COURT OF COMMON PLEAS OF PHILADELPHIA
ORPHANS' COURT DIVISION

Estate of Elizabeth Janiga,
Deceased
370 DE of 2006
Control No. 065237

Sur First and Final Account of Elizabeth Stelmach, Executrix

The account was called for audit May 1, 2006 By: **HERRON, J.**

Counsel appeared as follows:
Arthur Cavaliere, Esquire - for the Accountant
Michael VanBuskirk, Esquire – for the Accountant
Mary C. Kenney, Esquire – for the Commonwealth
Thomas W. Corbett, Esquire – for the Commonwealth

ADJUDICATION

Elizabeth Janiga died on March 12, 2003. Under her Will dated September 23, 2001, her grand-niece, Elizabeth Stelmach, was named Executrix. Letters Testamentary were granted on March 31, 2003, and proof of their publication was presented. Elizabeth Janiga was not survived by a spouse nor by children. On March 10, 2006, the accountant Elizabeth Stelmach filed an account for the period March 31, 2003 through March 6, 2006.

The Attorney General of the Commonwealth of Pennsylvania, as parens patriae, filed ten objections to the account and a hearing was scheduled. At that hearing, the Attorney General stated that various objections had been resolved, except for the objections that the executrix commission of $34,000, the attorney fee of $45,000[1] and the accountant fee of $31,000 were

1 As will be discussed within, the Account incorrectly listed attorney fees as $40,000, but during the hearing it was disclosed that attorney fees had actually totaled $45,000. See 10/3/2006 N.T. at 58-61 (Cavaliere); Account at "Disbursements."

unreasonable and excessive based on the nature of this estate.[2]

The Attorney General's involvement in this matter is to protect the interests of the charitable beneficiaries of Elizabeth Janiga's estate. See generally Pruner Estate, 390 Pa. 529, 531-33, 136 A.2d 107, 108-10 (1957). In her will, Ms. Janiga devised two properties located at 4400 Manayunk Avenue and at 134 Seville Street in Philadelphia to the executrix, her grand-niece Elizabeth Stelmach. Ms. Janiga also made specific bequests to various individuals and relatives. The residue of her estate was to be equally divided between two charities: St. Josaphat Church in Manayunk, Philadelphia and the Shrine of our Lady of Czestochowa in Doylestown. The Attorney General asserts, however, that the final distribution of the remaining residue to the charities was delayed until 2006 due to the neglect of the executrix and the estate counsel, Arthur Cavaliere.

According to the Attorney General, the bulk of the administration of the estate was accomplished by October 2004. The federal inheritance tax return had been filed by that date, and while it was later amended, there was no change to the tax liability since the majority of the estate was to go to the two charities. Moreover, by mid-2004 the Executrix had distributed all the probate and nonprobate assets due to herself and family members. She neglected, however, to make the distribution of the remaining residue of $174,000 due to the charitable beneficiaries until 2006.[3] The Attorney General also asserts that the executrix failed to monitor the legal and accounting fees that were billed to the estate. The record presented at the hearing supports these

2 In her brief, the Attorney General argues that the executrix fee is excessive because she breached her fiduciary duty "by failing to actively monitor the legal and accounting services being billed and by failing to promptly distribute the charitable bequests." 12/26/2006 Attorney General Brief at 6 (emphasis added). The delayed distribution of assets to the charities, therefore, is an integral element in the challenge to the executrix commission. Originally, the delayed distribution had been set forth as objection 11, which is not among the specific objections the Attorney General lists as no longer pending. See 12/26/2006 Attorney General Brief at 3.

objections as to the executrix and attorney fees. Although the executrix asserts the defense of good faith reliance on advice of counsel, that argument is unpersuasive based on the factual record and precedent.

It is undisputed that a personal representative of an estate is entitled to reasonable compensation. 20 Pa.C.S. § 3537. The fiduciary nonetheless has the burden of establishing the reasonableness of her commission "based on services actually performed and not on some arbitrary formula." Trust of Ischy, 490 Pa. 71, 81, 415 A.2d 37, 42 (1980)(citation omitted). The Orphans' Court has the authority to assess the reasonableness of a claimed commission based on the factual record. Reed Estate, 462 Pa. 336, 342, 341 A.2d 108, 111 (1975).

While a schedule for computing fiduciary and attorney fees was set forth in Johnson Estate, 4 Fid. Rep. 2d 6 (Mont. City. 1983) based on percentages related to the size and nature of estate assets, the Pennsylvania Superior Court has more recently emphasized that "[e]gregious 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 (1985). A methodology for determining attorney fees has been set forth by the Pennsylvania Supreme Court in LaRocca Estate, 431 Pa. 541, 546, 246 A.2d 337, 339 (1968).

