

he devised to Mrs. Bernstein his one-third interest as tenant-in-common in a New Jersey condominium that he had purchased with Mrs. Lovett prior to his marriage to Mrs. Bernstein. Under New Jersey law, title to the real property passed immediately to Mrs. Bernstein upon her husband's death. Mrs. Lovett was appointed personal representative of the decedent's estate, which consisted only of personal property worth \$2,205, including a car, some books, artwork, and jewelry. The estate debts, which included the decedent's share of the mortgage balance on the New Jersey condominium, medical expenses, estimated taxes, and estate expenses, far exceeded the value of the personal property.

In late November 2007, Mrs. Lovett and her brother, Hank Bernstein, collected some of the decedent's personal belongings from Mrs. Bernstein's Newport home, where the couple had resided during their marriage. The following month, Mrs. Bernstein prevented them from retrieving the remainder of their father's personal property as previously scheduled. Before they could return to Mrs. Bernstein's Newport home, however, Mrs. Bernstein received a copy of a *pro se* Petition to Sell Real Estate to Pay Debts, which had been filed by Mrs. Lovett in this Court in an effort to sell the New Jersey condominium. On January 13, 2008, in response to the petition, Mrs. Bernstein notified Mrs. Lovett and her brother that she had retained counsel, and that she would not be releasing the decedent's personal property to them.

Litigation erupted between the parties. On April 30, 2008, Mrs. Bernstein filed a Petition for Elective Share pursuant to 12 *Del. C.* § 906. On May 13, 2008,

the parties stipulated to the dismissal of the Petition to Sell Real Estate to Pay Debts without prejudice to the estate filing a similar petition in New Jersey. On May 14, 2008, I granted Mrs. Lovett's Motion to Compel Heir to Cooperate in Estate Administration, and ordered the parties to agree on a date for removing the decedent's personal property from Mrs. Bernstein's home, the removal of which was to be overseen by Mrs. Lovett's attorney with movers hired by Mrs. Lovett because Mrs. Bernstein would not allow Mrs. Lovett into her home. On July 1, 2008, Mrs. Lovett filed a Motion to Obtain Property, alleging that Mrs. Bernstein had refused to allow three specific pieces of decedent's artwork to be removed from her home, and listing numerous other items of the decedent's personal property that had not been included with the items that Mrs. Bernstein had allowed to be removed. On July 8, 2008, Mrs. Bernstein filed a Petition for an Order to Show Cause and/or Order for Removal of Executrix, alleging that Mrs. Lovett had breached her fiduciary duties by failing to account for certain assets, failing to obtain a proper appraisal of personal property, failing to promptly distribute Mrs. Bernstein's share of the real property, and acting punitively and hostilely toward Mrs. Bernstein.

Each motion generated a response, further pleadings, discovery, and expense, including attorney fees. Mediation was attempted without success. On November 11, 2008, Mrs. Lovett filed the equivalent of a petition to sell real estate to pay debts in New Jersey Superior Court, requesting that she be allowed to sell the condominium and apply one-third of the net proceeds of the sale to pay the

debts and expenses of decedent's estate. The New Jersey Superior Court granted the petition on March 5, 2009.

Meanwhile, a two-day trial was held in early 2009 on the pending motions. I issued a draft report on October 7, 2009, in which I calculated the amount of Mrs. Bernstein's elective share, denied the motion to remove Mrs. Lovett as executrix, and granted the motion to obtain the decedent's personal property that was still held by Mrs. Bernstein. The parties then took exception to my calculation of the amount of Mrs. Bernstein's elective share (Mrs. Lovett's exception) and my determination that Mrs. Lovett and her brother were each liable to Mrs. Bernstein for one-half of the elective share amount under 12 *Del. C.* §§ 901-908 (Mrs. Bernstein's exception). I issued a final report on September 10, 2010, essentially adopting my draft report as my final report. Both parties took exception to my final report, and on March 11, 2011, then Vice Chancellor Strine issued an Opinion in which he denied Mrs. Lovett's exception, ruling that in "calculating Mrs. Bernstein's elective share amount, the 'value of the [one third interest in the New Jersey Condominium] transferred to the surviving spouse' under 12 *Del. C.* § 903(a) shall be zero."¹ The Vice Chancellor also denied Mrs. Bernstein's exception where she had argued that Mrs. Lovett should be personally liable for the entire amount of Mrs. Bernstein's elective share; instead, the Vice Chancellor held that Mrs. Lovett and her late brother's estate, as recipients of the

¹ *Bernstein v. Lovett*, 17 A.3d 1172, 1185 (De. Ch. 2011).

a request for a refund of approximately \$1367, which had been withheld for tax purposes by New Jersey following the sale of the condominium. Since no capital gains had been realized from the sale, the amount was available to be refunded to Mrs. Bernstein. According to the Court's Opinion, the net proceeds from the sale of the New Jersey condominium were to be used to pay the remaining debts and expenses of the decedent's estate. Therefore, I ordered Mrs. Bernstein to pay over the tax refund to the estate as soon as she received it.

