

**COURT OF COMMON PLEAS OF PHILADELPHIA
ORPHANS' COURT DIVISION**

Estate of Margareta Berg, an Incapacitated Person
O.C. No. 1286 IC of 2016
Control No. 173478

Margaretta Berg, An Incapacitated Person



20160128606047

Estate of Edmund Berg, an Incapacitated Person
O.C. No. 1287 IC of 2016
Control No. 173477

OPINION

Josef Wituschek (“Objector”), plenary Guardian of the Persons and Estates of Margareta and Edmund Berg (collectively, “Bergs”), Incapacitated People, objects to the First and Final Accounts of Gloria Byars (“Accountant”), former plenary Guardian of the Persons and Estates of the Bergs, claiming that she breached her fiduciary duty to the Bergs by engaging in self-dealing and making improper expenditures from their estates. For the reasons stated below, the Court sustains the objections.

I. Background

On October 25, 2016, the Philadelphia Corporation for Aging (“PCA”) filed petitions for adjudication of incapacity and appointment of a plenary guardian of the persons and estates of the Bergs. At hearings on the petitions held December 6, 2016, the Court found that the Bergs are incapacitated and in need of guardianship services. (Resp’t’s Answer with New Matter to Pet. for Leave to Sell Real Property, 1) PCA proposed Accountant to serve as guardian; while Objector, the brother of Margareta Berg, had assisted the Bergs in managing their household and finances for years prior to PCA’s petition seeking appointment of a guardian, he did not feel prepared to accept the responsibilities of guardianship following the then-recent death of his wife. (Trial Tr., 19-22, July 26, 2017) Based on representations made to him that the Bergs would remain in their home and that in-home care would be provided to them, Objector did not contest Accountant’s nomination as guardian. (Resp’t’s Answer with New Matter to Pet. for Leave to Sell Real Property, 2; Trial Tr., 19, July 26, 2017) There being no objection to Accountant’s nomination, she was appointed plenary guardian of the Bergs. (Resp’t’s Answer with New Matter to Pet. for Leave to Sell Real Property, 2)

Soon after her appointment, Accountant moved the Bergs from their home in the Fox Chase section of Philadelphia to Springfield Senior Living, an assisted living facility. (Id., 2-3) On April 25, 2017, Accountant filed a petition for leave to sell the Bergs’ Fox Chase home, which she amended on May 4, 2017. (Pet. for Leave to Sell Real Property) In that petition, Accountant sought Court authorization to make various expenditures of principal from the

Bergs' estates. (Id., 7-12) Among those proposed expenditures was \$11,500.00 to be paid to DEPCO, LLC, the company Accountant hired to clean out the Bergs' home in preparation for its sale. (Id., 11)

Objector filed an answer with new matter to the amended petition on May 24, 2017. (Resp't's Answer with New Matter to Pet. for Leave to Sell Real Property) Objector opposed the sale of the Bergs' home, arguing that the sale price proposed by Accountant was substantially less than fair market value. (Id., 3) In his new matter, Objector sought removal of Accountant as the Bergs' guardian, revealing to the Court that Accountant's husband owns DEPCO, LLC, and that she had been convicted of multiple counts of passing bad checks in the Commonwealth of Virginia in 2000 and 2001. (Id., 8-10) Accountant did not disclose her interest in DEPCO when she sought authorization to pay the company \$11,500.00 from the Bergs' estates or in any previous matter, nor was the Court ever notified of her criminal history. (Trial Tr., 7, July 26, 2017)

The Court is deeply disappointed in PCA and disturbed by its lack of due diligence in examining the history and fitness of Accountant to serve as a guardian before nominating her in this and many other cases before this Court. PCA is well aware that, due to its nature as a largely reactive entity and its limited resources, the Court takes no role in the vetting of guardians before they are proposed, and relies on the representations of parties to incapacity proceedings regarding the fitness of a nominee when deciding the propriety of an appointment. PCA's utter failure to conduct even the most elementary assessment of Accountant's fitness to serve resulted in her appointment to nearly all of her 91 former cases in Philadelphia. Her misconduct ranged from mismanagement of the estates of her wards in the best of cases, to misappropriation of their assets in the worst.¹ While it is true that Accountant is only one bad apple, that one bad apple has

