

IN THE CIRCUIT COURT OF NICHOLAS COUNTY, WEST VIRGINIA

In Re:

JEAN DANDY, AN ALLEGED PROTECTED PERSON

Case No. 05-G-13

FINAL ORDER CONCERNING ATTORNEY'S FEES AND
COMPENSATION OF ATTORNEY-IN-FACT

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This matter came before the Court on the 18th day of December 2006 on the Petitioner's Brief in Support of Attorney Fee and Compensation Expenditures. The Court has carefully considered the evidence, the arguments of counsel, all papers of record, and pertinent legal authorities. As a result of these deliberations, the Court finds that the laws of Kentucky apply in this case, Ms. Meadows was not entitled to the gifts or compensation she received from Ms. Dandy's estate, and that Mr. Douglas is entitled to some, but not all, of the fees he charged to Ms. Dandy's estate.

Factual and Procedural Background

Jean Dandy, while a resident of Kentucky, hired an attorney to draft a power of attorney naming her granddaughter, Donna Meadows, attorney-in-fact. This occurred on April 12, 2001 and while Ms. Dandy was fully competent. In 2005, Ms. Dandy began to experience problems that prevented her from continuing to live in an independent manner. Shortly after, Ms. Meadows arranged for Ms. Dandy to move to Nicholas County, West Virginia so that she could better care for her.

On March 7, 2005, Jean Dandy's son, Ronald Bowers, filed a petition in Nicholas County, West Virginia (Case Number 05-G-6, hereinafter referred to as the "G-6 Petition") seeking his appointment as guardian and conservator for his mother. On March 18, 2005, the Court appointed Cammie L. Chapman as legal counsel for Ms. Dandy, pursuant to WV Code

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§44A-2-7(a). However, in a hearing conducted on July 8, 2005, and order entered September 6, 2005, the Court dismissed the G-6 Petition due to Mr. Bowers' withdrawal request and the Petition's omission of a physician's evaluation of Ms. Dandy as required by WV Code §44A-2-3.

On July 15, 2005, Mr. Bowers filed the present petition in Nicholas County, West Virginia (Case Number 05-G-13, hereinafter referred to as the "G-13 Petition") again seeking his appointment as guardian and conservator for his mother. As in the previous action, the Court, on July 27, 2005, appointed Cammie L. Chapman as legal counsel for Ms. Dandy, pursuant to WV Code §44A-2-7(a). Although Mr. Bowers later moved the Court for permission to pursue this petition without an accompanying physician's evaluation, the Court denied the motion and, on October 24, 2005, ordered a physician's evaluation of Ms. Dandy's competency to be completed. In this same order, the Court noted that, although Ms. Dandy was served personally with neither the G-13 Petition, the "Motion to File Petition Without Evaluation," nor notice of the hearing on this motion, Ms. Dandy's Guardian ad Litem, Ms. Chapman, had been properly served.

Following hearings on the G-13 Petition, conducted on December 9th and 15th, 2005, the Court made the following pertinent findings: Due and proper notice of the proceedings had been given as required by West Virginia Code §44A-2-6; Ms. Dandy was verbally informed of her rights, the contents of the petition, as well as the purpose and effect of guardian and conservator appointment; and that Ms. Dandy was a "protected person" as defined by West Virginia Code §44A-1-4(13). Based on these findings and other evidence presented, the Court ordered Ms. Meadows to serve as Ms. Dandy's temporary guardian and the Nicholas County Sheriff to serve as temporary conservator until a final determination

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could be made. Thereafter, the Court heard further evidence on May 22nd and 23rd, 2006, and determined that the appointment of Ms. Meadows as permanent guardian and the Nicholas County Sheriff as permanent conservator were in Ms. Dandy's best interests. In the same order, the Court required Ms. Meadows and Mr. Douglas to provide Ms. Dandy's Guardian ad Litem, Ms. Chapman, with an accounting of any compensation they had charged to Ms. Dandy's estate. The Court further ordered Ms. Chapman to review the submissions, together with her own fees and expenses charged to Ms. Dandy's estate, and to present the Court with a report of any questionable expenditures.

