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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

In the Matter of Lillian GLASSER, a vulnerable adult.
In the Matter of Lillian Glasser, an incapacitated person.
In the Matter of Lillian Glasser, an incapacitated person.

Argued March 21, 2011.
|
Decided July 21, 2011.

On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Middlesex County, Docket Nos. 209568 and 209568–2.

Attorneys and Law Firms

Jeffrey M. Pollock argued the cause for appellant/cross-respondent Suzanne Glasser Mathews in A–0500–08 and as respondent in A–0505–08 and A–0509–08 (**Fox Rothschild**, L.L.P., attorneys; Mr. **Pollock**, of counsel and on the briefs; Abbey True Harris, on the briefs).

Thomas S. Harty argued the cause for respondent/cross-appellant Eric Smith in A–0500–08 and as respondent in A–0509–08 (Cozen O'Connor, attorneys; Mr. Harty, on the brief).

Jonathan I. Epstein argued the cause for respondent/cross-appellant Joseph J. Catanese in A–0500–08 and as respondent in A–0509–08 (Drinker Biddle & Reath, L.L.P., attorneys; Mr. Epstein and Kristine M. Dress, on the briefs).

Paul F. Cullum, III, argued the cause for respondents Alexandra Mathews, Benjamin Mathews and Roselyn Mathews in A–0500–08 and A–0505–08 and as appellants in A–0509–08 (LeClairRyan, attorneys; Mr. Cullum, on the brief).

Lawrence M. Rosa, Board Counsel, argued the cause for respondent Middlesex County Board of Social Services, Adult Protective Services Unit, in A–0500–08 (Mr. Rosa, on the statement in lieu of brief).

David B. Rubin argued the cause for appellant Mark Glasser in A–0505–08 and as respondent in A–0500–08 and A–0509–08.

Andrew J. DeMaio, argued the cause for respondent Morgan Stanley Trust, N.A. in A–0500–08, A–0505–08, and A–0509–08 (Neff Aguilar, L.L.C., attorneys; Mr. DeMaio, on the brief).

Before Judges LISA, REISNER and SABATINO.

Opinion

PER CURIAM.

***1** These three appeals, which we have consolidated for purposes of this opinion, arise from disputes between Mark Glasser (Mark) and his sister, Suzanne Glasser Mathews (Suzanne), over the guardianship and finances of their mother, Lillian Glasser (Lillian).[1] The underlying guardianship dispute spawned litigation in Texas and New Jersey. The New Jersey action entailed collateral disputes over the choice of a guardian of Lillian's person, Lillian's December 2002 will, and the right or obligation of assorted parties to either receive or pay counsel fees.

I

In broad outline, after a thirty-four day trial, Judge Alexander P. Waugh, Jr., then sitting as the Probate judge, determined that Suzanne exercised undue influence over Lillian in a variety of ways, including the preparation of a December 2002 will. He also found that Suzanne violated her fiduciary duty in exercising Lillian's power of attorney (POA). The judge found that while Mark primarily had his mother's best interests at heart, he also acted in ways that were disruptive to her medical care and otherwise counter-productive to her interests. The judge determined that Lillian was incapacitated, but that none of her family members should act as the guardian of her person. Instead, he appointed an attorney who, in the judge's view, could act independently and could adequately protect Lillian's interests in the face of competing, aggressive demands from her children and friends.[2] All parties agreed that a neutral financial institution should act as guardian of her property.

Based on his view of the law and the equities, the judge determined that Suzanne should reimburse Lillian's estate for

monies Suzanne took from the estate and spent on her own counsel fees in the New Jersey litigation, and for counsel fees Suzanne spent in creating a family limited partnership in Texas, which Suzanne controlled and into which she improperly transferred almost all of Lillian's assets; he denied Suzanne's application for counsel fees and costs for the Texas litigation and ordered her to reimburse her mother's estate for those expenses as well; he awarded some counsel fees to Mark for the litigation in Texas; and he awarded no counsel fees to Suzanne's children for their effort to involve themselves in the New Jersey litigation. He also removed Suzanne as Lillian's health care representative, except for participation in end-of-life decisions.

