

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

KIM E. AYVAZIAN
MASTER IN CHANCERY

CHANCERY COURTHOUSE
34 The Circle
GEORGETOWN, DELAWARE 19947
AND
NEW CASTLE COUNTY COURTHOUSE
500 NORTH KING STREET, SUITE 11400
WILMINGTON, DELAWARE 19980-3734

November 8, 2012

David J. Ferry, Jr., Esquire
Ferry Joseph & Pearce, P.A.
824 N. Market Street, Suite 1000
P.O. Box 1351
Wilmington, DE 19899

Elizabeth M. Sutor-Banks
Dean A. Banks, D.D.
329 4th Avenue
Wilmington, DE 19808

RE: *Ella Moffett v. Elizabeth M. Sutor-Banks and Dean A. Banks, D.D.*
C.A. No. 6879-MA

Dear Counsel and Parties:

At the conclusion of the trial on September 26, 2012, I reserved decision on Plaintiff Ella Moffett's request for her attorney's fees to be paid by Defendants Elizabeth M. Sutor-Banks and Dean A. Banks, D.D. I have now reviewed the case law cited by Moffett during her closing argument, and am issuing my draft report denying her request for the following reasons.

The rule in Delaware is that each party normally bears its own attorney's fees. *See Slawik v. State*, 480 A.2d 636, 639 (Del. 1984). There are, however, the following exceptions: (1) when litigation creates a common fund or a nonmonetary benefit which inures to the benefit of others; (2) where fees are authorized by statute; (3) where the litigation was brought in bad faith or a party's bad faith conduct increased the costs of litigation; and (4) where the pre-litigation conduct of the losing party was so egregious as to justify an award of attorneys' fees as an element of damages. *Estate of Carpenter v. Dinneen et al.*, C.A. No. 1804-VCP, mem. op. at p. 49, (Del. Ch. March 26, 2008) (citing *Arbitrium (Cayman Is.) Handels AG v. Johnston*, 705 A.2d 225, 231 (Del. Ch. 1997)).

Moffett has accused defendants of bad faith in that they refused to return her property which they obtained, in part, through the exercise of a durable power of attorney. Moffett had executed this document naming Sutor-Banks as her agent while she was in a nursing home for physical therapy following an injury. Moffett argues that fee shifting is appropriate in this case because defendants' conduct has forced her to file suit to "secure a clearly defined and established right," citing *McGowan v. Empress Entertainment, Inc.*, 791 A.2d 1 (Del. Ch. 2000).

Defendants deny that they did anything wrong. According to their testimony, some of the funds were taken at Moffett's request to pay for their own living expenses and transportation while they maintained Moffett's house, paid her bills and visited her in the nursing home during her stay there. The figurines, books, and wooden carvings were taken at Moffett's request, according to defendants, so that her financial advisor David Durham would not take them. These items were being stored by defendants and were

supposed to be given to Moffett's son in accordance with her instructions. Defendants also drafted and executed a deed purporting to transfer title to Moffett's house from Moffett to Moffett and Sutor-Banks as tenants in common in order to protect the property from Durham..

The bad faith exception to the rule against shifting counsel fees is invoked only in egregious cases, and proof of bad faith must be by clear evidence. *Id.* at 4 n. 5 (citing *Slawik*, 480 A.2d 636 (Del. 1984)). The issue is whether Moffett has shown by clear evidence that defendants acted in subjective bad faith by refusing to return her property. The evidence in this regard is far from clear because Moffett's own testimony regarding defendants' use of her property was inconsistent. During direct examination, Moffett accused defendants of stealing money from her "sink" fund and transferring money out of her checking account. On cross-examination, however, Moffett admitted that Sutor-Banks had paid her bills while she was in the nursing home and was very honest. Moffett also testified that the sink fund was to be used to pay for defendants' gasoline. Moffett also remembered telling Sutor-Banks that she could be her attorney-in-fact, but claimed that it was only because Sutor-Banks was available to help her while she was in the nursing home for approximately six weeks. Moffett also testified that she did not remember signing any documents while in the nursing home,¹ and claimed that she was