On October 4, 2006, Ms. Chapman submitted her report outlining the following: Ms. Meadows reported receiving \$16,310.83 from Ms. Dandy's estate, based on expenses of \$2,510.83 for items Ms. Meadows personally paid for on behalf of Ms. Dandy, \$284.85 in travel expenses, \$65.49 for the purchase of blinds, \$1,450.00 in Ms. Dandy's moving costs, and \$13,800.00 for "compensation for her services." As to this latter expenditure, Ms. Meadows reported paying herself \$35.47 per hour for approximately 389 hours spent over 57 weeks of monitoring Ms. Dandy's care, making appointments, bookkeeping, and managing her finances. On the other hand, Mr. Douglas reported being paid \$17,447.50 by Ms. Dandy's estate, including compensation of \$9,912.50 for 5 hours and 50 minutes, at \$195.00 per hour, spent defending the G-6 and G-13 Petitions as well as a flat \$7,535.00 for the Writ of Prohibition filed with the West Virginia Supreme Court in the G-13 action. Finally, Ms. Chapman reported that her firm was paid \$1,789.50 for 12.1 hours at \$145.00 per hour for services rendered in the G-6 Petition. Additionally, Ms. Chapman reported that \$4,814.00 remained due to her firm for 33.2 hours thus far spent on the G-13 Petition.

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On December 18, 2006, the Court conducted a hearing related to the expenditures outlined in Ms. Chapman's report and subsequently ordered the following: Ms. Chapman's firm could receive \$5,205.50 for services rendered in the G-13 Petition based on an updated 35.90 hours at an hourly rate of \$145.00; and, Ms. Meadows could accept reimbursement of \$1,450.00 for Ms. Dandy's moving costs. However, as to the additional compensation taken from Ms. Dandy's estate by Mr. Douglas and Ms. Meadows, the Court directed that each could file memorandums with the Court justifying the additional compensation they received while the remaining parties could file responses. Having received supportive briefs as well as a response from the Guardian ad Litem, the Court herein issues the following opinion and order.

Issues

At the December 18, 2006 hearing, the Court was asked the following questions:

1. Do the laws of Kentucky, the state where Ms. Dandy drafted and executed her power of attorney, control the application, interpretation and construction of Ms. Dandy's Power of Attorney Agreement?
2. To what extent may an attorney-in-fact bestow herself gifts or be compensated for services?
3. Did Ms. Dandy's Power of Attorney Agreement give Ms. Meadows the authority to hire an attorney to represent Ms. Meadows in these proceedings?
4. Is it reasonable to charge Ms. Dandy attorney's fees of \$17,447.50 for the representation provided by Mr. Douglas in these proceedings?

Legal Contentions of the Parties

In answer to the first question, Mr. Douglas (sometimes referred to as "Petitioner") contends that Kentucky law controls on the issues of construction, application and interpretation of the Power of Attorney agreement in the instant case. In fact, both parties are

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in agreement on this issue. However, the parties do not agree as to whether an attorney-in-fact is permitted to charge for compensation for her services.

As to this second issue, the Petitioner contends that, under Kentucky law, there is no per se rule that prevents an agent acting under a power of attorney agreement from making gifts to herself from the principal's funds. The Petitioner argues that, under Kentucky law, the test is "whether the agent acted in the 'utmost good faith' when explaining to the satisfaction of the trier of fact what disposition was made of the properties in question, pursuant to an express authorization in the power instrument." *Wabner v. Black* for this position. *Wabner v. Black*, 7 S.W. 3d 379, 381 1999 Ky. LEXIS 158 (1999). The Petitioner further argues that the "utmost good faith" test was expanded in *Ingram* to apply when there was no express written authorization of the agent to bestow gifts upon himself from the principal's monies. *Ingram v. Cates*, 74 S.W. 3d 783, 2002 Ky. App. LEXIS 769 (2002). The Petitioner bases this assertion on the *Ingram* Court's finding, "We know of no rule of law requiring that a power of attorney specifically delineate each and every transaction the attorney-in-fact is authorized to perform." *Id.*

In applying these rules to the instant case, the Petitioner points out that section (k) of the Power of Attorney agreement dated April 12, 2001, provides the attorney-in-fact (Ms. Meadows) authority to "(k) sign in my name on all accounts standing in my name, and to withdraw funds from said accounts, to open accounts in my name or her [Meadows] name as my attorney in fact." Petitioner then argues that this language in the agreement gives Ms. Meadows express authority to pay herself for her time and the resources spent by her, to the detriment of her own business interests. Finally, Petitioner argues that Ms. Meadows, as a guardian/fiduciary, is further permitted to receive a commission rate of 5% of the ward's

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estate under West Virginia Code §44-15-10. Based on these assertions, Petitioner argues that Ms. Meadows was justified in taking a one-time draw of \$13,800.00 from Ms. Dandy as compensation.