Notably, no party to this appeal challenges the judge's finding that Lillian is incapacitated and requires the appointment of a guardian of her person and a guardian of her property. The appeals largely concern money—i.e., disputes over counsel fees and Lillian's will—and the judge's choice of Lillian's guardian of the person and health care representative.

In her appeal, Suzanne challenges the judge's decision to remove her as her mother's health care representative; she also contends the court erred in finding that she exercised undue influence concerning the December 2002 will and breached her fiduciary duty under the POA; and she challenges the counsel fee awards. In their cross-appeals, Lillian's nephew and her court-appointed guardian contend that the judge should have required Suzanne to pay additional counsel fees.

***2** In his separate appeal, Mark argues that he was entitled to counsel fees for his participation in the New Jersey guardianship litigation, and that the judge unduly limited his fee award for the Texas action.

Finally, in their appeal, Suzanne's three children (Lillian's grandchildren) argue that the judge should not have adjudicated the validity of Lillian's December 2002 will, or in the alternative, that he should not have adjudicated the issue without their participation; that the judge should have appointed one of the grandchildren as Lillian's guardian; and that they were entitled to an award of counsel fees.

Having reviewed the record, including the entire trial transcript, we find no basis to disturb the factually well-founded and legally appropriate decisions of Judge Waugh. Therefore, we affirm the final order dated August 14, 2008, as well as all interlocutory orders that are the subject of these appeals. [3]

II

Our review of Judge Waugh's factual determinations is limited. We are bound by the trial judge's factual findings so long as they are supported by substantial credible evidence. *Rova Farms Resort, Inc. v. Investors Ins. Co. of Am.,* 65 *N.J.* 474, 484 (1974). We owe particular deference to his credibility determinations, because he had the opportunity to see and hear the witnesses testify. *State v. Locurto,* 157 *N.J.* 463, 470–74 (1999); *Cesare v. Cesare,* 154 *N.J.* 394, 412 (1998). Mindful of the appropriate standard of review, we have canvassed the record to determine whether it supports the judge's factual findings, and we conclude that it does.

The procedural history and the evidence are discussed exhaustively in Judge Waugh's twenty-five page written opinion dated March 3, 2006, addressing jurisdiction; his eighty-two page written opinion dated March 8, 2007, addressing the merits; and his fifty-five page written opinion dated November 28, 2007, addressing counsel fees.

We will not repeat the background or the evidence in the same detail here. We address the most pertinent portions of the record, as it relates to the legal issues the parties are raising on these appeals. [4] In summary, the evidence supports the following findings.

The main actors in this drama are Lillian, a wealthy widow then in her eighties, her son Mark, her daughter Suzanne and son-in-law Gilbert, and her nephew Eric Smith (Rick). Lillian and her husband, Dr. Benjamin Glasser (Ben), had lived in New Jersey their entire married lives and had many friends here. They also rented a home in Florida, and frequently visited Suzanne and her husband Gilbert in Texas. Ben died in February 2002. Both before and after Ben's death, Lillian spent more time with Suzanne than Mark, and Suzanne sometimes helped to schedule doctor's appointments for her mother. In April 2002, Suzanne arranged for her mother to be examined by Dr. Lichtenstein in Texas. He found that Lillian had significant cognitive deficits [5] which rendered her unable to manage her finances, and he recommended to Suzanne in writing that she activate a POA that, according to Suzanne, Lillian had given her. However, Suzanne did not activate Lillian's then-existing POA, a 1998 document naming Mark and Suzanne jointly as Lillian's attorneys-in-fact. In May 2002, a New York doctor, Dr. Freedman, diagnosed Lillian with mild dementia.

***3** Despite her health issues, Lillian still had testamentary capacity in 2002. However, she was vulnerable to undue influence. In October 2002, Lillian met independently with an attorney from a New York law firm and had a new will prepared. Consistent with Lillian's recent prior wills, this will treated Mark and Suzanne equally.