In her petition, Mrs. Lovett was seeking the return of decedent's table and set of chairs that had been appraised by Mrs. Bernstein as worth \$250, and that were still in Mrs. Bernstein's possession. In response, Mrs. Bernstein argued that Mrs. Lovett had not wanted these items when the movers had collected the decedent's property, that Mrs. Lovett had not previously asked for the return of these items, and that her motion had been filed in retaliation for Mrs. Bernstein filing her motion to compel payment of spousal allowance and to compel filing an accounting. During the teleconference, I granted Mrs. Lovett's motion, pointing out that I had ordered all of the decedent's tangible personal property to be promptly returned to Mrs. Lovett after the two-day trial in 2009. Since no exceptions had been taken to that portion of my draft report, Mrs. Bernstein was in contempt of a Court order. Mrs. Bernstein thereafter agreed to have the table and chairs available to be collected by Mrs. Lovett

Mrs. Bernstein next argued that her petition for a spousal allowance of \$7500 had been approved by the Register of Wills in 2008 and that amount had been included in the Court's calculation of the elective share, but it had not yet been paid to her. According to Mrs. Bernstein, the spousal allowance was a priority claim that should have been paid to the surviving spouse during the administration of the estate, and should not have been delayed because the personal representative had not yet filed a final accounting. Mrs. Bernstein also argued that it had been over three years since the first accounting had been filed, and that there was no excuse for Mrs. Lovett not to have filed a second accounting by now.

In response, Mrs. Lovett argued that Mrs. Bernstein had filed exceptions to the first accounting, and although she had prepared responses to the exceptions, the matter was never heard by the Court. Mrs. Bernstein's exceptions to the first accounting were withdrawn by agreement of the parties in December 2011. Mrs. Lovett also argued that the spousal allowance was considered a debt of the estate, and was not paid until after all the administrative expenses, fees and commissions were paid according to 12 *Del. C.* § 2308. Once she had collected all of the assets of the estate, Mrs. Lovett argued, she would be able to file the second and final accounting, determine whether there were any assets remaining to pay the spousal allowance, and thus bring the matter to a close. Mrs. Lovett argued that Mrs. Bernstein's motion to compel the filing of the accounting was frivolous, especially

in light of the outstanding tax refund she had yet to receive. Mrs. Lovett, therefore, claimed that she was entitled to attorney fees. In turn, Mrs. Bernstein argued that Mrs. Lovett had been stalling for a long time, and since she had known the amounts that were owed to the estate, she should have been able to file an accounting.

During the teleconference, I granted the motion in part to compel the filing of an accounting, and ordered Mrs. Lovett to file the next accounting within two weeks of her receipt of the tax refund and table and chairs from Mrs. Bernstein. I denied the motion in part to compel payment of the spousal allowance without prejudice because, if there were any assets remaining after the estate administration expenses, commissions and fees were paid, then the spousal allowance could be paid to Mrs. Bernstein. I also denied the requests of both parties to shift attorney's fees.

Mrs. Bernstein has now taken exception to my denial of her request to shift attorney's fees. Mrs. Bernstein contends that I provided no analysis for my decision, and it is unclear from the transcript whether I was denying any shifting of counsel fees from the inception of this litigation. In opposition to this exception, Mrs. Lovett argues that Mrs. Bernstein failed to present clear evidence of any bad faith conduct on Mrs. Lovett's part. Having reviewed the transcript of the April 24th teleconference, I agree with Mrs. Bernstein that my draft report lacked a proper analysis of the issues surrounding her request to shift fees and

could have been stated more precisely. Therefore, I am modifying my draft report to provide the analysis and clarify my ruling as follows.

Delaware follows the American Rule under which each party bears its own attorney fees and costs except under certain circumstances. *Nichols v. Chrysler Group, LLC*, 2010 WL 5549048, at *3 (Del. Ch. Dec. 29, 2010). In particular, where a court finds that a party acted in bad faith or vexatiously to increase the costs of litigation, attorneys fees will be awarded. *Id.*

Mrs. Bernstein argues that Mrs. Lovett deliberately withheld funds, including her portion of the elective share and the spousal allowance, with malicious intent that caused the litigation to proceed for several years. Mrs. Bernstein accuses Mrs. Lovett of disregarding her duties as executrix of her father's estate so that Mrs. Bernstein had no choice but to file a motion to compel the payment of the spousal allowance and to compel the filing of an accounting. As a result, Mrs. Bernstein argues, she is entitled to an award of counsel fees.

Mrs. Lovett's failure to pay the spousal allowance and to file a second accounting does not, in my opinion, constitute clear evidence of bad faith conduct by Mrs. Lovett. Mrs. Lovett was placed in the unenviable position of trying to administer an estate whose assets consisted of tangible personal property of little value. Mrs. Lovett paid for the decedent's funeral with her own funds, and Mrs. Bernstein subsequently frustrated Mrs. Lovett's efforts to obtain decedent's personal property from Mrs. Bernstein's home. Mrs. Bernstein's actions forced

Mrs. Lovett to request relief twice from this Court. First, Mrs. Lovett had to obtain a Court order allowing her attorney to enter Mrs. Bernstein's home to retrieve the decedent's property. When Mrs. Bernstein refused to allow three pieces of artwork and other items of tangible property belonging to the decedent to be removed from her home, Mrs. Lovett had to resort to the Court a second time to enforce her right as personal representative of decedent's estate to obtain those items. She was also forced to defend herself against baseless allegations that she had breached her fiduciary duty to Mrs. Bernstein. As a result of Mrs. Bernstein's intransigence in releasing the decedent's personal property, estate administration costs including attorney fees began to accrue.