On the third issue, the Petitioner argues that the express grant of authority to hire counsel can be found in the United States Constitution and in Ms. Dandy's Power of Attorney document in paragraph (m). Paragraph (m) authorizes the attorney-in-fact "to retain counsel and attorneys on my behalf, to appear for me in all actions and proceedings to which I may be party in the courts of Kentucky or any other court in the United States." Further, Petitioner argues that only attorney fees after December 15, 2005 (the date on which the Court declared Ms. Dandy a protected person) should be scrutinized because until that date, Ms. Dandy was presumed competent under the law.

However, Petitioner argues that he is entitled to charge for services rendered even after Ms. Dandy was determined to be a protected person because, even though her capacity was no longer a predominate point of dispute, the selection of the person acting as guardian or conservator was a major issue. In fact, the Petitioner argues that the guardian/conservator issue was raised by Ronald Bowers who admitted that his aim was "to preserve the estate of his mother" (Ms. Dandy) from which he expected to inherit. In pursuit of this end, Petitioner argues that it was Mr. Bowers who directly increased Mr. Douglas' fee by improperly filing the G-6 Petition resulting in the need to defend two guardian actions. Further, Petitioner contends that the failure of Mr. Bowers to properly serve Ms. Dandy in the G-13 Petition, as required by West Virginia Code § 44A-2-6, resulted not only in the Writ of Prohibition to the Supreme Court but also provided a very promising avenue to prevent Mr. Bowers from being appointed as guardian or conservator. Finally, the Petitioner argues that his skills, experience,

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credentials, and education warrant and justify the fees and expenses charged and points out that his contract for legal representation was with Ms. Meadows, not Ms. Dandy.

Addressing the same questions, Ms. Chapman (sometimes referred to as "Respondent") agrees with Petitioner that the laws of Kentucky apply in evaluating Ms. Dandy's power of attorney agreement. However, Ms. Chapman contends that the Ms. Meadows cannot charge Ms. Dandy for her services because the 2001 Power of Attorney does not contain an express agreement for such compensation. In support of this position, Respondent relies on *Ingram*, which holds that in the absence of an express contract between the attorney-in-fact and the principal, the Court is "unwilling to infer that such existed." *Ingram v. Cates*, 74 S.W. 3d 783, 788 (Ky. App., 2002). The Respondent also points out that the *Ingram* Court noted that family members or other close associates of the elderly often perform such services daily and with no compensation. Although the Petitioner relies on *Ingram* to stand for the proposition that Kentucky allows for an attorney-in-fact to bestow gifts upon herself from the principal's monies even when there is no express written authorization to do so, Respondent contends that this rule does not apply to the Power of Attorney agreement at issue in this case. Instead, Petitioner points out that in *Ingram* the Power of Attorney document at issue was drafted in 1990. In 2000, the General Assembly of the Commonwealth of Kentucky amended Kentucky Revised Statutes § 386.093, which is the applicable statute dealing with Power of Attorney in Kentucky) and added the following section:

(6) Notwithstanding any provision of law to the contrary, a durable power of attorney may authorize an attorney in fact to make a gift of the principal's real or personal property to the attorney in fact or to others if the intent of the principal to do so is unambiguously stated on the face of the instrument. *KRS §386.093 (2000)*.

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Respondent thus contends that this revised Kentucky statute should govern Ms. Dandy's Power of Attorney Agreement because it was executed in April of 2001, after the Kentucky statute above was enacted. As a result, the Petitioner argues that Ms. Meadows could not bestow a gift upon herself unless that condition was expressly stated in the document.

The Guardian-ad-Litem also claims that Ms. Dandy's Power of Attorney Agreement did not authorize her attorney-in-fact, Ms. Meadows, to retain an attorney to perform work on behalf of the attorney-in-fact in a guardianship proceeding. The Respondent noted that, under the 2001 Power of Attorney agreement, Ms. Meadows was granted authority to retain counsel and attorneys *on behalf of the principal*, Ms. Dandy. Although the 2005 Power of Attorney did not delineate this authority, the Respondent notes that the key is whether Mr. Douglas was representing Ms. Meadows, Ms. Dandy, or both. In this regard, the Respondent contends that, under Kentucky law, a durable power of attorney is not a substitute for appointment of guardian and cannot prevent instigation of guardianship proceedings. *Rice v. Floyd* 768 S.W.2d 57 (Ky. 1989). Accordingly, a power of attorney agreement does not convey presumptive authority to the attorney-in-fact to oppose a guardian appointment. As a result, Respondent contends that Mr. Douglas never represented Ms. Dandy in the guardianship matters. Instead, the Guardian-ad-Litem provided Ms. Dandy with representation while Mr. Douglas was actually representing Ms. Meadows in her efforts to be appointed guardian/conservator, which Ms. Dandy had not authorized in her 2001 Power of Attorney agreement.

