

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ARCHIBALD W. LINGO,)
)
Petitioner,)
)
v.) C.A. No. 5183-MG (Consolidated)
)
DINAH H. LINGO, individually and in her)
capacity as Administrator of The Eleanor)
W. Lingo Estate,)
)
Respondent,)
)
And The Estate of Eleanor W. Lingo,)
)
Nominal Respondent.)

MASTER'S FINAL REPORT
(Attorneys Fees)

Date Submitted: August 16, 2010
Draft Report Issued from Bench: August 16, 2010
Final Report: August 20, 2010

Daniel V. Folt, Esquire and Matthew Neiderman, Esquire, of Duane Morris LLP,
Wilmington, Delaware; Attorneys for Petitioner.

Richard A. Zappa, Esquire, Joseph M. Nicholson, Esquire, Craig A. Karsnitz, Esquire, of
Young Conaway Stargatt & Taylor LLP, Wilmington, Delaware; Attorneys for
Respondent.

Seth L. Thompson, Esquire, of Hudson Jones Jaywork & Fisher, LLC, Georgetown,
Delaware; Sole Trustee.

GLASSCOCK, Master

This consolidated matter involved three issues; first, whether Eleanor Lingo (“Mrs. Lingo”) needed a guardian of her person and property, and, if so, who should serve as guardian; second, whether Mrs. Lingo’s daughter Dinah Lingo (“Dinah”)¹ had breached her fiduciary duties either as attorney-in-fact for Mrs. Lingo or as trustee for a trust (the “Lingo Trust”) of which Mrs. Lingo was the life beneficiary; and third, whether Mrs. Lingo’s purported will was genuine.² The facts of this matter are stated fully in my report of February 26, 2009.

Before the fiduciary duty claims and will contest issues were resolved, I established a guardianship for Mrs. Lingo, with a guardianship agency serving as guardian. The remaining issues were subject to several days of trial and post-trial briefing. Eventually, I found Mrs. Lingo’s will genuine, and not, as Mrs. Lingo’s son, Archibald Lingo (“Archie”) had contended, a forgery or the product of undue influence or lack of testamentary capacity. I also found that Dinah had breached fiduciary duties to Mrs. Lingo by transferring large amounts of funds from accounts belonging to Mrs. Lingo to accounts controlled by Dinah. In addition, I directed Dinah to account to Mrs. Lingo for the period during which Dinah ran the Lingo rental business.³ Ultimately, a forensic

¹ I use first names in this report, not out of disrespect, but to improved clarity.

² For reasons stated in my report of February 26, 2009, the validity of Mrs. Lingo’s will was litigated before her death.

³ The rental business, Lingo Bros., consisted of parcels of rental property owned half by Mrs. Lingo, individually, and half by the Lingo trust. Under the terms of the trust, the income of the rental business belonged solely to Mrs. Lingo. The trustees of the trust were Dinah and Archie, but Mrs. Lingo made decisions on behalf of the trust until around 2002, when Dinah assumed informal control over Lingo Bros.

accounting was performed and Dinah was ordered to disgorge the amounts she had transferred from her mother, as well as sums for which she could not account in connection with the rental business.

After these findings by the Court, and after Dinah had disgorged some funds converted but before the forensic accounting was completed, Mrs. Lingo died. Dinah is the sole beneficiary of Mrs. Lingo's estate. Despite the fact that the forensic accounting shows that Dinah must account to Mrs. Lingo for an additional \$398,000, payment of this amount by Dinah to Mrs. Lingo's estate would simply result in a distribution by the Estate to Dinah, as sole legatee. It is in this context that Archie seeks a fee award of \$300,000.

Typically, fees and costs in this Court are addressed by the American Rule, under which litigants are responsible for their own attorney fees. *E.g.*, Postorivo v. AG Paintball Holdings, Inc., Del. Ch., No. 2991, Parsons, V.C. (August 20, 2008)(Mem. Op.) at 24. There are exceptions to this rule, however, one of which is available here. Because Archie's representation has created a fund, not for himself, but for the incompetent Mrs. Lingo, it is appropriate that Archie be compensated from the fund for a reasonable attorney fee in connection with the creation of that fund. Moreover, Archie's initial guardianship petition resulted in a guardian being placed over Mrs. Lingo, which unquestionably was of benefit to her. Archie is entitled to a reasonable attorney fee in connection with creating this benefit, as well. *See, e.g.*, Korn v. New Castle County, Del.

Ch., No. 767, Chandler, C. (October 3, 2007)(Mem. Op.)(considering fee request for an intangible benefit).

In determining the appropriate attorney fee to be paid from a fund created for another,⁴ this Court exercises its discretion through an analysis consistent with the factors endorsed by our Supreme Court in Sugarland Industries, Inc. v. Thomas, Del. Supr., 420 A.2d 142, 149 (1980); *see*, Korn (Mem. Op.) at 2. The factors set out by the Sugarland court (and developed in subsequent case law) as important in determining the appropriate fee recovery are: 1) the benefit created by the litigation, and the extent to which that benefit was the result of the efforts of the party seeking the fee; 2) the time and effort spent by counsel; 3) the complexities and difficulties of litigation; 4) the skill and standing of counsel; 5) the stage at which the litigation ended; and 6) the contingent nature of fee expected. *E.g.*, In re Cox Radio, Inc. Del. Ch., No. 4461, Parsons, V.C. (May 6, 2010)(Mem. Op.) at 20. Parties seeking fees bear the burden of demonstrating the reasonableness of any fees sought. Korn (Mem. Op.) at 2.

