

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN THE MATTER OF THE)
ESTATE OF) C.A. No. 3619-MA
LAWRENCE P. DAMICO, SR.)

MASTER'S REPORT

Date Submitted: May 7, 2010
Draft Report: November 3, 2009
Final Report: April 21, 2011

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AYVAZIAN, Master

This final report concerns the actions of a fiduciary, petitioner Paul Damico (“Paul”), who served as attorney-in-fact for his father Lawrence P. Damico, Sr. (“decedent” or “Mr. Damico”), during the last years of Mr. Damico’s life and is currently serving as executor of decedent’s estate. The litigation began when Paul filed a petition to sell real estate to pay decedent’s debts.¹ The single largest creditor listed in the petition is Paul who claims that decedent owed him over \$38,000 under a personal services contract. Paul’s younger brother, respondent Lawrence Damico, Jr. (“Larry”) has challenged the validity of this debt and other claims against decedent’s estate.² Larry also has taken exception to the estate inventory that was filed by Paul in the New Castle County Office of the Register of Wills. Both matters were heard together.³ For the reasons that follow, I conclude that the debts claimed by Paul and other creditors are valid debts of decedent’s estate. However, I also find that the inventory filed by Paul did not list all of the personal property owned by Mr. Damico at the time of his death. Accordingly, the inventory must be amended to include joint bank accounts owned by Mr. Damico, specific items of tangible personal property owned by Mr. Damico, \$32,000, which is the amount of money that Paul transferred during Mr. Damico’s last months from a joint account into an account in Paul’s sole name, and then distributed to himself, his children, and his youngest brother Michael after Mr. Damico’s death, and an additional \$2140 of Mr. Damico’s funds that were expended by Paul during Mr. Damico’s last months for which he failed to account.

¹ See 12 Del. C. § 2701.

² Decedent was survived by three sons: Paul, Larry, and Michael Damico. Michael is not a party in this litigation. To avoid confusion and with no disrespect intended, I will refer to the three sons and their respective wives by their first names in this report.

³ During these proceedings, the parties agreed to sell decedent’s real property for \$125,000 and to hold the net proceeds in escrow until their dispute was resolved.

Factual Background

In early 2000, Mr. Damico was approximately 83 years old and living with his wife in their home at 253 Bassett Avenue, New Castle, Delaware when he was diagnosed with Parkinson's disease. In November 2002, Mr. Damico's wife passed away from cancer. His sons Paul and Michael spent two weeks residing with their father in his home until he adjusted to living without his wife. At the time, Mr. Damico had difficulty walking and getting out of a chair because of his Parkinson's disease. He was able to live alone in his own home from 2003 until December 2006 only with considerable help from his three sons. Paul was the oldest son. Paul lived in Middletown, Delaware with his family and worked at General Motors. He also coached volleyball and served as a volleyball official. Paul would stop by his father's house in between his jobs, and would prepare meals for his father. He balanced his father's checkbook, and wrote out checks for his father. Paul also took his father to volleyball matches and the racetrack on occasion.⁴ Larry was the middle son; he worked for the United States Post Office as a mechanic, and lived near his father. Larry handled repairs around his father's house, and maintained Mr. Damico's car. The youngest son, Michael, who also lived nearby, helped with his father's laundry and did light housekeeping for his father.

Under Mr. Damico's existing will at that time, his estate was to be divided after his death into four equal shares for his three sons and his daughter. Mr. Damico's daughter, however, had predeceased Mr. Damico's wife. In 2004, Mr. Damico decided to revise his will. Paul made an appointment for his father with a lawyer through the United Auto Workers union ("UAW"). This lawyer prepared a will that Mr. Damico

⁴ Volleyball was very important to Mr. Damico. According to Paul, his father was instrumental in starting volleyball programs in Delaware in the 1950s. Paul shared his father's enthusiasm for the sport, and was a volleyball coach at the University of Delaware.

later executed which divided his estate into four equal shares, and gave each son one-fourth and Paul's two children the remaining one-fourth of Mr. Damico's estate.⁵ When Larry and Michael found out about their father's new will, they became upset and demanded that another will be prepared. On April 12, 2004, Mr. Damico executed a new will that had been drafted by another lawyer at his sons' request ("2004 Will"). The 2004 Will left his estate in equal shares to his three sons, and named Larry as executor.⁶

Paul was laid off from General Motors in 2004. He listed his Middletown house for sale and, in September of that year, moved his family to Sussex County where they had a trailer so his daughter Margo could start high school. Paul and his family were planning to move to Sarasota, Florida where they owned a house because Margo was interested in a local high school that offered marine biology. In January 2005, Paul was called back to work at General Motors. Rather than drive back and forth from Sussex County, Paul stayed with his father three or four nights a week until he retired from General Motors in June 2005. Paul and his family moved to Sarasota soon afterward.

As Paul's interactions with his father became less frequent, Larry and Michael became more involved with their father's care. In 2005, Mr. Damico relinquished his driver's license after he drove his car into parked vehicle. Larry thereafter drove his father to medical appointments and the barber, and to visit the graves of his wife and daughter. Larry also assumed responsibility for his father's finances. Larry's wife Elizabeth prepared meals for her father-in-law or brought him food items on occasion.

⁵ Paul and his wife Susan have two children, Marty and Margo. Neither Larry nor Michael has any children.

⁶ Trial Exhibit No. 1. On the same date, Mr. Damico executed a Durable Power of Attorney naming Paul as his attorney-in-fact. Trial Exhibit No. 8.