¹ At the hearing, the Court brought to Accountant's counsel's attention the pending matter of the Estate of Estelle Segal, another of Accountant's former wards. As with all the other cases from which she was removed, Accountant was ordered to file an account of her actions as guardian. While Accountant's filing in that matter did not even approach the level of detail required, it was immediately evident that a substantial amount of money was missing from Ms. Segal's estate. In her initial Guardian's inventory, Ms. Byars stated that Ms. Segal had accounts with various financial institutions with a total value of \$236,585.70, two properties in Philadelphia, and two properties in New Jersey whose combined value she estimated to be \$60,000.00. At an April 2, 2018 hearing on that matter, another attorney representing Ms. Byars disclosed that the combined net profit to the Estate from the sales of Ms. Segal's two Philadelphia properties was \$261,555.37. After the sale of the two Philadelphia properties, the Estate's liquid assets would have totaled \$498,141.07. This Court approved principal expenditures totaling \$78,150.07 in its decrees authorizing the sales of the Philadelphia properties, and was provided with checks which counsel stated showed that Ms. Byars expended \$90,784.00 of Estate principal without prior authorization of the Court to pay for Ms. Segal's nursing home care, and delivered Estate funds to her successor totaling \$194,099.96. Ms. Byars' attorney in that matter further represented that Ms. Byars expended another \$7,500.00 in legal fees in connection with her attempts to sell the New Jersey properties without prior authorization of the Court. Deducting the authorized and unauthorized expenditures of principal as well as the funds forwarded to Ms. Byars' successor from the total liquid assets of the Estate following the sale of the Philadelphia properties revealed that \$127,607.04 remains unaccounted for. An interim Decree dated April 4, 2018 surcharging Accountant \$127,607.04 and imposing a fine of \$100.00 per day that the full account remains delinquent—which continues to accumulate—was entered into

imposed an astronomical administrative burden on this Court, whose miniscule legal staff have had to go to extraordinary lengths to remediate her misconduct and find suitable successor guardians for each ward.² The Court anticipates that it will have to review and adjudicate objections to accounts she still has yet to file.³ Perhaps most troublingly, however, PCA's failure to discover that the guardian it nominated in so many cases was plainly unfit to serve has shaken the public's faith in the guardianship system, which is vital to protecting incapacitated people throughout Pennsylvania.

The Court does not intend to be unduly harsh in its criticism of PCA, especially in consideration of the otherwise exemplary services it renders to the elderly. While PCA's lack of any formal vetting process unfortunately mirrors the current practice of most guardianship-related entities in Pennsylvania, the Court feels that PCA should be held to a higher standard given its statutory purpose as the protector of Philadelphia's elderly, and in particular its elderly incapacitated, pursuant to the Older Adults Protective Services Act, 35 P.S. § 10225.101 *et seq.* Although PCA's suggestion that it plans to begin conducting criminal background checks on proposed guardians is a step in the right direction, background checks alone are not a total solution. Background checks do not guarantee a potential guardian's integrity, that the guardian's financial literacy is sufficient, that the guardian will be attentive to a ward's needs, or that the guardian will be diligent in their recordkeeping and in the reporting that enables this Court to perform its supervisory role. The Court sincerely hopes that the discovery of Accountant's malfeasance will serve as a clarion call to make the larger changes necessary to protect incapacitated Pennsylvanians.

Following a July 26 hearing on the matter, at which Accountant gave gravely concerning testimony that the Court concluded rendered her position that she appropriately administered the Bergs' estates not credible, and at which counsel for PCA was given the opportunity to address its history of recommending Accountant as a guardian, this Court issued a Decree on July 27, 2017 permanently removing Accountant as the Bergs' guardian and ordering her to file a formal account of her actions taken as guardian. Accountant filed her account on September 18, 2017, to

the record here. (Trial Tr., 5-6) The Estate of Estelle Segal and the present matter have both been referred to the District Attorneys of Philadelphia and Delaware Counties for appropriate review.

² The judges of this Court have all instituted a requirement that prospective guardians sign a second consent form which requires them to affirm that they understand that they are entering into a fiduciary relationship with their prospective ward; that they understand the nature of the fiduciary relationship; that they are required to provide the Court with regular reports of the ward's person and/or estate; that they are forbidden from expending any estate principal or selling any of the ward's real property without prior authorization from the Court; and requiring them to affirm subject to penalty of law under 18 Pa.C.S. § 4904, relating to unsworn falsification to authorities, that they have not been convicted of or pleaded guilty or no contest to any crime involving fraud, deceit, and/or financial misconduct.

³ This Court removed Accountant in all 34 guardianships in which she was appointed. Although she was ordered to file accounts at the time of her removal, she has failed to do so in 26 matters.

which Objector filed his objections on November 2, 2017.⁴ (First and Final Account; Obj. to First and Final Account) Following settlement negotiations, Objector withdrew the majority of his objections prior to the hearing held on April 24, 2018. (Trial Tr., 6-8, April 24, 2018) The remaining objections to be heard alleged that Accountant made unexplained expenditures, and that she failed to provide any time records, receipts, or other appropriate documentation for over \$24,000.00 in payments made to home health aides. (Obj. to First and Final Account, 2) Objector further alleged that one of the home health aides—referred to by Accountant as Asia Jones—does not actually exist. (Trial Tr., 10-11, April 24, 2018) The objections also argued that Accountant should be denied the guardian fees she sought and surcharged the \$4,487.50 in guardian fees she already collected, all payments made to home health aides, miscellaneous unexplained expenditures, and for the legal fees Objector incurred in litigating the objections, opposing the sale of the Bergs' home, and in his efforts to have Accountant removed as guardian, which total \$24,479.50. (Obj. to First and Final Account, 2-4; Trial Tr., 22-30, April 24, 2018) Accountant did not file an answer to the objections. Accountant's attorney sought fees from the Bergs' estate for work he has performed throughout the matter, which came to a total similar to that of Objector's attorney, but ultimately settled for a fraction of that amount. (Trial Tr., 6-7, 30-32, April 24, 2018)

