IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

IN THE MATTER OF:	)	
PEGGY S. GRIFFITHS,	)	C.M. No. 8930-NC
a disabled person.	)	

MASTER'S REPORT

Date Submitted: December 10, 2003
Oral Draft Report: December 10, 2003
Final Report: July 23, 2004

RICHARD D. KIRK, ESQUIRE, Morris, James, Hitchens & Williams, Wilmington, Delaware; Attorney for Petitioner.

THOMAS HERLIHY, III, ESQUIRE, Herlihy, Harker & Kavanaugh, Wilmington, Delaware; Attorney for Respondents.

GLASSCOCK, Master

This is a contest over who should be guardian of the person and property of Peggy S. Griffiths. The petitioner is Mrs. Griffiths' son, Norman D. Griffiths. The respondents and cross-petitioners are Michael C. Griffiths, Stephanie D. Griffiths-Borges, Arthur A. Griffiths, Peggy Manel Griffiths, and Jacqueline D. Griffiths-Jones, also children of Ms. Griffiths and siblings of the petitioner. All parties agree, and the evidence demonstrates, that Mrs. Griffiths requires a guardian. *See* 12 Del. Code § 3901. The matter was tried over a period of two days and I issued a bench report following trial. In the bench report, I appointed the petitioner, Norman Griffiths, and the Senior Partner guardianship agency as co-guardians of the property, with the petitioner to handle investment decisions and with Senior Partner to handle the day-to-day payment of expenses and to be the point of contact with the other children of the ward. I directed Norman Griffiths to submit a plan to convert Mrs. Griffiths' real estate investments to more traditional guardianship assets, with that plan to be distributed for comment to the Court, the other parties and to an *attorney ad litem*. I directed Norman Griffiths to retitle certain assets and accounts, which he had placed in his name for Mrs. Griffiths' benefit, into the name of the guardianship. I directed all parties to disclose to the *attorney ad litem* all property held jointly with the ward, along with each party's contention as to the beneficial ownership of such joint property. I directed the petitioner to provide an accounting of his tenure as attorney

in fact for Mrs. Griffiths. I appointed Jacqueline D. Griffith-Jones and Stephanie D. Griffiths-Borges guardians of the person, but directed that the ward should not be moved from her place of residence without notice to all siblings and to the court and *attorney ad litem*. I directed that each party bear his or her own attorney's fees except for those fees associated with the initial guardianship petition, and I allowed the petitioner to seek a fiduciary commission under Rule 131.

Exceptions were taken to the bench report and the parties briefed those exceptions. This is my final report on the guardianship of Peggy Griffiths. I incorporate in this written report my bench report, to the extent consistent with this report, and the bench report and this report shall form my final report for purposes of exception.

I. The Appointment of the Petitioner and Senior Partner as Co-Guardians of the Property

In the draft report, I found that the petitioner, as the holder of a valid power of attorney to act on behalf of his mother, is entitled to a statutory presumption that he should be appointed to act as her guardian; that the petitioner was otherwise eligible and appropriate to serve as guardian for the ward; but that, because of the unfortunate nature of the relationship between the petitioner and the respondents, his service as

sole guardian of the property would lead to continuing friction among the interested parties in a way that is not in the best interest of the ward. I therefore appointed Senior Partner as co-guardian for the purpose of paying the ward's expenses and to be a liaison between the respondents and the petitioner. The petitioner himself was to undertake the other duties of a guardian of the property.

The respondents take exception on a number of grounds to the petitioner being appointed co-guardian of the property and seek instead to have Peggy Manel Griffiths appointed sole guardian of the property.

A. The Power of Attorney

The respondents concede that if a valid power of attorney was executed by the ward in favor of the petitioner a presumption arises in favor of his appointment as guardian. 12 Del. Code §4903(a). They strongly contest my finding that a valid power of attorney was executed by the ward, however. They rest their argument on the testimony of a psychiatrist, Dr. Foy. After a review of the arguments of the parties together with the testimony of Dr. Foy and other witnesses, I conclude that the ward was competent to execute the power of attorney on November 19, 1994.