Michael and his wife Jacalyn visited Mr. Damico on a daily basis to help him with grocery shopping, food preparation, housecleaning, dog-walking, and other errands.

After Paul moved to Florida, he spoke with his father by telephone, and visited his father two or three times during trips to Delaware. Visiting his father in December 2006, Paul noticed that Mr. Damico's mental processes were slower and that his physical condition had declined. Shortly after this visit, Mr. Damico fell and was taken to the hospital by Larry. During his hospitalization, Mr. Damico was diagnosed with Alzheimer's disease. When he was ready to be discharged, it was evident to Larry that Mr. Damico would need constant care because he could not walk or bathe himself. Since Larry's house was a ranch-style residence and he worked at night while his wife worked during the day, Larry brought his father home to live with him. After three weeks, however, Larry called Paul and said that he no longer could care for Mr. Damico, and that Paul would have to take care of their father. The exact nature of Larry's conversation with Paul and Susan is in dispute, but it is undisputed that Mr. Damico was unhappy living at Larry's house, and had asked Michael to return him to his own home.⁷

Paul called Michael and asked him to stay with their father in Mr. Damico's home until Paul could arrive in Delaware. Michael took time off from work around the middle of January 2007 in order to care for his father.⁸ After one week, however, Michael was physically drained by the task because Mr. Damico did not sleep through the night. He

⁷ The record shows that it would not have been feasible for Mr. Damico to live with Michael because Michael lived in a two-story townhouse with only one bathroom which was located on the second floor.

⁸ On March 15, 2007, Paul wrote a check from the joint checking account in the amount of \$1500 to pay Michael for the wages he had lost while taking care of Mr. Damico. Trial Exhibit No. 65, Bates No. 36. A month earlier, Paul had written a check from the same account in the amount of \$5,920 to the home health care agency that had provided aides to assist Michael in taking care of Mr. Damico. Trial Exhibit No. 13.

called out every 20 minutes because he was uncomfortable or because he wanted something. Mr. Damico also had to be watched constantly because of the risk that he might fall and hurt himself. Jacalyn helped her husband care for Mr. Damico several nights a week, but Michael eventually hired some aides from an agency to spend the night with his father so he could sleep. Toward the end of Michael's three-week stay at his father's house, aides were present in the home 24 hours per day.

Paul arrived in Delaware around the middle of February. He arranged for his father's van to be serviced, packed Mr. Damico's personal belongings and medical equipment into the van, and then drove his father to Florida. Michael and Jacalyn understood that Mr. Damico's move to Florida was going to be permanent. Before he left Delaware, Paul asked Jacalyn to clean out Mr. Damico's house in preparation for selling it. According to Paul, Mr. Damico was also aware that he was coming to live with Paul's family as a permanent resident. When Paul purchased his house in Sarasota in 2002, he had done so with the knowledge that it would be suitable for his father to live in.

By the time they arrived in Florida, Paul realized that his father needed round-the-clock care. They discussed different means of providing the care his father needed, including hiring an aide for Mr. Damico, or placing him in a nursing home. Mr. Damico suggested that Paul take care of him instead of hiring an aide. However, even with Paul's wife Susan working on a full-time basis, the family needed Paul's additional income as a restaurant cook and volleyball official to pay their current bills and Margo's anticipated college expenses. Paul explained the family's financial situation to his father, and Mr. Damico agreed to pay his son \$300 per week for his services as a caregiver. In

addition, Mr. Damico offered to contribute \$100 per week as his share of the household expenses.

Mr. Damico's retirement income consisted of a monthly Social Security benefit in the amount of \$1,116 and an occasional dividend check. He owned joint checking accounts with Paul at Sun Bank and Wachovia Bank. He also had several savings accounts, one of which was jointly owned with Paul, and three \$10,000 certificates of deposit ("CD") at Bank of America. After Paul moved his father to Florida, they started to consolidate Mr. Damico's finances. The Sun Bank account was closed, and as each CD matured, the account was closed and the funds deposited into a new joint money market account at Wachovia Bank. When Mr. Damico was no longer eligible for medical insurance coverage from Blue Cross and Blue Shield of Delaware, Paul enrolled his father as a dependent on his UAW pension plan so Mr. Damico could get coverage through Blue Cross and Blue Shield of Michigan. Paul found new doctors for his father in Florida, and also started a program of physical and occupational therapy for him. Paul also took his father to the senior center about twice a week, to the YMCA where they watched men's volleyball games, and to the racetrack.

Paul cared for Mr. Damico 24 hours a day for three months until his own health began to deteriorate, at which time his family intervened. Then Paul hired aides who came to the house for a few hours so he and his wife could go out for an evening. Paul also paid his son Marty and Marty's fiancée, Jenn Wasson ("Jenn"), to stay with Mr. Damico on occasion.⁹ In June 2007, Michael and Jacalyn traveled to Sarasota to visit with Mr. Damico over Father's Day weekend. They found Mr. Damico's physical condition and mental state to have deteriorated, but he appeared well-cared for, happy,

⁹ Trial Exhibit No. 17.

and was very content to be living with Paul and his family. Michael and his wife had originally planned to stay the week in Paul's house while Paul and Susan took a vacation, but they left after three days so Marty and Jenn were paid to take care of Mr. Damico until Paul and his wife returned home.

