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OF THE
STATE OF DELAWARE

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Re: ***Carol P. Wallace v. Diane Schrock***,
C.A. No. 13002-MZ

Dear Counsel and Ms. Schrock,

This estate matter, in which a successor executor of an estate alleges the previous executor breached her fiduciary duties as well as two stipulations, is limping towards the finish line. I write to address the remaining issues, including the plaintiff's request for attorney's fees. For the reasons that follow, I recommend the previous executor turn over all estate assets, including escrowed funds, to the successor executor. I also recommend a partial fee award.

I. **Background**[1]

Mary Emily Miller ("Miller") died on April 20, 2015, leaving a last will and testament dated May 30, 2013. The will named defendant Diane Schrock ("Schrock"), Miller's friend, as executor.[2] The will charged Schrock with holding a lottery to distribute Miller's eleven weeks of timeshare in the Outer Banks, North Carolina, among Miller's cousins; selling real property in Frederica, Delaware ("the Property"); and selling another timeshare in Ocean Pines, Maryland. Finally, the will gave specific monetary gifts to a variety of foundations and public media stations, and distributed the residue among Miller's cousins. Schrock was appointed executor on or about June 4, 2015.[3]

On December 23, 2016, plaintiff Carol P. Wallace ("Wallace") filed a complaint seeking to remove Schrock from her position as executor, and to hold Schrock liable for alleged breaches of fiduciary duty and misappropriation of estate assets. Wallace is Miller's first cousin once removed and a beneficiary of Miller's estate.[4] Wallace alleges Schrock failed to perform the tasks required by the will, including conducting the timeshare lottery and selling the Property; failed to account for the contents of Miller's safe deposit box; used the timeshare herself and allowed

[1] This background is drawn from the pleadings.
[2] Ans. ¶ 6; Cplt. Ex. 1.
[3] Ans. ¶¶ 3, 7.
[4] Cplt. ¶ 2; Ex. 1.

her son, Clifton Schrock ("Clifton"), to move into the Property and live there rent-free; misappropriated estate assets, including a Toyota Prius and funds; and refused to communicate with Wallace and other beneficiaries about the estate. Wallace also named Clifton as a defendant, seeking his removal from the Property.

The defendants were served with the complaint on January 18, 2017. The defendants sent Wallace letters dated February 6, 2017, a day before their answer was due, indicating they would produce information within one week.[5] But the defendants did not communicate any further, produce any information, or answer the complaint.[6] On March 28, 2017, Wallace moved for a default judgment. Subsequently, Clifton agreed to a stipulation in which Clifton would leave the Property and Wallace would dismiss the claim against him, which was entered on May 11, 2017. Schrock retained counsel, who entered his appearance on July 18, 2017.[7] On September 8, 2017, Wallace filed a motion to compel Schrock to respond to discovery requests.

On October 5, 2017, the day before a scheduled hearing on Wallace's motion for default judgment, Schrock and Wallace entered into a stipulation whereby: (1) Schrock was removed as executor of the estate effective October 25, 2017; (2)

[5] Docket Item ("D.I.") 13, Petr.'s Mot. for Default, ¶ 5.
[6] *Id.* ¶¶ 6, 7.
[7] Other members of the same firm entered their appearances on October 5, 2017.

Schrock would turn over "all statements, accounts, assets and other information or property of the Estate" to the successor executor; (3) on October 25, 2017, a hearing would be held to identify a successor executor; and (4) Schrock would respond to Wallace's discovery requests and answer the complaint.[8] The October 25 hearing was cancelled because the parties entered into a second stipulation, naming Wallace as successor executor and requiring Schrock to turn over estate assets and information to Wallace's counsel, and to provide a full accounting of the estate, by November 6, 2017.[9] Wallace was appointed successor executor on October 27, 2017.[10]

Schrock answered the complaint on November 6, 2017. Schrock's answer admits that she used the North Carolina timeshare for one week in 2016, that Clifton lived at the Property for a period of time and did not pay rent, and that Schrock used the Prius "for a period of time" before selling it and depositing the funds into the estate.[11] Schrock responded to the discovery requests on November 8, 2017. On November 16, 2017, Schrock's counsel moved to withdraw, alleging:

[8] D.I. 29, 31.
[9] D.I. 36, 37, 38.
[10] Ans. ¶ 3.
[11] Ans. ¶¶ 9, 11, 13.