In order to be competent to contract, an actor must understand the subject of the contract and able to formulate and express his interest with respect to that subject.

The burden is on the proponant of incapacity to show that the actor was unable to understand in a reasonable manner the nature and consequences of the transaction, or that he was unable to act in a reasonable manner in relation to the transaction and that the other party had reason to know of his condition. Barrows v. Bowen, Del. Ch., No. 1454-S, Allen, Ch. (May 10, 1994)(Mem. Op.) at 4 (*citing* Restatement (2d) of Torts); *see* McAllister v. Schettler, Del. Ch., 521 A.2d 617, 621 (1986). The creation of rights and duties under a power of attorney is similar to the creation of rights and duties under a simple contract, and I apply that standard to determine Mrs. Griffiths' competence here. The application of the Barrows standard means that, to be competent to bestow a power of attorney, the actor has to understand the subject of the power of attorney, that is, she must understand in general what the power of attorney will do and understand what property is subject to the control of the attorney-in-fact. She must be capable of understanding who is to be her attorney-in-fact and understand the power she is ceding to that attorney-in-fact.

The direct evidence for the ward's competence in the matter of the power of attorney is compelling. Up until the time she executed the power, Mrs. Griffiths was living alone and managing a portfolio of several rental properties on her own. Mrs. Griffiths is herself an attorney. Apparently aware of her declining mental faculties, she asked her son, an attorney, to become her attorney-in-fact and assist her. It is

noteworthy that she herself sought out the petitioner's help. A power of attorney was prepared by a lawyer, Mr. Holt, who explained the document to both the ward and the petitioner. After she executed the power of attorney, the petitioner made business decisions with Mrs. Griffiths, and she continued to participate in her own affairs, although this participation decreased over time as her dementia progressed. At the time she executed the power of attorney, she understood what property she owned. I note that as late as 1996, two years after she executed the power of attorney here at issue, a Delaware attorney, Mary Culley, prepared a second power of attorney, together with a will and trust, for Mrs. Griffiths. In the course of preparing these documents, Ms. Culley and Mrs. Griffiths spent around one and one-half hours alone together. Although those document were never executed, Ms. Culley, based upon her discussions with Mrs. Griffiths, formed the opinion that even at that point the ward was still capable of executing the POA and related estate planning documents.

At any rate, as of the time of the creation of the 1994 POA, the ward was aware of her declining capacity to conduct her affairs. She prudently sought out her attorney-son and asked him to serve as her attorney-in-fact. She entered into an arrangement whereby the petitioner bound himself to undertake fiduciary duties on her behalf without compensation, an arrangement wholly advantageous to her. In other words, Mrs. Griffiths was manifestly able to understand the nature of the power

of attorney and to act reasonably with respect to it. She was competent to execute the POA.

Against this evidence, the respondents point to the testimony of their medical expert, Dr. Foy. Dr. Foy examined the ward some weeks before and again some weeks after the execution of the power of attorney. In addition to offering his conclusion that the ward was incompetent to sign the power of attorney, Dr. Foy presented the following factual testimony: At the time of her first visit with Dr. Foy, the ward was complaining of memory loss, depression and fear of getting lost while driving in Washington, D.C.[1] After examining her and giving her a "mini-mental" examination, he found that she was suffering from dementia and depression. At the time of the second examination a few weeks after the signing of the power of attorney, her confusion had increased. Dr. Foy also testified, however, that despite some initial difficulty with their names and ages, she knew who her children were and knew she had a son who was an attorney in Wilmington, Delaware. Foy indicated that people suffering from dementia, including Alzheimer's, could have good days and bad days, although overall the condition grows progressively worse.