Around Thanksgiving 2002, Lillian underwent surgery and experienced delirium during recovery. As Lillian was convalescing, Suzanne arranged for her to see an attorney whom Suzanne selected. Suzanne did not tell this attorney about Dr. Lichtenstein's or Dr. Freedman's diagnoses, but presented her mother simply as an older woman in need of a new will and POA. For reasons Suzanne did not credibly explain, the attorney was directed to prepare a new will for Lillian in great haste.

Unlike the prior will, the terms of this new will were more favorable to Suzanne and her children than to Mark. At the same time, Lillian signed a new POA naming only Suzanne as her fiduciary. Dr. Freedman testified that, based on her mental condition in the weeks following the surgery, Lillian should not have been deciding on the terms of a new will between November 2002 and January 2003. Judge Waugh found, and the record supports his finding, that Suzanne exercised undue influence over her mother in the preparation of the December 2002 will and POA.

In 2003, Suzanne influenced Lillian to sign a complex financial instrument known as a family limited partnership (the New Jersey FLP). It is abundantly clear from all of the medical testimony that Lillian could not possibly have understood the lengthy document that created this financial arrangement, and she evidently had qualms about it. During a visit to Florida in January 2004, Lillian met with her nephew, Eric Smith (known as Rick), and asked him to advise her whether the New Jersey FLP was a good idea. Rick, whom Judge Waugh found entirely credible, assisted Lillian in obtaining independent advice from a New Jersey attorney, who pointed out flaws in the New Jersey FLP. When Suzanne and her husband learned about Rick's involvement, they became infuriated and directed him to desist from giving Lillian any financial advice. [6]

There is no dispute that Lillian's dementia continued to worsen, at least somewhat. The record also supports Judge Waugh's finding that Suzanne sought to isolate Lillian and make her mother more dependent on her. Among other things, while Lillian was staying in Florida in February 2005, Suzanne fired Lillian's long-time live-in caregiver. Suzanne then brought Lillian to Texas. According to Suzanne's testimony, this was to be a temporary visit, until Suzanne could hire replacement live-in help for Lillian, after which Lillian would return to Florida.

By late December 2004, Suzanne had activated the December 2002 POA that Lillian had signed, and used it to create a new family limited partnership (the Texas FLP) that was, for all intents and purposes, completely controlled by Suzanne. She then proceeded to transfer virtually all of her mother's considerable assets into the partnership, including Lillian's money and her New Jersey house. Like Lillian's December 2002 will, the terms of the partnership instrument were skewed to favor Suzanne and her family. Judge Waugh found incredible Suzanne's testimony that she created and funded the Texas FLP to protect her mother's assets.

***4** On March 14, 2005, after she had seized control of her mother's assets and brought her mother to Texas, Suzanne filed a guardianship action in Texas. Her filing falsely represented to the Texas probate court that Lillian lived in Texas, when in fact she was domiciled in New Jersey and was only visiting Suzanne in Texas. Suzanne's guardianship complaint also inaccurately stated that Lillian's assets were "unknown." Suzanne was initially named Lillian's temporary guardian.

The Texas probate filing set off an avalanche of litigation, as Mark, Rick, and a family friend intervened on Lillian's behalf. Among other things, they sought to have Suzanne replaced as guardian, and to have Lillian returned to her New Jersey home. Over a million dollars in counsel fees were incurred in the Texas litigation. Suzanne funded her litigation costs from her mother's assets. Eventually, the Texas court appointed a Texas attorney to act as a substitute guardian and authorized Lillian's return to New Jersey.

