

The Confusing and Conflicting Supreme Court Rulings Involving Attorneys' Fees in Probate Litigation

by Jordan S. Weitberg

While probate litigation is rarely a focus of the New Jersey Supreme Court's docket, in recent years there have been an unusually high number of cases decided by the Court concerning the shifting of attorneys' fees in probate matters. In these cases, the Court has taken a close look at whether it is appropriate to craft an exception to the American Rule. Under that rule, a litigant is prohibited "from recovering counsel fees from a defendant when the fees were incurred in an action to establish that defendant's liability."¹ The rule is based on the principles of unrestricted access to the courts for all, ensuring equity by not penalizing persons for exercising their right to litigate a dispute even if they should lose, and administrative convenience.²

Probate litigation is different than many other forms of litigation in that the contestants ordinarily are battling over their rights to a fund and not making claims against each other for money damages. In cases involving claims of undue influence (a form of fraud), the traditional remedy is to set aside the will so the perpetrator of the fraud reaps no benefit from the fraudulent will—each side's slice of the pie is adjusted. Money damages ordinarily are not necessary to compensate the victim, as a set-aside of the fraudulent instrument will make him or her whole. This reality seems to have struck the New Jersey Supreme Court in a series of cases concerning the propriety of crafting an exception to the American Rule relating to the shifting of attorneys' fees.

Even before the recent cases, probate cases had been subject to exceptions to the American Rule under Rule 4:42-9 of the New Jersey Court Rules. Under subsection (a)(2) of that rule, a fiduciary may pay legal fees "out of a fund entrusted to the fiduciary for administration," subject to court approval. Under subsection (a)(3) of that rule, in a probate action where

probate is granted, the court may award fees to a person who contested the validity of the will provided he or she had "reasonable cause" for the contest.

While Rule 4:42-9 operates as an exception to the American Rule, often it provides only limited benefit. For example, assume a beneficiary of a 45 percent share of the decedent's estate is successful in convincing the court to order his or her fees to be paid by the estate. The actual amount of fees shifted is limited to 55 percent, as the estate will be reduced by the amount of the fees and the beneficiary's 45 percent share will be reduced accordingly. Indeed, the Court has recognized that the rule does not necessarily make a beneficiary whole.³

Attorneys' Fees as Consequential Damages

In re Estate of Lash is the first of the recent Supreme Court cases discussing the American Rule in the context of a probate proceeding. *Lash* stands for the principle that "the American Rule does not preclude an allowance of reasonable counsel fees where the incurring thereof is a traditional element of damages in a particular cause of action."⁴

In *Lash*, a decedent's estate obtained a judgment against the estate administrator who had looted the estate and absconded. The estate sought to collect the judgment from the bonding company that had acted as surety for the administrator, together with its attorneys' fees in making the claim on the bond. Finding that the estate was entitled to recover the damages caused by the administrator's breach of fiduciary duty, the Court ruled that such damages included the fees incurred in the proceeding on the bond, which were a "foreseeable consequence" of the administrator's defalcation. The Court explained that "if 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."⁵ According to

the Court, its conclusion did not run afoul of the American Rule, because the rule “does not prohibit an award of attorneys’ fees incurred in litigation with a third party.”⁶

Strictly speaking, however, the claim against the surety was not a third-party claim as it related to the attorneys’ fees, as the fees the Court awarded were incurred in the proceeding to recover on the bond against the surety itself. The Court explained that quandary by essentially noting that the surety served two separate roles. First, it was the third party in the claim that was a “foreseeable consequence” of the administrator’s defalcation. Second, it had “coextensive liability” with the administrator and, like the administrator, was liable for the attorneys’ fees incurred in the third-party litigation, even though it was the defendant in that litigation.⁷

