COURT OF COMMON PLEAS OF PHILADELPHIA
ORPHANS' COURT DIVISION
No. 557 IV of 2002
Control No. 055424

Stuart David Fiel Trust Under Deed Dated June 20, 2000
Sur Account Entitled Interim Account of Alvin I. Elfand, Trustee

The Account was called for Audit April 4, 2005 **Before: Herron, J.**

Counsel appeared as follows:
Bruce Bellingham, Esquire – for Objectors
Daniel J. Dugan, Esquire- for Objectors
John A. Guernsey, Esquire- for Alvin Elfand
Bernice J. Koplin, Esquire – for the Accountant
James Mannion, Esquire – for Schachtel, Gerstley, Levine & Koplin, P.C.
Alan J. Mittelman, Esquire – for Objectors
James C. Veith, Esquire – for State Workers' Insurance Fund

ADJUDICATION

Stuart David Fiel, the sole shareholder of the law firm Stuart D. Fiel Associates,[1] (hereinafter "law firm" or "SDFA") died on July 28, 2000 unmarried and without children. He was, however, survived by his parents, Adele and Leonard Fiel, his sister Carol Eyler, his brother, Scott Fiel, two nieces and a nephew. Prior to his death, Stuart Fiel executed a will dated June 20, 2000 and a deed of trust dated June 20, 2000.

Mr. Fiel named Alvin Elfand, a long time personal friend and accountant for his law firm, as both Executor and Trustee. On March 2, 2005, Mr. Elfand, as Trustee, filed an Interim Account of the Stuart David Fiel Trust to which he annexed his First and Final Account, as Executor, of the Estate of Stuart David Fiel, Deceased, pursuant to 20 Pa.C.S. § 7799.1 of the Pennsylvania Uniform Trust Act which allows a trustee to annex

[1] 1/6/2006 Objectors' Memorandum at 6. The SDFA law firm was a New Jersey Professional Association with offices in New Jersey and primarily in Pennsylvania. 7/21/2005 N.T. at 42 (Koplin); 7/19/2005 N.T. at 32 (Elfand).

to his trust account a copy of an estate account if the trustee has received property in distribution of the estate.[2] The period covered for the Trust account is June 20, 2000 through December 31, 2004. The Estate account covers the period July 28, 2000 through January 31, 2002.

Objections to this account were subsequently filed by decedent's parents and siblings, who misleadingly characterized themselves as "all the beneficiaries under the Trust."[3] Nine days of hearings were held on these objections, during which voluminous documentation was presented. After the hearings, the parties submitted memoranda of law and participated in oral argument.

The objectors raise three objections to the account. They assert that Alvin Elfand, the Executor/Trustee seeks unreasonable and excessive fees in the amount of $275,000.[4] The objectors also challenge the fees of the Executor's attorney, the Schachtel, Gerstley, Levine and Koplin law firm ("SGLK") as excessive. The attorney fees presently at issue are $490,350.[5] Finally, the objectors seek to surcharge the Executor/Trustee because, they allege, "a substantial asset of the Estate—a law firm—was negligently administered for the benefit of the Executor/Trustee and counsel contrary to the interests of the Objectors/beneficiaries, and a substantial Estate value was thereby dissipated…"[6] Resolution of this dispute over the reasonableness of fees and the administration of an

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[2] This "piggybacking" of accounts had previously been authorized under former 20 Pa.C.S. §7188.

[3] See 4/4/2005 Objections, ¶6. In fact, the June 20, 2000 Deed of Trust of Stuart Fiel also provides for bequests to specific individuals, the creation of a Trust for the benefit of the decedent's nieces, Lauren and Bryn Fiel, and his nephew, Benjamin Eyler, as well as for the creation of a charitable foundation/trust denominated the Israel and Minnie Fiel Foundation. R-251, III (A)(1) and III(C)(1).

[4] 4/4/2005 Objections, ¶¶ 1 & 47-48; 7/19/2005 N.T. at 9.

[5] 3/3/2006 SGLK Memorandum at 1; 7/19/2005 N.T. at 9 (Guernsey); 9/27/2005 N.T. at 105-06 (Dugan). Although the total attorney fees sought in paragraph 13 of the Petition for Adjudication (Trust) are $625,000, the parties have agreed that for the purposes of the objections presently before this court, the amount in dispute is $490,350 with the defense costs of $135,000 to be resolved at a later time. See e.g., Ex. R-16: "Defense" - $134,650.

[6] 4/4/2005 Objections, ¶ 1(a).

Estate/Trust asset requires analysis of the factual record, the will, the deed of trust and controlling precedent.

I. Factual Record

A. History of Disputes Between the Executor/ Trustee, Attorney and the Objectors

Stuart D. Fiel was not only the sole shareholder of his law firm, SDFA, but its charismatic leader who kept much of its vital information in his head.[7] Although the law firm had a computer system, Abacus, it contained only minimal information on particular cases.[8] In running his firm, Mr. Fiel held daily mail meetings to keep track of cases and to assign matters to individual attorneys.[9] The firm handled hundreds of cases, both "active" and "treating," and the practice was consistently characterized as "high volume, low value."[10] The members of the firm, however, were all aware of the three plum cases with a promise of bringing in high judgments: Menafee, Torres and Galinsky.[11]

In addition to his work at the firm, Stuart Fiel was the family benefactor, especially to his brother, Scott Fiel,[12] his sister, Carol Eyler,[13] and his parents.[14] Alvin Elfand was a close family friend. His father had been the accountant for Stuart's parents and siblings, and then Alvin assumed that role.[15] Alvin Elfand began working as Stuart Fiel's accountant in the mid 1980's, and by 1989 he had become accountant for the law

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[7] 9/27/2005 N.T. at 43 (Eyler); 7/20/2005 N.T. at 124 (Koplin); 1/6/2006 Objectors' Memorandum at 6.
[8] 7/20/2005 N.T. at 129-30 (Koplin); 9/29/2005 N.T. at 95 (Block).
[9] 9/27/2005 N.T. at 6 (Eyler).
[10] The objectors characterize the firm with these terms. 1/6/2006 Objectors' Memorandum at 6. See also 9/28/2005 N.T. at 103-104 (Presto)(agreeing with the characterization of the firm as a "high volume/low value" practice). Vince Presto noted that 95% of the cases were probably "arbitration level cases" with a maximum recovery of $50,000. Id. at 104-05. Carol Eyler estimated there were over a thousand cases prior to her brother's death. 9/27/2005 N.T. at 45-46
[11] See, e.g., 9/28/2005 N.T. at 106 (Presto).
[12] 9/27/2005 N.T. at 214 (Scott Fiel). He lived at 510 South 4th Street since 1993, without paying rent to Stuart Fiel or the Trust. Id.
[13] 7/19/2005 N.T. at 39 (Elfand). Ms. Eyler was given help with a mortgage that was originally $56,000 but grew to $100,000 due to lack of payment. Id., 39-40 (Elfand).
[14] 7/19/2005 N.T. at 32 (Elfand). The Fiels live at Stuart Fiel's Margate property rent free. Id.
[15] 9/27/2005 N.T. at 175-76 (Scott Fiel).

firm.[16] He testified that he had played a continuing role in Mr. Fiel's personal financial planning, advising on investment strategy, estate planning and the purchase of insurance.[17]

In late 1999, Mr. Fiel was diagnosed with cancer. He began chemotherapy in December 1999. At that point, he began going into work less often and asked an associate in his firm, Vince Presto, to handle the mail meetings. His sister, Carol Eyler, thereafter saw her main job as taking care of her brother. Between November and March 2000, she testified, Mr. Fiel did not go into the office very often, approximately once or twice in a three month period; in April, he went in more often, but then by May he did not go into the office at all.[18]

After his illness was diagnosed around November 1999, Mr. Fiel met with Bernice Koplin, a neighbor and law school classmate, for estate planning at the recommendation of Alvin Elfand.[19] In their subsequent conversations, Ms. Koplin asked him "if something happened to him what should happen to his law practice, words to that effect, and he refused to answer me. I asked several times."[20] A possible explanation for this reluctance to consider future plans for his firm was suggested by his sister, Carol Eyler, who observed that her brother never thought he would die and so made no plans for afterwards.[21] In any event, Mr. Fiel did execute a will and a trust document, both dated June 20, 2000. These documents named Alvin Elfand as executor and trustee, respectively. Mr. Elfand's associate, Howard Lieberman, was named as substitute

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16 7/19/2005 N.T. at 19 (Elfand).
17 7/19/2005 N.T. at 18-20, 55 (Elfand).
18 9/27/2005 N.T. at 7-9 (Eyler).
19 7/19/2005 N.T. at 20-21 (Elfand); 7/20/2005 N.T. at 97 (Koplin).
20 7/20/2005 N.T. at 98 (Koplin).
21 9/27/2005 N.T. at 19 (Eyler).

trustee/executor. Significantly, no family member was named for these fiduciary positions. Both the Will and the Deed of Trust granted the Executor/Trustee broad discretion in the operation—and sale-- of Mr. Fiel's "business interests:"

> **BUSINESS INTERESTS**
> I now have certain business and professional interests, including without limitation my law practice, and I expect that some or all of these business interests and professional interests will eventually pass to my Trustees. I wish my Trustees to have the fullest discretion in dealing with any such interests. Accordingly, and except as otherwise provided in any shareholders' or similar agreements affecting the disposition of such interests and subject to accepted ethical constraints governing the conduct of my law practice and the welfare of my clients, I authorize my Trustees:
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> (A) To conduct, alone or with others, any business in which I am engaged or in which I have an interest at the time of my death, with all the powers of an owner with respect thereto, including the powers to delegate discretionary duties to others;
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> (E) To sell any or all of such interests at such time or times, to such persons, for such prices, and on such terms and conditions as they think advisable; to cause or prevent the incorporation, recapitalization, merger, consolidation, reorganization or liquidation of the business interest….[22]

Shortly before Mr. Fiel's death, his sister Carol Eyler recalls telling Alvin Elfand that the family would like to "preserve" the law firm and that they would like Vince Presto to take care of it.[23] To honor this family desire that Stuart's name be continued in the law firm, Ms Koplin had general discussions with Vince Presto to determine his willingness to help preserve the Fiel name as "Fiel and Presto" without making any firm commitments at that time. Believing it necessary that the new firm name be in existence while the two parties were alive, there was some urgency.[24] In July 2000, Mr. Presto

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[22] Ex. R-251 (emphasis added). Mr. Fiel's Will, Para. VIII contained identical provisions for his business interests, except rather than refer to "Trustees" the will referred to "Executors." See Ex. R-250.

[23] 9/27/2005 at 19-20 (Eyler); 7/19/2005 N.T. at 141-43 (Elfand).

[24] 7/20/2005 N.T. at 106-07 (Koplin)(Ms. Koplin noted that Mr. Fiel had never told her of any intent that Vince Presto assume control of the firm).

agreed to this proposal and articles of incorporation were prepared for "Fiel and Presto Associates, P.C." by SGLK. [25]

After Mr. Fiel's death, Alvin Elfand asked Ms. Eyler not to return to the law firm offices because, he testified, he had been advised by office staff that they would quit if she returned.[26] The objectors are highly critical of this action, and assert that it had serious practical consequences to the subsequent functioning of the law firm. In their formal objections, for instance, they state that Ms. Eyler had been employed as " manager of the law firm" and assert that her "knowledge of the firm's business (the status and value of the existing cases) would have been helpful for an orderly and profitable disposition of the Estate's interest in the law firm."[27]

In her testimony, however, Ms. Eyler presented a much more modest description of her involvement in her brother's firm. Ms. Eyler, who had never studied law, described herself as a realtor. Although she had helped an attorney, Joe Saraco, conduct a "touch inventory" of the firm's cases, she could not give an exact count of those cases except that it "had to be more than a thousand." She had helped her brother prepare three cases—Galinsky, Menafee and Torres—but could not remember the names of any other cases. She conceded that she did not know the value of any of the cases in the firm and was not aware of any such records. She also conceded that she was not the office

[25] 7/19/2005 N.T. at 63 (Elfand); 7/21/2005 N.T. at 147 (Koplin). See Ex. O-1.
[26] 7/20/2005 N.T. at 47 (Elfand). Mr. Elfand identified Helene Morgera, the office manager, as the source of this advice. In a July 24, 2001 letter, Alan Mittelman, counsel for the objectors, rued that the "ill will" resulting from this action "may never be cured." Ex. R-273.
[27] 4/4/2005 Objections, ¶ 31. The objectors attack Mr. Elfand for "abruptly" terminating "Mrs. Eyler's employment as manager of the law firm on the day of Decedent's funeral." Id.

manager of the firm, and had neglected to correct her attorney, Alan Mittelman, when he referred to her as such in correspondence.[28]

From the beginning of his administration of the Fiel Estate, Alvin Elfand was aware that the law firm presented unique issues as an estate asset.[29] On the advice of Ms. Koplin, Elfand appreciated the necessity of appointing a supervising attorney for the firm because of ethical prohibition against a layperson making legal decisions for a law firm.[30] To fill this role, Elfand initially appointed Vince Presto supervising attorney.[31] On one key point, Mr. Elfand's testimony was unwavering: his intent to transition the Fiel law firm as quickly as possible to Vince Presto or some other attorney.[32] Presto confirmed that this had been Elfand's stated goal.[33]

Initially, Elfand believed the transition to a group headed by Presto would take 60 to 90 days.[34] There were many reasons Elfand gave for the necessity of this transition. In his testimony, Elfand expressed acute awareness of the perils of this transition period. He was concerned, first of all, about potential malpractice. Because of the unique nature of a personal injury firm, there was always a risk that dissatisfied clients might leave the

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[28] 9/27/2005 N.T. at 33, 35-36, 45-47, 66-67, 81-83 (Eyler referencing July 24, 2001 letter by Alan Mittelman, R-273 complaining that the decision to "fire" Ms. Eyler was "so strange since Carol was the office manager….").

[29] 7/19/2005 N.T. at 61, 69, 213 (Elfand). As Ronald Levine of the Schachtel firm observed, the law firm was viewed as both an asset that could produce money for the estate and as a potential liability because of the threat of malpractice claims. 9/26/2005 N.T. at 103 (Levine).

[30] 7/19/2005 N.T. at 61 (Elfand); 7/20/2005 N.T. at 123 (Koplin).

[31] 7/19/2005 N.T. at 61-62 (Elfand).

[32] 7/19/2005 N.T. at 69 (Elfand). Ms. Koplin, likewise, testified that "the plan was to operate it (i.e. the law firm) for some short term and to transition it to Vince Presto and/or other attorneys." 7/21/2005 N.T. at 148 (Koplin). Ronald Levine likewise agreed that the objective was "to transition cases out in an orderly fashion and to collect as much money as you can for the Estate and terminate the law firm, at all times being mindful of the rights and obligations owed to clients." 9/26/2005 N.T. at 102 (Levine).

[33] 9/28/2005 N.T. at 117 (Presto)(After Stuart Fiel's death, Presto recalled Elfand focusing on a transition "sooner rather than later").