Ms. Stelmach testified that she had chosen Mr. Cavaliere as attorney because she knew him: "he lived next door to my parents and my parents basically were hard working people that only liked the same type of person and he was friendly with them."[4] She was not clear, however, as to the nature of the fee arrangement she had entered into with the estate attorney. As she noted, "I think it was in the beginning in the retainer fee that I said initially it's more hourly and

3 12/27/2006 Attorney General Brief at 11-12.

then after the time has lapsed, it is a percentage."[5] In fact, the retainer agreement was based on a scale of percentages.[6] Ms. Stelmach conceded that she neither received nor scrutinized the attorney bills, but merely went to Mr. Cavaliere's office to sign checks to pay for his fees.[7] When asked, "[d}o you remember getting any bills from Mr. Cavaliere for the services he performed," she replied: ""No. For his fees, I usually went into the office and signed the check."[8]

Ms. Stelmach testified that her commission of $34,000 as well as the attorney and accountant fees had been determined by the estate attorney, Arthur Cavaliere.[9] Ms. Stelmach kept no time records of her work on the estate, but testified that she had spent "easily over one thousand" hours[10] taking apart her aunt's large, three story Victorian house located at 4400 Manayunk Avenue in search of estate documents. She began this work shortly after her aunt died in March 2003 and was still searching up until October 2003 when she got a dumpster to clean out the house.[11] This work, however, was not for the sole benefit of the estate. On cross examination, Ms. Stelmach conceded that under her aunt's will, she received the 4400 Manayunk property as well as all of its contents.[12] She had been told by her Aunt that there were bonds under the dining room table, but Ms. Stelmach was surprised that instead of an estate of $200,000 her Aunt left an estate in excess of $1,000,000.[13]

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4 10/3/2006 N.T. at 8 (Stelmach).
5 10/3/2006 N.T. 31 (Stelmach).
6 See Ex. P-1.
7 10/3/2006 N.T. at 31-34 (Stelmach).
8 10/3/2006 N.T. at 34 (Stelmach).
9 10/3/2006 N.T. at 24 (Stelmach).
10 10/3/2006 N.T. at 17 & 11 (Stelmach).
11 10/3/2006 N.T. at 14-16 (Stelmach).
12 10/3/2006 N.T. at 26-27 (Stelmach).
13 10/3/2006 N.T. at 12-14 (Stelmach).

Ms. Stelmach repeatedly emphasized that paying the taxes was a "number one priority."[14] She could not remember, however, exactly when the federal or Pennsylvania taxes were paid though she knew they had been paid.[15] Ms. Stelmach conceded that by October 2004, she had received the two properties bequeathed to her as well as the proceeds from the joint bank accounts.[16] Although she was aware that "the bulk of the estate went to the charities," she acknowledged that "they got part of it earlier and then the rest of it they didn't get until everything else was closed" which "probably was this year 2006."[17] When asked to explain the cause of this delay, she replied "I frankly don't know."[18]

A main factor delaying the closing of the estate was the late filing of the last installment of Pennsylvania Inheritance Tax in March 2006, which had been the responsibility of the estate attorney Arthur Cavaliere.[19] Ms. Stelmach could not explain why it took so long to file that tax form, although she was aware that the estate had to pay penalties due to the late filing.[20] The estate attorney likewise could offer no explanation for this delay. When asked why that Pennsylvania tax was filed so late, Mr. Cavaliere stated: "I am sure I should have done it sooner but I can't give you a reason why it wasn't done sooner."[21] Mr. Cavaliere had hired an accounting firm, Titcher and Kritzstein, to take responsibility for paying the federal inheritance and personal income taxes as well as for valuing the bonds.[22] Mr. Cavaliere was equally vague as to the exact number of hours he had spent on estate matters. He testified that he kept no time

14 10/3/2006 N.T. at 16-17 (Stelmach).
15 10/3/2006 N.T. at 33-34 (Stelmach).
16 10/3/2006 N.T. at 26-28, 35 (Stelmach).
17 10/3/2006 N.T. at 37 (Stelmach).
18 10/3/2006 N.T. at 38 (Stelmach).
19 10/3/2006 N.T. at 64-65 (Cavaliere). See also 10/3/2006 N.T. at 83 (Titcher)(The accountant did not prepare the Pennsylvania tax return).
20 10/3/2006 N.T. at 41 (Stelmach).
21 10/3/2006 N.T. at 65 (Cavaliere).