Fee Shifting Permitted in Certain Undue Influence Cases

Whether or not *Lash* is viewed as creating an exception to the American Rule, the Court in *In re Estate of Niles* made clear that such an exception is created “when an executor or trustee commits the pernicious tort of undue influence.”⁸ In *Niles*, the decedent, Laura Niles, who with her younger brother had inherited a large fortune from their father, never married and had no children. As part of her estate planning, she established a charitable foundation and created three trusts, naming the foundation as the primary beneficiary of the trusts. After her brother married a younger woman, Serena, late in life, Laura began spending significant time with Serena and her son, Bono. Not long before her death, Laura amended her will and the trusts. She replaced her longtime financial advisor, Parkinson, with Bono as executor and trustee, and added provisions to the documents that heavily favored Bono’s family. Thereafter, as trustee, Bono, working as a team

with Serena, embarked on a 16-month “looting spree” of Laura’s assets.

Parkinson brought an action seeking allowance of his account as trustee and the appointment of a guardian *ad litem* for Laura, because Serena and Bono had caused her to change her will and trusts. The lower court removed Bono as trustee based on his embezzlement and misuse of Laura’s assets and surcharged him for his breach of fiduciary duty. The foundation subsequently brought a separate action directly against Serena and Bono, alleging they had exerted undue influence on Laura, causing her to change the will and trusts. The Court found the amendments to the documents to be null and void because they resulted from undue influence.

The Court was called upon to rule whether the estate should be reimbursed for the counsel fees it paid for the representation of Parkinson and the foundation as plaintiffs in litigation against Bono and Serena as defendants, directly implicating the American Rule. Finding that an important public policy concern was involved, the Court likened the situation to one where fee shifting is permitted in cases of attorney malpractice.⁹ Similar to the relationship of attorney and client, a trustee’s fiduciary relationship is based on the “utmost trust,” the trustee acting as an officer of the court when acting on behalf of the beneficiaries.¹⁰

Justifying the exception to the American Rule on the fiduciary relationship, the Court stated that a breach of that relationship is “at least as egregious as the administrator’s intentional wrongdoing in *Lash*, or an attorney who has intentionally breached his fiduciary duty.”¹¹ To the Court, “undue influence committed by an executor or trustee to obtain a significant financial benefit for himself is especially pernicious regardless of whether the fiduciary is an attorney.”¹²

According to the Court, the new exception would not “open the floodgates” to additional litigation, because it

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.”¹³ Most important, the undue influence exception did not violate the purposes of the American Rule, as undue influence “represents such an egregious intentional tort that it establishes a basis for punitive damages in a common law cause of action.”¹⁴

Whether the Court was correct in its rationale for the new exception is questionable. Unlike an attorney who takes improper advantage of his or her license to practice law, Bono was not a fiduciary when he exerted undue influence. Rather, he became trustee by exerting the influence that caused Laura to change her trust documents. Although the Court refers to a “trustee’s undue influence” as leading to the fee shifting, it recognized the case involved undue influence by “a non-attorney who becomes trustee.”¹⁵ While the Court asserts that its ruling would not “open the floodgates,” a typical undue influence case involves a person who becomes a fiduciary as a result of the undue influence, not a fiduciary who exerts the undue influence. The distinction is important, since the Court’s analysis focused on the fiduciary relationship of trustee and beneficiary.

Fee Shifting Not Available in Breach of Fiduciary Duty Cases

In *In re Estate of Vayda*, the Court had little trouble narrowly applying the exception to the American Rule it had crafted. There, the daughter of the decedent, Katherine, made a claim that the will of her mother was the product of undue influence exerted by her brother, Peter, and that Peter had breached his fiduciary duty after being appointed as executor. The trial court found a breach of fiduciary duty by Peter in his conduct as executor, but no undue influence in

causing his mother to change her will. It determined that Katherine's legal fees should be paid from Peter's share of the estate rather than out of the estate itself.

The Supreme Court recognized that unless Peter is held liable for Katherine's attorney's fees, as beneficiary of 45 percent of the estate Katherine would not be made whole. Notwithstanding the finding of breach of fiduciary duty by a non-attorney executor, the Court was unwilling to create "yet another exception" to the American Rule where no undue influence is present.