> [Counsel] has been unable to communicate effectively with defendant Schrock regarding issues in this action that need to be addressed. This lack of communication and cooperation has left [counsel] unable to represent defendant Schrock effectively in this action.[12]

On December 11, 2017, Wallace responded to the motion to withdraw and filed a motion for an order directing Schrock to show cause as to why she failed to comply with the stipulations ("Show Cause Motion"). The Show Cause Motion alleges Wallace misappropriated over $100,000 in estate assets. Based on bank records, Wallace compiled a spreadsheet of $117,895.49 in self-serving transactions by Schrock, executed by writing checks to herself, transferring funds to herself, making personal point of sale transactions, and paying personal credit card bills.[13]

Wallace also points to a diminution in estate assets between July 2016 and November 2017. The inventory Schrock filed in Miller's estate on July 22, 2016, listed stocks and bonds valued at $191,560.67 in a Merrill Lynch account, and $264.07 in mortgages, notes, and cash.[14] Schrock's First Accounting, dated August 17, 2016, similarly listed $191,660.67 in stocks and bonds, and $264.07 in mortgages, notes, and cash.[15] But a July 18, 2017, letter from Schrock's counsel stated that as of that date, Schrock held "$6,173.18 on deposit with PNC Bank in

[12] D.I. 41, ¶ 2.
[13] D.I. 42 ¶ 19, Exs. 6, 7.
[14] *Id.* Ex. 3, Scheds. B, C.
[15] *Id.* Ex. 4.

an[] estate checking account," "$28,402.77 on deposit with Merrill Lynch in a brokerage account," and $100,000.00 in an escrow account with her counsel.[16] Schrock's discovery responses received November 8, 2017, indicated the PNC Bank account held $414.49, and the Merrill Lynch account held $14,644.72.[17] The Show Cause Motion also alleges Schrock refused to allow her counsel to give the escrowed $100,000.00 to Wallace, because Schrock claimed the funds were hers and not the estate's. The Show Cause Motion does not oppose the withdrawal of Schrock's counsel, but seeks the funds in their escrow account.

Wallace also alleges Schrock turned over bank statements, but not any other estate assets such as personal property and keys, garage door openers, or other access devices to the Property. The Show Cause Motion concludes by seeking an order requiring Schrock to show cause as to why she failed to account for and turn over estate assets, directing her counsel to turn over all assets to Wallace including the $100,000 held in escrow, and awarding attorney's fees.

On January 3, 2018, I wrote the parties recommending Schrock obtain counsel but noting she could proceed *pro se*, and requesting she respond to the Show Cause Motion within thirty days, or the motion would be considered unopposed. On January 26, 2018, with their motion to withdraw still pending, Schrock's counsel

[16] *Id.* Ex. 5.
[17] *Id.* ¶ 15.

wrote in their own capacity to confirm they continued to hold the $100,000 in their trust account and would do so until the Court ordered distribution. I granted the motion to withdraw on February 2, 2018. On February 6, 2018, Schrock filed a letter stating she was seeking representation. I interpreted that letter as a request for an extension of the time to respond to the Show Cause Motion, and I granted a thirty-day extension on February 7, 2018. Schrock has not responded and no counsel has appeared on her behalf.

On March 29, 2018, Wallace filed a letter noting that Schrock had not responded to the Show Cause Motion, and sharing a written communication Schrock had sent Wallace's attorney "along with a small box of materials."[18] That communication states, "I have been unable to find a lawyer who will work with me. Here are the papers. … There is $100,000 @ [former counsel's] office intended for the estate."[19] Wallace characterizes this communication as an admission that the escrowed funds should be distributed to the estate, and notes Schrock did not dispute Wallace's allegations of misappropriation. Wallace requests the Court enter an order directing the escrowed funds to be paid to Wallace in her capacity as successor executor.

[18] D.I. 48 at 2.
[19] *Id.* Ex. 1.

Wallace's March 29, 2018, letter also elaborates on the Show Cause Motion's request for attorney's fees. On April 18, 2018, Wallace's counsel supplemented that request with an affidavit of fees alleging $33,703.96 in fees and costs incurred. Schrock has not responded.

On May 9, 2018, I issued a draft report recommending the Court compel Schrock to return all estate assets, including the $100,000 in escrow, to Wallace as successor executor. The draft report also recommended a partial attorney's fee award under the bad faith exception. No party took exception. This is my final report.

II. Analysis

As an initial matter, I, like Wallace, interpret Schrock's letter addressing the escrowed $100,000 to concede those funds belong to the estate. Schrock has not opposed this interpretation. Schrock agreed in two successive stipulations to remit all estate assets to Wallace. I therefore recommend the Court order all estate assets, including the $100,000 escrowed by Schrock's former counsel, to be remitted to Wallace as executor of Miller's estate.

As for the request for attorney's fees, the prevailing American Rule provides that parties bear their own costs of litigation.[20] An exception to that rule is that,

[20] *Beck v. Atl. Coast PLC*, 868 A.2d 840, 850 (Del.Ch. 2005).

where a party conducts the litigation process in bad faith and thereby unjustifiably increases the costs of litigation, equity supports a shifting of fees from the innocent to the vexatious party.[21] The bad faith exception only applies when the party in question displays "unusually deplorable behavior."[22]

Wallace seeks all of her attorney's fees under the bad faith exception. Wallace alleges Schrock completely disregarded Court processes and deadlines, evidenced by her failure to answer the complaint or discovery requests until Wallace filed a motion for default judgment, and then required protracted negotiation to reach stipulations that Schrock ultimately ignored. Wallace claims Schrock repeatedly failed to act as she had stipulated she would, including by turning over assets of the estate and providing a proper accounting. Finally, Wallace points to the fact that Schrock has not responded to or opposed Wallace's fee request.