records,[23] and when asked to estimate his hours, he responded: "Very difficult to do. I would really have to guess."[24] The accountants, in contrast, kept time records which were admitted as evidence.[25]

Based on this record, it is clear that both the executor commissions and the attorney fees are unsupported by a factual record and are excessive. It is well established that the "executor of an estate is accountable for the fees paid to himself or his counsel" by presenting "facts which show that he is entitled to the requested compensation." Estate of Preston, 385 Pa. Super. 48, 56, 560 A.2d 160, 164 (1989)(citation omitted). As a fiduciary, an executor owes a primary duty of loyalty to the beneficiaries. Estate of Harrison, 745 A.2d 676, 679 (Pa. Super. 2000)(citations omitted). The Attorney General asserts that the executrix breached her duty to the charitable beneficiaries in two ways: by failing to monitor the legal and accounting services and fees and by failing to assure a timely distribution of the estate's residue to the charitable beneficiaries.[26]

A party seeking a surcharge against a fiduciary has the burden of proof. Estate of Geniviva, 450 Pa. Super. 54, 64, 675 A.2d 306, 311 (1966). A surcharge is a penalty imposed on a fiduciary for failure "to exercise common prudence, skill and caution in the performance of its fiduciary duty, resulting in a want of due care." Estate of Scharlach, 809 A.2d 376, 384 (Pa. Super. 2002)(citation omitted). However, in a case cited by the executor—In re Smith, 2006 Pa. Super. 5, 9, 890 A.2d 1082, 1087 (2006), --the Superior Court emphasized that "where a significant discrepancy appears on the face of the record, the burden shifts to the executor to present exculpatory evidence and thereby avoid the surcharge." Accord Estate of Geniviva, 450

22 10/3/2006 N.T. at 68 (Cavaliere).
23 10/3/2006 N.T. at 53 & 66 (Cavaliere).
24 10/3/2006 N.T. at 53 (Cavaliere).
25 10/3/2006 N.T. at 76 (Titcher). See also Ex. P-2.

Pa. Super. at 64, 675 A.2d at 311. Examples of such blatant discrepancies include late filing of estate taxes or redeeming large numbers of EE U.S. Savings Bonds without consideration of the tax implications. Id., 890 A.2d at 1087-89. Similarly, a 2 year unexplained delay in disbursing the residue due to charitable beneficiaries after the executrix has made sure that she received her own bequests constitutes a "significant discrepancy" on the face of the record that requires explanation. In this case, both Ms. Stelmach and the estate attorney were unable to provide such an explanation.[27]

Instead, the executor raises the defense of good faith reliance on counsel. This defense that a fiduciary relied on the advice of counsel "is not a blanket of immunity in all circumstances." Estate of Lohm, 440 Pa. 268, 275, 269 A.2d 451, 455 (1970)(citation omitted). Moreover, there is a two-prong test which must be considered: "The initial choice of counsel must have been prudent under all the circumstances then existing, and the subsequent decision to rely upon this counsel must also have been a reasonably wise and prudent choice." Id. Although the Attorney General questions the reasons given for the selection of the attorney to represent the Janiga Estate, Ms. Stelmach's explanation was valid: she chose the attorney based on her prior knowledge of him as a respected neighbor of her parents.[28] What was not reasonable or prudent was her subsequent "oversight" of the estate attorney. Her testimony revealed that she was unaware or unclear of the terms of the payment schedule set forth in the retainer agreement.[29] She did not request any documentation of services rendered before blindly signing checks for

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26 12/27/2006 Attorney General Brief at 6.

27 Nonetheless, Mr. Cavaliere admitted that he was responsible for making sure "everything comes out right at the end." 10/3/2006 N.T at 72 (Cavaliere).

28 10/3/2006 N.T. at 8 (Stelmach).

29 10/3/2006 N.T. at 31 (Stelmach).

attorney fees.[30] Indeed, not until the hearing was it revealed that the Account understated the attorney fee by $5,000.[31] Although the executrix was aware that the bulk of the estate under her Aunt's will was to go to the two charities, she apparently was unconcerned that the residue was not distributed to them until 2006—nearly two years after she had received her own distributions from the estate.[32] Although she had repeatedly emphasized that paying the taxes was the number one priority,[33] she apparently did nothing to prod Mr. Cavaliere into filing the final payment Pennsylvania Inheritance Tax Return earlier than 2006. Neither she nor Mr. Cavaliere could offer any explanation for this late filing which caused penalties to the estate.[34]

The executor, therefore, cannot satisfy the second prong of the good faith reliance on counsel test. Moreover, the facts of the precedent the executrix invokes to support this defense cuts against her defense. In the Estate of Lohm, for instance, the executor, who was an attorney, hired a tax expert to pay the taxes of the estate which had to be timely filed to take advantage of the "alternate valuation date." Unfortunately, the federal tax return was filed four months late, resulting in loss to the estate. When the executor and attorney fees were subsequently challenged, the court rejected the executor's defense that he had relied entirely on the advice of the tax expert/counsel. It concluded that the executor "was guilty of supine negligence" in failing to ascertain when the tax return was due. In so doing, the Lohm court made a general observation particularly relevant to the present case:

> A prudent man may not have the technical knowledge or skill to prepare an estate tax return or even an income tax return, and so would properly rely on one more knowledgeable.