[34] 7/20/2005 N.T. at 59-60 (Elfand). Levine also believed the transition would occur in a few months. 9/26/2005 N.T. at 206-07 (Levine).

firm or that disgruntled associates would leave and steal the files.[35] There was also the concern that if the firm simply shut down, it would force clients to turn to other firms. If, however, the firm remained open—and the attorneys paid—there was the possibility that the lawyers would be less likely to leave with the files.[36] Finally, Elfand worried that the firm's morale would suffer due to Fiel's death.[37] Unfortunately, after appointing Vince Presto supervising attorney, Elfand quickly became concerned about Presto's performance. He was warned by the office manager that cases were not moving smoothly. This raised the specter of a potential conflict of interest or that Presto was deliberately stalling in settling cases to increase the benefits for himself.[38]

To address these concerns, Elfand arranged a meeting with Presto in mid-August 2000. At that meeting, however, Elfand was confronted by a set of demands by Presto, a "wish list," that was unacceptable to Elfand. In particular, Elfand found the demand for a ten month severance "if everything goes down the drain" untenable. Presto also wanted the first right of refusal of all shares of Fiel and Presto, with the right to then determine how to dole out shares to the other attorneys. He wanted all new cases to be written up as "Fiel and Presto" cases with a changed fee agreement. In addition, Presto wanted the firm to take out a disability policy on him but paid for by the Fiel firm. According to Elfand, Presto demanded a raise with an upfront bonus of $25,000.[39]

After considering Presto's demands for several weeks and realizing the potential conflict inherent Presto's role as supervising attorney and the person to whom the firm

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35 7/19/2005 N.T. at 69-70 (Elfand).
36 9/26/2005 N.T. at 206-07 (Levine).
37 7/19/2005 N.T. at 213 (Elfand).
38 7/19/2005 N.T. 71-73, 160 (Elfand); 7/20/2005 N.T. at 55-56 (Elfand).
39 See R-255 ("Vince Wish List" as transcribed by Elfand); 7/19/2005 N.T. at 71-76 (Elfand). Presto did not recall demanding a raise plus bonus, the 10 month severance pay or the purchase of a disability policy. 9/28/2005 N.T. at 151-52 (Presto). In Paragraphs 3, 4 and 5 of Elfand's notes of "Vince Wish List," however, the raise, disability policy and 10 month severance requests are noted. Ex. R-255.

would be transferred, Elfand decided to appoint a new supervising attorney for Pennsylvania, Bennett Block. Efland chose Mr. Block because he had experience with personal injury litigation and because "I wanted somebody that was going to be loyal to the Estate."[40] Elfand delegated numerous tasks to Block: evaluating the status and value of all of the firm cases; identifying potential malpractice issues with the cases; analyzing the firm's cash flow and costs; supervising the attorneys; keeping track of settlements; eliminating costs.[41] The review of any potential malpractice claims was particularly pressing for Elfand because the firm's coverage was due to expire in late October 2000. Mr. Block discovered and was able to correct some problematic files, while identifying three potential malpractice claims.[42]

Meanwhile, less than 2 months after Mr. Fiel's death, his brother Scott Fiel wrote a letter dated September 11, 2000 to Alvin Elfand asking him to resign as executor and trustee: "[T]he family has decided to request your resignation as trustee and that of Howard as alternate" so that "Carol and I shall assume trusteeship in your place."[43] Scott Fiel also demanded that the estate attorneys communicate directly with him and Ms. Eyler as to all legal documents, checkbooks, ledgers and court communications. Ex. R-39. The beneficiaries "regarded the law firm asset as 'fresh fruit' that should be disposed

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[40] 7/19/2005 N.T. at 76-77 (Elfand). Bennett Block testified that between 1978 and 2000 his practice was virtually all litigation, mostly personal injury. He had known Levine all his life and was of counsel with the SGLK firm but received no set salary. 9/29/2005 N.T. at 83—84.

[41] 7/19/2000 N.T. at 78-80 (Elfand). Ms. Koplin advised Elfand on the need to evaluate the firm's cases as to potential malpractice, their status of preparation, their status as to open or closed, and the potential value. This information would also be helpful in determining taxes. 7/20/2005 N.T. at 130-31 (Koplin). Levine concurred. 9/26/2005 N.T. at 103-04 (Levine).

[42] See Ex. R-236 (October 25, 2000 letter by Bennett Block); 7/19/2005 N.T. at 80-81 (Elfand); 7/21/2005 N.T. at 122-23 (Koplin).

[43] Ex. R-39. Interestingly, although professing a desire to insure "that Stuart's wishes be fulfilled," both Carol Eyler and Scott Fiel admitted in their testimony that they had mischaracterized the terms of the trust that Stuart Fiel had established for his nieces and nephews because they did not want distribution at the age of 21 as set forth in the trust document. 9/28/2005 N.T. at 26 (Scott Fiel); 9/27/2005 N.T. at 84 (Eyler).

of as quickly as possible."[44] Upon questioning during the hearing, Scott Fiel testified that he did receive from the estate copies of transactional statements for bank accounts and IRAs, death tax returns, the July 2001 draft of the Fiduciary Accounting, profit and loss statements regarding the Fiel firm.[45] When Elfand refused to step down as Executor and Trustee, the objectors hired their own counsel, Alan Mittelman.[46] Although Mittelman complained about the lack of information he was able to obtain about the status of the law firm prior to February 2001,[47] he acknowledged that this reticence reflected the estate's counsel's strategy to maximize its value for the estate." [48] He also conceded that Ms. Koplin agreed to meet with him[49] and responded to his many letter inquiries.[50]

In January 2001, Elfand directed Ronald Levine of SGLK to resume negotiations with Vince Presto[51] after the malpractice review and valuation of the Fiel cases had been completed. A knowledge of the value of the cases was essential, Elfand believed, for meaningful negotiations with Presto.[52] Once again, Elfand initially believed that these negotiations could be wrapped up in 60 days.[53] Presto recalls Levine asking for a proposal so that Elfand could evaluate the advisability of transferring the cases to him in

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[44] 1/6/2006 Objectors' Memorandum at 11, quoting 9/27/2005 N.T. at 187-88 (Scott Fiel).
[45] 9/28/2005 N.T. at 23-25 (Scott Fiel).
[46] 9/27/2005 N.T. at 206 (Scott Fiel); 9/27/2005 N.T. at 27 (Carol Eyler).
[47] 9/28/2005 N.T. at 31-32 (Mittelman). Mittelman testified that when the beneficiaries requested information about the sale of the law practice, they were told that they would get no information whatsoever due to the delicate status of the negotiations, but by January/February 2001 this changed. Id Mittelman noted that he first received information about the status of the law firm in a March 9, 2001 letter from Koplin. Id. at 46. See Ex. O-36.
[48] See Ex. O-36 (Letter dated February 8, 2001 from Alan Mittelman to "Bernice").
[49] 9/28/2005 N.T. at 76-77 (Mittleman). By letter dated September 12, 2000, Mr. Mittelman requested a meeting with Ms. Koplin. Ex. R-265. On September 18, 2000, they met for 3 hours. Ex. R-221. Mittleman conceded that during that meeting he made veiled threats of potential litigation: "And I can't tell you what Mrs. Koplin took from that, but my message was clear that I am the kind of person who they should talk to, that there are other guys in, or ladies in our office who are more than capable of litigating if that's where this Estate was going to go." 9/28/2005 N.T. at 82 (Mittelman).
[50] 9/28/2005 N.T. at 84 (Mittelman). See generally Ex. O-36 (Mittelman correspondence).
[51] 9/26/2005 N.T. at 106-07 (Levine).
[52] 7/19/2005 N.T. at 94 (Elfand).
[53] 7/20/2005 N.T. at 60 (Elfand).

terms of the estate's interest.[54] Nonetheless, the negotiations broke down in March, when Elfand and Levine learned that Manes and other attorneys had decided not to go along with Presto.[55] Initially, the estate attempted to negotiate with both factions,[56] but on the advice of Ms. Koplin and Mr. Levine, they decided to hire an attorney, Patrick Kittredge, to handle any potential litigation.[57] In April 2001, the estate locked out four attorneys: Manes, Goodman, Williams and Presto.[58] Afterwards, Kittredge brought litigation against the Manes group under the caption Stuart D. Fiel Assocs. v. Manes, Williams, & Goodman, July 2001, No. 662, which resulted in a settlement (Ex. R-115) in November 2003. Negotiations continued with Presto, until a settlement was reached on January 11, 2002.[59] Meanwhile, the Fiel Firm formally closed its doors in October 2001, after letters were sent to notify the remaining clients[60] and a tail malpractice insurance policy had been obtained.[61]

In the end, the SDFA law firm did show a profit. Before the SDFA firm closed, it generated $359,548 in profit as of November 20, 2001. By December 31, 2004, additional revenues of $915,582 were deposited into the Trust, for a total law firm profit through the year 2004 of $1.3 million.[62]

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54 9/28/2005 N.T. at 161 (Presto).
55 7/19/2005 N.T. at 99 (Elfand).
56 9/26/2005 N.T. at 123-27 (Levine); 7/19/2005 N.T. at 100 (Elfand).
57 7/19/2005 N.T. at 101 (Elfand)
58 7/20/2005 N.T. at 18 (Elfand).
59 7/20/2005 N.T. 21 (Elfand). This settlement agreement is marked Ex. O-34.
60 7/19/2005 N.T. at 99-105 (Elfand).
61 7/21/2005 N.T. at 123-24 (Koplin); 9/26/2005 N.T. at 138 (Levine obtained a $2 million tail policy)..
62 Elfand 3/7/2006 Memorandum at 46; Ex. R-21; Interim Trust Account, Ex. J-8, Schedule B at 19-33; 9/29/2005 N.T. at 179 (Elfand). The objectors generally agree with these computations, but assert that if the firm had been closed immediately after Fiel's death, the total value of the firm would have been $2,846,510, so that the resulting loss due to the continued operation of the firm was $1,300,756. Objectors' 1/6/2006 Memorandum at 39. But Elfand counters, if the firm had been valued as the objectors' originally asserted, the resulting increase in taxes would have amounted to "some $1,446,000." Elfand, 3/3/2006 Memorandum at 46, n.23.

B. Testamentary Plan and Assets

Stuart Fiel's Will dated June 20, 2000 provided for specific bequests to forgive any loans or mortgages to two specific individuals. The residue of his estate was to pour over to the Trustees under the Deed of Trust he executed on June 20, 2000. Alvin Elfand was named both Trustee and Executor. The deed of trust provided for specific monetary gifts to relatives, employees, Temple University School of Law, the Federation/Allied Jewish Appeal of Philadelphia and Beth Emeth-B'nai Yitzhok. It also provided for the creation of a charitable trust—the Israel and Minnie Fiel Foundation for Jewish Childrens' Resources. Alvin Elfand and Bernice Koplin were named the initial trustees of the foundation.

The residue was to be used for the creation of two trusts. The first trust is for the benefit of Mr. Fiel's nieces, Lauren Fiel and Brynn Fiel, and for his nephew, Benjamin Eyler. The rest of the residue is to be held in trust for decedent's parents and two siblings. The Trustee is directed to pay or apply the net income at least annually to the beneficiaries in the prescribed shares: 15% to Adele Fiel, 15% to Leonard Fiel, 35% to Carol Eyler and 35% to Scott Fiel. The trustee is also authorized to pay as much of the principal as he deems advisable in this sole discretion. The trust terminates upon the death of these beneficiaries, and any remaining principal is to be distributed to the decedent's nieces and nephew per capita.

The total gross estate listed on the decedent's 706 Federal Estate Tax Return was $12,810,972.45. It listed real estate assets of $3,615,000, stocks and bonds of

$1,660,907.56, notes and cash of $$274,289.84, insurance of $6,074,681.81, jointly held property of $33,446.33, and annuities of $1,117,646.93. [63]

The balance of the estate was distributed to the trust, as well as those assets of which the trust was the direct beneficiary such as IRAs and life insurance payments. According to the accountant, Pennsylvania Transfer Inheritance Tax and Estate Tax in the amount of $1,340,000 was paid on May 21, 2001 and $41,917.55 on November 15, 2004.

II. Questions of Adjudication

As questions for adjudication, the accountant notes that the Executor/Trustee, Alvin Elfand is seeking approval of his total compensation of $275,000 for the combined administration of the Estate and Trust for the period July 28, 2000 through December 31, 2004. He is also seeking approval of attorney fees for the firm of SGLK in the total amount of $625,000 for the period through December 31, 2004, but by agreement the amount presently at issue is $490,350. The Petition for Adjudication further states that it "is anticipated that an additional $225,000 will be paid thereafter upon approval by the court."[64] Objections to this request for fees and commission were filed as well as a request to surcharge the Trustee/Executor.

Legal Analysis

A. The Executor/Trustee Should Not Be Surcharged for the Alleged Negligent Administration of Decedent's Law Firm

The objectors assert that the Executor/Trustee Alvin Elfand should be surcharged in the amount of $1,650,000 plus "additional damages" because "a substantial asset of the Estate—a law firm—was negligently administered" and a "substantial Estate value

[63] Ex. J-4.
[64] Petition for Adjudication and Statement of Proposed Distribution (Trust) at 4, ¶ 13.

was thereby dissipated."[65] In their initial objections, they were critical of Mr. Elfand's decision to "abruptly" terminate Carol Eyler as "manager" of the law firm "even though Mrs. Eyler's knowledge of the firm's business (the status and value of the existing case) would have been helpful for an orderly and profitable disposition of the Estate's interest in the law firm."[66] They also complained, initially, that the Executor/Trustee "grossly undervalued" the law firm asset at "$621,000 on the Estate Tax Return "without valuing the firm's existing cases."[67] In addition, they assert that Mr. Elfand breached his fiduciary duty by failing to conduct a cost/benefit analysis of the consequences of the continued operation of the SDFA law firm.[68] The record presented during the hearings, however, undermines these and other claims regarding the continued operation of the law firm.

A surcharge is a "penalty imposed for failure of a trustee to exercise common prudence, skill and caution in the performance of its fiduciary duty, resulting in the want of due care." Pew Estate, 440 Pa. Super. 195, 236, 655 A.2d 521, 541 (1994). Typically a trustee's standard of care is "that which a man of ordinary prudence would practice in the care of his own Estate" but if a trustee has greater skill "then the fiduciary's standard of care must be judged to the standard of one having a special skill." Id., 440 Pa. Super. at 236, 655 A.2d at 542-43. The objectors do not dispute that the Trustee Executor should be held to the standard of "common prudence, common skill and common caution." 1/6/2006 Objectors' Memorandum at 41 (citations omitted).

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65 4/4/2005 Objections at 1. See also 1/6/2006 Objectors' Memorandum at 1 & 63.
66 4/4/2005 Objections, ¶31.
67 4/4/2005 Objections, ¶35.
68 1/6/2006 Objectors' Memorandum at 52.

As the parties seeking to surcharge a trustee, they have the burden of proof that he breached his fiduciary duty. In re: Dentler Family Trust, 2005 Pa. Super. 146, 873 A.2d 738, 745 (2005), citing Estate of Stetson, 463 Pa. 64, 345 A.2d 679, 690 (1975). The actions of a trustee, however, cannot be analyzed in a vacuum. Instead, "[o]ur law is well-settled that evaluating the propriety of a trustee's course of conduct requires consideration of the terms of the trust, the nature of the power accorded to the trustee, and all the circumstances surrounding the trust." In re Stella Scheidmantel: Appeal of Trustee Sky Trust, 2005 Pa. Super. 6, 868 A.2d 464, 487 (2005)(citations omitted).

In His Will and Deed of Trust, Stuart Fiel Gave His Executor/Trustee Broad Discretion to Conduct His Business Subject to Accepted Ethical Constraints

Only weeks before his death, Stuart Fiel executed a Will and Deed of Trust, naming his long-time friend and accountant as Executor and Trustee. Both of these documents specifically addressed Mr. Fiel's "business and professional interests." In both, Mr. Fiel expresses the clear intent that his Executor and Trustee should have "the fullest discretion in dealing with any such interests" with specific authority "[t]o conduct, alone or with others,; any business in which I am engaged or in which I have an interest at the time of my death, with all the powers of an owner with respect thereto, including the powers to delegate discretionary duties to others."[69] It is hard to imagine a more emphatic authorization for the exercise of discretion by a trustee/executor in the operation of decedent's business. As the Pennsylvania Supreme Court observed, it is an "important precept in our law that where a trust instrument is explicit as to the duty owed, it, as evidencing the settlor's [testator's] intent, should govern." In re Niessen, 489 Pa. 135, 139, 413 A.2d 1050, 1052 (1980).

[69] Exs. R-250, Para. VIII; Ex. 251, Para. VIII.

Nonetheless, the objectors fail to acknowledge the implications of those provisions in the Will and Deed of Trust that specifically give the Executor/Trustee authority to "conduct, alone or with others, any business in which I am engaged" or "to sell any or all such interests at such time or times, to such persons, for such prices, and on such terms and conditions as they think advisable."[70] Instead, they argue that the will did not direct the Executor to operate the business but merely contained "generic protective language: 'I wish my Executor to have the fullest discretion in dealing with any such [business] interests.'"[71] This argument is unpersuasive and fails to acknowledge the Will's explicit authorization given to the Executor/Trustee to carry on the decedent's business.