While Dr. Foy's testimony certainly bears on the general condition of the ward, like Ms. Culley's, it is only suggestive of her level of understanding at the time the

[1] A fear I share.

power of attorney was executed. Dr. Foy's testimony demonstrates to me that the ward's mental faculties were in decline by 1994 and that she was exhibiting symptoms of her dementia. I do not find Dr. Foy's testimony inconsistent with the ward's ability to reasonably comprehend the nature of the relationship that she entered by executing the power of attorney, however. *See* Simms v. Slovin, Del. Ch., 207 A.2d 597, 602 (1965)(holding evidence of decline in mental faculties, even coupled with disease and extreme old age, insufficient of itself to demonstrate incompetence). In fact, Foy's testimony is consistent with Mrs. Griffiths' evident awareness that she was unable to continue to manage her rather complicated affairs without help, with the result that she asked her son to serve as attorney-in-fact. After consideration of all the evidence, therefore, I find that Mrs. Griffiths, although not retaining all of her once-formidable mental faculties, remained competent to enter the 1994 power of attorney.

B. Equitable Considerations

Moreover, even if the power of attorney were found to be invalid, that fact would not invalidate the fitness of the petitioner to be a guardian of the property. Similarly, the existence of the POA only creates a presumption that the petitioner should serve as guardian, a presumption that under 12 Del. Code §4903(a) is rebutted upon a showing that appointment of another is in the best interest of the ward. The

respondents suggest that Peggy Manel Griffiths, due to her professional financial expertise, is more suitable to be guardian of the property than is the petitioner. There is no question in my mind that Peggy Manel Griffiths (and, indeed, any of her siblings) is completely qualified to manage the property of Mrs. Griffiths. There is certainly nothing, however, in the nature of a guardianship of Mrs. Griffiths' property that goes beyond the considerable abilities demonstrated by the petitioner himself. The respondents also argue that Peggy Griffiths, if appointed, would not need a co-guardian, and could proceed without the services of Senior Partner, resulting in a saving to the estate of the ward. However, given the relationship among these parties, it would be imprudent to appoint any manager of the property without some buffer between the petitioner and the respondents.[2]

C. The Supposed Unfitness of the Petitioner

The respondents argue that the petitioner's service as attorney-in-fact for the ward demonstrates that he should not be made a guardian of the property. The respondents point out that the petitioner has not fully accounted for his service under the power of attorney between 1994 and 1999. I have ordered an accounting of this

[2]I have considered the cross-allegations of the parties that Mrs. Griffiths has been used as a pawn in the on-going conflict among the siblings. I find that, whatever their relationships with one another, the parties all love and respect Mrs. Griffiths, and mean to act in her best interest, as each sees it.

period to be filed by the petitioner, but nothing in the record so far indicates to me that the petitioner acted in a self-interested manner or is otherwise disqualified from serving as guardian. The respondents point to the fact that some property of the ward was put into the petitioner's name, via the power of attorney. While I have ordered that this property be transferred to the guardianship account to be established under the guardianship, once again it appears that this was done for the convenience of the administration of the affairs of the ward and there was no indication in the record of self-dealing.

The bulk of the respondents' argument about the unfitness of the petitioner involves his conduct of the real estate rental business owned by and formerly managed by his mother. Specifically, the respondents claim that he violated laws or regulations of the District of Columbia in managing this business, including his failure to name a registered agent resident in the District; that he submitted or permitted the submission of erroneous documents to the District of Columbia government; and that he filed misleading documents in connection with the ward's income taxes. They suggest that these alleged discrepancies or violations could have been avoided through competent management and through consultation with his siblings concerning his mother's care and investments.

If the question before me were whether the petitioner is able, in terms of his background, geographical residence and available time, to run a rental property business in the District of Columbia, this case might have a different outcome. As I found in the bench report and find in this report, *infra*, a rental business is not an appropriate investment vehicle for the assets of a ward, however. Without finding whether the ward's business was appropriately managed during the period of the petitioner's service as attorney-in-fact (a finding which awaits the accounting of that period which I have directed be filed) it is clear that once the assets are exchanged for more appropriate investments the concern with the petitioner's expertise as a real estate manager will evaporate.