¹ On May 4, 2011, and May 30, 2011, Moffett executed the following documents: (1) "Termination of Employment" discharging Durham as her financial planner, Pl. Ex. 2; (2) a durable general power of attorney naming Sutor-Banks as agent, Pl. Ex. 3; (3) a Revocation of Power of Attorney for health care revoking a Health Care and Durable General Power of Attorney granted to Durham, Pl. Ex. 4; (4) a "Declaration and Revocation of Trust," Pl. Ex. 5; (5) a Last Will and Testament, Pl. Ex. 6; and (6) Revocation of Power of Attorney purporting to revoke a previous power of attorney granted to Durham. Pl. Ex. 10.

under medication. Subsequently, however, Moffett conceded that the only medication she was taking at the time was for her bowel movements.

At the time of trial, Moffett was a 96- year old widow who lived alone in her own home in Brandywine Hills, was hard of hearing, but also was very sharp in her responses to questioning. Her only child, Ralph Moffett, resided in Florida. Sutor-Banks was her niece, and Moffett testified that she thought they had a nice relationship. Both defendants, on the other hand, testified that they cared very deeply about their aunt, and were concerned about the actions of Durham, whom they accused generally of exploiting elderly people and specifically of laying the groundwork for depleting Moffett's estate after she died by becoming executor of her estate. Sutor-Banks testified that Moffett had instructed her to hire an attorney in case Durham sued her for terminating him, and that she had paid the attorney \$1400 from Moffett's funds. Both defendants testified that they were trying to protect their aunt from Durham, and that they were not going to return her personal property or transfer title to the home back into Moffett's sole name because they wanted Moffett's property to go her son or to whoever would guarantee that it would not go to Durham. Moffett testified at trial that she had known Durham for 27 years, and considered him a very close friend. She did not understand why the defendants distrusted Durham. The record includes a letter dated June 21, 2011 from Durham addressed to Moffett while she was at the nursing home, expressing his concern about the defendants' actions.² In this letter, Durham referred to Moffett as "Mom," and Moffett testified that she viewed him like a son. On July 28, 2011, with the assistance of a different attorney,

Moffett executed a new durable power of attorney and medical power of attorney again appointing Durham as her agent.³

At the conclusion of trial, I found that defendants had breached their fiduciary duty to Moffett by failing to return her property, and ordered them to return the personal property to Moffett's counsel and to cooperate with counsel in signing any documents needed to cancel the deed that had been executed by Sutor-Banks as Moffett's agent. I also ordered defendants to provide an accounting of the funds taken from Moffett's home and her bank account. Nevertheless, the mere fact that a fiduciary has breached his fiduciary duty does not justify an award of attorney's fees. *Estate of Carpenter*, mem. op. at 50, *supra* (citing *HMG/Courtland Props., Inc. v. Gray*, 749 A.2d 124-25 (Del. Ch. 1999)). To warrant fee shifting, "that conduct must be shown to have been in 'bad faith, ... totally unjustified, or the like.'" *Id.* (quoting *Weinberger v. UOP, Inc.*, 517 A.2d 653, 656 (Del. Ch. 1986)).

I do not find that defendants' action were so egregious that they constitute bad faith. Defendants were zealously trying to protect their aunt from a person they viewed as a predator. They also believed they were acting on her instructions. Although Moffett denied having given those instructions, there were enough inconsistencies in her testimony for me to question her credibility. As a result, I do not find clear evidence of bad faith so as to warrant an award of attorney's fees in this case.

² Pl. Ex. 11.

³ Pl. Ex. 7-8.

Very truly yours,

/s/ Kim E. Ayvazian

Kim E. Ayvazian
Master in Chancery

cc: Register in Chancery