30 10/3/2006 N.T. at 31-34 (Stelmach).
31 10/3/2006 N.T.at 58-59 (Cavaliere).
32 10/3/2006 N.T. at 37 (Stelmach).
33 10/3/2006 N.T. at 16-17 (Stelmach).
34 10/3/2006 N.T. at 38 (Stelmach) and 64-65 (Cavaliere)("I am sure it should have been done sooner but I can't give a reason why it wasn't done sooner").

> But a prudent man in the conduct of his own affairs would certainly know that there is a time when *a tax return must be made and a time when a tax is due and payable*, and if he did not know what those times were, he would find them out. Estate of Lohm, 440 Pa. at 276, 269 A.2d at 455.

By failing to monitor the timely filing of the Pennsylvania Inheritance Tax return by the Estate attorney, the executrix failed to prevent the delayed distribution to the charities. In this, both she and the attorney were guilty of the supine negligence rued by the Lohm court, which further observed:

> Both executors in this case testified that they did not know the time for filing the federal estate tax return, or the penalties for late filing. Assuming, *arguendo*, that such ignorance did exist, we fail to conclude that this ignorance is completely excused by reliance on a lawyer believed to be an expert. The matter of missing a tax return date, a privotal factor in connection with the administration of the entire estate, is not an error of law or of judgment for which the entire blame can be shifted to the expert. This was not a matter of acting on advice of counsel; it was a matter of neither knowing nor seeking to ascertain a key fact in the proper performance of a fiduciary function voluntarily undertaken.
> Estate of Lohm, 440 Pa. at 277, 269 A.2d at 456.

Similarly, the delay in distributing the final payments to the two charitable beneficiaries until nearly two years after distributions had been made to the other beneficiaries—including the executrix—was a serious breach in the executor's fiduciary duty. The Lohm court concluded that where the executor had failed to monitor the timely the filing of a federal income tax return—and the estate suffered a discernible loss as a consequence—the trial court could have approved no fees at all. It did not disturb the court's decision to award the executor approximately one-half of a minimum executor's fee for a comparable estate.[35]

The facts in the present case are distinguishable in several regards. No evidence was

35 Estate of Lohm, 440 Pa. at 272-73, 277-78, 269 A.2d at 454, 456-57 (the lower court determined that a minimum executor's fee for the estate at issue would have been $30,000 but it reduced the fee to $15,000 which was approved by the appellate court).

presented of a specific loss to the estate comparable to the tax losses cited in the Estate of Lohm. Instead, the Attorney General demonstrated that the charitable beneficiaries had not received their distribution of $174,000 until nearly 2 years after distribution of the estate assets to the executrix and her family. [36] It should be noted, however, that the Account indicates that distributions in the amount of $200,000 were made to both St. Josaphat Church and the National Shrine—Lady of Czestochowa in October 2004 as partial distributions.[37] In addition to this partial fulfillment of her obligation to the charitable beneficiaries, the executrix neglected to monitor in any way the late filing of the Pennsylvania Inheritance tax by the estate attorney or any duplicative costs from the efforts of the estate attorney and accountants. This record establishes how easily the delay in final distributions to the two charities could have been avoided if the executrix—or the estate attorney—had behaved properly.

In determining the reasonableness of attorney fees, courts apply the methodology set forth in LaRocca Estate, 431 Pa. 542, 546, 246 A.2d 337, 339 (1968) which sets forth the following factors: "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." It is not possible to assess accurately the amount of work performed by Mr. Cavaliere because he failed to meet his burden of presenting a factual record. Not only did he not keep

36 12/27/2006 Attorney General Brief at 12.