In May 2005, while the Texas action was pending, Rick filed a complaint in New Jersey asking the New Jersey probate court to determine his aunt's competency and appoint a guardian. His complaint alleged that Suzanne exercised undue influence over the procurement of the December 2002 POA, and that she breached her fiduciary duty by transferring virtually all of her mother's assets to the Texas FLP which she controlled. In September 2005, New Jersey Adult Protective Services also filed a complaint seeking to protect Lillian from alleged exploitation, and the two New Jersey actions were eventually

consolidated. After Judge Waugh issued a March 3, 2006 opinion determining that the New Jersey probate court had primary jurisdiction over Lillian, the Texas probate judge stayed the pending Texas action to allow Judge Waugh to adjudicate the guardianship issues in New Jersey. Suzanne voluntarily submitted to the jurisdiction of the New Jersey court. [7]

After hearing exhaustive testimony from each of the principal actors, Judge Waugh found that Suzanne, her husband, and Mark were not credible witnesses. On the other hand, he found Rick to be an entirely credible witness who was motivated solely by concern for Lillian. The judge found that the December 2002 will and POA were the result of Suzanne's undue influence and therefore invalid, and that Suzanne, acting under the POA, improperly transferred Lillian's assets to the Texas FLP. He reinstated Lillian's October 2002 will, finding that she had testamentary capacity at that time. He concluded that Lillian was incapacitated at the time of the trial, a finding no one now disputes. He appointed a financial institution as guardian of her estate. As guardian of Lillian's person, the judge appointed Joseph Catanese, the attorney who had served as Lillian's court-appointed counsel in the guardianship litigation.

We next address, in turn, the parties' various appellate arguments.

III

A.

Turning first to Suzanne's appeal, we find no merit whatsoever in her arguments that she should serve as her mother's health care representative under a living will signed on October 17, 2002, and that removing her violated her mother's constitutional or statutory rights.

***5** Even assuming that Suzanne has standing to assert her mother's constitutional right to medical self-determination, her constitutional argument was not properly raised before the trial court and is not properly before us on this appeal. *See Nieder v. Royal Indem. Ins. Co.*, 62 *N.J.* 229, 234 (1973); *Meeker v. Meeker*, 52 *N.J.* 59, 65 (1968). As Judge Waugh stated in his written opinion of June 13, 2008, Suzanne failed to assert her constitutional argument during the guardianship trial. Instead, she waited more than a year and then sought to assert the argument by applying, by order to show cause, to be reinstated as Lillian's health care representative. Noting that Suzanne had not timely raised the issue, either at trial or in an earlier motion for reconsideration, the judge found that she was belatedly raising it only for the strategic purpose of adding an issue on appeal. He therefore declined to issue the order to show cause and declined to address the constitutional issue. We agree with his analysis. *See Meeker, supra*, 52 *N.J.* at 65.

We also find no merit in Suzanne's statutory argument that a designated health care representative cannot be removed. To the contrary, under the applicable statute, even an incapacitated person may revoke or suspend her own previous health care directive. *N.J .S.A.* 26:2H–57(b), (d). In this case, Lillian was represented by her personal attorney and a court-appointed attorney, who both advocated against allowing Suzanne to exercise control over her mother's affairs. At the trial, Lillian testified that she did not want either of her children to serve as her guardian. While she was obviously confused on other issues, she was clear on that point.

Moreover, if the court appoints a guardian for an incapacitated person, the court may authorize the guardian rather than the health care proxy to make medical decisions for the incapacitated person:

> If a different individual has been appointed as the patient's legal guardian, the health care representative shall retain legal authority to make health care decisions on the patient's behalf, unless the terms of the legal guardian's court appointment or other court decree provide otherwise.
>
> [*N.J.S.A.* 26:2H–61(b).]

See also N.J.S.A. 3B:12–56(c)(the guardian shall follow the ward's advance health care directive "unless revoked or altered by the court"); *R.* 4:86–4(b)(court–appointed counsel for the alleged incapacitated person shall recommend whether the court should "order that any ... health care directive ... be revoked").

Suzanne's objections to her removal are also based on her "spin" of the facts, a version Judge Waugh did not find credible. The record supports his findings that Suzanne abused her mother's POA and acted contrary to her mother's medical and emotional well-being, and that allowing her to act as the health care proxy would be harmful to Lillian's interests. Judge Waugh cogently expressed the reasons for his decision in his March 8, 2007 written opinion and in an oral

opinion issued on August 14, 2008. We agree, adding only the following comments.