Objectors ask this court to ignore these key provisions and argue that the Executor/Trustee was bound by 20 Pa.C.S. § 3314 to obtain the consent of the beneficiaries or court authorization for the continued operation of SDFA. Since Mr. Elfand is also a trustee, however, the provisions of the Pennsylvania Uniform Trust Act would also apply and section 7780.6(29) sets forth as an "illustrative" power of a trustee the authority "[t]o continue or participate in the operation of any business or other enterprise and to effect incorporation, merger, consolidation, dissolution or other change in the form of the organization of the business or enterprise."[72]

Focusing strictly on 20 Pa.C.S.§ 3314, however, the objectors' claims are without merit. Section 3314 provides, inter alia, that "[t]he court, aided by the report of a master

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[70] Ex. R-251, Para VIII; Ex. R-250, Para. VIII.

[71] 4/4/2006 Objectors' Memorandum re Elfand at 2. Elsewhere, the objectors characterize the will and deed of trust as merely authorizing the executor/trustee "to handle his business interests in compliance with applicable ethical requirements." See 1/6/2006 Objectors' Memorandum at 8.

[72] The Uniform Trust Act is also clear that "the provisions of a trust instrument prevail over any contrary provisions in this chapter." 20 Pa.C.S. §7705(a). Under the former trust provisions in the PEF code, 20 Pa.C.S. § 7133,the powers of a trustee relating to the continued operation of a decedent's business were identical to those of an executor under section 3314.

if necessary, may authorize the personal representative to continue any business of the estate for the benefit of the estate and in so doing the court, for cause shown, may disregard the provisions of the governing instrument, if any. 20 Pa.C.S.§3314. To support their claim that Elfand failed to comply with the dictates of section 3314, objectors invoke Estate of McCrea, 475 Pa. 383, 380 A.2d 773 (1977). In McCrea, however, the court emphasized that the will at issue "contained no authority to continue the operation of either the farm or rental units"[73] in dispute, and is thus factually distinguishable from the Fiel will. In the instant case, the governing instruments clearly give the Trustee/Executor discretion to conduct the decedent's business "subject to accepted ethical constraints governing the conduct of my law practice."[74] This testamentary direction would thus control over section 3314. See generally Estate of Kurkowski, 487 Pa. 295, 301, 409 A.2d 357, 361 (1979)("a personal representative breaches his trust if he continues to operate a trade or business on behalf of an estate *in the absence of testamentary direction"). *

The Executor/Trustee therefore had the authority under Mr. Fiel's will and trust to continue operating his law firm "subject to accepted ethical constraints." The Executor/Trustee's actions will nonetheless be subjected to the test of "common prudence, common skill and common caution." Lentz Estate, 364 Pa. 304, 308, 72 A.2d 276, 278 (1950)(Even where will gave trustee authority to retain all securities in so doing failure to exercise common prudence, common skill and common caution will not be excused). A trustee must "administer the trust in good faith, in accordance with its provisions and purposes and the interests of the beneficiaries." 20 Pa.C. S. §7771.

[73] Id., 475 Pa. at 384, 380 A.2d at 774.
[74] Exs. R-250 & R-251, Para. VIII.

The objectors are highly critical of the Elfand's purported "decision" to continue the operation of the SDFA law firm "indefinitely" after Stuart Fiel's death.[75]As a matter of fact, the record supports the Executor/Trustee's claim that neither he, Ms. Koplin nor Mr. Levine ever intended to keep the doors of SDFA open for 15 months. On the contrary, they all anticipated an expeditious transfer of files either to Vince Presto or some other attorney.[76] What prevented this expeditious transfer, they convincingly established, was both critical ethical considerations in winding up a personal injury law firm that lacked easily accessible records and difficult, protracted negotiations with the firm's attorneys.

The objectors and the Trustee present radically different views of the ethical considerations in dealing with the SDFA firm after Stuart Fiel's death. The objectors assert that Elfand, as a nonlawyer executor, was precluded by Pennsylvania Professional Rule of Conduct 5.4(d) from operating the law firm. They also maintain that no rule of ethics precluded the Executor from simply collecting percentage based referral fees for the cases and quickly closing down the firm. The Executor/Trustee agrees that under Rule 5.4(d) a nonlawyer may not supervise a law firm. Instead, the Executor/Trustee speedily delegated to a supervising attorney not only supervision of the law firm but responsibility for serving its clients.

In support of their differing interpretations of the Executor/Trustee's duty to the estate and to the law firm's clients in the continued operation of the law firm, both parties

[75] 4/4/2005 Objections, ¶ 30 ("Predictably, Mr. Elfand's ambition to run the decedent's law firm indefinitely rather than liquidate it to realize its maximum value to the Estate for minimal expense, led to quarrels with the beneficiary objectors'). See also 1/6/2006 Objectors' Memorandum at 17, ¶ 44.
[76] 7/19/2005 N.T. at 69 (Elfand)("Well, my goal was to transition it, keep the name alive, transition it to, hopefully, Mr. Presto and his associates as quickly as feasible….");7/21/2005 N.T. at 148 (Koplin)(noting the plan to transition the firm to Vince Presto and/or other attorneys after operating the law firm for "some short term"); 9/26/2005 N.T. at 102 (Levine)(the goal was to transition the firm in an orderly fashion, collect as much money as possible for the beneficiaries and terminate the law firm).

submitted expert reports and testimony by Jeffrey Reiff (for the objectors) and Lawrence Fox (for the executor). For Mr. Reiff, the "easiest solution at hand was exemplified by James Carville as the campaign manager of former President William Jefferson Clinton…'KISS…., keep it simple, stupid!'"[77] Mr. Reiff emphasized the unique nature of a personal injury firm headed by a charismatic leader who exercised a strong and guiding hand over his firm through daily "mail meetings." He asserted that neither Mr. Elfand nor his attorneys had the requisite experience with personal injury practice. "The only viable option," he concluded, "was to shut the firm down as quickly as possible consistent with the need to protect the clients in accordance with ethical rules."[78] In his view, operating costs were exacerbated by the hiring of Bennett Block as supervising attorney; the executor failed to make a cost/benefit analysis that would have told him to "cut and run" and refer out all cases; a personal injury firm specialist should have been consulted; time was wasted in efforts to obtain a valuation of cases.[79]

The expert report and testimony submitted by the Executor/Trustee present a very different perspective on the standard of care of the executor regarding the operation of the law firm. As Lawrence Fox observed, a unique aspect of the law firm as an asset was the prohibition under Pennsylvania Rule of Professional Conduct 5.4 against the supervision of a law firm by a nonlawyer. This required Elfand to delegate those tasks to lawyers. Moreover, the firm's duties to its clients must come first, and as a consequence, it was imperative to make sure cases were handled competently and diligently. It was therefore necessary to keep the staff "on board" to service the needs of the fast-paced practice and its clients. Under Pennsylvania Rule of Professional Conduct l.6 the law firm had an

[77] Ex. O-41 (Reiff Expert Report) at 11.
[78] Ex. O-40 (Reiff Expert Report) at 9.
[79] Ex. O-40 (Reiff Expert Report) at 2-11.

obligation to maintain the confidentiality of its clients' files. The law firm was not a typical asset that could be quickly disposed of to benefit the trust beneficiaries; instead, it was also a potential liability to those beneficiaries due to the threat of malpractice claims. Ex. R-19 (Fox Expert Report) at 3-6.

It was therefore imperative that any potential malpractice claims be identified and that appropriate malpractice insurance maintained. Moreover, since clients under Rule of Professional Conduct 1.16(a)(3) had an absolute right to fire their attorney, the so-called "assets" of the trust might easily have walked out the law firm's door. Similarly, the attorneys at SDFA were free under Professional Rule of Conduct 5.6 to leave the firm at any time while soliciting clients. As a practical matter, if they had opted to do so immediately after Fiel's death, they would have owed the firm nothing until a recovery was obtained by the clients and "then they would owe the firm only an amount limited to quantum meruit, an amount that would have to be litigated" and capped as "no more than an hourly rate times the hours put in"—a calculation it would have been impossible to make since the attorneys in the Fiel firm kept no time records.[80]

More specifically, Mr. Fox concluded that it was appropriate to hire an attorney, Bennett Block, to supervise the firm due to the ethical prohibition against a nonlawyer supervising a law firm. In fact, he was a better choice than Vince Presto, because once a decision was made to transition the firm to Mr. Presto, he had a potential conflict of interest with the estate beneficiaries.[81]

The limitations of the analysis of the objector's expert report were revealed in Mr. Reiff's live testimony. He conceded, for instance, that he had read neither Mr. Fiel's

[80] Ex.R-19 (Fox Expert Report) at 8, 5-7.
[81] Ex. R-19 (Fox Expert Report) at 14.

Will nor his Deed of Trust with their explicit provisions as to "business interests."[82] He nonetheless offered the expert opinion "with a reasonable degree of legal certainty that the actions or inactions of the Executor/Trustee Alvin Elfand were a reckless, negligent breach of the fiduciary obligations owed to the beneficiaries of the Stuart D. Fiel Estate."[83] This sweeping conclusion based on breach of fiduciary duty was undermined in subsequent questioning. For instance, when asked if Elfand had breached his fiduciary duty by failing to bring in an outsider to conduct the malpractice review, the objectors' expert undercut his prior sweeping opinion when he demurred: "whether that constitutes a breach of fiduciary obligation, I am not qualified to state."[84] Although he made the broad assertion that there was an "ethical" duty to wrap up the firm sooner than 15 months,[85] in follow-up questioning, the objectors' expert once again demurred that he is "not an expert on ethics."[86] Significantly, he was unable to point out any specific harm suffered by the firm's clients such as a missed hearing or deadline.[87]

As for specific actions by Elfand in administering the SDFA law firm during the transitional period, the objector's expert found many of them necessary and prudent. He agreed, for instance, on the absolute necessity of appointing a supervising attorney for the firm.[88] He agreed that is was proper for Elfand to order a review of the files for potential

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[82] 9/29/2005 N.T. at 34 (Reiff).
[83] 9/29/2005 N.T. at 15 (Reiff)(emphasis added).
[84] 9/29/2005 N.T. at 42 (Reiff). Even when pressed to elaborate, Mr. Reiff stated: "I am not qualified to make that determination. I would have done it differently. I would have done it more objectively." Id.
[85] 9/29/2005 N.T. at 48 (Reiff)("I think that ethically there was a duty to wrap this thing up and move quickly rather than to let it drag on for fifteen months").
[86] 9/29/2005 N.T. at 49 (Reiff)("Sir, I am not an expert on ethics. I will leave that to my esteemed colleague Mr. Fox, who wrote a great report on ethics").
[87] 9/29/2005 N.T. at 50 (Reiff).
[88] 9/29/2005 N.T. at 71-72 (Reiff). He did not believe, however, that Bennett Block was a good choice for this position.

malpractice: "Absolutely, that should have been done."[89] He agreed it had been reasonable for Elfand to authorize negotiations with the Manes group once they split with Presto.[90] He agreed that once Elfand was unable to reach an accord with either Presto or the Manes group, he had "no choice" but to retain an expert like Kittredge experienced in litigation.[91] He agreed it was reasonable for Elfand to order a review of the files to determine their value.[92]

On the key issue of Elfand's valuation of the firm for tax purposes, the objectors' expert conceded that he had never personally handled a federal audit and was unfamiliar with the standards of the IRS. He therefore offered no opinion on this point.[93]

On balance, therefore, the objectors' expert opinion that Elfand had breached his fiduciary duty to the beneficiaries in his administration of the SDFA law firm after Stuart Fiel's death was not persuasive, especially in its failure to come to grips with the standard of care in the Will and Deed of Trust concerning the continued operation of Mr. Fiel's business operations "subject to accepted ethical constraints governing the conduct of my law practice and the welfare of my clients."[94] Far more compelling was the testimony of Elfand's expert, who had reviewed the Fiel Will and Deed of Trust.[95] In outlining the ethical constraints on the Executor/Trustee's operation of the law firm after the death of its sole shareholder Stuart Fiel on July 28, 2000, Mr. Fox observed:

> The restraint on the Executor was that the Executor could not supervise the operation of the law firm and the Executor could not take any action even if the

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89 9/29/2005 N.T. at 38-39 (Reiff). He did not believe this review was properly done.
90 9/29/2005 N.T. at 70-71 (Reiff).
91 9/29/2005 N.T. at 71 (Reiff). He would have like Kittredge brought in sooner.
92 9/29/2005 N.T. at 44 (Reiff). He would, however, have selected someone other than a nonpersonal injury attorney or Trugman and Associates. He conceded, however, that valuation of cases was necessary for any cost/benefit analysis. Id. at 66 (Reiff).
93 9/29/2005 N.T. at 76 (Reiff). He conceded as well that he was unfamiliar with Trugman and Associates.
94 Ex. R-250, paragraph VIII; Ex. R-251, paragraph VIII.
95 10/12/2005 N.T. at 19 (Fox).

> Executor thought it was in the best interest, best financial interest of the law firm, that interfered with in any way the ethical obligations the law firm had to the clients of the law firm.
>
> So that unlike most assets, where you can maximize the value and most assets you can decide to close up shop today or continue to operate the business, depending on what your best judgment is, here there were serious limitations on what the Executor could do, because the asset was a law firm and the law firm had clients. And despite the untimely death of Mr. Fiel, the law firm continued to have all of these duties to the clients of the law firm that operated as a serious constraint on what otherwise one might say an executor could do.[96]

Because of its unique nature as an estate asset, the law firm's cases could not be referred to the highest bidder, but had to be referred to a lawyer capable of meeting the standard of care.[97] Given the tortured history of negotiations, Mr. Fox concluded with a reasonable degree of professional certainty that the executor and his lawyers "acted well within the standard of care in terms of doing the best they could to realize as much for the Estate as they could under the circumstances" particularly since the law firm was "as much more likely to result in significant liability to the estate than significant opportunity" but "that the Estate realized some significant sums seemed to me to be a pretty good accomplishments under the circumstances."[98]

As to more specific factual criticisms of actions taken by the Executor/Trustee during his administration of SDFA, the objectors raise myriad issues in their 64 page post-hearing memorandum. In so doing, they admit that the law firm was a "complicated asset" as a high volume/low value personal injury firm.[99] But in contrast to their initial objections, they concede that Carol Eyler was not the "manager" of the law office, but an "unofficial" paralegal or legal secretary who worked primarily for Mr. Fiel, thereby abandoning the claim that the termination of her employment deprived the executor of

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96 10/12/2005 N.T. at 23-24 (Fox).
97 10/12/2005 N.T. at 39(Fox).
98 10/12/2005 N.T. at 40 (Fox).
99 1/6/2006 Objectors' Memorandum at 6.

her "knowledge of the firm's business (the status and the value of existing cases)."[100] As Ms. Eyler admitted in testimony, she did not know the value of the firm's cases nor was she aware of any such records.[101]

The objectors criticized Elfand for removing the firm's "heir apparent," Vince Presto as supervising attorney out of "misconceived pique", and then bringing in Bennett Block to serve as supervising attorney for Pennsylvania.[102] In his testimony, however, Elfand articulated various business reasons why Presto had proven unsuitable as supervising attorney, especially reports that he was not supervising the other lawyers and that he was not moving the cases along in an acceptable manner.[103] The implications of these conclusions were elaborated on by Lawrence Fox, Elfand's expert witness:

> It was particularly wise in my view for the Executor and his lawyers to recognize that they could not rely on Vince Presto to be the person in charge of the office during the period of time Mr. Presto was also viewed as a potential transferee of the caseload of the law firm. It was the duty of the Executor and his lawyers to benefit the estate through the preservation of the law firm asset to the greatest extent possible. Yet if Mr. Presto was in charge of the office during the time that there were negotiations going on between the estate and Mr. Presto on the transfer and its economic terms, Mr. Presto's motivation in administering the law firm might be skewed by his conflicting interest in negotiating against it. Ex. R-19 (Fox Report) at 14

As Elfand testified, he was concerned about Presto's potential conflict of interest and chose Block as supervising attorney because he wanted someone loyal to the estate whom he could trust.[104]

The objectors criticize Elfand for withdrawing from transition negotiations with Presto "to operate the law firm himself for an extended time."[105] Yet Elfand testified in

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[100] **Compare** 4/4/2005 Objections, ¶ 31 **with** 1/6/2006 Objectors' Memorandum at 6-7, ¶ 15.
[101] 9/27/2005 N.T. at 66-67 & 81 (Eyler).
[102] 1/6/2006 Objectors' Memorandum at 11-14.
[103] 7/19/2005 N.T. at 70-78 (Elfand).
[104] 7/19/2005 N.T. at 77 (Elfand).

detail on his reasons for postponing negotiations with Presto until early January 2001 so that case files could be analyzed for potential malpractice, status reports and valuation by Bennett Block.[106] The objectors' own expert witness, Jeffrey Reiff, agreed on the need for these analyses.[107] In concluding that he should be armed with knowledge of the value of the cases before resuming negotiations with Presto in January 2001, Elfand was exercising the discretion granted to him under the will as well as his prudent business judgment.