Finally, the respondents point out that there was poor communication between the petitioner (as attorney-in-fact) and the respondents about the care of the ward and her property. It is clear to me that there are unfortunate family dynamics at work in this case and that the respondents feel strongly that the petitioner has acted in a high-handed and uncollegial manner with them. It is those concerns that have led me to appoint Senior Partner as a co-guardian of the property. For the reasons above, the respondents' exceptions to the appointment of the petitioner as a co-guardian are denied.

II. The Sale of Real Estate in the District of Columbia

In my bench ruling, I directed that within 30 days of this report becoming final the petitioner submit a plan to divest the ward of her real estate investments. I directed that the plan be distributed to all parties, to the Court and to an *attorney ad litem* to be appointed in order to review that and other provisions of the guardianship order. All parties have raised concerns (in the form of exceptions or requests for clarification) that a sale of the real estate may lead to adverse capital gains tax consequences and have other unforseen results. It is clear to me that the real estate business must be liquidated and a more manageable guardianship investment created. However, it is with the concerns raised in the exceptions in mind that I directed that a plan be formulated by the petitioner and that all parties have an opportunity to review and comment on the plan before the property is ordered to be sold. In addition, I have directed that an *attorney ad litem* be appointed to review and comment on the plan as well, to ensure that all considerations pertinent to the sale of the property and the final form of the assets of the ward be considered. Because I find that the bench ruling as explicated here adequately addresses the concerns raised in the exceptions, the exceptions are denied.

III. Attorney's Fees and Commission

A. Payment of the Fees of Petitioner's Attorney from the Estate

In the draft report, I indicated that each party should bear his own fees. The petitioner takes exception to this finding.

Courts in Delaware follow the American rule on fees, in which each side generally bears its own fees and costs, absent unusual circumstances. *E.g.* Shapiro v. Healthcare Acquisition, Inc., Del. Ch., No. 030-N, Lamb, V.C. (April 20, 2004)(Letter Op.) at 1. Because guardianships involve a peculiar kind of equitable action in which the petitioner is frequently acting, not to vindicate some right of his own, but to protect the rights of another (the ward), it is common to allow attorney's fees to be paid out of the ward's estate. Indeed, in this case, the petitioner was acting in the ward's interest in filing the initial guardianship petition, and (as I allowed in the draft report) those attorney's fees associated with the initial establishment of the need for a guardianship should be paid from the estate. The petition in this case was filed in November of 1998. On March 23, 1999, the respondents filed their response and cross-petition. At that point, it was clear that there was unanimity among the parties and the experts that a guardianship was required. Thereafter, the litigation was conducted over which of the siblings would serve as guardian. There is no question in my mind that both the petitioner and the respondents litigated in good faith. Having said that, however, it is also clear to me that any of the parties, who are all

accomplished, well-educated professional men and women, would have been competent and suitable to act as guardian for Mrs. Griffiths. Put another way, Mrs. Griffiths' well-being, in my view, does not depend on the outcome of this litigation. The trial in this matter made quite clear to me that there are numerous issues involving the relations among the members of this family that have made settlement impossible. None of these has to do with the best interest of Mrs. Griffiths, no matter how understandable or reasonable they may appear to each of the litigants. In other words, I find that after March 23, 1999 this litigation ceased to proceed solely for the benefit of Mrs. Griffiths. After that date, therefore, it is appropriate that each bear his own costs.[3] The petitioner's exceptions are denied.

[3] This is true as well for those costs under the jurisdiction of this court which were expended by the petitioner in opposing the conservatorship proceeding brought by some of the respondents in the District of Columbia.