After Mr. Damico left Delaware, Jacalyn started to clean out his house on Bassett Avenue so it could be sold. The house had been occupied by the family for fifty years and contained a considerable amount of tangible personal property. Eventually, a dumpster was brought in to dispose of unwanted items. During this process, Larry entered the house and discovered that his encyclopedias were missing. He called Paul, became upset, and broke some dishes and food containers. Michael went over to the house to clean up the mess Larry had made. Michael then called the police and accused Larry of breaking into their father's residence. Larry was arrested, but the charges were later dismissed. After this incident, Paul instructed Larry not to talk to Mr. Damico about the damage he had caused in the house, and Paul monitored Larry's telephone conversations with their father. Although he was invited to visit, Larry never visited his father in Florida. Instead, Larry called Paul's house on occasion to talk with his father or Susan. Michael and his wife were in telephone contact with the family in Florida about every other day.

On June 17, 2007, Mr. Damico executed a new will that was prepared at a UAW office in Sarasota ("2007 Will"). The 2007 Will left Mr. Damico's estate to his three sons in equal shares, but named Paul as executor instead of Larry.¹⁰ Meanwhile, Paul realized that he might not be able to care for his father in the future, i.e., as Mr. Damico got older, he might need more professional care than Paul could provide. Paul

¹⁰ Trial Exhibit No. 3.

started to look at nursing homes in the Sarasota area, and was advised to seek a lawyer's assistance. In the summer of 2007, Paul took his father to an attorney named John Griffin who recommended that they spend down or transfer Mr. Damico's assets out of his name to render him immediately eligible for Medicaid coverage if he had to enter a nursing home. In addition to preparing a durable power of attorney and an advanced health care directive for Mr. Damico, Griffin prepared a personal services contract that was executed by Mr. Damico and Paul on July 11, 2007.¹¹ The agreement was given a retroactive date of February 12, 2007, and called for Mr. Damico paying Paul \$71,351.28 in exchange for Paul providing care-giving services for his father for the remainder of Mr. Damico's life regardless of its duration and regardless of where Mr. Damico was residing. Griffin also suggested that Paul and his father transfer funds on a monthly basis from Mr. Damico's joint account to another account under Paul's name as so-called "gifts" in order to shorten the penalty period for making such transfers under Florida Medicaid regulations.

Over the next several months, Paul transferred a total of \$32,000 of his father's funds from their joint money market and checking accounts into a new account in Paul's sole name.¹² The last transfer occurred on September 26, 2007. Four days later, on September 30, 2007, Mr. Damico passed away suddenly after aspirating fluid into his lungs. He was 90 years old when he died.

After his father's death, Paul wrote a check for \$9500 from the "gifting" account to his brother Michael. He then gave \$9500 from that account to his children, and

¹¹ Trial Exhibit No. 11.

¹² According to Paul's testimony, the last transfer of \$9500 from the joint account included \$6000 that had been transferred to the joint account from his wife's account. The bank statement shows a \$6000 deposit into the joint account. Trial Exhibit No. 64, Bates No. 19.

retained the balance for himself. Paul continued to write checks to himself on the Wachovia joint checking account until January 22, 2009, when he closed the account.

Procedural History

On February 14, 2008, the 2007 Will was admitted to probate in the Register of Wills Office in New Castle County, and letters testamentary were granted to Paul as personal representative of decedent's estate.¹³ On March 14, 2008, Paul filed a Petition to Sell Real Estate and Approve Real Estate Contract.¹⁴ According to the Petition, Paul was seeking reimbursement from the estate of \$8,408.42 that he had contributed to pay decedent's funeral expenses, and there were several creditors to whom the estate owed a total of \$46,531.57. Paul was listed as a creditor to whom the estate owed \$38,526 under a personal services contract. On June 8, 2008, Larry filed an objection to the petition in which he alleged that the personal services contract was invalid because the decedent lacked the capacity to contract. Larry also accused Paul of misappropriating or failing to account for decedent's assets. He questioned various charges on decedent's credit card, and ultimately objected to the \$2500 commission that Paul was seeking for an estimated 100 hours of estate administration and travel expenses.

A two-day hearing was held in November 2009, at the conclusion of which I issued an oral draft report from the bench. In my report, I found that the elderly and frail Mr. Damico was completely reliant upon Paul while he lived in Florida, and that a fiduciary relationship existed between the two men irrespective of the durable power of attorney. Since Paul owed a duty of loyalty to his father, his actions in both handling his father's finances and paying himself for caring for his father constituted self-dealing.

¹³ Trial Exhibit No. 4.

¹⁴ Trial Exhibit No. 73.

Paul, therefore, had the burden of demonstrating that his dealings with his father were entirely fair to Mr. Damico. I found that the personal services contract was entirely fair to Mr. Damico because Paul was bound to care for his father for the rest of his father's life in Paul's home or, if necessary, in a nursing home. In exchange, Paul received a set fee calculated by using a rate of \$18 per hour for 21 hours per week of providing care to Mr. Damico for 3.63 years, which was Mr. Damico's life expectancy according to a Medicaid-approved life expectancy table. I found that Paul was entitled to the contractual fee for his care-giving services. I also found that the "gifting" of Mr. Damico's funds to Paul, which was done on the advice of an attorney for Medicaid planning purposes, was not a true gift to Paul from his father, but that Paul was holding this money in trust for his father's care. I did not find Paul's testimony to the effect that Mr. Damico had wanted these funds to go to Paul, Paul's children, and Michael after his death to be clear and convincing. Therefore, I directed that these funds, a total of \$32,000, were to be included in decedent's estate. I found that the expenses for cleaning out Mr. Damico's house to be valid claims on the estate. However, because I found that Paul had: (1) omitted to list joint bank accounts, a metal box containing coins and other items, and two cemetery plots Mr. Damico owned on the estate inventory; (2) "junked" Mr. Damico's van which had a date of death value of \$500; and (3) incurred some inappropriate financial transaction fees, I reduced Paul's commission by one-third. I also awarded a portion of Larry's attorney fees to be paid by the estate because Larry's objection to the \$9500 "gifts" had benefited the estate.

