requirement that the compensation promote the underlying principles and policies of the Guardianship Act, as stated in D.C. Code Sec. 21-2001(b). Citing *In re Smith*, 138 A.3d 1181 (D.C. 2016), the Court of Appeals reiterated that allowing compensation for work relating to compensation is consistent with the purposes of the

Act, as that would foster the availability of guardians who may be more willing to serve if they understand that they can be compensated for work protecting their right to compensation.

The Court suggested that the trial court erred in requiring the attorney to definitively determine the source of funds, which by improperly imposed a burden on the attorney, thus "contributing to the need for the attorney to spend more time pursuing his right to compensation."

IN RE JACQUELINE COSTLEY

Case No. 2008-IDD-000385
10/27/2017; Judge Darlene M. Soltys

GENERAL SUBJECTS:

DDS Standing:

In an IDD case, the District of Columbia in an interested party in the action entitled to participate in all matters relating to the case.

Retained Counsel for Third Party

An attorney retained to represent an individual other than the subject of the proceeding and who intends to seek compensation from assets of the ward must notify the court of that intention at the earliest possible opportunity.

Compensation of Attorney for a Guardian Whose Performance is Challenged

Absent a showing of direct benefit to the ward, counsel retained by a guardian whose performance is questioned will not be compensated pursuant to D.C. Code Sec. 20-2060(a).

FACTS:

After a review of a report on an attorney-guardian's performance by the Guardianship Assistance Program, the Court scheduled a hearing to address concerns raised in the report, and appointed counsel for the ward for that hearing. DDS and the Register of Wills Legal Branch Manager sought removal of the guardian. Counsel for the ward advocated keeping the guardian in place. The guardian had retained legal counsel for the hearing, who advocated on behalf of his client, the guardian. The parties agreed that the issues raised by the report and reviewed at the hearing should be referred to mediation and the matter was continued for six months. At the conclusion of the hearing,

counsel for the guardian filed a praecipe entering his appearance and advising that he would be seeking compensation from assets of the ward or the Guardianship Fund.

A mediation session took place and an agreement was reached. The agreement detailed the respective responsibilities of the DDS service coordinator and the guardian. At the six month status hearing, the parties reported that the situation had improved in several respects, DDS stated it no longer sought the guardian's removal, and the guardian remained in place.

Counsel for the guardian filed a petition for compensation paid from the Guardianship Fund. DDS opposed the petition, arguing that counsel was retained for the benefit of the guardian herself and not for the benefit of the ward.

HOLDING:

The Court denied compensation from the guardianship fund to counsel for the guardian. The Court, citing the compensation provision of the Uniform Guardianship and Protective Proceedings Act and *In re Graelis*, 902 A.2d 821 (D.C. 2006), interpreted D.C. Code Sec. 20-2060(a) to require that the court must consider whether legal services rendered in an intervention proceeding provided any benefit to the ward. The court cited a number of trial court memorandum opinions in support of this proposing, and distinguished the one appellate court opinion that approved compensation without a showing that the attorney's services directly benefitted the particular ward in that case. [*In re Edward T. Smith*, 138 A.3d 1181 (D.C. 2016).] The Court also cited Probate Rule 308(b)(1)(E) -- which provides that one of the several factors in evaluating the reasonableness of compensation is "the benefits that accrued to the estate or the subject of the proceeding as a result of the services," -- as authority for its position that the question of whether privately-retained counsel for the guardian "turns on whether counsel provided any conceivable benefit to [the ward] as a result of his services."

The Court rejected the argument that the guardian, although being charged with deficient services requiring her removal and therefore was a party litigant, was unable to represent herself. The Court also held that, because counsel represented a guardian whose services were called into question, the ward did not benefit from the attorney's services. Although the settlement agreement resulted in the issues regarding the guardian's services being resolved, "preservation of [the guardian-ward

relationship], under these circumstances, did not benefit Ms. Costley, because any other court-appointed guardian could adequately serve her." The court held that there was no benefit to the ward, either directly or indirectly.

IN RE CONSTANCE CHAMPION

Case No. 2013-INT-00011
11/07/2017; Judge Alfred S. Irving, Jr.

GENERAL SUBJECTS:

Late Filed Petition for Compensation

HOLDING:

An attorney filed requests for compensation for services as counsel for the subject over three years after the services were completed, over one year after the ward's death, and three months after the end of the six-month period for filing creditor claims in the decedent estate proceeding. The request for leave to late-file the petition for compensation was denied.