Perhaps just as important as the holding in *Vayda* was the comment made by the Court in footnote 4 of the opinion. Apparently recognizing the expansive nature of its ruling in *Niles*, the Court stated:

Had Katherine established that the decedent's will was the result of undue influence, Peter's performance as executor would have been squarely governed by the holding of *In re Estate of Niles*.¹⁶

Similar to *Niles*, in *Vayda* the claim was made that the undue influence exerted by Peter took place *before* he became executor. While footnote 4 is a fair reading of the holding in *Niles*, since Peter was not a fiduciary when he was alleged to have exerted undue influence, it seems to contravene the Court's contention that *Niles* involved undue influence exerted by a fiduciary. It also seems to undermine the Court's rationale in *Niles* for why the decision would not cause the 'floodgates' to open.

Fee Shifting Based on Taking of Assets During Lifetime

Further discussion regarding the exception to the American Rule came several years later, in *In re Estate of Stockdale*, where the issue before the Court was whether the remedy of punitive damages was available in an undue

influence case.

As in *Niles*, *Stockdale* involved a claim of undue influence against persons who were "strangers to the natural bounty" of the decedent. The claim was made in *Stockdale* by a first aid squad, as beneficiary of a 1998 will, against Sollitto, a neighbor of the decedent, and Casale, an attorney who assisted Sollitto. Through the actions of Sollitto and Casale, Sollitto was able to cause the decedent to transfer her property to Sollitto and to name Casale as executor and Sollitto as beneficiary under a 2000 will. Finding that punitive damages were available, the Court noted that in the case before it, as in *Niles*, the remedies ordinarily available in the probate part—namely, a surcharge against the fiduciary or an offset against the share of the estate distributed—might not be available because the claim was being made against complete strangers to the decedent, who were not appointed as fiduciaries and were not paid any portion of the estate.

While the Court in *Niles* recognized that punitive damages might be available in an undue influence case, it did not explain under what circumstances such damages might be awarded. In *Stockdale*, the Court filled in that gap. It advised that punitive damages might be available in situations in which "the ordinary remedies for breach of fiduciary duty will not lie or will be inadequate," and in those involving a person who is essentially a stranger to the decedent and gains access to him or her through undue influence and then seizes control over his or her assets through *inter vivos* transfer or by bequest.¹⁷

Although the holding in *Stockdale* pertains to the availability of punitive damages, the Court—in seemingly gratuitous comments—seemed to recognize that its decision in *Niles* on attorneys' fees had the potential to lead to confusion. It thus took pains to explain three of the factors that were critical to

its decision in *Niles*.

First, the Court stated that the claims in *Niles* were presented on behalf of the estate by the substitute executor. This statement seems directly contrary to language in the *Niles* opinion itself that refers to Parkinson and the foundation as plaintiffs.

Second, the Court seems to downplay the status of the perpetrator of the fraud as a fiduciary, focusing instead on the depletion of the assets by the wrongdoer during the decedent's lifetime. The Court thus stated that "although the tortious actions undertaken in *Niles* were acts of a fiduciary, the effect was to strip the estate of virtually all of its assets," and reliance on the usual remedy of surcharge against commissions or offset against a bequest was inadequate.¹⁸ This characterization of the *Niles* holding appears directly at odds with the focus in that decision on the fiduciary relationship, as discussed above. Nonetheless, this factor may be the most important of the three, as it involves a lifetime taking of assets from the decedent, not merely a redistribution at death.

Third, the Court made clear that the actors in *Niles* were strangers to the natural bounty of the testator, thereby justifying the description of their acts as pernicious and deserving the Court's awarding of counsel fees and potentially punitive damages. However, in *Niles* itself the Court made no mention of the status of Serena and Bono as strangers to the decedent's natural bounty.