***6** In an effort to evade Judge Waugh's issuance of an injunction prohibiting Lillian from being taken out of New Jersey, on September 14, 2005, Suzanne surreptitiously arranged for Lillian to be spirited out of New Jersey and back to Texas. The trip was accomplished in such haste that Lillian's caregiver was not even able to pack Lillian's medications or a change of clothing to send with her. In addition to evading service of the injunction, the abrupt move prevented Lillian from attending a scheduled, independent medical examination with a New Jersey doctor. The move to Texas was deeply distressing to Lillian, who wished to continue living in New Jersey.

Suzanne also generally isolated her mother in order to consolidate her control over Lillian's person and her assets. As a result, her mother felt trapped and miserable. Judge Waugh found that giving Suzanne control over her mother's health care would invite a repetition of that inappropriate conduct. We find no abuse of discretion in his decision that Suzanne should not act as Lillian's day-to-day health care representative.

B.

Suzanne's challenge to the finding of undue influence is equally insubstantial. She first makes the unconvincing argument that she cannot be guilty of undue influence and breach of fiduciary duty because she did not take any of Lillian's funds "for her personal benefit." We cannot agree. Suzanne improperly induced her mother to sign a will that favored Suzanne and her children. She then took an enormous sum of her mother's money and placed it in the Texas FLP that Suzanne controlled and whose terms gave a financial advantage to Suzanne and her children. Her contentions on this point warrant no further discussion here. *R.* 2:11–3(e)(1)(E).

We likewise decline her invitation to second-guess Judge Waugh's credibility determinations and other factual findings. That is not our role.

> "[T]he findings of the trial court on the issues of testamentary capacity and undue influence, though not controlling, are entitled to great weight since the trial court had the opportunity of seeing and hearing the witnesses and forming an opinion as to the credibility of their testimony." Such factual findings should not be disturbed unless they are so manifestly unsupported or inconsistent with the competent, reasonably credible evidence so as to offend the interests of justice.
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> [*In re Will of Liebl,* 260 *N.J.Super.* 519, 523 (App.Div.1992) (citations omitted) (quoting *Gellert v. Livingston,* 5 *N.J.* 65, 78 (1950)), *certif. denied,* 133 *N .J.* 432 (1993).]

We have thoroughly reviewed the record and we find that the trial judge's credibility determinations were well-grounded and his factual findings are supported by substantial credible evidence. *Rova Farms, supra,* 65 *N.J.* at 484. Suzanne's appellate arguments on this point require no further discussion. *R.* 2:11–3(e)(1)(E).

C.

We likewise find no merit in Suzanne's appeal, or in Joseph Catanese's and Rick's cross-appeals, concerning counsel fees. So long as a trial judge's decision is authorized by law, we will not overturn a decision to award or withhold counsel fees, absent "a clear abuse of discretion." *Packard–Bamberger & Co. v. Collier,* 167 *N.J.* 427, 444 (2001)(quoting *Rendine v. Pantzer,* 141 *N.J.* 292, 317 (1995)); *Shore Orthopaedic Group, L.L.C. v. Equitable Life Assurance Soc'y of the U.S.,* 397 *N.J.Super.* 614, 623–24 (App.Div.2008); *In re Will of Landsman,* 319 *N.J.Super.* 252, 271 (App.Div.), *certif. denied,* 162 *N.J.* 127 (1999). We find no legal error or abuse of discretion, and we affirm substantially for the reasons stated in Judge Waugh's November 28, 2007 and August 14, 2008 opinions on the fee applications. We add the following comments.

***7** Suzanne objects to the court's award of counsel fees to Linda Lashbrook, Esq., Mark, and Rick. We find no error in the fee award to Ms. Lashbrook, who acted as Lillian's personal attorney. At a case conference on the record on April 24, 2006, Judge Waugh approved Ms. Lashbrook's representation, noting that a person who is the subject of a guardianship action has a legal right to retain her own attorney. *See R.* 4:86–4(b). The record fairly supports the conclusion that Lillian had sufficient capacity to decide to retain her own counsel and that Ms. Lashbrook was not retained for her by any other party.