The Court's detailed memorandum opinion set out an extensive review of the facts advanced by the attorney for the late-filing and the Court's rationale for rejecting the explanation. The opinion contained an instructive detailed discussion of the rationale for requiring timely-filed requests for compensation.

IN RE CECIL GARDNER, Jr.

Case No. 2012-INT-000298
01/27/2017, Judge Gerald I. Fisher

GENERAL SUBJECTS:

Reasonableness of Services:

Fiduciary duty includes duty to avoid excessive time out of proportion to the value of the estate, and duty to efficiently manage the ward's resources.

HOLDING:

This case involves the Court's review of a conservator's petition for compensation in which the conservator expended a very large amount of time to claim a bank account of less than $2,000.00. The conservator sought compensation of over $7,600.00 and over $630.00 in costs.

The Court noted that the conservator had alternatives that would have required much less time than that incurred by the conservator and, noting a fiduciary's duty to efficiently manage the resources of the estate, reviewed the services reported. The Court held that the fee sought was not justified by the value of the assets being managed and that available alternatives could have accomplished the same result much more easily and at much less cost.

The Court reduced the conservator's compensation by over $2,200.00.

IN RE PEARL ROBINSON

Case No. 2014-INT-358
09/25/2017; Judge Richard A. Levy

This order is the Court's ruling on the attorney-guardian's amended petition for compensation and his motion for reconsideration of the Court's June, 2017 order, which was the first ruling on the guardian's amended petition compensation. The Court vacated the June, 2017 order and issued the amended order. A review of the facts, unique to this case, is not needed. The rulings of the trial court in this amended order are reviewed here.

Law of the Case:

The Law of the case doctrine does not apply to petitions for compensation. The following reasons for that holding are:

(a) the law of the case doctrine is discretionary;
(b) the doctrine applies to determination of law and not factual determinations;
(c) a review of compensation is based on the facts specifically relevant to the services performed and other relevant facts applicable to the period during which the services were rendered; and
(d) determination of compensation, including the reasonable rates for specific services, is a discretionary decision made by the judge deciding the request for compensation.

Lodestar Method

The "lodestar method" of determining compensation in intervention proceedings is appropriate.

- The "lodestar" is the number of hours reasonably expended multiplied by a reasonable hourly rate, with upward or downward adjustments thereafter made as appropriate to the specific case.

- The court identified a number of factors that can be considered in determining the lodestar amount.

Prevailing Market Rate for Compensation

The hourly rate for a fiduciary's compensation in a specific case is not determined by "the prevailing hourly rate." While the prevailing hourly rate is relevant, as is an attorney's customary rate, the court must consider a variety of factors in determining the rate of compensation, including the nature of the services rendered.

Conservation of, and potential depletion of, the ward's assets is a relevant consideration in determining the reasonableness of compensation.

The court rejected the contention that conservation of the ward's assets is the responsibility of a guardian only when a conservator is not in place and that, if there is a conservator for the ward, conservation of the ward's assets is the conservator's responsibility.

Citing D.C. Code Sec. 20-2047(a)(4), the Court held that a guardian has a statutory duty not to be improperly spend or be wasteful of the ward's money and to maintain and save the ward's funds for future use.

The Court also cited Probate Rule 308(b)(1)(d) in support of its view that it is appropriate for the Court to consider both the size of the ward's estate, including the total assets and the annual income, as well as the amount to which those assets and income will be depleted, when determining reasonable compensation.

It is appropriate for the Court to consider the nature of the services rendered and whether the services can be rendered in a more economical way when determining whether the services should be compensated at the attorney-guardian's normal hourly rate.

It is not necessary that discharge of the statutory duties of 21-2047(a)(1) - (3) be done by an attorney-guardian personally, when a specific service could be performed by a competent elder care giver or housekeeper.

That the ward benefitted from the services does not mean that the Court cannot determine that the services could have been rendered in a more efficient or less expensive manner.

Finally, the Court held that, when compensating an attorney-guardian, it is appropriate to make a distinction between legal services and non-legal services, and apply different rates for different types of services. The Court cited a variety of sources in support of this conclusion, including D.C. appellate authority, rulings of other Superior Court judges, and authority from other jurisdictions.

[The Court did agree with the attorney-guardian's argument that virtually none of the statutory duties of the guardian set out in D.C. Code Sec. 21-2047 are inherently legal, but that does not follow that Sec. 20-2060 mandates compensation of attorney-guardians at normal attorney rates.]

The Court concluded that, except for services that can be reasonably identified as services requiring legal work or preparing court filings, reasonable compensation for guardianship services rendered by the attorney-guardian is $90.00 per hour.

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