I agree with Wallace in part. In my view, a defendant who drags her feet in litigation until threatened with a motion for default is not necessarily acting in bad faith. I recognize that such tactics create expense and frustration for a plaintiff, but I believe that the American Rule requires a plaintiff to generally take on her adversary as she may find her, including as a reluctant defendant. Such reluctance may be deplorable, but it is not unusually so. Both Schrock and Clifton failed to

[21] *Id.* at 850-51.
[22] *Barrows v. Bowen*, 1994 WL 514868, at *2 (Del. Ch. 1994).

answer the complaint or engage in negotiations until the motion for default judgment was filed; Clifton's behavior does not inspire a fee award.

But Schrock's reluctance to engage in litigation turned into recalcitrance. She twice negotiated with Wallace and agreed to turn over the estate assets to Wallace as successor executor, and to produce an accounting of her own tenure as executor. Schrock was represented by counsel in these negotiations, supporting the conclusion that she understood what she had agreed to do. But Schrock refused to perform. Her defiance of the stipulations was so complete that her counsel withdrew. I conclude Schrock's negotiation of, and nonperformance under, the stipulations was in bad faith.

Schrock has not responded to Wallace's fee request and supporting affidavit showing over $33,000 in fees. She has offered no defense of her conduct. Equity also compels a fee award because if Wallace's attorney's fees were paid by the estate as an expense of administration, Schrock's unjustifiable increase of those fees would sting not only Wallace, as plaintiff, but also the nonparty beneficiaries of Miller's estate.[23]

[23] *See Burge v. Fidelity Bond & Mortg. Co.*, 648 A.2d 414, 422 (Del. 1994) (affirming an equitable fee award designed to restore innocent third parties to their status quo); *cf.* Ct. Ch. R. 192. Whether Miller's estate may pay some or all of Wallace's expenses is not before me at this time, and this report should not be read to make any determination on that issue. I only note that a framework exists for such payment, and that if the estate were to pay Wallace's attorney's fees, Schrock's conduct would harm innocent (and in many instances charitable) nonparty

I conclude Schrock litigated in bad faith from at least the point when she began negotiating the first stipulation, which was dated October 5, 2017. Schrock's refusal to comply with her own stipulations comprises unusually deplorable behavior, and unjustifiably increased the cost of litigation. Wallace's fee affidavit first notes negotiations with Schrock's counsel about a stipulation on October 2, 2017. I recommend the Court award attorney's fees and costs Wallace accrued in this matter from October 2, 2017, onward.

The final remaining issue is whether the fees requested by Wallace's attorney are reasonable.[24] Upon review of counsel's fee affidavit and the attached transaction summary, I find the requested fees are reasonable. "Under settled Delaware law, a court is to consider the factors set forth in Delaware Lawyers' Rule of Professional Conduct 1.5 in assessing the reasonableness of attorneys' fees,"[25] which include:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) the fee customarily charged in the locality for similar legal services;
> (4) the amount involved and the results obtained;
> (5) the time limitations imposed by the client or by the circumstances;
> (6) the nature and length of the professional relationship with the client;

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beneficiaries. One beneficiary is represented by counsel who entered his appearance in this case, but no other beneficiary has participated.

[24] *In Matter of Estate of Branson*, 2014 WL 1600518, at *1 (Del. Ch. Apr. 22, 2014).

[25] *Id.*

> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
> (8) whether the fee is fixed or contingent.[26]

I find, after consideration of those factors relevant to this matter, that the fees requested here are reasonable. Wallace's counsel has represented her throughout her endeavor to remove Schrock as executor and marshal the estate assets. That counsel has an hourly rate of $350.00 and spent 89 hours on this matter between November 29, 2016, and March 31, 2018. This included time preparing the complaint, attempting to secure responses from Schrock and Clifton through a motion for default judgment and a motion to compel, negotiating, preparing stipulations, and legal research and correspondence with the Court. These hours are reasonable in light of the issues presented and the procedural history, and the hourly rate is commensurate with counsel's experience and reputation.

For the foregoing reasons, I conclude it is equitable that Schrock be ordered to pay attorney's fees and expenses Wallace incurred from October 2, 2017, onward, as set forth in her counsel's transaction summary. If and when this final report is adopted by the Court, I ask counsel to submit a conforming proposed order.

[26] Del. Lawyers' R. Prof'l Conduct 1.5(a).

III. Conclusion

For the reasons stated, I recommend the Court compel a previous executor of an estate to return all estate assets to the successor executor. I also recommend the Court award the successor executor attorney's fees incurred from October 2, 2017, onward, under the bad faith exception. This is a final report pursuant to Court of Chancery Rule 144.

Respectfully,

/s/ Morgan T. Zurn

Master in Chancery