Exceptions

Larry has taken exceptions to my draft report. First, he again challenges the validity of the personal services contract, arguing that Paul failed to establish that Mr. Damico was competent and free from undue influence at the time of its execution. Larry would have the Court apply to the contract the same standard for determining competency to execute a will set forth in *In re Estate of West*, 522 A.2d 1256 (Del. 1987), because Mr. Damico was effectively disposing of his estate through this contract. Moreover, Larry would put the burden of proving competency and lack of undue influence on Paul. Second, Larry challenges Paul's handling of Mr. Damico's finances, arguing that Paul failed to account for: (1) over \$5,500 in charges to Mr. Damico's Discover credit card; (2) \$2662 expended from Mr. Damico's Wachovia checking account; and (3) \$5,550 expended from Mr. Damico's Wachovia Money Market account. Larry also challenges the total funds paid to Paul's son and daughter-in-law (\$3,558) for the alleged care they gave Mr. Damico because Paul did not itemize the hours they had spent with Mr. Damico or the services they had provided.

In response to these exceptions, Paul points to his own trial testimony, and the testimony of Michael and his wife, as demonstrating that Mr. Damico was competent when he executed the personal services contract. In addition, Paul argues, the Florida attorney who drafted the contract would have referred Mr. Damico for a guardianship if he had not been confident that Mr. Damico had the competency to understand the documents he was executing. Paul denies that his father was unduly influenced to execute the contract, which was in his best interest because it ensured that he would receive the care he needed, and was supported by consideration. Paul argues that the

payments to himself, Marty, and Jenn for their caregiving services were reasonable and sufficiently documented. The credit card charges, Paul argues, were all itemized and consistent with what Michael had been charging when he cared for Mr. Damico in Delaware. As to three specific checks that were questioned by Larry in his exceptions, Paul argues that they were payments to him for caring for his father.

Analysis

The parties dispute Mr. Damico's capacity to execute the personal services contract. Larry contends that the burden is on Paul to establish that Mr. Damico had the requisite testamentary capacity at the time he executed the personal services contract. According to Larry, Paul has presented only his own self-serving testimony that the decedent was competent, and thus has failed to meet his burden. Paul concedes that as a fiduciary, he has the burden of proving the validity of the contract, but he argues that the burden-shifting does not require him to meet the standard set forth in *In re Melson*, 711 A.3d 783 (Del. 1998). Paul argues that there are no suspicious circumstances that warrant applying the *Melson* rule to this case because Mr. Damico was represented by independent counsel who drafted the contract, and there was consideration for the contract, i.e., Paul's care-giving services.

In *Melson*, the Supreme Court held that the presumption of testamentary capacity does not apply and the burden shifts to the proponent of a will to prove by a preponderance of the evidence that the testator or testatrix possessed the requisite testamentary capacity and to show the absence of undue influence where a challenger is able to establish, by clear and convincing evidence, that the will was executed by a testator or testatrix who was of weakened intellect, that the will was drafted by a person

in a confidential relationship with the testator or testatrix, and the drafter received a substantial benefit under the will. 711 A.2d at 788. The burden-shifting rule in *Melson* was later applied in a case involving a quitclaim deed where the Court found that the deed was being used as a will substitute in suspicious circumstances. *See Tucker v. Lawrie*, 2007 WL 2372616 (Del. Ch. Aug. 17, 2007). A will substitute was defined as:

An arrangement respecting property or contract rights that is established during the donor's life, under which (1) the right to possession or enjoyment of the property or to a contractual payment shifts outside of probate to the donee at the donor's death; and (2) substantial lifetime rights of dominion, control, possession, or enjoyment are retained by the donor.

Id. at *6 (quoting RESTATEMENT (THIRD) OF PROP.: DONATIVE TRANSFERS § 7.1 (2003)).

The personal services contract in this case was not designed to shift the payment of \$71,351.28 outside of probate to Paul at Mr. Damico's death. Nor was Mr. Damico supposed to retain lifetime rights of dominion, control, possession or enjoyment of these funds. According to Griffin's deposition testimony, the parties intended to pay Paul the entire contractual amount before Mr. Damico entered a nursing home. The contract was designed to qualify Mr. Damico for Medicaid long-term care coverage before he had to enter a nursing home and to guarantee Mr. Damico the care he needed at that time and in the future if he moved into a nursing home. Griffin testified that when he first met the Damicos, the personal services contract was in the process of being developed as a Medicaid planning tool in Florida. According to Griffin, the contract involved an exchange for consideration rather than a gift, so the payment to Paul would not have triggered a penalty period before Mr. Damico could become eligible for Medicaid long-

term care coverage. Griffin also testified that when he drafted the contract for Mr. Damico, he believed that Mr. Damico's house was in the process of being sold and that Mr. Damico would soon receive the net sale proceeds. Griffin expected the payment to be made to Paul with the proceeds from the sale of Mr. Damico's home. In light of these undisputed facts, I conclude that there is no reason to apply the burden-shifting *Melson* scheme to this case because the personal services contract was not designed to be a will substitute.

There is a presumption of competency in business transactions, and the burden of proof of incompetency normally rests upon the person challenging the validity of the contract. *See Gallo v. Glick*, 1964 WL 68944, *2 (Del. Ch. March 10, 1964). Here, however, the relationship between Paul and Mr. Damico at the time the contract was executed was one of trust and confidence, making Paul a fiduciary in respect to his father. *See In re Estate of Surian*, 1990 WL 100794, *4 (Del. Ch. July 12, 1990). As a result, Paul bears the burden of showing the fairness of the contract with his father.