The objectors also claim Elfand was imprudent in not conducting a cost/benefit analysis during the transitional period.[108] There is an inherent trap to this argument. Performance of a cost benefit analysis would have presupposed an intent or plan to continue the operation of the law firm—which Elfand has steadfastly denied. Moreover, Elfand's attorney, Ronald Levine, did conduct analyses of the firm's expenses[109] and Elfand continually checked profit/loss statements throughout the firm's operation.[110] Finally, as a practical matter, the cost or benefit in keeping the firm open could be definitively determined "only through the benefit of hindsight"[111] and it is axiomatic that when evaluating a fiduciary's actions, "[h]indsight will never be permitted to be substituted for foresight." Lentz Estate, 364 Pa. at 309,72 A.2d at 278.

The law firm should have been transitioned promptly to Vince Presto, the objectors assert, because no rule of professional ethics precluded the executor from collecting referral fees pursuant to Pennsylvania Rule of Professional Conduct 1.5(e).

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105 1/6/2006 Objectors' Memorandum at 15.
106 7/19/2005 N.T. at 78-79 & 94 (Elfand).
107 9/29/2005 N.T. at 44, 38-39 (Reiff).
108 1/6/2006 Objectors' Memorandum at 20.
109 9/26/2005 N.T. at 101-02 (Levine). See, e.g. Ex. R-36 (9/11/2000 Memorandum by Levine analyzing "cash flow needs").
110 7/20/2005 N.T. at 6 (Elfand).
111 Ex. R-19 (Fox Expert Report) at 12.

They argue that the cases could have been quickly referred based on a percentage referral fee rather than engaging in the laborious, time-consuming quantum meruit analysis undertaken by the Estate.[112] Rule 1.5 (e) provides:

> A lawyer shall not divide a fee for legal services with another lawyer who is not in the same firm unless:
>
> (1) The client is advised of and does not object to the participation of all the lawyers involved, and;
>
> (2) The total fee of the lawyers is not illegal or clearly excessive for all legal services they rendered to the client.

Objectors also cite Philadelphia Bar Association Guidance opinions which are expressly "advisory" and nonbinding on any court.[113]

The Executor, in contrast, properly asserts that Professional Rule of Conduct 5.4(a)(2) controls since this case involves an estate, rather than a living attorney, who seeks to transfer the cases. Rule 5.4(a)(2) provides that " a lawyer who undertakes to complete the unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that portion of the total compensation which fairly represents the services rendered by the deceased lawyer."[114]

The advisory opinion cited by the objectors that is closest factually to the present dispute is Opinion 97-4, but as the objectors concede, it contains contradictory advice. After suggesting that under Rule 5.4(a)(2) "[t]here is no per se rule that prohibits quantification of the amount under the rule as a percentage of the total fee," the opinion concludes:

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[112] 1/6/2006 Objectors' Memorandum at 43-46.

[113] See, e.g., 1/6/2006 Objectors' Memorandum, Exs. A, B & C (Caveats to Opinion 93-3 (May 19, 1993) PBA Professional Guidance Comm.; Opinion 92-1 (May 1992) PBA Professional Guidance Comm.; Opinion 97-4 (May 1997)PBA Professional Guidance Comm.).

[114] 3/7/2006 Elfand Memorandum at 39-40 (citing Pennsylvania Rule of Professional Conduct, 5.4 (a)(2))(emphasis added).

> However, in the present situation, a common sense approach must be used. For instance, a client who met with a deceased attorney on Day 1 for a one hour consultation, whose matter is taken up by your firm clearly should not receive anything more than reasonable compensation for one hour's work."[115]

Authority cited by the objectors, therefore, would support the quantum meruit analysis of the estate's cases undertaken by the Estate.

As a practical matter, moreover, neither Professional Rule 1.5(e) nor 5.4(a)(2) provides for a prompt transfer of cases. By its express terms, Rule 1.5(e) requires consent by the client, which can be time-consuming to obtain. In fact, both rules would require consent by the client as well as confidentiality. As has been observed in the different context of valuing law firm files for potential equitable distribution due to an attorney's pending divorce, "[t]he right of appraisal provides an extremely difficult issue to resolve because aside from the interests of the parties in whatever business the firm may pursue, there is the right of confidentiality and for the clients to have their personal affairs be absolutely privileged and private." Beasley v. Beasley, 359 Pa. Super. 20, 32, 518 A.2d 545, 555 (1986).

The objectors also fail to acknowledge the obligations of the executor to maximize benefits of the law firm asset for the estate which presuppose knowledge of the value of those assets. Before negotiating anew with Presto, it would have been negligent if the executor had not evaluated the cases in terms of work expended, costs incurred and potential recovery. Finally, the prompt transfer of cases was hampered by the obstacles the executor encountered in attempting to reach the best deal for the beneficiaries with Vince Presto, their chosen "heir apparent," and then with the Manes group once that split

[115] 1/6/2006 Objectors' Memorandum at 45-46 and Ex. C (Opinion 97-4 – May 1997). This opinion focused on an attorney who engaged in negotiations with the administrator of a deceased solo practitioner's estate for the transfer of his personal injury cases.

occurred. Referral fees, thus, were just one element in the troubled, difficult transition negotiations—as Elfand explained at length when testifying as to the difficulties he encountered in negotiating with Vince Presto.[116]

The difficulties inherent in these negotiations were outlined by another expert witness for the Estate—Joseph Ricchiuti, who had experience both with plaintiff's personal injury work and with the dissolution of two firms:[117]

> Concerns as to whether Mr. Presto would take every case in the firm, or would reject certain ones had to be negotiated. This would require both sides to have some idea of the nature of the various cases. The fact that negotiations with both Mr. Presto and the Manes Group proceeded deliberately shows how complicated such a procedure is. It was extremely important the executor/trustee not conduct a "fire sale" of the files.
> Ex. R-20 (Ricchiuti Expert Report) at 6.

The objectors have thus failed to meet their burden for imposing a surcharge against Mr. Elfand. In their attacks on his administration of the law firm, they neglect to acknowledge the impressive financial benefits he bestowed on the beneficiaries, which are relevant not only to this surcharge issue but also to the reasonableness of his executor's commission.

B. The $275,000 Commission Requested for the Executor/Administrator Alvin Elfand Is Reasonable

In addition to seeking a surcharge, the objectors challenge the Executor/Trustee commission requested for Alvin Elfand. They argue that the requested $275,000 commission is excessive and minimize the difficult tasks Mr. Elfand encountered in administering the Fiel Estate and Trust. Instead, they maintain that the Estate of "just under $13 million dollars" was "uncomplicated" since approximately $7 million in assets

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[116] See, e.g. 7/19/2005 N.T. at 72-77 (Elfand describing Presto's various demands in August 2000).

[117] Mr. Ricchiuti had experience with the dissolution of Leibert, Harvey, Hertig, Short & Lavin firm as well as with the Litvin, Blumberg, Matusow & Young Firm, where he served as the liquidating manager. 9/30/ 2005 N.T. at 5-8 (Ricchiuti). Ex. R-20 at 8.

consisted of life insurance policies ($6,074,681.81), annuities and IRAs. Administration of the remaining probate assets should also have been straightforward, they suggest, because the probate assets included approximately $ 3.6 million in real estate that "posed little burden" for the Executor Trustee.[118]

The record must therefore be examined to determine the reasonableness of the requested commission. Under the PEF code, a "court shall allow such compensation to the personal representative as shall in the circumstances be reasonable and just, and may calculate such compensation on a graduated percentage." 20 Pa.C.S. § 3537. The Pennsylvania Uniform Trust Act likewise provides that where a trust document does not specify the commission, a trustee is entitled to reasonable compensation "under the circumstances." 20 Pa.C.S. §7768 (a). Moreover, "[i]n determining reasonable compensation, the court may consider, among other facts, the market value of the trust and may determine compensation as a fixed or graduated percentage of the trust's market value." 20 Pa. C.S. § 7768(d).

The fiduciary has the burden of establishing the reasonableness of the commission claimed "based on services actually performed and not on some arbitrary formula." Trust of Ischy, 490 Pa. 71, 81, 415 A.2d 37, 42 (1980). The Orphans' Court has authority to supervise the fees of fiduciaries, but its determination of the reasonableness of an executor's commission must be based on the factual record. Reed Estate, 462 Pa. 336, 342, 341 A.2d 108 , 111(1975). Although courts frequently consider compensation as a matter of percentage, "the true test is always what the services were actually worth and to

[118] 1/6/2006 Objectors' Memorandum at 4, citing Ex. J-4 Estate Tax Return Form 706. In fact, the Objectors assert that the executor's fee should be cut in half. 1/6/2006 Objectors' Memorandum at 63.

award a fair and just compensation therefor." Estate of Rees, 425 Pa. Super. 490, 625 A.2d 1203, *8 (1993); In re Abdoe, 45 Pa.D & C 4th 564, 568 (Lawrence Cty. 1999).

A schedule for computing fiduciary and attorney fees was set forth in Johnson Estate, 4 Fid. Rep. 2d 6 (Mont. Cty. 1983) based on percentages related to the size and nature of estate assets as approved by the attorney general. More recently, the Pennsylvania Superior Court concluded "egregious error is committed when a court awards commissions and fees simply on a percentage basis without inquiry into the reasonableness of the compensation…." In re Preston, 385 Pa. Super. 48, 57, 560 A.2d 160, 165 (1989). The proper focus should be on facts that establish reasonable compensation for either executor or attorney. Id., 385 Pa. Super. at 57, 560 A.2d at 164 (citations omitted).

A methodology for evaluating the "reasonableness" of fees is set forth in LaRocca Estate, 431 Pa. 542, 546, 246 A.2d 337,339 (1968), which outlines a number of specific factors to consider in determining a reasonable attorney fee: "the amount of work performed, the character of the services rendered; the difficulty of the problems involved; the importance of the litigation; the amount of money or value of the property in question; the degree of responsibility incurred; whether the fund involved was "created" by the attorney; the professional skill and standing of the attorney in his profession; the results he was able to obtain; the ability of the client to pay a reasonable fee for the services rendered; and, very importantly, the amount of money or the value of the property in question."

Alvin Elfand testified that he determined his executor's commission in consultation with the estate attorney, Bernice Koplin. Although he kept time sheets, they

were not used in the calculation of his commission.[119] According to Ms. Koplin, she was able to recommend an appropriate executor's fee because they worked closely on estate matters, she was aware of what he was doing and "what he was up against." [120] In support of his commission request, Mr. Elfand presented expert testimony and a report by Martin Heckscher. Ex. R-18. Significantly, the objectors presented an expert testimony and report by Janet Amacher, who did not question the commission requested for Mr. Elfand. Ex. O-41.

In evaluating the reasonableness of the requested executor's commission, Martin Heckscher applied the LaRocca factors to the record and services of Alvin Elfand. Preliminarily, he noted that the requested $275,000 commission constituted 2.15 per cent of the Estate's gross value on the federal tax return and would thus have been reasonable even under the formula adopted in Johnson Estate, which serves as a general benchmark for routine cases. Ex. R-18 at 22. Next he applied the LaRocca factors to the record, and concluded based on the record that the $275,000 commission was "eminently reasonable." Ex. R-18 at 23.

Amount of Work - The amount of work performed by the fiduciary is the first LaRocca factor. Throughout his testimony, Mr. Elfand displayed his sharp, comprehensive knowledge of the assets within the Fiel estate and trust that underscored his expertise, service and work. In his many years serving as accountant for Stuart Fiel and his law firm, Alvin Elfand did the bookkeeping, prepared corporate and personal taxes, advised on investments and insurance purchases and nudged Fiel to consider estate

[119] 7/19/2005 N.T. at 130, 133 (Elfand). Although Elfand kept time sheets, but Ms. Koplin did not ask to see them in advising him as to a reasonable commission. He noted that the IRS did not challenge his commission. Id.
[120] 7/20/2005 N.T. at 96 (Koplin).

planning, especially after he became ill.[121] In unrebutted testimony, Elfand outlined the services he performed as to the various types of estate/trust assets, often with the advice and assistance of the estate's legal counsel.

Real Property

At his death, Stuart Fiel owned four parcels of real estate:

(1) his residence, a condominium at 1820 Rittenhouse;
(2) his former residence at 510 South 4th Street;
(3) the building for the law offices at 232 South 3rd Street;
(4) his beach property at 109 South Argyle in Margate, New Jersey.

In addition, Fiel was the sole shareholder of BH Enterprises, a Pennsylvania limited liability company which owned investment real estate located at 1928 South 20th Street that was rented to by a company American Collision owned by the Galati family.[122]

Each of these properties demanded Elfand's attention:

1820 Rittenhouse Square Property - Elfand had the 1820 Rittenhouse property appraised and paid the bills until it was sold and then attended settlement. With the assistance of legal counsel, he also resolved confusion concerning a mortgage that had been satisfied but the satisfaction had not been properly recorded.

510 South 4th Street Property - Elfand had the 4th Street property, where Scott Fiel resided, appraised. He paid the taxes, insurance, general maintenance bills as well and contractor bills for work ordered by Scott Fiel.

232 South 3rd Street Property - When the 232 South 3rd Street property was put up for sale in 2001, Elfand had the building appraised and paid the bills. With the assistance of Ms. Koplin, he made sure certain zoning code violations were satisfied.

Margate Property - Elfand had the Margate property appraised for the tax return. He paid the bills on the property as well as for the special flood insurance. He had the mortgage paid off, and provided for the property's landscaping.

[121] 7/19/2005 N.T. at 19-20, 43-44 (Elfand).
[122] 7/19/2005 N.T. at 25-36 (Elfand).

20th Street Property – This was an investment property for Fiel that was used for an automobile collision body shop under a lease/purchase agreement. With the assistance of the SGLK firm, this property was transitioned to the tenants.[123]

Stocks and Bonds

As executor, Elfand liquidated the various stocks and bonds that Fiel had amassed during his lifetime and transferred them to the estate/trust. He then invested over $1,000,000 in several different mutual funds to assure diversification and to maximize the return for the beneficiaries.[124] He also invested in a money market account at one-half percentage point above the going rate. He continually reconsiders short term investments with the potential of outperforming the money market account.[125]

Bank Accounts

Elfand made sure that bank accounts were liquidated and the monies transferred to the estate. He also located a "missing" account through the abandoned properties website, which he checked as a matter of course for clients, and those funds were deposited into the estate.[126]

Life Insurance Policies with $6 Million Face Value and Enhancement of Benistar Payment

In addition to encouraging Stuart Fiel—a bachelor-- to purchase insurance policies with a face value of over $6 million dollars, after Fiel's death Mr. Elfand negotiated an increased payment that benefited the estate/trust by $1.2 million dollars. He documented how he increased the death benefit payments to the Estate/Trust from Benistar Ltd. from $1,632,000 to $2,800,155 by providing tax returns to establish that

[123] 7/19/2005 N.T. at 26-36 (Elfand).
[124] 7/19/2005 N.T. at 37-38 (Elfand) & Ex. R-41.
[125] 7/19/2005 N.T. at 37-39 (Elfand).
[126] 7/19/2005 N.T. at 42 (Elfand).