Despite many attempts by her attorney to contact Accountant on the day of the hearing and in the days leading up to it in an effort to secure her presence, she failed to appear before the Court, and offered no explanation for her failure to appear. The hearing proceeded in her absence, and her attorney attempted to rebut the case made by Objector. (Id., 5)

At the April 24 hearing, Objector pointed out that although Accountant stated that a \$4,567.80 check she wrote to her company on December 23, 2016 was a reimbursement for food, home health aides, and roof repair, no receipts or invoices were ever produced to substantiate her statement. (Id., 27) He also introduced into evidence a check for \$5,200.00 that Accountant wrote to herself on March 10, 2017, for which no explanation was ever given. (Id., 25-27)

Beyond noting that no documentation supporting the validity of payments totaling \$24,345.00 made to any home health aides was ever admitted into the record, Objector introduced evidence that on three occasions Accountant wrote checks from the Bergs' account to Asia Jones, then endorsed them herself. (Id., 10-11) The checks were later cashed through a check-cashing service. (Id., 11) Based on these three incidences, taken together with the fact that no timesheets, tax documents (such as a form 1099), or valid contact information for Asia Jones were ever produced, Objector posited that she is a fiction, and that Accountant actually collected

⁴ Objector filed supplemental objections on November 6, 2017, but they did not request any relief from the Court and were later withdrawn.

all of the money allegedly paid to Asia Jones. (Id., 12-13) Over the course of her guardianship of the Bergs, Accountant wrote checks from their account to Asia Jones totaling \$10,250.00; of that, the three checks endorsed by Accountant represent \$2,625.00. (Pet'r's Ex. 1; Def's Ex. 1)

The Court carefully considered the record in this matter and the arguments advanced by the parties. This Opinion follows.

II. Discussion

Pennsylvania's guardianship system is intended to allow incapacitated people to participate as fully as possible in decisions that affect them, while at the same time recognizing that appointment of a guardian is necessary to assist incapacitated people in meeting the essential requirements for their physical health and safety, protecting their rights, managing their financial resources and developing or regaining their abilities to the maximum extent possible. 20 Pa.C.S. § 5502. As the Bergs' guardian, Accountant was bound by the duties of a fiduciary; she was required to act in their best interest, to manage their estates with the prudence an ordinary person would employ in the management of her own estate, and to refrain from self-dealing. See *Estate of Rosengarten*, 871 A.2d 1249, 1256 (Pa. Super. Ct. 2005); *In re Noonan's Estate*, 361 Pa. 26, 30-31, 63 A.2d 80, 83 (Pa. 1949). Forbidden self-dealing has occurred where the fiduciary had a personal interest in an estate transaction of such a substantial nature that it *might* have materially affected her judgment, and can be established even in the absence of evidence that the personal interest at issue actually did affect the fiduciary's judgment. *Id.* Where a guardian has breached her fiduciary duties and caused a loss to the estate of her ward, surcharge is an appropriate remedy. *In re Estate of Scharlach*, 809 A.2d 376, 384 (Pa. Super. Ct. 2002).

Objector, seeking to surcharge the Accountant for losses to the Bergs' estates for improper and unauthorized expenditures of principal, has the initial burden of showing the Accountant breached her fiduciary duties to the Bergs; when the Objector meets his burden, it shifts to the Accountant, who must show she used due care in carrying out her duties as guardian of the Bergs' estates. See *Estate of Maurice*, 433 Pa. 103, 108, 249 A.2d 334, 336 (1969).

Objector objected to payments made to medical aides not supported by any documentation, disbursements made without any supporting documentation and/or explanation of their purpose, and opposed awarding Accountant any guardianship fees. He requested that Accountant be surcharged for the unsupported expenditures, denied any further guardianship fees, and be surcharged for guardianship fees already collected due to her imprudent management of the Bergs' estates and self-dealing. He also seeks surcharge for legal fees and court costs he has incurred in litigating the matter.

