

In re Burnbrae Maintenance Ass'n  
Del.Ch.,2008.  
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UNPUBLISHED OPINION. CHECK COURT  
RULES BEFORE CITING.

Court of Chancery of Delaware.  
Re: In the Matter of BURNBRAE MAINTENANCE  
ASSOCIATION.  
C.A. No. 3405-VCN.

Submitted: April 25, 2008.

[Edward B. Rosenthal](#), Esquire, Rosenthal, Monhait &  
Goddess, P.A., Wilmington, DE.

[Clark C. Kingery](#), Esquire, Clark C. Kingery, P.A.,  
Wilmington, DE.

[Daniel K. Hogan](#), Esquire, The Hogan Firm,  
Wilmington, DE.

[JOHN W. NOBLE](#), Vice Chancellor.

\*1 Dear Counsel:

I have Mr. Hogan's Petition for Relief from Appointment as Custodian of Burnbrae Maintenance Association Pursuant to [8 Del. C. § 226](#) and his Notice of Fee and Expense Application. I also have correspondence from Mr. Rosenthal, Mr. Kingery, and several members of the Burnbrae Maintenance Association (the "Association").

On January 14, 2008, Mr. Hogan was appointed custodian of the Association. This was done for several reasons; the most pressing was to hold a new election of the Association's governing council in order to resolve ongoing disputes over who were the members of the governing body. This condominium association, because of strife among its members, had been dysfunctional; necessary work was not being performed; the financial records were in disarray; and there was uncertainty with regard to several legal actions that had been filed to collect assessments.

Under Mr. Hogan's supervision, an election was held and a new governing council (the "New Council") was chosen. Mr. Hogan filed a detailed report; he

made substantial progress in reconciling the Association's finances. In addition, he identified numerous action items for the New Council to address. In short, he has provided a focus for the New Council on a going-forward basis.

Mr. Hogan now asks to be relieved of his appointment as custodian and for approval of the fees and expenses incurred as the result of his activities as custodian. Several objections have been received: there are complaints about the Edward B. Rosenthal, Esquire Clark C. Kingery, Esquire Daniel K. Hogan, Esquire May 5, 2008 fees; there is some opposition to his discharge because of a perception that important work remains for him to perform within the scope of the order appointing him custodian and because the New Council is inexperienced; his custodian's report has been criticized for errors, but those errors have not been identified with any specificity; vague allegations of breach of fiduciary duty have been made; it has been asserted that he has not turned over all of the Association's financial records to the New Council.

I turn first to the question of discharge. The New Council is in place. Under the condominium scheme to which all unit owners necessarily have committed, the affairs of the condominium association are to be administered by a democratically-elected council, not by a court-appointed custodian. A custodian was only appointed because the community could not even come together to hold a proper election. Once the primary purpose for establishing a custodianship is satisfied, discharge may be appropriate. Moreover, Mr. Hogan, as custodian, achieved significant progress with respect to financial and other issues confronting the Association. There is no reason why the New Council cannot now move forward on its own, and, as it deems appropriate, hire its own advisers.

I have considered the grounds set forth in opposition to his discharge and find that they do not warrant continuation of the custodianship. The contention that the New Council is not competent ignores the purposes of the electoral process and rings of disappointment in the outcome of the voting. The suggestion of a breach of fiduciary duty by Mr.

Hogan is so vague as to preclude either crediting it or evaluating it. The argument that his report contains errors is not substantiated and, moreover, fails to recognize that it is nothing more than a reporta general document that the New Council may address as it sees fit. As for Ms. White's contention that Mr. Hogan has not turned over all of the Association's financial records, I note that the missing records have not been identified and that Mr. Hogan has represented that he no longer has any such records. I will, however, direct Mr. Hogan to review one more time his files regarding the custodianship in an effort to determine whether he still retains any of the financial records mentioned by Ms. White. If she can identify the "missing" records with any specificity, she should promptly provide that information to Mr. Hogan. The process of reviewing the records should be completed within fifteen days from the date of this letter. If Mr. Hogan finds any additional records, he, of course, should turn them over to the New Council. Otherwise, the Court will deem this issue resolved.

\*2 Mr. Hogan's fees total \$61,972.50 and his expenses total \$1,907.88.<sup>FN1</sup> His task as custodian was not an easy one; it required him to act promptly; it drew upon his skill and experience as a practitioner in this area of the law; he encountered numerous problems. He made significant progress, however, in restoring the council to a functioning governing body. His fees (and those of others working with him in this matter) are reasonable in this context. His expenses are also reasonable. Accordingly, they are approved.

<sup>FN1</sup>. I note that Mr. Hogan has not asked for any award for his efforts before his appointment as custodian or since April 2, 2008.

As the objectors have observed, the fees are substantial and impose a financial burden on the Association. Perhaps the cost was greater than anticipated, but the problems and challenges were substantial. The concern about the impact on the Association is a legitimate one. Two responses come to mind. First, the governance structure for this condominium association was ineffective, perhaps chaotic. Something had to be done, and the appointment of a custodian was the only viable solution. Custodians are entitled to be compensated fairly for their efforts. If the unit members could have

worked together in good faith initially, as one would have hoped, judicial intervention likely would not have been necessary. Second, although the Court has no factual record from which to draw a quantitative conclusion, it is clear that pervasive problems with the discharge by a condominium association of its assigned duties will adversely affect the value of the condominium units. Restoration of an effective governance structure will thus have some positive benefit for the unit owners.

For the foregoing reasons, the Court will enter an order approving the fees and expenses sought by Mr. Hogan and discharging him as custodian. The order will not be entered for a period of fifteen days from the date of this letter in order to allow for the further check of Mr. Hogan's files for the financial records mentioned above. Mr. Hogan may take the award of fees and expenses and have it entered as a judgment among the records of the Superior Court. The Court, however, acknowledges the financial strain that this unfortunate series of events has placed on the Association and hopes that Mr. Hogan would work with the Association to arrange for deferral of some of the payments over a reasonable period; perhaps one year would be appropriate.

Very truly yours,

*/s/ John W. Noble*

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Not Reported in A.2d, 2008 WL 1952166 (Del.Ch.)

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