The most important of these factors is the size and nature of the benefit conferred by the actions of counsel. Therefore, I consider this factor first.

⁴ Typically, the Sugarland factors are applied in cases where the efforts of a member of a group, as a shareholder, create a common fund for the benefit of the group. In contrast, in this unusual case, the actions of an interested party produced a fund for a disabled person in connection with the establishment of a guardianship for that person, in vindication of her rights under a trust and power of attorney. Such litigation would typically be undertaken by a guardian, rather than a third party, as here; a guardian, of course, would conduct the litigation with funds of the ward, instead of litigating with his own funds as Archie did here. While the creation of the fund for Mrs. Lingo in this particular matter justifies a fee under application of the Sugarland factors, I do not mean to imply that any litigation that results in a benefit to another would necessarily trigger a right in the plaintiff to fees from that other.

The Benefit Created

As I found in my report of February 26, 2009, Archie's counsel created an intangible but substantial benefit for Mrs. Lingo by ensuring that a guardian was put in place for her. Archie, however, has chosen not to submit separately those of his fees which were incurred solely in connection with the guardianship. Instead, he seeks an award of \$300,000, under Sugarland, based on the amount of the funds returned by or made available from Dinah to Mrs. Lingo. Those funds include over \$400,000 converted from Mrs. Lingo by Dinah under the power-of-attorney, together with almost \$400,000 in disbursements or missing rental fees in connection with the rental business, for which Dinah was unable to account. Thus, the funds returned or available to Mrs. Lingo as a result of this litigation total \$800,000.⁵ This fund was created solely by the efforts of Archie's counsel.

Dinah argues that the value of the amounts returned or returnable to Mrs. Lingo should be considered, for purposes of an analysis under Sugarland, zero. Dinah points out that the amounts she was ordered to disgorge were transferred to Mrs. Lingo very shortly before her death, or have not yet been transferred to Mrs. Lingo's estate. Dinah is the sole beneficiary of Mrs. Lingo's estate. Dinah rationalizes that the benefit of returning funds to Mrs. Lingo, from the sole beneficiary of her estate, at or after the time of her death, is illusory only, and should not be considered in analyzing whether Archie

⁵ This does not include a return of a piece of real property which Mrs. Lingo had transferred to Dinah under Dinah's influence. The record contains no appraisal or other valuation for this real property.

should be allowed an attorney fee. I disagree. The litigation efforts Archie made resulted in a fund of \$800,000 to be disgorged from Dinah to Mrs. Lingo. That money would have been available to Mrs. Lingo whether she survived ten days or ten years after the finding that the funds must be disgorged. Archie's right to a reasonable attorney fee based upon the fund he created for his mother cannot be defeated by a mere happenstance, the timing of her death. Therefore, I find the benefit created for Mrs. Lingo (in addition to the intangible benefit conferred by establishment of the guardianship) was in the amount of \$800,000.

The Other Sugarland Factors

I now turn to the other factors applicable to analysis of a fee request. The time and effort devoted by Archie's counsel in this matter were extraordinary. Billable time was incurred leading to legal fees of over \$1,000,000. Archie has, however, not broken down that amount into time allocable to guardianship issues, breach of duty issues and will contest issues. It was quite clear to me during the course of this litigation that it was motivated in principal part by Archie's desire to set aside his mother's will—which made Dinah the sole beneficiary of Mrs. Lingo's estate—and, in a more general sense, by his great and reciprocated animosity towards his sister. I note that much of the discovery necessary to the prosecution of the breach of duty claims against Dinah was also necessary to pursue Archie's unsuccessful contention that Mrs. Lingo's will was the product of Dinah's undue influence. Archie contended that the will was either forged or

the product of undue influence on Dinah's part, or was void for lack of testamentary capacity on the part of Mrs. Lingo. The will contest did nothing to benefit Mrs. Lingo or clarify her testamentary intentions. Therefore, I find the large amount of time expended on this consolidated matter by plaintiff's counsel is an unreliable guide to the appropriate fee which should be allowed based on the benefit worked for Mrs. Lingo. Similarly, while there were complex parts to this litigation, they mostly involved the will contest; the fiduciary duty claims were capable of straightforward resolution. The skill and reputation of plaintiff's counsel are among the finest of the Delaware Bar. The case was not taken on a contingency basis, which makes a more modest fee award appropriate.

In applying all these factors, I must keep certain policies in mind. While the award should be sufficient to encourage useful litigation, the award cannot be so large as to represent an unwholesome windfall. Moreover, the nature of this matter, which involved litigation between brother and sister over the control of the property of a parent, requires that I proceed with care "lest the funds of an incompetent parent serve as an incentive to litigate the interests, not of that parent, but of the child."⁶ Taking into account the Sugarland factors discussed above, and particularly the fact that much of the litigation effort which developed the fund would have been necessary in any event in Archie's unsuccessful attempt to set aside Mrs. Lingo's will, I find that an attorney fee representing 10% of the fund recovered on behalf of Mrs. Lingo—\$80,000—an

⁶ See my Master's Report of February 26, 2009, at 33.

appropriate award. The funds of Mrs. Lingo are being held by the Trustee appointed by this Court, Seth Thompson, Esquire, pending an Order directing their release to Mrs. Lingo's estate. Mr. Thompson should pay over \$80,000 to Archie from Mrs. Lingo's funds as part of any distribution of those funds, to compensate Archie for litigation for the benefit of Mrs. Lingo.

/s/ Sam Glasscock, III
Master in Chancery