Mr. Fiel's benefits should be calculated on compensation of $466,692.50 rather than $272,000. This resulted in an increased payment of $1.2 Million for the Estate/Trust.[127]

In addition, at Elfand's urging, Fiel had purchased overhead and disability insurance, the proceeds of which were paid to the estate.[128]

Valuation of the Law Firm as Estate/Trust Asset

As an accountant, Elfand was sensitive to the critical issue of valuation of the SDFA law firm for tax purposes. During his lifetime, Stuart Fiel had placed a value on his firm of $1.5 million dollars for the firm's line of credit, but for the purposes of minimizing federal estate tax, Elfand valued the firm at $621,000 based on his calculations of book value.[129] His objective was to obtain the lowest value that could be justified to obtain estate tax savings. By valuing the firm at $621,000 rather than $1.5 million, Elfand saved the estate nearly $540,000 in taxes. This valuation, with the assistance of Ms. Koplin, withstood a Federal audit.[130]

Elfand was concerned not only with the valuation of the law firm, but also with its profits and losses throughout the period of its operation. He testified, for instance, that he continually checked profit and loss statements that were prepared by Robert Levine of SGLK firm.[131]

Review of Tax Payments

Elfand reviewed the Pennsylvania and New Jersey tax returns filed for the Estate, the final 2000 income tax return for Stuart Fiel, the City of Philadelphia Tax Returns, the

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[127] 7/19/2005 N.T. at 43-48, 52-53 (Elfand). See also Exs. R-42, R-43, R-44.
[128] 7/19/2005 N.T. at 55 (Elfand).
[129] 7/19/2005 N.T. at 106-111 (Elfand).
[130] 7/19/2005 N.T. at 116-17, 121 (Elfand). Elfand explained that to withstand review in an audit, he devised a strategy of paying whatever expenses he could out of the law firm to keep the profit as low as possible. If the law firm showed a tremendous profit, the value of the firm for the purposes of estate tax would increase. Id. at 119.
[131] 7/20/2005 N.T. at 6 (Elfand).

Business and Privilege Tax Returns on the rental properties on 3rd and 20th streets, the 1041 Fiduciary returns for the Estate and Trust. He was subsequently involved in amending tax returns to get additional deductions after the Federal audit raised the value of the building.[132]

Character of the services rendered and difficulty of problems involved - The character of the services Alvin Elfand provided to the trust were varied but included solution of difficult issues: valuation of the SDFA law firm for taxes; assisting the estate attorney in the IRS audit; negotiating with Benistar to increase the payment to the estate in the amount of $1.2 million dollars. As Mr. Heckscher concluded in his report, this factor is "highly positive." Ex. R-18 at 23.

Amount of money or value of property in question - The gross estate listed on the 706 federal tax return was $12,810,972.45. Ex. J-4. An estate of this size would justify the requested commission, especially considering Mr. Elfand's involvement with those assets that the objectors minimize as simple, such as the increased Benistar payment and the calculation of annual IRA payments requested by the beneficiaries.

Degree of responsibility incurred - Alvin Elfand played a vital role in the creation and administration of Stuart Fiel's estate. He was far from a passive fiduciary whose role is limited to signing documents prepared by the estate attorney. On the contrary, he actively assisted the estate attorneys in such critical areas as valuation of the law firm and preparation for a federal audit. Moreover, as the longstanding financial adviser to Stuart Fiel, Elfand had encouraged him to do estate planning, including the

[132] 7/19/2005 N.T. at 121-24 (Elfand).

purchase of the nearly $6 million dollars in life insurance policies that enhanced the value of his estate.[133]

Whether a fund was created - Because of his knowledge of Stuart Fiel's finances and income, Mr. Elfand achieved a $1.2 million increase in the Benistar insurance payments for the beneficiaries. Ex. R-44..

Professional Skill and Standing as well as the Results Obtained - As a certified public accountant with years of involvement in decedent's personal and business finances, Mr. Elfand brought a unique level of professional skill to his role as Executor/Trustee.[134] This helped him achieve exceptional results for the estate by the careful valuation of the law firm asset, the defense of that valuation during the audit, and the negotiation of increased payments from Benistar Ltd.

Ability of the Client to Pay a Reasonable Fee – The trust has the resources to pay a reasonable fee.

The record thus amply supports the reasonableness of a $275,000 commission for Alvin Elfand.

C. The Attorney Fees Sought for General Estate/Trust Administration Were Reasonable but the Attorney Fees Relating to the Administration of the Law Firm Asset Must Be Reduced Where There Was Duplication of Tasks by SGLK Attorneys

"What is a fair and reasonable fee," the Pennsylvania Supreme Court has cautioned, "is sometimes a delicate, and at times a difficult question." LaRocca Estate, 431 Pa. at 546, 246 A.2dat 339. This is especially so where, as in the present case, the estate attorneys were presented with the unique challenge of a law firm "asset" that raised

[133] 7/19/2005 N.T. at 43 (Elfand).
[134] 7/19/2005 N.T. at 15 (Elfand).

ethical concerns about protecting the interests of the firm's clients as well as the financial interests of the trust beneficiaries.

The SDFA law firm was undoubtedly a complex trust asset— the "elephant in the room" according to the objector's expert. The beneficiaries assert that the attorney fees should be limited to the $130,000 permitted under the Johnson guidelines.[135] Nonetheless, the test for establishing attorney fees for the services of SGLK to the Estate/Trust is reasonableness. The burden for establishing facts to support the reasonableness of their fee rests on the party seeking the fee. Estate of Preston, 385 Pa. Super. at 56, 560 A.2d at 164; Estate of Sonovick, 373 Pa. Super. 396, 399, 541 A.2d 374, 376 (Pa. Super. 1988). Ultimately, however, the responsibility for determining the reasonableness of attorney fees falls upon the auditing or hearing judge based on the record. Estate of Burch, 402 Pa. Super. 314, 318, 586 A. 2d 986, 987 (1991). As previously discussed, the factors set forth by the Pennsylvania Supreme Court in LaRocca Estate, 431 Pa. 542, 246 A.2d 337 (1986) are employed in determining the reasonableness of fees. These factors reflect the considerations set forth in Rule of Professional Conduct 1.5.[136]

In support of the $490,350 in attorney fees requested for SGLK, the executor has presented the time records for SGLK as well as an expert report by Martin Heckscher.[137] Objectors have submitted a report by Janet Amacher, but unfortunately it is limited to a

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[135] 1/6/2006 Objectors' Memorandum at 63.

[136] Those factors include: "(1) whether the fee is fixed or contingent; (2) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly; (3) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (4)the fee customarily charged in the locality for similar legal services; (5) the amount involved and the results obtained; (6) the time limitations imposed by the client or by the circumstances; (7) the nature and length of the professional relationship with the client; and (8) the experience, reputation, and ability of the lawyer or lawyers performing the services. Pennsylvania Rule of Professional Conduct 1.5.

[137] Ex. J-11 (SGLK time sheets); Ex. R-18 (Expert Report).

rigid analysis of the fees under the schedule set forth in the Johnson Estate, without addressing the LaRocca factors for determining reasonableness. Both reports, however, share a similar shortcoming: neither fully address the services performed by SGLK relating to the law firm asset SDFA. Mr. Heckscher, for instance, notes: "Because I am not a personal injury lawyer and have never handled an estate in which a personal injury law firm was an asset, I am not qualified to render an opinion on the reasonableness of Mr. Elfand's conduct in operating and then closing the law firm (or the countless issues that confronted Mr. Elfand while the firm was in operation) and will therefore offer no opinion on that question." R-18 at 7. Consequently, he ventures a carefully "limited opinion" that the fees in the amount of $252,250 incurred in "law-firm" related activities were reasonable.[138]

This conclusion, however, does not provide an analysis of particular services rendered under certain broad categories of fees set forth in R-16: "the SDFA law firm" and "negotiations" with Presto and the Manes Group. Similarly, Ms. Amacher's analysis does not grapple with the services rendered related to the SDFA law firm but merely factors the $621,000 value given to that firm into her Johnson Estate equation to buttress her conclusion that a reasonable attorney fee for the Fiel estate/trust would be $128,471. Ex. O-41. She essentially dismisses the law practice as the "elephant in the room"[139] without providing guidance as to the reasonableness of the SGLK fees claimed relating to

[138] Ex. R-18 at 21. The only reference to the particular services performed by SGLK regarding the law firm asset is highly speculative: "Although, as I have stated, I will not opine on the best course of action regarding the firm, SOME action and attention needed to be given to the law firm and thus it would have required services (e.g., accounting, reporting, tax treatment) well beyond those in a routine, Johnson-type estate." Id. at 14. Significantly, this reference does not grapple with the specific law firm issues reflected in Ex. R-16—the breakdown of time by category and time period for Koplin, Levine and Swingle in the context of services provided by Block and Kittredge.

[139] 9/27/2005 N.T. at 113 (Amacher).

it. Before addressing the "elephant in the room" and its related attorney fees, the fees claimed relating to the trust and estate will be analyzed.

a. The Fees Claimed by SGLK for Estate and Trust Services Are Reasonable Under the LaRocca Standard

The Heckscher expert report provides a useful breakdown of the attorney fees claimed relating to the trust and estate:

Administration	$58,075.00
Beneficiary	$37,400.00
1820 Rittenhouse Sale	$ 9,112.50
Estate Planning	$ 587.50
3rd Street Property Sale	$19,700.00
NJ Probate/Inheritance Tax	$ 3,675.00
Fiel Foundation	$ 7,237.50
BH Enterprises	$ 4,250.00
Trusts: Lauren & Brynn	$ 862.50
706 Audit	$15,112.50
Fiel & Presto Firm	$ 1,150.00
Case Tracker	$ 21,862.50
Howard Michael (SWIF)	$ 16,587.50
Tuite (defense of referral Fee claim)	$ 11,687.50
Rehberg (referral fee claim)	$ 1,600.00
Trust Administration	$ 31,650.00
TOTAL:	**$240,550.00**[140]

These figures were drawn from a "Summary of BJK, RJL & MAS-Breakdown of Time By Category and Time Period," Ex. R-16, that was prepared by Marilyn Swingle under the direction of Ms. Koplin, who reviewed it.[141] This summary provides an invaluable overview of the general categories of time expended by SGLK attorneys on the various issues they encountered with the Fiel Trust and Estate.

The objectors' expert witness, Janet Amacher, applies the Johnson Estate schedule to the assets in Fiel trust and estate, and concludes that a reasonable attorney fee

[140] See Ex. R-18 (Heckscher Expert Report) at 8 and Ex. R-16.
[141] 7/21/2005 N.T. at 56-57, 71-72 (Koplin).

would total $128,471. In reaching this conclusion, she applies rigid percentages between nonprobate assets of $7,192,329 and probate assets of $5,752,312. Ex. 0-41. As previously discussed, this approach has been rebuffed as "egregious error" by Estate of Preston, 385 Pa. Super. at 57, 560 A.2d at 165 which criticized awarding fees "simply on a percentage basis without inquiry into the reasonableness of the compensation." As counsel for SGLK observes, this approach inappropriately emphasizes one factor—the amount of assets—over all the other LaRocca considerations. It also penalizes estate attorneys who obtain a favorable tax result for the beneficiaries by obtaining a low valuation of an asset. In addition, in this case the objectors' expert conflates the seeming objectivity offered by the use of percentages to calculate fees with the necessity of evaluating the difficulty of particular tasks when she dismisses the creation of the charitable trust as not particularly difficult because of Ms. Koplin's special expertise in that area. 9/27/2005 N.T. at 150 (Amacher). The proper approach must be to analyze the record regarding legal services for the trust and estate in terms of the LaRocca factors.

The amount of work performed - The services provided to the Fiel Trust and Estate were set forth in copious detail and documentation at the hearing. Bernice Koplin, Ronald Levine and paralegal Marilynn A. Swingle kept contemporaneous time sheets that were submitted to document the variety of estate administration tasks they performed.[142] These tasks included negotiating and preparing the incorporation documents for "Fiel and Presto Associates,"[143] preparing consents for a proposed distribution of assets to Marcia Neff,[144] responding to requests for distributions by the

[142] See Ex. J-11. Marilynn Swingle also prepared a breakdown of time spent by Koplin, Levine and Swingle. 7/21/2005 N.T. at 57 (Koplin). See Ex. R-16.
[143] 7/20/2005 N.T. at 106-07; 7/21/2005 N.T. at 147 (Koplin). Ex. O-1.
[144] 7/20/2005 N.T. at 163-64 (Koplin).

beneficiaries such as $50,000 for Bryn's wedding,[145] arranging a $52,000 severance payment for Carol Eyler,[146] corresponding with the beneficiaries' attorney, Alan Mittelman.[147] Because the family requested annual distributions from the trust IRAs, SGLK was required to make complicated calculations concerning income for the purposes of income tax and estate taxes to avoid double taxation.[148] Ms. Koplin also helped create the charitable Fiel Foundation to honor Mr. Fiel's grandparents; in addition to drawing up the necessary documents and bylaws, she obtained tax-exempt status.[149] SGLK was responsible for completing and overseeing the federal, Pennsylvania and New Jersey tax returns in conjunction with Alvin Elfand.[150]

As part of the administration of the Fiel estate, Ms. Koplin became involved in resolving legal issues that arose regarding the real property owned by Mr. Fiel. When the 1820 Rittenhouse Square property was being sold, for instance, a mortgage satisfaction that had not been recorded was discovered, and Ms. Koplin's firm worked on resolving that issue as well as problems with personal property in the condominium.[151] When the firm's office building at 232 South 3rd Street was being sold for $975,000, Ms. Koplin helped obtain this purchase price despite zoning issues, a use and occupancy tax problem, fire code violations and an easement on the balcony. Although the buyer attempted to use these issues to back out of the deal, Ms. Koplin managed to resolve them and extract a $5,000 penalty from the buyers.[152]

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145 7/20/2005 N.T. at 164 (Koplin).
146 7/20/2005 N.T. at 165 (Koplin).
147 7/20/2005 N.T. at 165 (Koplin).
148 7/20/2005 N.T. at 166-67 (Koplin).
149 7/20/2005 N.T. at 169-70 (Koplin).
150 7/20/2005 N.T. at 171-72 (Koplin).
151 7/20/2005 N.T. at 156-57 (Koplin)
152 7/20/2005 N.T. at 157-59 (Koplin).