There is no dispute that Mr. Damico was physically frail, and unable to walk or stand without assistance while he was in Florida. The parties, however, presented differing observations of Mr. Damico's mental capacity. Paul testified that his father understood about his finances, and always knew him, his wife and children, although he sometimes called Jenn "the girl." According to Paul, Mr. Damico sometimes woke up at night thinking it was morning and that he had to get dressed for work, but he never had any hallucinations.¹⁵ Mr. Damico enjoyed receiving visits from old friends who lived or vacationed in Florida, and when Michael and his wife came to visit him in June,

¹⁵ The issue of hallucinations arose because Mr. Damico once told Jacalyn that he had seen the spirit of his late wife. Jacalyn testified, however, that she did not believe that he thought that his wife was actually physically present.

approximately a month before he signed the contract, Mr. Damico greeted his son and daughter-in-law by name and nearly cried when he saw his dog, whom they had adopted when Mr. Damico moved to Florida. During this visit, Jacalyn observed that her father-in-law's physical condition had further declined, but she also observed that he still knew where he was, i.e., in Paul's house in Florida, and he was quite content with his current living arrangement. Michael, however, observed that Mr. Damico's memory had diminished since he had last seen his father, to the point where Mr. Damico could not remember how many sons he had. Larry testified that his father always had been good with numbers, but he never had handled his own finances and never had made any decisions. According to Larry, Mr. Damico always relied on other people to make the household or legal decisions. Larry also testified that Mr. Damico suffered a very steep mental and physical decline in the middle of 2006, and about the same time he started to have hallucinations about his wife being in the house.

In addition to the family's general observations of Mr. Damico's mental capacity in 2006 and 2007, Griffin testified to his observations of Mr. Damico during their attorney-client relationship. Griffin testified that he specialized in elder law, which he described as a subset of estate planning that focuses on the long-term care needs of clients who are typically over the age of 65. He recalled meeting with Mr. Damico and Paul together at least two times. He witnessed and notarized Mr. Damico's signature on the documents that Griffin had drafted for him, i.e., the personal services contract, a durable power of attorney, and an advanced health care directive. It was Griffin's habit and practice to determine his elderly client's capacity before having his client sign any documents. Before Griffin even drafted any documents, he would first ascertain that his

elderly client had a general understanding of his or her available assets, a general understanding of “the natural heirs of their bounty,” and a general understanding of the documents to be signed.¹⁶ In addition to his client having the legal capacity to execute documents, Griffin assessed whether his client had the desire to execute new documents. At a subsequent appointment, Griffin would address these same issues again when it was time for the documents to be signed. Based on his interactions with his client, if Griffin felt that his client had anything less than a full understanding of the documents to be signed, he would refer the matter to the guardianship side of his practice.¹⁷

In this case, Griffin could recall Mr. Damico being very friendly and personable, but due to the passage of time he could not recall specifically Mr. Damico’s mental capacity. Griffin was aware at the time that Mr. Damico was suffering from Parkinson’s disease and Alzheimer’s disease. Griffin remembered a discussion about one of Mr. Damico’s sons being difficult to deal with. According to Griffin, it was likely that Paul had provided most of the financial information about his father’s assets during their meetings, and it was not unlikely that when Griffin went over and explained the draft documents during the execution appointment, both Paul and Mr. Damico had been present. However, Griffin testified that he would have asked Paul to leave the room, and then he would have discussed any concerns or questions Mr. Damico might have had in private. Execution of the documents by Mr. Damico would have taken place without Paul being present. Griffin testified that he had full reason to believe Mr. Damico understood the documents and, under Florida law, had the capacity to sign the documents on July 11, 2007.

¹⁶ Griffin Deposition at 45.

¹⁷ Griffin estimated that his legal practice was 50% Medicaid planning, 30-40% guardianship, and 10% traditional estate planning. Griffin Deposition at 64.

There is nothing in the record here that would undermine the credibility of Griffin's testimony about his method and practice of evaluating the capacity of his elderly clients or his belief in Mr. Damico's competency at the time of the contract's execution. Griffin had nothing to gain financially by drafting a personal services contract for Mr. Damico. According to his testimony, Griffin charged a flat fee for Medicaid planning, and would have offered his services in a guardianship proceeding if he had suspected that Mr. Damico lacked capacity to sign the contract. I find that Paul has met his burden of proving by the preponderance of the evidence that Mr. Damico, although elderly, physically frail and suffering from some memory loss, was legally competent to execute the personal services contract on July 11, 2007. This exception, therefore, is denied.

Under the personal services contract, Mr. Damico agreed to pay Paul \$71,351.28 in exchange for Paul providing lifelong care for Mr. Damico. According to Griffin, it was an appropriate legal contract and planning tool for Mr. Damico because Paul already had been providing care for his father and had left his job in order to do so.¹⁸ It was also necessary to transfer funds out of Mr. Damico's name before he could become eligible for long-term care coverage under Florida Medicaid regulations. The record shows that the family had a history of longevity, and Mr. Damico knew that with his health

¹⁸ Griffin testified that the rate of \$18 per hour, which the personal service contract provided, was a fair rate in the community, and was based in part on the level of care that Paul was providing his father. Griffin described Paul's services to his father as on the "very high end of care typically provided by caregivers." Griffin Deposition at 21. The contract Griffin drafted obligated the caregiver to provide three hours of services a day to the care recipient, or 21 hours per week. In this case, Griffin described three hours as not an accurate reflection of the amount of care Paul was providing his father. Griffin testified that his practice was to listen to the client and then, based upon what the client described as the level of care the client was receiving, Griffin would reduce the number of hours to what would be "more reasonable in the eyes of Medicaid." *Id.* at 23. He then would set the number, and, in this case, both Mr. Damico and Paul were satisfied with the number he had selected even though it was very low

problems, he might have to enter a nursing home one day. According to Paul, Mr. Damico always had wanted to pay his share, and was afraid of becoming destitute and dependant on someone. Mr. Damico also wanted to be reassured that whatever was done was in his best interests for the future.