B. Petitioner's Commission

The petitioner has managed his mother's affairs for several years. It is clear that he has expended a significant amount of time and effort in the care of his mother and her property. Although I denied the petitioner's request to pay his attorneys fees out of the ward's estate with respect to those fees incurred after March 23, 1999, I indicated that I would allow petitioner to take a fiduciary commission, to be "set off" against the fees.[4] Our Rule 132 sets out how that commission is to be arrived at, based on the value of the property managed.

I) Respondent's Exceptions

The respondents object to the allowance of a commission on three grounds. First, they argue that they have demonstrated bad faith on the part of the petitioner in the management of his mother's estate. I find, however, any allegations of bad faith completely unsubstantiated. Nothing in the record indicates to me that the petitioner acted other than in what he believes was his mother's best interest. To the extent that the respondents argue that the D.C. real estate business was mismanaged, that issue in part awaits the filing of a final accounting but nothing indicates to me that any

[4] I used the term "set off" in the draft report because the petitioner, relying on the power of attorney, has already paid some of these attorney's fees from the ward's estate, funds which will have to be reimbursed.

mistakes in the management of business were undertaken in bad faith. I therefore think that a commission to be offset against attorney's fees is reasonable given the circumstances.

The respondents also argue that I have created a potential large windfall for the petitioner because there has not been an appraisal of the D.C. property and therefore it is unknown what a commission computed under Rule 132 will amount to. I have allowed a reasonable commission, however, and once that commission is computed I will review it for reasonableness in light of the circumstances, a process in which respondents may be involved.

Finally, the respondents point out that the testimony indicated that among the reasons the petitioner became involved as attorney-in-fact was because, according to his mother, another family member was requesting payment to act on her behalf. He agreed to help her without compensation. The respondents point out that Rule 132 permits commissions to be allowed "subject to agreement" of the parties. Respondents argue that the petitioner agreed that there would be no compensation in connection with his service as attorney-in-fact.

The respondents' point is valid but, I think, misapplied. The commission offset I have contemplated involves only the period during which the petitioner acted as a *de facto* guardian, during the period of his mother's established incompetency, no

earlier than the filing of the guardianship petition and physician's affidavit in November 1998. I have not allowed a commission for that period before November 1998 during which the petitioner assisted his mother pursuant to the power of attorney.

ii) Petitioner's Exceptions

The petitioner takes exception to the draft report because he contends that a large portion of his efforts on his mother's behalf were in connection with her person and not property. He contends that he should be able to take a "fee" equivalent to that which might have been paid to a "fee-for-service" guardianship agency, up to the amount of his attorney's fees, rather than compensation based on a Rule 132 commission. Such a fee, however, would be completely inappropriate here. First, the fee-for-service guardians are approved in advance by the Court, are required to post a bond, and act as a business at the direction of the Court for the benefit of the ward. The petitioner undertook to act on behalf of his mother, I am sure, out of concerns for her welfare, and not as a business proposition. If he had intended the latter, to be compensated as a fee-for-service guardian he would have had to comply with the requirements that I have stated above, and would have had to meet strict accounting

requirements. There is no reason in equity to "employ" the petitioner, *nunc pro tunc*, as a fee-for-service guardian for care rendered to his mother in the past.

For the foregoing reasons, the exceptions of the petitioner and respondents regarding attorneys fees and commissions in offset thereof are denied.

IV. The Accounting of Petitioner's Tenure as Attorney in Fact

In the draft report, I ordered the petitioner to produce an accounting of his tenure as attorney-in-fact for the ward pursuant to the 1994 power of attorney. Neither side takes exception to this portion of the draft report. *See* 12 Del. Code §4903(b). However, the parties disagree as to whether the cost of the accounting should be borne by the estate or by the petitioner and seek clarification of that issue. Because this issue turns, at least in part, on the results of that accounting, I reserve decision on that issue pending the filing of the accounting.

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Master in Chancery

oc: Register in Chancery (NCC)