The SGLK firm also helped settle a dispute involving real property located at 1928-30 South 20th Street between B.H. Enterprises, LLC, and American Collision and Automotive Center, Inc. Stuart Fiel had been the sole shareholder of B.H. Enterprises which acquired the 20th street property. Ronald Galati, the owner of American Collision, claimed that he had entered into a lease/purchase agreement with Stuart Fiel in 1999 to purchase the real property. Ronald Levine of SGLK helped negotiate a settlement agreement.[153] The SGLK firm spent 20.8 hours on the "B.H. Enterprise" issue for a total of $4,250.00.[154]

Ms. Koplin testified as to her role in obtaining a favorable valuation of the law firm as an estate/trust asset. In so doing, she was also careful to come up with a valuation that would withstand a challenge by the IRS in a 706 Audit.[155] Initially, the Trugman Evaluation Associates had been employed to evaluate the SDFA firm, but upon review, Ms. Koplin concluded that this approach would not be cost effective.[156] Based on careful calculations, she concluded that it would be in the interest of the beneficiaries to value the law firm at $621,000 rather than the $1.5 million value Stuart Fiel had placed on the law firm during his lifetime. She estimated a tax savings under this approach in excess of a half a million dollars.[157] The estate's federal estate tax return was selected for audit, but the IRS did not object to or adjust the valuation of the law firm.[158]

An issue did arise during the Audit, however, concerning the sale of the Rittenhouse Square condominium and the 232 South 3rd Street property because their sale

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153 See Ex. R-218.
154 Ex. R-16.
155 7/20/2005 N.T. at 134-35 (Koplin).
156 7/20/2005 N.T. at 131-39 (Koplin).
157 7/20/2005 N.T. at 138-40 (Koplin). Ex. R-22.
158 7/19/2005 N.T. at 117-121 (Elfand).

price exceeded their appraised value. Ms. Koplin successfully negotiated a smaller rate of increase in valuation. She also induced the agent to allocate more to the 3rd Street property, which was advantageous to the estate because it was depreciable. The estate was permitted to claim the interest on the increased tax as a deduction and it filed amended fiduciary income tax returns. The Audit negotiations concerning the sales of these 2 properties resulted in a tax savings of approximately $125,000.[159] The SGLK firm devoted a total of 82.5 hours on the 706 Audit for a total of $15,112.50.In addition, the SGLK firm was required to expend 168 hours in responding to requests for information from the beneficiaries and their attorney, Alan Mittelman.[160]

The character of the services rendered and the difficulty of problems involved - The record demonstrated that the SGLK firm provided an array of services to the Fiel Trust and Estate that required different degrees of expertise. According to expert testimony, the beneficiaries' request for annual IRA distributions necessitated complicated, albeit tedious, computations. Creation of the Fiel Foundation with the need to prepare bylaws and obtain tax-exempt status required specialized expertise. The valuation of the law firm and participation in the 706 Audit likewise demanded special care, knowledge and discretion. Finally, the objectors hired separate counsel and responding to the constant inquiries was time-consuming and necessary. In fact the variety of services required as well as the varying levels of difficulty are positive factors in favor of the reasonableness of the fees claimed for trust and estate (as opposed to SDFA law firm) issues.

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[159] 7/20/2005 N.T. at 172-78 (Koplin); 9/26/2005 N.T. at 25-26 (Heckscher); 7/19/2005 N.T. at 118 (Elfand)..

[160] Ex. R-16. See also 3/3/2006 Schachtel Memorandum at 18-20.

The importance of the litigation - Since the services at issue did not involve litigation—except to the extent that the attorneys recommended hiring Patrick Kittredge to handle potential litigation with Presto and the Manes Group—this LaRocca factor is not a factor for consideration.

The amount of money or value of the property in question - The combined assets of the estate and trust exceed $12 million dollars, but both SGLK and its expert acknowledge that the attorney fees sought are "significant;" in fact, the expert report observes: "At first glance, the total fees sought (including those related to the law firm issue) appear high in relation to the gross value of the Estate."[161] In dealing with these proportionately high fees, it is helpful to distinguish between those fees related to the more typical trust and estate issues and those fees related to the SDFA law firm issues. The record as to the estate and trust services is clear as to the variety and difficulty of tasks encountered and completed. Their expert notes that the hourly rate of Ms. Koplin and Mr. Levine, which remained $250 throughout the administration, was a "surprisingly low rate." Ex. R-18 at 18. Moreover, the paralegal rate of $125 for Swingle was appropriate given her expertise. Id.

Unfortunately, the record as to the attorney fees charged for the SDFA law firm issues is less clearly substantiated. In light of the apparent duplication in tasks also performed by Mr. Block and Mr. Kittredge, this factor weighs negatively in evaluating the reasonableness of the SGLK fees charged for these services as will be explained below.

The degree of responsibility assumed - The record establishes that the SGLK attorneys assumed a great deal of responsibility in representing the Estate during the IRS

[161] See 3/3/2006 SGLK Memorandum at 23; Ex. R-18 at 18.

Audit, in preparing a valuation for the law firm, in preparing the various tax forms and in dealing with the IRA accounts.

Whether a fund was created by the attorney - Although this was rated a neutral factor by SGLK's expert, there was evidence that Ms. Koplin's efforts to obtain a favorable valuation of the law firm that she successfully defended in the Audit resulted in an approximate savings for the Estate of half a million dollars.[162] She also testified to a tax savings of approximately $125,000 through Audit negotiations concerning the sale of Mr. Fiel's Rittenhouse condominium and 232 South 3rd Street property.[163]

Professional Skill and Standing of the Attorney in his Profession - In his report, Mr. Heckscher noted that he knew "Ms. Koplin professionally and by reputation as a meticulous, careful and competent practitioner." Ex. R-18 at 19. Throughout his testimony, Ronald Levine demonstrated an impressive knowledge of the record and issues.

The results the attorney was able to obtain - The record demonstrates the many favorable results SGLK obtained regarding the Fiel Trust and Estate issues. Most impressive, perhaps, was the successful defense at the 706 Audit of the aggressive valuation of the law firm. Ms. Koplin's ability to negotiate a favorable result after the adjustments during the Audit to the valuation of the Rittenhouse condominium and the 3rd Street property was also beneficial to the Trust/Estate. The beneficiaries also benefited from the distributions and handling of Mr. Fiel's IRA accounts. This is therefore another favorable factor.

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[162] 7/20/2005 N.T. at 138-40 (Koplin). Ex. R-22.
[163] 7/20/2005 N.T. at 172-78 (Koplin); 9/26/2005 N.T. at 25-26 (Heckscher).

The ability of the client to pay a reasonable fee for the services rendered - There is no evidence of an inability to pay a reasonable fee.

Based on the record and LaRocca factors, the fees sought relating to the general trust and estate issues are reasonable. Closer attention is necessary, however, as to the fees claimed in dealing with the problematic SDFA law firm asset.

b. Certain Attorney Fees relating to the SDFA Law Firm, Negotiations with Firm Attorneys and Valuation of Files Are Not Reasonable Based on the Record Presented and Those Fees Must Be Reduced

Because the Fiel law firm was both a potential asset and liability to the estate, counsel had to advise the executor/ trustee on the need for a supervising attorney to maintain a clear distinction between administrative and legal personnel. Ms. Koplin alerted Elfand to the need for a supervising attorney immediately after Stuart Fiel's death to maintain order and prevent employees "from getting scared and running off with files."[164] Since Mr. Fiel had kept so much information about the cases in his head and the firm's ABACUS program contained only rudimentary case information, Ms. Koplin also emphasized the importance of creating a system for evaluating the status of the case files both to monitor any potential malpractice claims and to protect the clients' interests.[165] Because the Fiel firm's malpractice policy was due to expire in October 2000,

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[164] 7/20/2005 N.T. 123-24 (Koplin).

[165] 7/20/2005 N.T. 124, 129-30 (Koplin). Ms. Koplin observed that "Stuart had had a series of incidents where lawyers had worked for him and then run off with files, and he was virtually paranoid about it. So what he did was he kept almost everything in his head, and he would put different attorneys to work on different pieces of a file so that no one attorney really knew what was going on in a file, and this would be absolutely more so the case for the bigger files. So that only he and in his head knew what was really going on. He had total control of that firm personally." Id. at 124 (Koplin). The problem of poor recordkeeping was exacerbated by the discovery that the attorneys did not keep time records. Id. See Ex. R-1 (Rudimentary ABACUS records).

appropriate insurance had to be obtained for the firm.[166] On her advice, a supervising attorney was employed for the Fiel law firm during its transitionary period.[167]

Since it was the intent of the executor/trustee to transition the Fiel firm as soon as possible to Presto or other attorneys, the SGLK firm, and especially Mr. Levine, became involved in those negotiations in January 2001.[168] When these negotiations broke down due to the Presto/Manes split and Patrick Kittredge was retained in late March 2001 for any litigation or settlement negotiations. Ms. Koplin and Mr. Levine offered assistance due to their knowledge of the personalities and issues.[169]

The SGLK firm, and especially Marilynn Swingle devised a "case tracker" to summarize all the active cases at the time of the Estate's involvement providing an overview of the date the Fiel firm was discharged, the location of the file, the date the matter was settled. The main purpose of the case tracker is to make sure the "beneficiaries get every penny we can out of these cases."[170] Ms. Koplin assisted Alvin Elfand in preparing corporate and tax filings for the dissolution of SDFA in Pennsylvania and New Jersey while taking advantage of "tax planning opportunities."[171]

The expert report for SGLK segregates certain categories of fees related to the Fiel "Law Firm" as follows:

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166 7/20/2005 N.T. at 141-42; Exs. R-239, R-240, R-242.

167 7/20/2005 N.T. at 122-23 (Koplin) Bennett Block, who was "of counsel" with the SGLK firm, was hired as supervising attorney to replace Vince Presto. Mr. Block's responsibilities included valuing cases and conducting a malpractice review. 7/21/2005 N.T. at 122-23, 173-74 (Koplin).

168 9/26/2005 N.T. at 107-29 (Levine). See Exs. R-56, R-60 through R-67, R-71 through R-73, R-75 through R-77.

169 7/20/2005 N.T. at 149, 152-53 (Koplin); 9/26/2005 N.T. at 129-30 (Levine).

170 7/20/2005 N.T. at 181 & 180 (Koplin); Ex. R-2. The practical benefits of the case tracker are also described by the Schachtel Memorandum: "The Case Tracker was developed to track the referral fees paid and due to TRUST after the firm closed, from Presto, Manes, Williams, Goodman, and the other attorneys who owed money when cases were completed. This allowed SGLK to follow up on the status of cases by checking dockets, often times discovering cases had settled without agreed payments being made to the Trust." 4/26/2006 SGLK Memorandum at 6.

171 7/21/2005 N.T. at 42-43 (Koplin).

SDFFA Law Firm	$111,137.50
Valuation of Files	$ 8,012.50
Negotiations –MWG & Presto	$114,575.00
SDFA Clients	$ 11,100.00
Kalman – Client of SDFA	$ 2,625.00
Ferraro	$ 500.00
Dejulius	$ 1,762.50
Graf	$ 1,575.00
Etkin	$ 137.50
Slaughter/Richardson	$ 825.00
Total	**$252,250.00**

Ex. R-18 at 8

These categories are generally straightforward. There are, however, three categories relating to SDFA law firm issues that are unclear:

SDFA Law Firm	$111,137.50
Valuation of Files	$ 8,012.50
Negotiations- MWG & Presto	$ 114,575.00

Issues involving the "SDFA Law Firm" required a great deal of attention from the SGLK law firm—more than 453 hours. In addition, 458 hours were spent on negotiations with the Manes Group and Presto.[172] Carefully prepared time sheets are undoubtedly an essential tool for determining the reasonableness of fees. Gottlieb Estate, 26 Fid. Rep. 2d 52, 60 (O.C. Mont. Cty. 2005). But "time alone does not measure the value of services, nor hourly rate the quality. The determination of reasonable compensation to an attorney for an estate is not relegated to a clock and computer." Estate of Abdoe, 45 Pa. D. & C. 4th 564, 572 (Common Pleas Lawrence Cty. 1999), quoting Estate of Burch, 402 Pa. Super. 314, 318-19, 586 A.2d 986, 988 (1991).

Unfortunately, the record does not support the reasonableness of the total amount sought for those particular services under the following LaRocca factors: character of

[172] See Ex.R-16 ("SDFA Law Firm and "Negotiations - MWG & Presto").

services rendered; the amount of money or value of the property in question and the degree of responsibility incurred.

1. Negotiations-MWG & Presto

SGLK is claiming $114,575 in fees for negotiations with Vince Presto and the Manes, Williams and Goodman Group (hereinafter "Manes Group"). They state that once Mr. Elfand directed that negotiations should resume with Presto in January 2001, Ronald Levine conducted the negotiations with Ms.Koplin's assistance. Ms. Koplin was then directly involved with negotiations with the Manes Group. They concede that in March 2001, Mr. Kittredge was employed to conduct the negotiations with Presto and the Manes Group[173] for which he was paid $102,000.[174]

A review of the testimony and documentation, however, supports the conclusion that the request for $114,575 for SGLK's involvement with these negotiations is excessive and should be reduced by half due to duplication in efforts by Levine, Koplin and Kittredge. According to Ms. Swingle, who prepared R-16, the fees charged under this category did not commence until negotiations actually began,[175] which was in January 2001. Beginning in March 2001, Patrick Kittredge was employed to negotiate with both Presto and the Manes Group after their split. In her testimony, Ms. Koplin expressed a great deal of respect—and deference—toward Kittredge.[176] The exhibits cited[177] to support these fees based on the Presto negotiations consist of memoranda by

[173] 3/3/2006 SGLK Memorandum at 11-12.
[174] 7/21/2005 N.T. at 32-33 (Koplin).
[175] 7/21/2005 N.T. at 231-32 (Swingle); Ms. Koplin testified that she did not participate in negotiations with Presto until January 2001. 7/21/2007 N.T. at 190 (Koplin).
[176] See, e.g. 7/21/2005 N.T. at 77-86 (Koplin). Ms. Koplin concedes that she deferred to Kitteredge as to the release issue that was so critical to the Manes negotiations. Id. at 85 (Koplin) She also stated that she made no recommendations to Elfand as to the proposed Manes settlement but advised him to "discuss it with Mr. Fullem and Kittredge." Id. at 86 (Koplin).
[177] 3/3/2006 SGLK Memorandum at 11-12, ns. 31-33.

Levine,[178] letters to or from Levine[179] or joint letters to and from Levine and Koplin.[180] The documents presented as to Ms. Koplin's direct involvement with the Manes Group negotiations consist of handwritten notes or memoranda ostensibly by Koplin,[181] letters by or to Levine,[182] joint letters by or to Levine and Koplin,[183] as well as a letter and a memorandum to Koplin from a period after Kittredge was employed to deal with the Presto/Manes Group negotiations.[184] Finally, the documents presented as to the assistance provided to Kittredge by Koplin and Levine consist of a joint letter to Levine and Koplin, Ex. R-138, a memorandum by Levine, Ex. R-139, and typed questions for Sam Stretton, unidentified as to author. Ex. R-140.

These documents and the testimony at the hearing support the conclusion that Mr. Levine was the moving force in the "Negotiations—MWG & Presto," with supervision by Ms. Koplin before Mr. Kittredge was brought into the negotiations in March 2001. But the fee breakdown on R-16 allocates $54,075.00 to Ms. Koplin, and $60,350.00 to Mr. Levine. Ex. R-16. Moreover, Mr. Kitteredge was separately paid $102,000 for his role in these negotiations. Indeed, according to Elfand, once Mr. Kittredge came into the negotiations, Kittredge took command:

> **Q**: To your understanding what role then did Mr. Mr. Kittredge play at the time of his retention, let's say, through the April period, in terms of trying to negotiated a transfer of the files to these two groups?
>
> **A**.(Elfand): He took over the major role. He still, I believe, worked with Mr. Levine and got information from him, but he began negotiating or continued to negotiate with their attorneys to try to effectuate a transfer. And he had a meeting

[178] Exs. R-60; R-64; R-65; R-66; R-67; R-70; R-84; R-85.
[179] Exs. R-56; R-62; R-63;R-77; R-82.
[180] Exs. R-61; R-72; R-73; R-75 (cover letter by Koplin for joint letter by Koplin and Levine); R-76; R-80; R-81; R-87; R-91; R-92.
[181] Exs. R-78; R-79.
[182] Exs. R-83; R-86; R-88; R-111 (5/2001 referencing Koplin telephone call).
[183] Exs. R-89; R-93; R-98; R-102; R-103.
[184] Exs. R-112; R-110 (May 10, 2001).

> with them, I know, at some point in April or the end of April, with the attorneys and hopefully with them.
> 7/19/2006 N.T. at 102 (Elfand).

While the attorneys opted for this "team approach," [185] they have not met the burden of showing either the extent of their particular efforts in these negotiations or how these duplicative efforts benefited the beneficiaries. The fairest remedy is to adjust the SGLK fees claimed of $114,575.00 in half for a total of $57,287.50. This would result in a deduction of attorney fees by $57,287.50.