time records, but when asked to estimate the time he spent working on the estate he confessed at least twice that he was unable to do so but could merely guess.[38] The character of the services and the difficulty of problems on the record presented were routine. As for the results obtained, Mr. Cavaliere admitted that he had assumed responsibility for filing the Pennsylvania Inheritance tax and could offer no explanation for why it was untimely filed, thereby delaying the final distribution to the beneficiaries. He also could give no reason for the delayed distribution to the 2 charitable beneficiaries. It should be noted, however, that 4 payments of Pennsylvania Inheritance Tax totaling $73,824.93 had been made between June 13, 2003 through October 19, 2004. According to the accountant, Pennsylvania Inheritance and Estate tax were paid in the following amounts: $4,170.57 on June 13, 2003, $27,075.00 on June 13, 2003, and $27,579.36 on June 13, 2003, $15,000 on October 19, 2004 and $1,102.34 on March 8, 2006. The delinquent payment of the remaining tax on March 8, 2006 was merely $1,102.34 but it inexplicably delayed the final distribution to the charities.

On this record, therefore, the payment of $45,000 in attorney fees was unreasonable. It will therefore be reduced by half to $22,500. The executrix will therefore be surcharged in the amount of $22,500 for that excessive payment and her claimed commission of $34,000 will likewise be reduced by half to $ 17,000. Consequently, the surcharge that she must return to the estate is $39,500. A crucial factual consideration in reducing these fees and surcharging the executrix is that the beneficiaries whose interests were neglected were charities. Such beneficiaries are frequently more vulnerable and hence depend on the good faith of the fiduciary. Regrettably, in this case, it was necessary for the Attorney General, as parens patriae, to step in to assure the final distribution to

37 Account – Distributions (unnumbered).

the charities Ms. Janiga had sought to benefit. This cavalier treatment of charitable interests cannot be rewarded.

In arguing that the attorney fees were reasonable, the executrix asserts that percentage contracts are not prohibited.[39] This, of course, is true, but if attorney fees based on a percentage contract are challenged, controlling precedent requires factual support for fees charged.[40]

In reducing the executor commission, this court is also unpersuaded by the testimony concerning the long hours the executrix spent cleaning out the property at 4400 Manayunk Avenue. While a search of that home by the executrix had been necessary to locate estate bonds and documents, Ms. Stelmach testified that her Aunt had told her about the location of the bonds under the dining room table. The work in cleaning out the Manayunk house, moreover, was not for the sole benefit of the estate. Indeed, in cross examination, the executrix conceded that she had inherited both the house and its contents.

Finally, the Attorney General argues that the $31,000 in accounting fees paid to the firm of Titcher and Kritzstein was unreasonable. In response to these objections, detailed time sheets were presented and admitted as Exhibit P-1. Moreover, Eliot Titcher, a certified public accountant since 1975, testified in convincing detail about the services he performed in preparing the various tax forms that were filed on behalf of the estate. The accountants prepared a 2002 income tax return, a 2003 income tax return, a 2004 Estate Income Tax return, a 2005 Estate Income Tax Return, Federal Estate Tax Return, an amended Federal Estate Tax return as well as an evaluation of bonds and

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38 10/23/2006 N.T. at 53 & 56.
39 11/29/2006 Executrix Brief at 13.
40 See, e.g., Estate of Preston, 385 Pa. Super. at 56, 560 A.2d at 164; Novotny Estate, 24 Fid. Rep. 2d 214, 216 (Mont. Cty. 2004).

compilation of assets.[41] Those fees were thus reasonable. To the extent that the accounting services may have been redundant as to any services normally provided by the executrix in gathering records or the estate attorney in preparing taxes, that redundancy is more than compensated by the decrease in both the estate attorney fee and the executor commission. See generally Feise Estate, 21 Fid. Rep. 2d 317, 321 (Mont. Cty. 2001)(attorney should not be compensated for work performed by accountants)

The account shows principal and income receipts totaling $1,024,425.21 with disbursements of $190,006.23 and distributions of $660,000. with a combined balance remaining of $174,418.98. 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 any additional tax as may be due, and subject to the surcharge of $39,500 that is being charged against the Executrix, is awarded as set forth in the Accountant's Petition:

Income

St. Josaphat's Church	50%
Shrine of Our Lady of Czestochowa	50%

Principal

St. Josaphat's Church	50%
Shrine of Our Lady of Czestochowa	50%

A schedule of distribution, containing all certifications required by Phila. O.C. Rule 6.11.A(2), and in conformity with this Adjudication, shall be filed with the clerk within ninety (90) days of absolute confirmation of the account.

41 10/3/2006 N.T. at 82-84 (Titcher); Ex. P-2; 11/29/2006 Executrix Brief at 12.

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

AND NOW, this _____ day of SEPTEMBER, 2007, the account is confirmed absolutely.

Exceptions to this Adjudication may be filed within twenty (20) days from the date of the 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 7.1A 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.