Nevertheless, Larry argues that Paul had a disposition to exert undue influence over Mr. Damico because Paul and his wife were experiencing financial difficulties around the time of the execution of the personal services contract. Larry accuses Paul of “surreptitiously causing Mr. Damico to enter into this agreement which would effectively deplete the majority of the assets in his estate, [so] Paul and Susan would be able to avoid filing for bankruptcy and could potentially get out of debt.”¹⁹ Paul disputes the basis of Larry’s claims, arguing that he and Susan did not encounter financial difficulties until after Mr. Damico’s death when Susan lost her job. However, I do not need to resolve this factual dispute. Unlike a typical undue influence claim in a will contest, this case involves a contract for which there was consideration. As I stated at the conclusion of the trial, the contract obligated Paul to provide care for his father for the remainder of Mr. Damico’s life whether Mr. Damico resided in Paul’s home or in a nursing home. It was drafted by and on the advice of independent legal counsel for Mr. Damico. Paul’s fee was set using a formula based upon Mr. Damico’s life expectancy of 3.63 years, so Paul was taking the risk that he would have to care for his father for a fixed payment even if Mr. Damico had lived another ten years or more. Both parties took a risk in entering this

¹⁹ Respondent’s Opening Brief in Support of Exceptions, at p. 9.

contract because Mr. Damico would not have received the full benefit of his bargain if, as turned out to be the case, he did not live out his expected life span.²⁰

There is no evidence that Paul was aware of personal services contracts before he made the initial contact with Griffin's law firm. There is also no evidence that the contract was induced or influenced by any improper motive on Paul's part to take advantage of Mr. Damico. It was Larry who called Paul in the first place and asked him to take Mr. Damico because Larry was unable to continue caring for his father. It was Paul who left his job, traveled to Delaware, and then drove his father back to Florida to assume the single-handed task of caring for his father 24 hours a day. It was Paul who was suffering a financial loss in taking care of his father since he testified that \$400 a week as payment for taking care of his father did not fully compensate him for his lost earnings as a cook and volleyball official. Even though Paul eventually hired aides and other family members to assist him in the task of caring for Mr. Damico, it is undisputed that Paul took good care of his father in the months before the contract was executed, and that Mr. Damico was satisfied with his son's care and was happy living with his son's family. Moreover, according to Griffin's testimony, Griffin probably had discussed with his client the fact that their short-term Medicaid planning would result in zero assets being left in Mr. Damico's name for the beneficiaries of his testamentary estate. Mr. Damico nonetheless executed the personal services contract, thus guaranteeing that he would continue to receive the same quality of care he had been receiving from Paul for the rest of his life. There is nothing in the record to suggest that Paul ever disappointed his father in this respect. After reviewing the record, I am satisfied that the contract was

²⁰ The parties intended to pay the personal services contract with the proceeds from the sale of Mr. Damico's home that was expected to take place shortly after the contract was executed. Griffin Deposition at 33. Trial Transcript at 242.

entirely fair to Mr. Damico and was not induced by any improper conduct or influence on Paul's part. This exception, therefore, is denied.

Even though I conclude that the personal services contract is a valid contract, Paul chose not to claim the entire amount to which he would be entitled under the contract. At trial, Paul testified that his claim against the estate for \$38,526 was based on a calculation of his time as a caregiver in a way that he and his attorney considered was fair. He described that he had multiplied 14 hours a day at an hourly rate of \$14 for 33 weeks (the time his father resided in Florida), and then had multiplied 14 hours a day at the same hourly rate for the 12 to 14 weeks it took Paul to find another job after his father's death. He then had subtracted from the sum of those two numbers the amount of money he had already been paid for caring for Mr. Damico. Larry has taken exception to this method of calculation, contending that Paul's calculations are inconsistent with the amount Paul now claims he is owed, i.e., \$38,526. Larry also argues that part of the time Mr. Damico was in Florida, he spent two weeks in the hospital and Michael cared for him for one week, and there were others who also cared for Mr. Damico. Larry argues that because Paul is unable to describe in an accurate fashion how he arrived at this number, it is therefore unreasonable. Furthermore, Larry argues that Paul already has received over \$14,000 for caring for Mr. Damico.

According to the copies of cancelled checks that were submitted in evidence, Paul paid himself a total of \$14,300 for his services as a caregiver for his father from February 12, 2007 until September 30, 2007.²¹ Using the same formula Paul described at trial, my

²¹ I added all checks that contained notations of "Dad's care" and all checks in amounts of \$400, \$800, \$1200, or \$1600 because Paul testified that these checks were payment for his father's care because he paid himself several weeks at a time for his services. I also counted a portion of any

calculations yield \$45,640 as the amount that Paul is still owed.²² If Paul instead had subtracted \$14,300 from the full contractual amount of \$71,351.28, he could have claimed \$57,051.28 as a debt against decedent's estate. Instead, Paul is claiming only \$38,526. It appears from Paul's testimony that Paul was trying to be fair to his brothers, and had discounted his services in light of decedent's unexpected demise. I do not find it reasonable or fair to deny Paul this amount of money (\$38,526), which is less than the amount to which he is entitled under the contract, simply because at trial Paul was unable to describe how he had calculated this amount. In addition, I do not consider it unreasonable for Paul to be paid for the week that he was on vacation when Michael and Jacalyn came to visit, or when other people were hired to look after Mr. Damico, or when Mr. Damico was in the hospital. Paul bore the ultimate responsibility for his father's care wherever he was. Larry and Michael were unable to take care of Mr. Damico because they needed to work. Despite having retired from GM, Paul still needed to work to support his family. This exception, therefore, is denied.