We conclude that Suzanne lacks standing to object to the award of counsel fees to Mark and Rick, where those awards are not being paid from her funds, and Lillian, through her counsel, does not object. *See In re Estate of F.W.,* 398 *N.J.Super.* 344, 353 (App.Div .2008)(noting that, ordinarily, a litigant has no standing to assert the rights of third parties).

With respect to Suzanne's fee application, both the New Jersey and Texas judges agreed that the New Jersey courts had primary jurisdiction over Lillian's guardianship, and they both agreed that in the context of the New Jersey probate action, Judge Waugh would decide all of the fee applications for the Texas and New Jersey litigations. We find no error in Judge Waugh, who had jurisdiction over Lillian's person and financial estate, deciding whether any of Lillian's funds should be spent to pay for Suzanne's counsel fees.

We reject Suzanne's contention that Judge Waugh lacked jurisdiction to require her to reimburse Lillian's funds that Suzanne spent on her own counsel fees in the Texas litigation and in the creation of the Texas FLP. In an analogous context, we held that where a New Jersey court has jurisdiction over a controversy in which New Jersey law permits a counsel fee award, it may award fees for litigation comprising "an integral part of the entire controversy," even if that litigation occurred in another state. *See Myron Corp. v. Atl. Mut. Ins. Corp.,* 407 *N.J.Super.* 302, 312 (App.Div.2009), *aff'd o.b.,* 203 *N.J.* 537 (2010). *Myron* concerned an insurance coverage dispute, in which complete relief to the insured required that the insurer pay all of the fees caused by its wrongful refusal to defend. *Id.* at 308, 311. In this case, complete relief to Lillian requires that Suzanne repay all of Lillian's funds that Suzanne improperly spent to pay her own expenses, whether those expenses were incurred in Texas or in New Jersey.

We also find no reason to disturb Judge Waugh's finding that Suzanne was not entitled to charge Lillian's estate for her fees in the Texas litigation. Based on his decision that Suzanne did not commence the Texas guardianship in good faith, and that she committed undue influence and breached her fiduciary duty, Judge Waugh denied Suzanne's fee application. Attorneys fees are a procedural issue, to which New Jersey law would apply in the New Jersey guardianship action. *See N. Bergen Rex Transp., Inc. v. Trailer Leasing Co.,* 158 *N.J.* 561, 569 (1999). However, Judge Waugh's decision is legally correct under either New Jersey or Texas law. The Texas Probate Code does not entitle a guardianship litigant to fees unless the court finds that the litigant "acted in good faith and for just cause in the filing and prosecution of the application." *Tex. Prob.Code Ann.* § 665B (West 2007). We find no basis to disturb Judge Waugh's decision that Suzanne was not entitled to counsel fees for the Texas litigation.

***8** Addressing the cross-appeals, we find no legal error or abuse of discretion in Judge Waugh's decision not to require Suzanne to reimburse Lillian's estate for counsel fees the estate incurred. Under the American Rule, each party ordinarily absorbs its own counsel fees. In some limited circumstances, a faithless fiduciary can be required to pay an estate's counsel fees for litigation required to remedy the fiduciary's wrongdoing:

> [I]f a plaintiff has been forced because of the wrongful conduct of a tortfeasor to institute litigation against a third party, the plaintiff can recover the fees incurred in that litigation from the tortfeasor. Those fees are merely a portion of the damages the plaintiff suffered at the hands of the tortfeasor.
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> [*In re Estate of Lash,* 169 *N.J.* 20, 26 (2001).]