2. SDFA Law Firm

Another problematic category of fees in R-16 is attributed to "SDFA Law Firm" in the total amount of $111,137.50. In testimony, Ms. Koplin was not clear as to the nature of services reflected in this category, and deferred to Ms. Swingle, [186] who characterized it as encompassing "everything from security issues" involving the security firm and the fire alarm company, to obtaining insurance coverage and tail insurance to "issues with the employees, anything where they were talking either with Bennett Block or Alvin Elfand."[187] These mélange of legal and administrative services, therefore, would overlap with those provided by the Supervising Attorney, Bennett Block, who was paid an annual salary of $150,000.00.[188] Although SGLK suggests that part of these

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[185] 7/21/2005 at 87 (Koplin). When specifically asked whether the reference to "negotiations" in Exhibit R-16 was "really a shorthand for negotiations and support of Mr. Kittredge" Ms. Koplin responded affirmatively. 7/21/2005 N.T. at 77 (Koplin). See note 188 infra.

[186] See, e.g. 7/21/2005 N.T. at 208-09 (Koplin). While work involving dissolution of the law firm might fall within this category on R-16, Ms. Koplin could not recall how much time was spent on this issue, 7/21/2005 N.T. at 39 (Koplin) nor on the tax issues related to SDFA that she identified in explaining the attorney fees on the 706 federal income tax form(Ex.J-4). 7/21/2005 N.T. at 46-47 (Koplin).

[187] 7/21/2005 N.T. at 232-33 (Swingle)

[188] 9/29/2005 N.T. at 122 (Block). Indeed, Ms. Koplin conceded her difficulty in accounting for specific tasks performed by individual attorneys when asked if she was involved in efforts to obtain insurance for SDFA law firm:

SDFA matters included "dealing with literally hundreds of claims," the only record support for these numerous claims is a vague, conclusory reference in testimony and two notice of hearings.[189] A review of the time sheets reveals, once again, overlapping functions with SGLK and Bennett Block.[190]

This record, therefore, does not support the fees claimed of $111,137.50 for the "SDFA Firm;" that specific fee will also be reduced by half to $55,568.75.

3. Valuation of Files

Finally, SGLK seeks $8,012 for "Valuation of Files," despite testimony that this task had been specifically assigned to the Supervising Attorney, Bennett Block, who was paid his separate fee.[191] That $8,012.50. will thus also be disallowed. In total, therefore, the request of SGLK for $ 490,350.00 (absent the $135,000 in defense costs) will be reduced by $120,868.75 to the amount of $369,481.25

D. The Objectors Request for Their Attorney Fees and for the Removal of Alvin Elfand as Trustee Are Denied

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I and Mr. Levine, and possibly Mr. Elfand, Mr. Block, I don't remember, and part of the reason I don't remember is that we worked as a team on all these matters, but I know I had conversations with the agent for the malpractice insurance." 7/20/2005 N.T. at 141-42 (Koplin).

[189] 4/26/2006 SGLK Memorandum at 5; 3/3/2006 SGLK Memorandum at 12, n. 35. Neither memorandum provides specific cites to the time records, Ex. J-11.The notice of hearings are denominated Exs. R-219 and R-224. In addition, two "secondary" documents are offered in support: the R-16 Summary Sheet and the Ricchiuti Expert Report (Ex. R-20). For the vague reference to "hundreds" of claims, see 7/20/2005 N.T. at 178 & 7/21/2005 N.T. at 208. The failure to identify these claims with greater specificity is striking since other claims are set forth on R-16. The work related to the SWIF claim, for instance, discussed next was very well done considering the difficult factual record.

[190] The time sheets are extensive and detailed. The "other claims," however, are necessarily presented in telegraphic format and not easily distinguished. Since SGLK has not identified the "other claims" within the context of the time sheets, there is a certain guess work in identifying them. In any event, the entry for 2/5/2001 by Ms. Koplin underscores the overlapping of roles when it identifies 2 "Phen Phen" cases with the following notation: "Bennett Block & Ronald Levine re: 2 Phen-Phen cases." Ex. J-11 (Koplin at 8). Since the claimant has the burden of proof, it was necessary to identify the exact nature and number of these claims with greater specificity.

[191] Unfortunately, Ms. Koplin during her testimony was unable to explain the fees or services under the "Valuation of Files" set forth in R-16. See 7/21/2005 N.T. at 34-35 (Koplin).

Finally, the objectors' claim that their legal fees should be paid by the Estate because their efforts substantially benefited the Estate or Trust is denied. Their assertion that Alvin Elfand should be removed as Trustee is not supported by the record.

E. The Claim Asserted Against the Estate/Trust by the State Workers' Insurance Fund ("SWIF") for $39,952.84 Is Denied

The State Workers' Insurance Fund (hereinafter "SWIF") has asserted a claim against the Stuart Fiel Estate/Trust in the amount of $39,952.84 based on a distribution of settlement proceeds to a client of the Fiel Firm, Howard Michael.[192] In essence, SWIF asserts that through the correspondence of one of its lawyers, the Fiel law firm entered into a contract to protect the SWIF subrogation liens against any proceeds recovered by the Fiel firm on behalf of Mr. Michael. The Executor/Trustee does not dispute that SWIF has a valid subrogation claim, but argues that this claim must be asserted against Howard Michael directly and not against the estate of the sole shareholder of the former Fiel Law Firm.[193] The parties have submitted memoranda of law, a stipulation of facts, as well as relevant documentation.

"A claim against a decedent's estate, " the Pennsylvania Supreme Court has cautioned, "can be established and proved only by evidence that is clear, direct, precise and convincing." Estate of Allen, 488 Pa. 415, 422, 412 A.2d 833, 836 (1980)(citation omitted). The claimant has the burden of proof. Id. Upon review of the record and stipulation, this court concludes that the claimant (SWIF) has met its burden.

The parties have stipulated to the following facts. Howard Michael, a client of the Fiel law firm, "sustained work-related injuries" on December 13, 1996 when he was hit

[192] SWIF Brief at 10.
[193] Executor's Brief at 8.

by an automobile driven by John Birnbrauer. In June 1997, the Fiel firm filed a civil action against John Birnbrauer ("Third Party Birnbrauer Action"), which settled for $15,000. In November 1997, the Fiel firm issued a demand letter to UIS Brokers East, Ltd. (agent for Reliance Insurance Company) for payment of underinsured motorist benefits ("UIM Claim"). The UIM claim settled for $100,000, and on September 18, 1998, the sum of $59,928.96 was distributed from the UIM settlement to Michael after a deduction of attorney fees and costs.[194]

Throughout this period, a Fiel firm attorney (hereinafter "Fiel firm) was aware of the SWIF subrogation claim through correspondence with representatives of SWIF (Al Taub and Ruth Abbott) as well as Barbara Buss, a representative of Reliance Insurance Company. It is axiomatic that the Fiel firm is accountable for this correspondence because a "corporation is a creature of legal fiction which can 'act' only through its officers, directors and other agents;" consequently, "[a]cts of a corporate agent which are performed within the scope of his or her authority are binding upon the corporate principal." Daniel Adams Assocs., Inc. v. Rimbach Publishing, Inc., 360 Pa. Super. 72, 80, 519 A.2d 997,1000 (1987), app.denied, 517 Pa. 597, 535 A.2d 1056 (1987). Moreover, in this case Stuart Fiel was also personally notified by Ruth Abbott of the SWIF lien in reference to the third party action as early as September 11, 1997.[195]

After making the demand for UIM payments in November 1997, the Fiel firm wrote to SWIF (i.e. Taub) by letter dated January 13, 1998 and requested SWIF's assistance in pursuing a recovery for its client Michael by providing documentation:

> Since this office represents Mr. Howard Michael in all matters relevant to his accident of December 13, 1996, it is imperative that I obtain documentation with

[194] Stipulation, ¶¶1-6 & Ex. A(c)(Complaint).
[195] Stipulation, Ex. A(b)(9/11/1997 Letter from Abbott to Stuart Fiel).

> regard to the investigation conducted by SWIF and the payment of any and all medical bills on his behalf. In addition, I need to obtain any documentation you have with regard to wage loss incurred by Mr. Michael and any payments made by SWIF with regard to this disabling injury. Moreover, if you wish to have this office protect any lien which SWIF may have with regard to this accident, it is necessary that I obtain notice from you of said lien and documentation with regard to the amount of said lien.[196]

SWIF (through Ms. Abbott) wrote back two days later to place the Fiel firm on notice of SWIF's claim regarding the UIM benefits. By letter dated January 15, 1998, Ms. Abbott alerted the firm that the workers' compensation lien "currently stands at $62,567.59, with payments continuing." She concluded:

> We also expect reimbursement of our lien from the proceeds of the UIM policy Accu-Tow held with Reliance Insurance Co. Please advise as to the status of that UIM claim."[197]

By letter dated April 28, 1998, the Fiel firm responded to Abbott and assured her that the SWIF lien would be protected "out of any proceeds we obtain." It also sought additional information as to the extent of that lien, and requested documentation to pursue it:

> As you are aware, we are continuing to pursue all avenues of recovery on behalf on Howard Michael. We have also agreed to protect the lien of SWIF out of any proceeds we obtain in this matter. We have agreed to undertake the protection of the lien of SWIF for the fee of 33 1/3% of all payments made to SWIF.
>
> Presently, I have been advised that Mr. Michael has returned for a second surgery and, therefore, the lien would have increased considerably since your letter of January 15, 1998. Would you please provide me with the amount of the lien as it stands presently and provide me with any and all medical documentation with regard to same. I am attempting to obtain the limit of the underinsured motorist policy of Mr. Michael's employer's vehicle and will be unable to proceed without the information regarding the actual value of said lien.[198]

In fact, the Fiel firm had already used documentation from SWIF to buttress its client's demand for the full extent of available UIM benefits. In a February 12, 1998

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196 Stipulation, Ex. A(h)(1/13/1998 Letter from Fichera to Taub-SWIF).
197 Stipulation, Ex. A(i)(1/15/1998 Letter from Abbott to Fichera)(emphasis added).
198 Stipulation, Ex. A(k)(4/28/1998 Letter from Fichera to Abbott).

letter to the representative of Reliance Insurance Company, Barbara Buss, the Fiel firm emphasized the $62,000 workers' compensation lien to support the $100,000 demand for underinsured benefits:

> Since your insured has a One Hundred Thousand Dollar ($100,000.00) underinsured motorist limit, Plaintiff is demanding payment of the full One Hundred Thousand Dollars ($100,000.00) in order to compensate him for the injuries suffered, the permanent nature of his injuries and the repayment of the $62,000.00/plus Workers' Compensation Lien.[199]

These demands were successful: the UIM claim settled for $100,000.00. A check was forwarded to SWIF by the Fiel firm in the amount of $5,780 as compensation for its lien as to the third party claim. But by letter dated July 22, 1998, the Fiel firm peremptorily wrote to Abbott, denying any responsibility to protect SWIF's lien:

> Although you stated in your letter of January 1998 that SWIF expects reimbursement from the proceeds of any recovery from Mr. Michael's claim against his employer's UIM policy, under the law of the Commonwealth of Pennsylvania, SWIF has no right of subrogation with regard to uninsured motorist or underinsured motorist claims made by workers who receive benefits under a Workers' Compensation agreement. In this regard, I refer you to Standish v. American Man. Mut. Ins. Co., 698 A.2d 599 (Pa. Super. 1997), which held that uninsured motorist provisions of accident insurance policies, and by inference, underinsured motorist provisions, are not considered claims against "third party tortfeasors" and, therefore, subrogation by a compensation carrier would not be permitted under the Workers' Compensation Act.
>
> Since the State Workers' Insurance Fund is entitled to receive reimbursement on a pro rata basis of settlement proceeds obtained in third party claims only, no further distribution will be made by this office or Mr. Michael to SWIF from any proceeds obtained in the UIM claim which Mr. Michael is making against his employer's motor vehicle insurance policy.[200]

In response, a SWIF representative, Mark Schultz, challenged both the Fiel firm's calculation of $5,780.65 as SWIF's lien for the $15,000 third party action and the Fiel Firm's claim that under Standish SWIF had no subrogation lien as to the UIM

[199] Stipulation, Ex. A(j)(2/12/1998 Letter from Fichera to Buss)
[200] Stipulation, Ex. A(o)(7/22/1998 Letter from Fichera to Abbott).

benefits.[201] Mr. Schultz correctly pointed out that the Fiel firm had misinterpreted Standish, and that it did not preclude SWIF's claim. Unfortunately, this September 30, 1998[202] letter came after the UIM recovery in the amount of $59,928.96—deductions having been made for costs and attorney's fees— had been distributed directly to Michael on September 18, 1998.[203]

SWIF now argues that the Fiel Trust/Estate is liable to it for $39,952.84 for the breach of contract by the Fiel Firm. The Executor raises several arguments in opposition to this claim that the Fiel Estate should be liable to SWIF on its breach of contract claim. First, he emphasizes that there were two separate actions at issue: the UIM action and the third party action against Birnbrauer, which were treated differently by the parties. But

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[201] The issue of whether $5,780.65 was adequate reimbursement for SWIF was analyzed by Workers' Compensation Judge Hetrick. The parties affixed copies of proceedings and rulings by WCJ Hetrick and Commissioner Santone. Stipulation, Exs. B (transcripts) and D(decisions). By decision dated March 14, 2001, WCJ Hetrick dealt generally with the employer's right to subrogation as to Mr. Michael's third party action and UIM recoveries, concluding that the employer's petition to enforce subrogation was reasonable. Ex. D(a). An appeal was filed with the Workers' Compensation Appeal Board, which by order dated April 23, 2002 remanded the matter back for the narrow determination of whether the employer's lien on the $15,000 third party action had been totally settled by the tender of $5,780. Ex. D(b). On remand, WCJ Hetrick concluded that the employer was entitled to a lien of $8,670.99 as to the third party action. He noted that Bennett Block had convincingly testified that the Fiel firm held the $5,780 in escrow. Significantly, WCJ Hetrick concluded that the remaining $2,890.33 due on the lien should be paid by Mr. Michael rather than the law firm. Ex. D(c). None of these rulings, however, focused on the Estate's liability or obligations as to the present SWIF claim. In fact, during the December 3, 2002 hearing, WCJ Hetrick stated that Orphans' Court was the proper forum for deciding claims against the Fiel estate, since his ruling that the employer had a subrogation claim as to the $100,000 UIM recovery had been affirmed by the Workers' Compensation Board. Ex. B(b) at 11-13, 24, 32, 42 & 49. The focus of the December 2002 hearing was limited to the $15,000 third party claim. Id. at 17-19, 38.

[202] Stipulation, Ex. A(p)(9/30/1998 Letter from Schwartz to Fiel). Standish v. Amer. Man.Mut. Ins. Co., 698 A.2d 599, 1997 Pa. Super. LEXIS 2117 (1997) stands for the narrow proposition that a workers' compensation carrier's subrogation lien does not apply against uninsured motorist proceeds derived from the employee's own personal automobile policy. Id. The Standish court acknowledged, however, that a "compensation carrier had right of subrogation for workers' compensation benefits paid where insured worker received uninsured motorist benefits from the employer's policy." Id., 698 A.2d at 601 (citing Warner Continental Ins. Co. v. Continental, 455 Pa. Super. 295, 688 A.2d 177(1996)). The record did not show that Michael paid for the insurance policy at issue. Stipulation, Ex. D(b), 4/23/2004 Opinion, Santone, Commissioner, at 4 (holding that Warner was dispositive and that the result would be different "had the Claimant [Michael] been making a claim under his own underinsured motorist coverage" and noting that the claimant made no such contention). Moreover, the 1/15/1998 letter from Abbott to Fichera clearly identified the policy at issue as "the proceeds from the UIM policy Accu-Tow (i.e. Michael's employer) held with Reliance Insurance Co." Stipulation, Ex. A(i).