Larry also takes issue with over \$5,500 in charges to Mr. Damico's Discover card, \$2500 expended from Mr. Damico's Wachovia checking account, and \$5,550 expended from Mr. Damico's Wachovia money market account. According to Larry, Paul failed to provide receipts or documentation for the expenditures. He also questions payments to Marty and Jenn totaling \$3558 for care-giving services because Paul failed to detail the hours the couple spent with Mr. Damico or services they provided.

check if it contained a notation of "Dad's care" and another expense, such as an insurance payment or another caregiver's payment.

²² I used 12 weeks, instead of 14 weeks, for the time Paul spent looking for work after his father's death, in reaching this amount.

According to the Discover card monthly statements, the charges on Mr. Damico's account consisted primarily of payments for food, gasoline, medicines or medical supplies, and household goods.²³ Paul testified that these expenditures were made on behalf of Mr. Damico. Some of the expenditures were incurred while Paul and his father traveled from Delaware to Florida in February 2007, and some were incurred by Michael during Michael's round-trip visit to his father in Florida in June 2007.²⁴ There was also an expensive "lift chair" (\$995) that was purchased for Mr. Damico. There was a restaurant meal that Paul testified was a birthday gift to him from his father, and flowers from a Wilmington florist that Paul could not recall but thought may have been purchased for a friend of Mr. Damico.

The pattern of credit card charges in Florida is not dissimilar from the charges made shortly before Mr. Damico left Delaware. Purchases on Mr. Damico's Discover account were typically made at supermarkets, gasoline stations, pharmacies, and a few other retail establishments. Statements from mid-October 2006 to mid-January 2007 reveal average monthly purchases of approximately \$370.²⁵ From mid-January to mid-February 2007, the time when Michael was caring for Mr. Damico, the monthly total increased to \$831.81. The next month's purchases totaled \$975.41, but this included purchases made during the trip to Florida, and pet food (\$44.46) bought in Wilmington on February 25, 2007, presumably by Michael for Mr. Damico's dog, as well as two health-care related expenses in Sarasota on February 19th and March 1st. From mid-

²³ Trial Exhibit No. 57.

²⁴ Michael testified that he used his father's Discover credit card to pay for his expenses during the trip to and from Florida, and that he cut up the card when he returned home. Larry also had used his father's Discover card when he was taking care of his father, but Larry gave his card to Paul when Paul moved Mr. Damico to Florida.

²⁵ Trial Exhibit No. 57.

March to mid-April, credit card purchases totaling \$331.85 were made at supermarkets, gasoline stations, and Sam's Club. From mid-April to mid-May, purchases totaled \$709.80 at similar establishments, but also included two purchases on one date at a restaurant (\$82.13). The next statement shows a total of \$1650.83, but includes the purchase of medical supplies (\$995) and dog food (\$46.98). The statement covering the period from mid-June to mid-July reveals purchases totaling \$1,094.45, but many if not most of the purchases appear to have been incurred by Michael on his trip to and from Florida. From mid-July to mid-August, there was only \$398.74 worth of purchases made at gasoline stations, supermarkets and Sam's Club. From mid-August to mid-September, there were purchases made at gasoline stations, supermarkets, Sam's Club, and pharmacies that totaled \$310.64. The last account period where there were any purchases ended on October 16, 2007. The total for that period was only \$254.35, with the final charge occurring on September 27, 2007 (\$116.95 to a Wilmington, Delaware florist). There were no purchases made after Mr. Damico's death although the remaining balance on the account was not paid off until December 31, 2007.

These monthly statements demonstrate that, aside from the expenses of three long-distance trips and an expensive "lift chair" for Mr. Damico, the purchases made by Paul while Mr. Damico lived in Florida were not significantly different in kind or amount from the purchases made by Michael while Mr. Damico was still living in Delaware. Although Paul did not provide receipts for the purchases, according to his undisputed testimony, all of these purchases were made on behalf or at the request of Mr. Damico. There is nothing inherently suspect about these credit card purchases that would lead me to find otherwise. This exception, therefore, is dismissed.

Larry also argues that Paul failed to account for \$2662 expended from the Wachovia joint checking account during the time Mr. Damico was living with Paul. Unfortunately, since Larry has not specified which checks or withdrawals are allegedly unaccounted for, I cannot determine whether his exception has any merit. Similarly, Larry has failed to enumerate which expenditures (totaling \$5550) from the Wachovia money market account were unaccounted for. To the extent that Larry refers to checks that were made out to Paul and signed by Paul which deviated from the \$400 weekly amount that Mr. Damico had agreed to pay Paul, the record shows that there were several checks in increments of \$400 made out to Paul that did not have any notation in the memo line as to the purpose of the payment.²⁶ Paul testified, however, that these checks were written to cover two, three, or four weeks of his care-giving services. Paul also testified that he reimbursed himself for payments he had made for his father's health insurance, and a check in the amount of \$940 dated May 11, 2007, was for his care-giving services (\$800) and \$140 for a private-duty aide named Chris.²⁷ While Paul's record-keeping may have been sloppy, his testimony provided additional support for these expenditures. However, Paul could not recall the purpose of a money market check for \$1300 made payable to Paul, signed by Paul, and dated June 7, 2007.²⁸ Thus, Larry's exception is upheld in part to the extent that Paul failed to account for \$1300 in expenditures from the joint money market account. The remainder of this exception is dismissed.