Following *Lash,* the Court held that two non-relatives, who unduly influenced a wealthy widow to make them her fiduciaries and then looted her estate, could be forced to pay the estate's counsel fees. *In re Niles,* 176 *N.J.* 282, 300 (2003). However, "[t]he exception is limited to cases in which an executor's or a trustee's undue influence results in the development or modification of estate documents that create or expand the fiduciary's beneficial interest in the estate." *Id.* at 299. *Niles* was further narrowed in the later decision of *In re Estate of Stockdale,* 196 *N.J.* 275, 306 (2008), where the Court explained that

> it was significant that the two individuals who were the actors in *Niles* were strangers to the natural bounty of the testatrix and who, solely through the mechanism of undue influence, both gained access to her and then used their confidential relationship to overbear her will to their personal benefit.

The Court also declined to order fee shifting in a post-*Niles* will contest between siblings:

> This case invites us to create yet another exception to the American Rule, one that would allow attorney fee shifting whenever a non-attorney executor is removed because of, among other things, breach of a fiduciary duty and bad faith against co-beneficiaries. This is an invitation we ultimately decline to accept.
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> [*In re Estate of Vayda,* 184 *N.J.* 115, 123 (2005).]

In view of these precedents, we find no abuse of discretion in Judge Waugh's decision to withhold the extensive additional relief that is now the subject of the cross-appeals. As he observed, the underlying action was for Lillian's guardianship. In that context, the other issues—Suzanne's alleged undue influence in the creation of the December 2002 will and her violation of her fiduciary duty under the POA—were not independent causes of action but were necessary components of the dispute over who should be Lillian's guardian.

Although Suzanne clearly exercised undue influence, she was not a stranger to her mother, but instead was one of the natural objects of her mother's bounty. *See Stockdale, supra,* 196 *N.J.* at 306. While she acted improperly, Suzanne did not dissipate her mother's assets the way the defendants did in *Niles*. Moreover, given the strained relationship between Suzanne and Mark, and his "take no prisoners" approach to anyone who disagreed with his views, it is highly likely that any guardianship action would have been vigorously litigated, even if Suzanne had exercised no undue influence over Lillian.

***9** In all likelihood, both Suzanne and Mark will eventually inherit what remains of Lillian's estate, somewhat depleted as it will be by the expenses of this litigation. It is neither unjust nor inequitable that they each eventually bear some of the economic consequences of this extended power struggle over their mother. Given the anguish that this long-running dispute has caused Lillian, one can only hope that they will refrain from further such litigation.

IV.

Following up on that observation, we find no merit in Mark's appeal concerning his alleged right to additional counsel fees. His arguments require no discussion beyond that set forth here. *R.* 2:11–3(e)(1)(e). We affirm substantially for the reasons set forth in Judge Waugh's written opinion dated November 28, 2007, and his oral opinion issued August 14, 2008.

We agree with Judge Waugh that Mark could not be awarded fees for the New Jersey litigation, because he did not file a guardianship action here. As Judge Waugh stated, Mark "did not file an affirmative pleading seeking the appointment of a guardian." *See R.* 4:42–9(a)(3)(in a guardianship action, counsel fees may be allowed, as permitted by *Rule* 4:86–4(e), "to the attorney for the party seeking guardianship, counsel appointed to represent the alleged incapacitated person, and the guardian ad litem"); *In re Landry,* 381 *N.J.Super.* 401, 409–10 (Ch. Div.2005). Moreover, given Mark's sometimes inappropriate behavior, including interfering with his mother's New Jersey caregivers and medical care, it would be an appropriate exercise of discretion to deny him counsel fees, even if an award was legally permissible.

We find no abuse of discretion in Judge Waugh's determinations, expressed on August 14, 2008, concerning the fees awarded to Mark's various attorneys for the Texas litigation. *See Landsman, supra,* 319 *N.J.Super.* at 271 (the award of counsel fees is within the trial court's sound discretion). We acknowledge that, according to Karen Peña, Lillian's former Texas attorney ad litem, Lillian expressed her hope that the court would allow Mark's counsel fees to be paid from her assets. However, Lillian was hardly in a position to judge the legal merits of the fee applications. Moreover, given the number of times that Mark changed attorneys in the Texas litigation, the award of fees to so many of his multiple attorneys was generous, albeit not an abuse of discretion.