As personal representative of decedent's estate, Mrs. Lovett had the legal right to obtain the decedent's personal property and to seek approval of the sale of the decedent's real estate to pay the debts of his estate. Similarly, Mrs. Bernstein had the legal right to request an elective share in decedent's estate and a spousal allowance of \$7500. The parties' dispute over the value of the decedent's one-third interest in the New Jersey condominium for the purposes of calculating Mrs. Bernstein's elective share generated considerable litigation. The issue was one of first impression in Delaware as no previous decision by this Court or the Supreme Court had defined the statutory phrase "the value of the property derived from the decedent by virtue of death."¹¹ After the Supreme Court affirmed the decision of

¹¹ 12 *Del. C.* § 903.

Vice Chancellor Strine,¹² who had found the value of the property interest to be zero,¹³ Mrs. Lovett paid her portion of the elective share to Mrs. Bernstein with interest.

Meanwhile, Mrs. Bernstein's exceptions to the estate's first accounting were still pending. Although a personal representative is required to file an accounting of their administration annually each year until the estate is closed, *see* 12 *Del. C.* § 2301(a), the administration of this estate was essentially on hold until the exceptions to the first accounting were resolved or additional assets were received by the estate. Filing another accounting would have accomplished nothing but generate more expense for the estate. And because the estate was essentially insolvent, there were no assets with which to pay Mrs. Bernstein's spousal allowance. The possibility of continued litigation also meant that additional estate administration expenses might be incurred and, under 12 *Del. C.* § 2105, administrative expenses, fees and commissions have priority over other claims against the decedent's estate, including the spousal allowance. *See generally, Estate of Hitch*, 1992 WL 94372, at *3 (Del. Ch. Apr. 30, 1992); *Estate of Chadick*, 1996 WL 307442, at *1 (Del. Ch. Feb. 26, 1996) (Master's Final Report).

Mrs. Bernstein's exceptions to the first accounting were withdrawn by stipulation in December 2011. One month later, Mrs. Bernstein filed her petition

¹² *Bernstein v. Lovett*, Del. Supr. No. 230, 2011, Berger, J. (Nov. 10, 2011).

¹³ *Bernstein v. Lovett*, 17 A.3d 1172, 1185 (Del Ch. 2011).

to compel payment of the spousal allowance and to compel the filing of an accounting in the Register of Wills Office. The State of New Jersey was still holding in escrow tax funds to which the decedent's estate was entitled, and Mrs. Bernstein had not yet turned over to Mrs. Lovett all the remaining items of decedent's tangible personal property.

The above chronology does not demonstrate either bad faith or a malicious intent to increase litigation costs by Mrs. Lovett. While there may have been no love lost between these women, they were both litigating for what they thought was proper or due to them in their respective roles as fiduciary and surviving spouse/beneficiary of decedent's estate. Their relationship was further complicated when Mrs. Bernstein, now Mrs. Lovett's co-tenant following the death of the decedent, refused to contribute to the costs of the New Jersey condominium. As I stated during the April 24th teleconference, both parties "dug in their heels," but a mere failure to compromise is not enough to demonstrate bad faith or malicious intent on the part of a litigant. *See Nichols v. Chrysler Group LLC*, 2010 WL 5549048, at * 3 (Del. Ch. Dec. 29, 2010) ("Ultimately, the bad faith exception is applied in extraordinary circumstances primarily to deter abusive litigation and protect the integrity of the judicial process.") (citing *Montgomery Cellular Hldg. Co. v. Dobler*, 880 A.2d 206, 277 (Del. 2005)).

Mrs. Bernstein argues that I failed to view the conduct of Mrs. Lovett in total. I have reviewed Mrs. Lovett's conduct over the course of this litigation. In

light of all that has transpired in this litigation since its inception, I do not find Mrs. Lovett's failure to pay the spousal allowance while the litigation between the parties was ongoing or to file a second accounting when it would have generated only additional estate expense to have been abusive conduct on Mrs. Lovett's part or to have been motivated by a malicious intent to increase litigation costs. My ruling denying Mrs. Bernstein's request for attorney fees during the April 24th teleconference was meant to be limited to attorneys' fees incurred with the filing of Mrs. Bernstein's most recent petition. Nothing I stated at that time was intended to prevent Mrs. Bernstein from taking exception to the second and final accounting that has now been filed by Mrs. Lovett, or to seek counsel fees after Mrs. Bernstein has had an opportunity to review its accuracy.

For the reasons stated above, I recommend denial of Mrs. Bernstein's request for an award of her attorneys' fees that were incurred in connection with her Petition to Compel filing of an Accounting and to Compel the Payment of the Spousal Allowance from Mrs. Lovett.