While Accountant was represented by counsel, who appeared on April 24, Accountant herself failed to appear personally. Counsel was unable to provide any explanation for Accountant's failure to appear. At the hearing, Objector pointed out that in her account, Accountant stated that she wrote a check to Global Guardian Services, LLC—the corporation through which Accountant provided guardianship services—from the Bergs' estates for \$4,567.80. She elaborated that the check was a reimbursement for “direct payments for food, medical care aides, and repairs to the roof of [the Bergs'] home,” but provided no receipts or invoices to show any reimbursement was due. Objector also produced a cashier's check Accountant made out to herself from the Bergs' estates for \$5,200.00 that is entirely unexplained and unsupported. Finally, Objector also presented the Court with three checks written to Asia Jones, but endorsed and cashed by Accountant. While no other checks written to Asia Jones were endorsed by Accountant, Objector posited that the three checks that she did endorse, taken together with the fact that neither Objector nor the Bergs recall ever meeting Asia Jones, and that no timesheets, form 1099, or any other evidence of Asia Jones' employment (including valid contact information) were ever produced leads to the conclusion that Asia Jones does not exist, and was simply an alias for Accountant. Further, he argued that while the \$11,500.00 payment to DEPCO, LLC was returned to the Bergs' estates, the self-dealing nature of the transaction combined with Accountant's other misconduct supports surcharging her to recoup guardianship fees she collected prior to her removal. Accountant's counsel attempted to rebut Objector's evidence.

It is virtually beyond question that the combined \$34,112.80 that Accountant paid to her company, herself, and the home health aides without any evidence to support the validity of the payments constitutes a serious breach of her fiduciary duties. See *In re Strickler's Estate*, 354 Pa. 276, 277, 47 A.2d 134, 135 (Pa. 1946) (“Where a fiduciary claims credit for disbursements made by him the burden rests upon the fiduciary to justify them. Proper vouchers or equivalent proof must be produced in support of such credits. Accountant's unsupported testimony is generally insufficient”). As is always the case when endeavoring to prove a negative, it is difficult to conclude that Asia Jones does not exist. However, whether or not Asia Jones is a fiction is ultimately immaterial; if she is, Accountant has misappropriated a substantial sum from the Bergs' estates, and if she is not, Accountant has failed entirely to properly document any services Asia Jones may have rendered the Bergs, in violation of the rule that fiduciaries must produce evidence of the propriety of disbursements they make. In either case, Accountant breached her fiduciary duty to the Bergs and caused a loss to their estates. The Court agrees with Objector that Accountant should not be permitted to benefit from her pervasive misconduct, and that surcharging her \$4,487.50 to recoup guardian fees she collected from the Bergs' estates is justified.

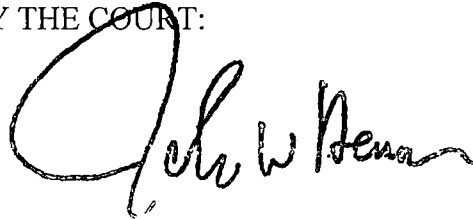
The Court finds that Objector's attorney's fees and costs are reasonable, given his extensive efforts and the similarity of his fees to those which Accountant's attorney originally sought. The award of attorney's fees is within the sound discretion of the Orphans' Court. *In re Estate of Geniviva*, 450 Pa.Super. 54, 69, 675 A.2d 306, 313 (Pa. Super. Ct. 1996); *In re Estate of Albright*, 376 Pa.Super. 201, 216, 545 A.2d 896, 904 (Pa. Super. Ct. 1988). Where legal fees are incurred as a result of a fiduciary's misconduct, equitable principles support assessing those fees as a surcharge rather than forcing the estate to bear them. Accord *In re Kline's Estate*, 280 Pa. 41, 43-49, 124 A. 280, 281-84 (Pa. 1924) (holding that appeal costs would be assessed against a trustee as a result of its "supine negligence"); *Geniviva*, 450 Pa.Super. at 69, 675 A.2d at 313. Here, Accountant's misconduct—her self-dealing and complete failure to properly document expenditures from the Bergs' estates—justifies assessing court costs and attorney's fees incurred by Objector against her.

III. Conclusion

The Court commends Objector's attorney for the considerable time and effort he expended in bringing Accountant's misconduct and criminal history to light. The Court, most unfortunately, also recognizes that he will likely need to expend further effort, and that Objector will incur further expenses, in securing execution of the judgement in this matter.

For the reasons stated above, the objections are SUSTAINED; the Account is rejected, Accountant's request for guardian fees is DENIED, and she is surcharged \$34,112.80 for improper expenditures she made as the Bergs' guardian, \$4,487.50 for guardian fees collected while she served as the Bergs' guardian, and \$24,479.50 for legal fees and costs incurred by Objector.

BY THE COURT:



John W. Herron, J.

Dated this 10th day of May, 2018

Daniel McElhatton, Esq., counsel for the Objector
Paul Heintz, Esq., counsel for the Philadelphia Corporation for Aging
Robert L. Feliciani, Esq., counsel for the Accountant