Curiously, the Court in *Stockdale* validated the exception to the American Rule announced in *Niles*, even where the three factors are absent. In clarifying its ruling on punitive damages, the Court explained that undue influence claims in estate contest proceedings usually do not give rise to punitive damages claims, as other remedies are adequate. As an example, the Court described a dispute between two sib-

lings, one of whom alleges that undue influence exerted by the other caused the parent to change the will.

Citing to its decision in *Vayda*, the Court instructed that “the sibling who becomes empowered to act as an executor might be liable for an award of attorneys’ fees payable to the other sibling who succeeds in proving that [the change in the will] was accomplished through undue influence.”¹⁹ To some this comment might seem unexpected, since *Vayda* did not involve claims brought by a substitute executor, the depletion of virtually all (or any) of the estate’s assets, or strangers to the natural objects of the decedent’s bounty, the three factors critical to the *Niles* decision.

Additional Guidance Needed to Resolve Conflicting Language

How this confusing and conflicting guidance is ultimately sorted out remains to be seen. In one recent unpublished Appellate Division decision, the court declined to order the shifting of counsel fees notwithstanding a finding that the will was the product of undue influence exerted by the decedent’s daughter.²⁰ That court described the *Niles* exception as limited to situations where undue influence is exerted by a fiduciary who causes a change in estate documents, and as further narrowed to situations involving strangers to the natural bounty of the testator. The court ignored the footnote in *Vayda* that suggested fees should be shifted where through undue influence a person becomes a fiduciary. Pointing out that the decedent’s daughter was a natural object of her mother’s bounty, and her brother had adopted a “take no pris-

oners” approach to the litigation and himself engaged in “inappropriate behavior,” the court found it neither unjust nor inequitable that they together bear the consequences of their “power struggle.”²¹ The court appears to have concluded that the daughter’s behavior was directed as much against her brother as it was to her mother.

Conclusion

While undue influence indeed is a form of fraud and may sometimes involve pernicious acts, in many if not most cases it involves harm caused by one family member against another, and not against the decedent. There may be circumstances where a child who wrests control of assets from a parent during the parent’s lifetime should be assessed the attorneys’ fees of other family members in order to correct the wrong after death. Nonetheless, where the wrongful conduct would cause only a change in distribution of assets after death, there will not often be a compelling reason to shift responsibility for attorneys’ fees, as the traditional probate remedies will be adequate.

As suggested by the Court in its recent cases, the circumstances where an exception to the American Rule is in order are properly limited to those that involve some or all of the three factors discussed in *Stockdale*. Chief in importance among the factors should be the taking of assets during the lifetime, using undue influence. However, in both *Vayda* and *Stockdale* the Court suggested that the exception to the American Rule it crafted in *Niles* is available even where the *Stockdale* factors are not present. As a result, more guidance is

needed from the Court to ensure the floodgates do not remain open. ♪

Endnotes

1. *In re Estate of Lash*, 169 N.J. 20, 21 (2001).
2. *In re Estate of Niles*, 176 N.J. 282, 294 (2003).
3. *In re Estate of Vayda*, 184 N.J. 115, 124 (2005).
4. *Lash*, *supra*, note 1 at 26.
5. *Id.*
6. *Id.* at 25.
7. The dissent in *Lash* describes this reasoning as “circular.” *Id.* at 39.
8. *Supra*, note 2 at 298.
9. *See Packard-Bamberger & Co. v. Collier*, 167 N.J. 427 (2001); *Saffer v. Willoughby*, 143 N.J. 256 (1996).
10. 176 N.J. at 297.
11. *Id.* at 298.
12. *Id.* at 299.
13. *Id.*
14. *Id.* at 300.
15. *Id.* at 299.
16. *Id.* *See also, In re Estate of Stockdale*, 196 N.J. 275 (2008).
17. *Id.* at 308.
18. *Id.* at 306.
19. *Id.* at 309-10.
20. *In re Estate of Glasser*, 2011 N.J. Super. Unpub. LEXIS 1959 (App. Div., July 21, 2011).
21. *Id.*

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