Larry takes exception to the fact that Paul did not properly account for payments to Marty and Jenn. Paul testified that he paid the couple \$10 per hour for staying with

²⁶ Trial Exhibit No. 65, Bates Nos. 37-39, 47.

²⁷ Trial Exhibit No. 65, Bates Nos. 40, 50, 54

²⁸ Trial Exhibit No. 65, Bates No. 43.

Mr. Damico. This rate is considerably less than the \$21.50 per hour rate paid to home care aides hired from the Right at Home agency in Sarasota.²⁹ There is a one-page handwritten document which lists the dates and amount of payment to Marty and Jenn.³⁰ Although the document does not list the specific services that were provided to Mr. Damico, the record shows that Mr. Damico needed to be watched 24 hours per day because he was at risk of falling and did not sleep through the night. He could not walk or get out of a chair easily, and there were some references in the record to his being incontinent. I think it safe to conclude that 90-year old Mr. Damico needed assistance in most if not all of the activities of his daily life. Nevertheless, in the absence of any evidence to the contrary, I also have to conclude that each payment which was written down next to a specific date on this document corresponds to care-giving services Marty and Jenn provided on that specific date. Since there are no more than 24 hours in any given day, none of the payments should have been over \$240, with the exception of the July 23rd payment for \$700, because a check made payable to Jenn on that date indicates that it was payment for three days of Mr. Damico's care, the May 29th payment of \$300, because a check made payable to Jenn on that date indicates that payment was for two days of care, and the June 23rd payment of \$1000, because a check made payable to Jenn on that date indicates that it was payment for a week of Mr. Damico's care during a week of vacation, presumably the week's vacation that Paul took when Michael and Jacalyn came to visit Mr. Damico over Father's Day weekend.³¹ By my calculation, Paul has failed to account properly for \$80 of the \$3558 total that he paid to Marty and Jenn. This exception, therefore, is upheld to that extent, but the remainder is dismissed.

²⁹ Trial Exhibit No. 14.

³⁰ Trial Exhibit No. 17.

³¹ Trial Exhibit Nos 64 (Bates No. 68) & 65 (Bates Nos. 42, 46).

In my draft report, I concluded that a portion of Larry's attorney's fees should be reimbursed by decedent's estate because Larry's efforts had benefited the estate to the extent of \$32,000. Paul argues that since Paul and Michael each have already received \$9500, they each would be entitled only to an additional \$1,166.66 while Larry would be entitled to \$10,666.66 or one-third of this common fund. Citing *Carpenter v. Dineen*, 2008 WL 859309 (Del. Ch. 2008), Paul argues that the exception to the "American Rule" concerning attorneys' fees should not apply here since the benefit inuring to others is minimal. Paul also argues that any fees awarded to Larry should be related to the size of the estate, and decedent's estate is a modest one.

This Court generally adheres to the American rule under which each party must bear its own costs of litigation. *Speed v. Palmer*, 2000 WL 1800217 (Del. Ch. Nov. 28, 2000) (Master's Report). In certain cases, however, the Court has the discretion to award costs. *See, e.g., In re Estate of Melson*, 1999 WL 160136 (Del. Ch. March 10, 1999) ("[a] party who successfully challenges a will and causes the reinstatement of a prior will reflecting the decedent's true plan of disposition, has shown 'exceptional circumstances' 'benefiting the estate.'"); *In re Pusey*, Del. Ch. C.A. No. 106784, Allen, C. (May 25, 1977) (Mem. Op.) at 4 (attorneys fees may be granted in challenge to administration of estate where made on "good grounds," as they "potentially benefit the estate as a whole by insuring that it will be administered in a manner intended by the testatrix ..."). Larry challenged Paul's administration of decedent's estate and demanded an accounting of Paul's handling of Mr. Damico's funds while he was living in Florida. As a result of Larry's objections, the value of the assets in the estate have increased by

over \$34,000.³² While Larry will receive a larger share of the estate than he would have received but for his attorney's efforts, the third beneficiary, Michael, who was essentially a free rider here, will also benefit from the efforts of Larry's counsel. *See In re Estate of Sipple*, 2004 WL 603705 (Del. Ch. March 24, 2004). Thus, I find that the circumstances of this case warrant an award of Larry's reasonable attorney's fees and costs from the estate. The issue remaining to be determined, however, is the amount of the award in light of the small size of this estate. *See, e.g., In re Estate of Newell*, 1977 WL 23836 (Del. Ch. Dec. 20, 1977) (“[F]ees should not be awarded in such an amount as to virtually dissipate the estate.”). Therefore, counsel should confer and provide a form of order which sets forth reasonable fees for Larry's attorney, representing the benefit to the estate as I have described above. If counsel cannot agree, each party should submit a brief letter memorandum within 30 days setting forth the appropriate size of the fees and costs award that should be made by the estate to Larry. I will then issue a supplemental final report. In the interest of judicial economy, I am staying the period for exceptions to this final report pending the release of my supplemental final report.

³² There are additional estate assets, such as the contents of the metal box and two cemetery plots, which had not been given date-of-death values by the time the trial took place.