Regarding the fourth question, the Respondent contends that \$17,447.50 is an unreasonable attorney fee for the estate of Ms. Dandy to be responsible for. Respondent

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argues that the hourly rate, \$195.00/hour, and the time spent, 50 hours and 50 minutes on the two Guardianship Petitions, are excessive for this area of the state and this area of the law. Respondent admits that she has no evidence that this time was not spent on these cases. However, Respondent also argues that the flat rate of \$7,535.00 charged to Ms. Dandy for the Writ of Prohibition to the West Virginia Supreme Court of Appeals is excessive. Respondent contends that the writ "consisted of 7 pages with 14 point font and basis of the writ was frivolous" as evidenced by the Supreme Court's refusal to hear the petition.

Response to respondents Brief in Support of Attorney Fee and Compensation Expenditures by the Former Attorney in Fact Donna Meadow, Page 5. Further, Respondent points out that Mr. Douglas did not submit any billing information for the time spent on the writ. However, "assuming [Mr. Douglas] was charging \$195.00 per hour he would have had to spend over 38 hours drafting a 7 page Writ of Prohibition, which is unreasonable." *Id.* As a result, the Respondent contends that the entire fee charged for the writ should be refunded to the Estate of Jean Dandy.

Discussion

Addressing the first question, whether the laws of the Kentucky control the application, interpretation, and construction of the Power of Attorney Agreement Ms. Dandy executed in 2001, the Court finds that the laws of Kentucky do apply with regards to this agreement. Because Ms. Dandy executed the agreement while a competent resident of the State of Kentucky, the agreement should be interpreted under the laws of Kentucky. In fact, Kentucky law governed the drafting and execution of the document in 2001 and remains the only logical source of law by which to control the Power of Attorney Agreement. As a result,

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the Court agrees with the assertions of both parties that the laws of Kentucky govern the interpretation of Ms. Dandy's Power of Attorney Agreement.

As to whether the attorney-in-fact in the instant case may be compensated for her services when there is a lack of express authorization, the Court finds that she may not because the governing Kentucky statute does not authorize such compensation. Petitioner correctly asserts that the Supreme Court of Kentucky has determined that there is no per se rule prohibiting an agent under a power of attorney from making gifts to herself from the principals funds. *Wabner v. Black*, 7 S.W.3d 379, (KY 1999). Also, the Petitioner correctly identifies the applicable test as one outlined in *Wabner* based on whether the agent acted in the "utmost good faith." *Id.* Further, the "utmost good faith" test was expanded in *Ingram*, which provided, "a general power to convey and alienate any personalty, if done in the utmost good faith, permits specific transfers." *Ingram v. Cates*, 74 S.W.3d 783 at 787 (KY 2002).

However, the crucial determinant in these cases is the fact that *Wabner* and *Ingram* occurred in 1999 and 2002 respectively and addressed Power of Attorney agreements drafted in 1994 and 1990. In the year 2000, the General Assembly of the Commonwealth of Kentucky amended Kentucky Revised Statutes § 386.093, the statute dealing with power of attorney agreements in Kentucky, and added the following section:

(6) Notwithstanding any provision of law to the contrary, a durable power of attorney may authorize an attorney in fact to make a gift of the principal's real or personal property to the attorney in fact or to others if the intent of the principal to do so is unambiguously stated on the face of the instrument. *KRS §386.093(2000)*.

Since the Power of Attorney Agreement at issue here was drafted in 2001, it would fall under the purview of the recently enacted section six of § 386.093 and as such, no attorney-in-fact could bestow gifts upon himself or others from the principal's

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estate unless unambiguously stated in the power of attorney agreement. Although the 2001 Power of Attorney granted Ms. Meadows the power to "(k) sign in my name checks on all accounts standing in my name, and to withdraw funds from said accounts, to open accounts in my name or her name as attorney in fact," the Court finds that this language does not contain the unambiguous statement required by the revised Kentucky statute. Thus, Ms. Meadows was not authorized to make gifts from Ms. Dandy's funds to herself or others. As a result, the one-time draw of \$13,800 Ms. Meadow took from the Estate of Jean Dandy as Compensation was not authorized in Ms. Dandy's Power of Attorney Agreement.