[203] Stipulation, ¶ 6.

the correspondence makes it clear that both the representatives of SWIF (Ms. Abbott and Mr. Taub) and the Fiel firm were aware of the two different claims; nonetheless, the Fiel firm in its January 13, 1997 and April 28, 1997 letters to SWIF representatives made broad promises to "protect the lien of SWIF out of any proceeds we obtain in this matter"[204] if SWIF cooperated by supplying documentation and honoring the Fiel firm's demand for a fee of 33 1/3% of all payments made to SWIF.[205]

The issue, therefore, is whether the letters between the Fiel firm and the SWIF representatives constitute a binding contract. Both parties invoke Neville v. Scott, 182 Pa.Super. 448, 452, 127 A.2d 755, 757 (1956), which observed that where "several instruments are made as part of one transaction, they will be read together, and each will be construed with reference to the other and this is so although the instruments may have been executed at different times, and do not in terms refer to each other." Moreover, whether a series of letters constitute an integrated contract is a question of law for a court to decide. United Refining Co. v. Jenkins, 410 Pa. 126, 133,189 A.2d 574, 578 (1963). Finally, interpretation of a contract is a question of law. Abbott v. Schnader, Harrison, Segal & Lewis, 2002 Pa. Super. 247, 805 A.2d 547, 553 (2002), app.denied, 573 Pa. 708, 827 A.2d 1200 (2003).

For a contract to be binding there must be a mutual agreement, consideration and terms that are set forth with sufficient clarity. First Home Savings Bank v. Nernberg, 436 Pa. Super. 377, 387, 648 A.2d 9, 14 (1994). Courts distinguish between unilateral and bilateral contracts:

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[204] Stipulation, Ex. A(k)(4/28/1998 Letter from Fichera to Abbott). See also Stipulation, Ex. A(h)(1/13/1998 Letter from Fichera to Taub-SWIF)("if you wish to have this office protect any lien which SWIF may have with regard to this accident, it is necessary that I obtain a notice from you of said lien").

[205] Stipulation, Ex. A(k)(4/28/1998 Letter from Fichera to Abbott).

> Bilateral contracts involve two promises and are created when one party promises to do or forbear from doing something in exchange for a promise from the other party to do or forbear from doing something else. Unilateral contracts, in contrast, involve only one promise and are formed when one party makes a promise in exchange for the other party's act or performance. Significantly, a unilateral contract is not formed and is, thus, unenforceable until such time as the offeree completes performance.
> First Home Savings Bank v. Nernberg, 236 Pa. Super. at 387, 648 A.2d at 14.

SWIF asserts that "the Fiel Firm entered into an express contract with SWIF on April 28, 1998 to protect SWIF's subrogation lien against the proceeds of the UIM settlement."[206] This letter by the Fiel firm, however, must be viewed in response to the earlier January 15, 1998 letter from Ms. Abbott in which she alerted the Fiel firm that the worker's compensation lien at that point was $62,567.59 and then stated: "We also expect reimbursement of our lien from the proceeds of the UIM policy Accu-Tow held with Reliance Insurance Co."[207] This demand was explicitly accepted when the Fiel firm stated in its April 28, 1998 letter to Ms. Abbott that "We have also agreed to protect the lien of SWIF out of any proceeds we obtain in this matter. We have agreed to undertake the protection of the lien of SWIF for the fee of 33 1/3 % of all payments made to SWIF."[208]

This record thus establishes that the Fiel Firm entered into a binding contract with SWIF in which the Fiel firm promised to protect SWIF's lien on "any proceeds we obtain in this matter" in return for SWIF's promise to provide documentation to support Michael's claim and to honor the Fiel firm's fee request. The record is clear that the Fiel

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206 SWIF Brief at 6.
207 Stipulation, Ex. A(i)(1/13/1998 Letter from Abbott to Fichera).
208 Stipulation Ex. A(k)(4/28/1998 Letter from Fichera to Abbott).

firm received its fee from the $100,000 UIM settlement.[209] The Fiel firm, however, with its July 22, 1998 letter refused to "protect" SWIF's lien on the UIM proceeds. In fact, it denied that SWIF was entitled to assert any subrogation lien as to Michael's UIM proceeds. This denial of SWIF's lien was an anticipatory breach of the contract between the law firm and SWIF. Under Pennsylvania law, an anticipatory breach of contract occurs where there is "an absolute and unequivocal refusal to perform or a distinct and positive inability to do so." 2401 Pennsylvania Avenue Corp. v. Fed. of Jewish Agencies, 507 Pa. 166, 489 A.2d 733 (1985). By its July 22, 1998 letter, the Fiel firm absolutely refused to protect the SWIF lien as to the UIM claim when it stated that there would be no distribution from "this office or Mr. Michael to SWIF from any proceeds obtained in the UIM claim which Mr. Michael is making against his employer's insurance policy."[210]

The Executor next asserts a statutory argument in his efforts to protect the Fiel Trust from the SWIF claim. He argues, for instance, that under the Workers' Compensation Act, an employer's subrogation rights are limited to the benefits received by an injured employee or his estate. It does not reach the assets of the employee's attorney. See 77 Pa.C.S. § 671. This contrasts to the Public Welfare Code which contains third party liability provisions authorizing actions against those who make distributions without satisfying the interests of the Commonwealth. SWIF Brief at 8-9 (citing 62 Pa.C.S. §1409(9)). Moreover, the Executor argues, even with this statutory basis for imposing third party liability, Pennsylvania courts have refused to recognize claims by

[209] Stipulation, ¶ 6 & Ex. D(a) 3/14/2001 Opinion by WCJ Hetrick at 2, ¶3 ("Employer's UIM carrier paid a total of $100,000.00 with deductions for costs ($118.40) and a 40% attorney fee giving claimant a net share of $59,928.96").

[210] Stipulation, Ex. A(o),(7/22/1998 Letter from Fichera to Abbott).

the DPW against an attorney for failure to follow the notice provisions of section 1409 because the legislature did not provide for such remedies. Dept. of Public Welfare v. Thomas, 129 Pa. Commw. 528, 566 A.2d 365 (1989), aff'd, 526 Pa. 540, 587 A.2d 727 (1991). The facts of the instant case, however, are distinguishable from the Thomas case where liability would have hinged simply on an attorney's failure to provide notice to the DPW of an action against a third party. In this matter, the Fiel firm made written assurances to SWIF that its subrogation lien would be protected in exchange for documentation and assurances as to attorney fees. Based on these key factual distinctions, the Executor's statutory argument, likewise, is ultimately unpersuasive.

Finally, the Executor argues that under Pennsylvania law, specifically, 15 Pa.C.S. 1526, "a shareholder is not personally liable for the debts of a corporation or the acts of any representative of a corporation." [211] SWIF responds that this is a case where the corporate veil should be pierced to prevent injustice.[212] There is, however, "a strong presumption in Pennsylvania against piercing the corporate veil." Advanced Tel. Sys., Inc. v. Com-Net Prof' Mobile Radio, LLC, 2004 Pa. Super. 100, 846 A.2d 1264, 1278 (2004)(citing Wedner v. Unemployment Bd., 449 Pa. 460, 464, 296 A.2d 792, 794

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[211] Executor's Brief at 10. 15 Pa.C.S. § 1526 provides:

> (a) GENERAL RULE – A shareholder of a business corporation shall not be liable, solely or by reason of being a shareholder, under an order of a court or in any other manner for a debt, obligation or liability of the corporation of any kind or for the acts of any shareholder or representative of the corporation.

The SDFA law firm was a New Jersey Professional Association with offices in New Jersey and primarily Pennsylvania. 7/21/2005 N.T. at 42 (Koplin); 7/19/2005 N.T. at 32 (Elfand). See generally N.J.S.A. §14A:17-8("professional relationship; personal liability; corporate liability"). Nonetheless, the parties cite only Pennsylvania law on the corporate veil issue. New Jersey courts, however, also recognize the ability of courts to pierce the corporate veil. See, e.g. Stochastic Decisions, Inc v. DiDomenico, 236 N.J. Super. 388, 393, 565 A.2d 1133, 1136 (1989), cert. denied, 121 N.J. 607, 583 A.2d 309("The power of New Jersey courts to pierce the corporate veil is well-established"); Walensky v. Royce Int'l., Inc., 264 N.J. Super. 276, 282, 624 A.2d 613, 617 (1993), cert. denied, 134 N.J. 480, 634 A.2d 527 (1993)("It is well established that a court of equity is always concerned with substance and not merely form and thus it will go behind the corporate form when necessary to do justice").

[212] SWIF Reply Brief at 2.

(1972)). See, e.g., McKenna v. Art Pearl Works, Inc., 225 Pa. Super. 362, 310 A.2d 677 (1973)(refusing to pierce corporate veil where injured plaintiff sought to hold individual agent of the company that manufactured the punch press personally liable). Moreover, there is no general rule for when a corporate veil may be pierced:

> "Also the general rule is that a corporation shall be regarded as an independent entity even if its stock is owned entirely by one person" Lumax Industries , Inc. v. Aultman, 543 Pa. 38, 41-41, 669 A.2d 893, 895 (1995). Nevertheless, "a court will not hesitate to treat as identical the corporation and the individuals owning all its stock and assets whenever justice and public policy demand and when the rights of innocent parties are not prejudiced thereby nor the theory of corporate entity made useless." Kellytown Co. v. Williams, 284 Pa. 613, 426 A.2d 663, 668 (Pa. Super. 1981). "The corporate form will be disregarded only when the entity is used to defeat public convenience, justify wrong, protect fraud or defend crime." First Realvest, Inc. v. Avery Builders, Inc., 410 Pa. Super. 572, 600 A.2d 601, 604 (Pa. Super. 1991)(quoting Kellytown, supra, 426 A.2d at 668). However, "there appears to be no clear test or well settled rule in Pennsylvania…as to exactly when the corporate veil can be pierced and when it may not be pierced." Kellytown, supra, 426 A.2d at 668 (citations omitted) Good v. Holstein, 2001 Pa. Super. 320, 787 A.2d 426, 430 (2001), app.denied, 568 Pa. 738, 798 A.2d 1290 (2002).

Pennsylvania courts have, however, pierced the corporate veil under the "alter ego" theory "where the individual or corporate owner controls the corporation and the controlling owner is to be held liable" for any claim or debt. Good v. Holstein, 787 A.2d 430. See Hanrahan v. Audubon, 418 Pa. Super. 497,508, 614 A.2d 748 (1992)(corporate veil pierced to hold the president of construction company personally liable for damages under a construction contract where defendants "treated the corporation as a proprietorship" with a commingling of personal and business funds); College Watercolor Group, Inc. v. Newbauer, 468 Pa. 103, 118, 360 A.2d 200, 207 (1976)(corporate veil pierced on "alter ego" theory where corporate president used control of his corporation to further his personal interests by threatening not to pay sums due to another company unless given a controlling interest in that other company).

The corporate veil "is properly pierced whenever one in control of a corporation uses that control or corporate assets to further one's personal interests" since in "such circumstances the shareholder, in effect, pierces the corporate veil by intermingling his personal interests with the corporation's interests." College Watercolor Group, 468 Pa. at 118, 360 A.2d at 207. More generally, a "court will pierce the corporate veil on an alter ego theory when there is a showing of injustice after the establishment 'that the dominant shareholder or the controlling corporation wholly ignored the separate status of a corporation and so dominated and controlled its affairs that its separate existence was a mere sham.'" Lycoming County Nursing Home Assoc., Inc. v. Com., Dept. of Labor, 156 Pa. Commw. 280, 627 A.2d 238, 243 (1993). It is not necessary to show fraud. Id. 627 A.2d at 244. There are two critical requirements for application of the alter ego theory: it is "applicable only where the individual or corporate owner controls the corporation to be pierced and the controlling owner is to be held liable."[213]

As previously discussed, the record was replete with evidence that Stuart Fiel exercised dominant control over his law firm before his illness.[214] The complaint that was filed on behalf of Howard Michael, for instance, lists only Stuart Fiel as the "attorney for plaintiffs"[215] even though another attorney handled this matter for the firm. Moreover, the first letter sent by SWIF on September 11, 1997 to notify the Fiel Firm of their

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[213] Miners, Inc. v. Alpine Equipment, 722 A.2d 691, 694, 1998 Pa. Super. LEXIS 3730 (1998), app.denied, 560 Pa. 728, 745 A.2d 1223 (1999)(recognizing principle but refusing to pierce corporate veil on facts presented).

[214] See, e. g. 9/28/2005 N.T. at 97-100(Presto)(Fiel came to the office every day, put every case in suit, was attorney of record for all cases, filed all complaints under his name, conducted daily mail meetings to keep track of cases, maintained no clear policy as to remuneration of firm attorneys).

[215] Stipulation, Ex. A(c), Complaint.

subrogation lien was addressed personally to Stuart Fiel, as was the September 30, 1998 letter from SWIF protesting the firm's failure to protect their lien.[216]

By its July 22, 1998 letter to SWIF, the Fiel firm breached its agreement to protect the SWIF subrogation lien while pocketing its fee. This shortchanging of the SWIF of its reimbursement for expenses paid on behalf of a client is unconscionable.[217] The Fiel Trust cannot be permitted to profit from the firm's flagrant violation of its contractual obligations with SWIF in pursuing a settlement for its client. Having induced SWIF to assist it in pursuing the UIM claim, it must be held accountable. Indeed, the account filed for the Trust documents that it was a direct beneficiary of fees paid to the Fiel firm with deposits of those fees to the Trust.[218] On this record, therefore, the Trust cannot avoid the SWIF claim for $39,592.84 due to the breach of contract by the Fiel firm.

III. Conclusion

The Interim Account for the Trust for the period ending December 31, 2004 shows a balance of principal before distribution of $5,510,009.71 and a balance of income before distribution of $394,676.01 for a total of $5,904,685.72. This sum, composed as stated in the account, plus income or credits received since the filing thereof, subject to distributions already properly made and subject to the deduction of $39,592.84 for the SWIF claim and subject to a deduction in the requested attorney fees

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[216] Stipulation, Exs. A(b)(September 11, 1997 letter from Ruth Abbott to Stuart Fiel) and Ex. A(p)(September 30, 1998 letter from Mark Schultz to Stuart Fiel).

[217] At the very least, these disputed funds should have been placed in escrow. Pennsylvania Rule of Professional Conduct 1.15(c), for instance, provides: "When in connection with a client-lawyer relationship a lawyer is in possession of property in which two or more persons, one of whom may be the lawyer, claim an interest, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute."

[218] See Interim Fiel Trust Account at 19-33 (listing fees from Stuart Fiel & Associates from 9/11/2002 through 12/10/04 under Principal "Net Gain or Loss on Sales or Other Distributions").

of $490,350 to $369,481.25,[219] is awarded as set forth in the Petition for Adjudication and Statement of Proposed Distribution as follows:

Proposed Distributee	***Amount/Proportion***
Income	
Stuart D. Fiel Trust Under Deed Dated June 20, 2000	100%
Principal	
Stuart D. Fiel Trust Under Deed Dated June 20, 2000	100%

Leave is hereby Granted to the accountant to make all transfers and assignments necessary to effect distribution in accordance with this adjudication.

The certificate of the Official Examiner of the examination of assets awarded in further trust shall be submitted, and, when approved by the Auditing Judge, will be annexed.

AND NOW, this day of June 2007, the account, as modified by this adjudication as to the SWIF claim and requested attorney fees, is confirmed absolutely.

[219] As previously stated, this requested attorney fee of $490,350 does not include an additional $134, 650 in "defense fees." According to the Account through December 31, 2004, the law firm Schachtel, Gerstley, Levine and Koplin, P.C. was paid a total $300,000 for the administration of the trust and estate with a payment of $100,000 on 1/9/2002; $100,000 on 2/5/2002; and $100,000 on 1/24/2003. Ex. J-8, Fiel Interim Trust Account at 60-62. The Petition for Adjudication (trust) states that an additional $100,000 was paid to SGKL on February 28, 2005, which is beyond the period covered by this Interim Account.

Exceptions to this Adjudication may be filed within twenty (20) days from the date of issuance of the Adjudication. An appeal from this Adjudication may be taken to the appropriate Appellate Court within thirty (30) days from the issuance of the Adjudication. See Phila. O.C. Rule 7.1.A and Pa. O.C. Rule 7.1 as amended and Pa.R.A.P. 902 and 903.

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John W. Herron, J.