V.

Finally, we have considered the grandchildren's appellate contentions and find them to be without sufficient merit to warrant discussion here. *R.* 2:11–3(e)(1)(E). We affirm substantially for the reasons stated in Judge Waugh's thorough written opinion issued March 31, 2008, and his oral opinion issued August 14, 2008. We add the following comments.

We agree with Judge Waugh that, in the context of the guardianship action, it was appropriate to adjudicate whether Suzanne exercised undue influence over Lillian in connection with the December 2002 will. *See Niles, supra,* 176 *N.J.* at 291 (based on a finding of undue influence, the trial judge set aside the will of a living incapacitated person); *Garruto v. Cannici,*

397 *N.J.Super.* 231, 239–40 (App.Div.2007); *Casternovia v. Casternovia,* 82 *N.J.Super.* 251, 256–57 (App.Div.1964).

***10** We also agree that Suzanne was judicially estopped from arguing that Judge Waugh should not have decided that issue, because she consented to the court making that decision. Because Suzanne functioned as her children's virtual representative for purposes of the litigation over the will's validity, they are likewise bound by her agreement that the trial court should decide the issue. *See R* . 4:26–3. Further, since the grandchildren clearly knew about the guardianship trial and made no attempt to intervene while the trial was ongoing, their later application was untimely. [8] *See R.* 4:33–1 (intervention motion must be filed in a "timely" manner). We find no error in Judge Waugh's decision to reject the grandchildren's belated effort to re-try issues that their mother had thoroughly litigated and lost.

Moreover, given the unfortunate history of family strife; Lillian's repeatedly expressed desire that neither of her children should act as her guardian; and the grandchildren's obvious alliance with their mother; we find no error in the court declining to appoint one of the grandchildren as Lillian's guardian.

Affirmed.

All Citations

Not Reported in A.3d, 2011 WL 2898956

Footnotes

1 Intending no disrespect, we refer to these and other parties by their first names to avoid possible confusion, because many of them have the same or similar last names.

2 This was consistent with the recommendation of the court-appointed psychologist, Dr. Siegert, that Lillian needed "a guardian who has good judgment and the strength to ward off people who disagree strenuously."

3 Suzanne and Lillian's granchildren appeal from the August 14, 2008 final order "and the proceeding [sic] interim orders and opinions of the court." Their notices of appeal do not specify which such orders they are appealing. Eric Smith appeals from the portions of the August 14, 2008 final order and March 8, 2007 decision declining to shift certain counsel fees to Suzanne. Joseph J. Catanese appeals from the portions of the August 14, 2008 final order and November 28, 2007 order and opinion declining to shift certain counsel fees to Suzanne. Mark Glasser appeals from the portion of the August 14, 2008 final order denying him certain counsel fees.

4 After reading the transcripts, we conclude that, to a great extent, the length of the trial reflected the number of parties and attorneys involved rather than the complexity of the issues. Objections were argued at length by multiple attorneys and issues were re-visited on successive examinations of the witnesses by multiple counsel. Throughout the proceedings, the trial judge displayed exemplary patience and scrupulous fairness.

5 For purposes of this opinion, it is unnecessary to discuss either Lillian's health issues or her finances in detail. Out of respect for her privacy, we discuss them only as needed to explain our conclusions.

6 The 2003 New Jersey FLP was never funded, for reasons we need not address here.

7 In a letter dated March 28, 2007, the Texas judge also agreed with Judge Waugh that he should decide all of the parties' counsel fee applications for both the New Jersey and Texas litigations. The only limited exception was for attorneys and experts whom the Texas judge had appointed in the Texas litigation. The Texas judge retained jurisdiction to decide those fee applications.

8 In fact, Alexandra, the adult grandchild who now asserts that she should have been named guardian, testified at the trial. During that testimony, she admitted that her parents were providing her with significant financial support. Despite her affection and concern for her grandmother, Alexandra was in no position to act as an independent guardian of Lillian's person.

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