

COMMONWEALTH OF MASSACHUSETTS  
THE TRIAL COURT  
THE PROBATE AND FAMILY COURT DEPARTMENT

BARNSTABLE, SS.

Docket No. BA05P1100GI1

In the Matter of  
Guardianship of Kenneth E. Simon

**FINDINGS OF FACT FOR DECREE ON**  
**PETITION FOR ATTORNEYS FEES AND COSTS**  
**EXPENDED BY THE SIMON CHILDREN**  
(Petition filed on February 11, 2010)

1. The Court incorporates herein the Findings of Fact, Rationale and Conclusions of Law that the Court made in the case of the Guardianship of Kenneth E. Simon Docket No. BA05P1100GI1, which are annexed hereto as Exhibit "A".
2. This case involved a First and Final Account in the Guardianship of Kenneth E. Simon filed by Attorney James Veara who was the Temporary Guardian of Kenneth E. Simon. Attorney James Veara, in his capacity as Temporary Guardian, was represented by Attorney Gerald Nissenbaum.
3. The Guardianship was in existence for approximately 83 days before Kenneth E. Simon passed away.
4. Initially, the First and Final Account was assented to by Mr. Simon's children and his wife.
5. The Temporary Guardianship fees and costs exceeded \$500,000.00.
6. Although the Account was assented to, Justice Scandurra of the Barnstable Probate and Family Court refused to allow the Account.
7. Subsequent to Justice Scandurra's action, the children withdrew their assents, obtained their own attorneys and objected to the Account.

8. After a trial on the Account, which lasted for 11 days, the Simon children prevailed and the Court found that the Temporary Guardian and the Temporary Guardian's attorney had acted improperly and they were collectively ordered to return \$328,770.97 to the estate.
9. This present action is a Petition for Attorneys Fees and Costs Expended by the Simon Children. All parties agreed that this Petition would be heard and decided by written findings submitted by both sides and without testimony or oral argument.
10. The Court finds that Attorney Nissenbaum and Attorney Veara engaged in a joint enterprise and did everything in their power to prolong the proceedings regarding the contested account. Their actions were conducted in bad faith and their egregious litigation conduct was designed to make the proceedings as costly as possible in an attempt to force the Simon children to withdraw or abandon their objections.
11. After the trial on the first and final account ended, Attorney Nissenbaum and Attorney Veara asked the Court to schedule a conference so the Court could provide its "thoughts" on the evidence. That conference was held on February 13, 2009. At that conference, the Court expressed concerns about the conduct of Attorney Nissenbaum and Attorney Veara during the Temporary Guardianship.
12. Instead of this conference leading to a settlement, Attorney Nissenbaum and Attorney Veara accused the Court (Steinberg, J.) of violating the Canons of Judicial Ethics and blamed the Court for the high cost of litigation.
13. The services provided by Attorneys Todd and Waters were clearly necessary in order to seek reimbursement for the outrageous fees charged by the Temporary Guardian and his attorney.
14. The rates charged by Attorneys Todd and Waters were reasonable under the circumstances and were appropriate for the area in which they practice.
15. The services actually provided were effective and led to a favorable decision for the Simon children and the estate of Kenneth Simon, resulting in the ordered return of \$328,770.97 to the estate.
16. Most of the hours spent by the Simon children's attorneys were, unfortunately, necessitated by the outrageous conduct of the Temporary

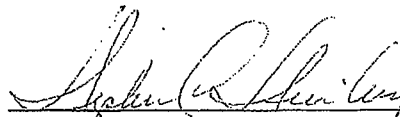
Guardian in concert with his attorney and their intransigent position in refusing to settle this case in a reasonable and equitable manner.

17. Thus, the Court has considered the necessity of the services, the rates charged, the services actually provided and the hours spent by the Simon children's attorneys.
18. The bad faith strategy and egregious conduct of Attorney Nissenbaum and Attorney Veara are set forth in letters to counsel for the Simon children. Examples of this strategy are statements by Attorney Nissenbaum as follows:
  - a. "In other words, whatever imagined good might come from a trial on the Accounts, the expense of such a trial in itself plus the expenses to the Estate from the other litigation will cost more than any potential savings."
  - b. "[The objectors] should expect to pay anywhere from (\$5) dollars to six hundred \$600 or more dollars for every dollar they get back."
19. The Simon children, however, should bear some of the responsibility for the costs of the litigation in this case because, in some part, their conduct contributed to the expenditure of the fees at the outset of the guardianship. The Simon children initially assented to and acquiesced to the actions of Attorney Nissenbaum and Attorney Veara in their attempt to thwart their Father's wife. They did not object to the Account when it was first filed and they also failed to participate in the proceedings conducted by the Master. Their initial acquiescence and their delay in objecting to the account partially contributed to the litigation in this case.
20. The Simon children should have expected a contest regarding the account in this case.
21. The reasonable fees and costs to litigate this case should have been \$200,000.00. The actual fees and costs incurred were \$431,149.00.
22. The actions of Attorneys Nissenbaum and Veara necessitated attorneys fees and costs in substantial excess of what would have been appropriate in a properly litigated dispute over the Account.
23. It would be a hollow victory for the Simon children to receive \$328,770.97 returned to the estate after spending attorneys' fees in a sum substantially more than that to prevail.

24. The Court clearly has the authority and the duty to award attorneys fees and costs in a case such as this.
25. The Court has broad discretion in determining the amount to be awarded.
26. Taking all of these matters into consideration and balancing the equities in this case, the Court finds that the legal fees encountered by the Simon children were exceptionally high because of the deliberate, outrageous actions of Attorney Nissenbaum and Attorney Veara, acting in concert to cause protracted litigation.
27. Attorney Veara, as the Temporary Guardian and presenter of the Account which led to the underlying litigation is clearly a party to the action.
28. Attorney Nissenbaum and Attorney Veara engaged in a joint enterprise throughout the term of the Temporary Guardianship and throughout the trial of this case. This joint enterprise subjects Attorney Nissenbaum to the jurisdiction of this Court to order him to pay a share of the attorneys' fees incurred by the Simon children.
29. Therefore, the Court has decreed that Attorney Gerald Nissenbaum and Attorney James Veara each pay \$115,574.50 in legal fees to the Petitioners within 30 days from the date of the Decree entered on this date.

Dated: April 7, 2011

By the Court,



Stephen C. Steinberg, Associate Justice  
Probate and Family Court Department