As to whether Ms. Meadows could hire an attorney to seek her appointment as guardian or conservator and pay for this attorney with funds from the principal's estate, the Court finds that the Power of Attorney Agreement did not provide Ms. Meadows with this authority. The 2001 Power of Attorney Agreement gave Ms. Meadows authority, "to retain counsel and attorneys on *my* [Dandy's] behalf, to appear for *me* in all actions and proceedings to which I may be party in the courts of Kentucky or any other court in the United States." *April 12, 2001 Power of Attorney, paragraph (m)*. However, Kentucky law provides that a durable power of attorney is not a substitute for appointment of a guardian and cannot prevent instigation of guardianship proceedings. *Rice v. Floyd* 768 S.W.2d 57 (Ky. 1989). In other words, under Kentucky law, a power of attorney agreement does not convey presumptive authority to the attorney-in-fact to oppose a guardian appointment. As a result, the Court finds that the work performed by Mr. Douglas in seeking Ms. Meadows' appointment as guardian was work performed on behalf of Ms. Meadows, not Ms. Dandy, and was thereby beyond the scope of the

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Power of Attorney Agreement and beyond the scope of services that Ms. Dandy should be required to pay for. Thus, the Court finds that Mr. Douglas is not entitled to charge Ms. Dandy's estate for the services he performed after the issue of competency was determined, which occurred following the hearing on December 15, 2005.

Finally, the Court finds that the costs and fees charged by Mr. Douglas to Ms. Dandy's estate should not include those incurred for the Writ of Prohibition. The decision to file the Writ of Prohibition was made by Ms. Meadows and her counsel. It was no way beneficial to Ms. Dandy and it would not be fair that her estate be charged for it. Further, Mr. Douglas did not itemize the charges for the Writ and the Court does not award attorney's fees on a flat rate basis. Thus, the Court finds it inappropriate to charge Ms. Dandy's estate for the Writ.

Now, therefore, the Court does hereby **ORDER**:

1. Any compensation from Ms. Dandy's estate received by Ms. Meadows without court approval, including the \$13,800.00 taken as compensation for her services, shall be returned to the Estate of Jean Dandy.
2. If Ms. Meadows wishes to receive compensation for her costs or services in the future, she must submit a request with this Court, which will then schedule a hearing to determine the issue.
3. Any compensation from Ms. Dandy's estate by received Mr. Douglas for services rendered subsequent to Ms. Dandy's competency hearing on December 15, 2005, is to be returned to the Estate of Jean Dandy.
4. Any compensation from Ms. Dandy's estate received by Mr. Douglas for the Writ of Prohibition is to be returned to the Estate of Jean Dandy.

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5. Considering the foregoing, Mr. Douglas is only entitled to receive from Ms. Dandy's estate compensation for services rendered through the December 15, 2005, hearing and excluding costs associated with the Writ of Prohibition. Based on the itemized bills submitted to the Court, Mr. Douglas may receive from Ms. Dandy's estate no more than \$7,198.75 for his services (nearly 36.92 hours at \$195 per hour), plus \$237.91 for expenses, for a total of \$7,436.66 in this matter. Any compensation received by Mr. Douglas in excess of this amount is to be returned to the Estate of Jean Dandy.
6. Ms. Chapman is to continue serving as Ms. Dandy's Guardian ad Litem in this matter until she files a report with the Court indicating that all funds are returned, as herein ordered, to the Estate of Jean Dandy.

It is further **ORDERED** that the Clerk of this Court shall prepare and forward certified copies of this order to Cammie L. Chapman, Esq., 509 Church Street, Summersville, WV 26651 and James Wilson Douglas, Esq., 181B Main Street, P.O. Box 425, Sutton, WV 26601.

ENTERED this 12th day of March, 2008.

NUNC PRO TUNC October 10, 2007


Hon. GARY L. JOHNSON, Circuit Judge

A true ~~copy~~, certified this
12 day of March, 2008

Gary Jarrell, CIRCUIT CLERK
Nicholas County Circuit Court
Summersville, WV 26651

By , Deputy

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