

COURT OF COMMON PLEAS OF PHILADELPHIA
ORPHANS' COURT DIVISION

Estate of Donald Butler, Deceased
Estate of Donald Butler, Intervivos Trust
O.C. No. 679 DE of 2011
O.C. No. 680 IV of 2011
Control Nos. 111700 & 111907

Sur First and Final Account of Cheryl Dickerson, Executrix

The account was called for audit August 1, 2011 By: **HERRON, J.**
Counsel appeared as follows:
Bradley Newman, Esquire
Ronald Harper, Esquire

AUDIT MEMORANDUM

Petitioner, Dona Butler, is the sole heir of her father, Donald Butler, who died testate on March 7, 2010. Shortly prior to his death, he engaged counsel and completed an estate plan whereby he devised his estate by will to a testamentary residuary trust for the benefit of his daughter, Dona Butler. In addition, on the same day he executed an inter vivos trust document naming himself as income beneficiary and his daughter as the sole remainder beneficiary of the trust.

Donald Butler named his sister, Cheryl Dickerson, executrix under his will as well as trustee of the testamentary trust created by his will and the inter vivos trust created by the trust agreement. Decedent's entire estate and/or trust, including his pension death benefit paid directly to Petitioner, was in excess of two (2) million dollars. He directed that up to 80% of the annual income of his trust be paid to petitioner for twenty (20) years at which time the trust would terminate with petitioner receiving the entire balance of the principal and income.

The Respondent and accountant in these proceedings is Cheryl Dickerson, the designated executrix and trustee, who is a resident of Florida and the sister of Decedent. Preliminary proceedings resulted in an Order entered compelling Respondent to file an accounting of her administration of the estate and of her administration of the trust. On June 22, 2011, Respondent filed an account in the estate and on July 28, 2011, Respondent filed an amended account. In response, Dona Butler filed objections. A hearing was subsequently held on August 24, 2011 to

consider those objections challenging the reasonableness of the fiduciary commissions and attorney fees and further requesting the removal of Respondent as trustee.

Discussion

With few exceptions, the facts are not in dispute. Decedent was a retired Philadelphia police officer. Upon learning he was terminally ill several months prior to his March, 2010 death, he designated his daughter, Dona Butler, as his agent pursuant to a power of attorney.¹ On January 21, 2010 he executed a Will. In his will, Mr. Butler created a residuary testamentary trust for the benefit of his daughter, Dona Butler, naming his sister, Cheryl Dickerson, as trustee.² On that same date, he also executed a Revocable Agreement of Trust. That Trust document in Schedule A designated the trust assets as follows: (1) real property located at 3722 Spring Garden Street; (2) all Police and Fire Federal Credit Union Accounts, and; (3) all Valic Accounts.³

Dona Butler, as the sole beneficiary of her father's estate and trust, filed petitions seeking an accounting by the trustee and executor, Cheryl Dickerson, which was granted by this court. Ms. Dickerson responded to these orders by filing an account and amended account for the estate. No accounting has yet been filed in the trust, although an Order was entered May 23, 2011 requiring her to do so. Ms. Dickerson has stated, however, that the accounts filed encompass the trust assets as well as the estate assets.⁴ Dona Butler filed objections to these accounts. Although Petitioner has filed 13 objections, objections 10 through 13 were withdrawn at the commencement of the proceedings and objections 7 through 9 were withdrawn at the conclusion of the proceedings thus leaving the first six objections for resolution by the Court. The remaining objections challenge the reasonableness of the attorney fees and "fiduciary" fees

¹ 8/24/11 N.T. at 8 (Dona Butler).

² In paragraph Second of his will, Mr. Butler provided that "All the rest and residue of my real and personal estate whatsoever and wheresoever, of whatever nature, kind and quality soever the same may be, and not hereinbefore given and disposed of, I give and bequeath unto my sister, **CHERYL DICKERSON**, in trust nevertheless for my daughter, **DONA CHRISTINE BUTLER**."

³ Dona Butler stated that based on the accountant's REV-1500 Inheritance Tax Return, the combined death values of the assets listed in Schedule A of the trust totaled \$1,892, 536.56. The accountant rebutted that the combined date of death value of those assets based on the Pennsylvania Inheritance Tax Form is \$2,136,136.99. See 5/12/11 O.C. No. 680 IV of 2011 Petition for Citation and 6/28/11 Answer at ¶8.

⁴ In her 6/28/11 Answer to the Petition for Citation filed by Dona Butler relating to the inter vivos trust (O.C. No. 680 IV 2010), Cheryl Dickerson appears to suggest that the accounting for the estate should suffice for the trust: "An accounting of the Administration of the Estate of Donald Butler has been filed with the Court on June 21, 2011 (O.C. No. 679 DE of 2011). Informal accounting was previously provided to counsel for Petitioner. The Estate Accounting is actually the Trust Accounting." 6/28/11 Answer, O.C. No. 680 IV of 2010, ¶ 13.

and commissions claimed by Ms. Dickerson.

On his death, Donald Butler left an estate consisting of his personal residence, a small amount of cash, shares of a corporation, an insurance refund, and various liquid accounts at the Police and Fire Federal Credit Union for a total in excess of 2 million dollars. An additional \$267,000 representing his interest in the Public School Employers Retirement System Pension was paid directly to Petitioner.⁵

In her amended account, Ms. Dickerson claimed a “fiduciary commission” of \$106,806.00 representing “...5% of the total gross assets, taxable as a part of the estate.”⁶ In addition, the REV-1500 inheritance form that Ms. Dickerson filed revealed that she had claimed commissions for the sale of the decedent’s real property in the amount of \$7,100 as “closing costs, Executor commission.” This 3% “executor’s closing cost commission claimed on the proceeds of the sale of the decedent’s personal residence was in addition to the realtor’s 6% commission. See Ex. P-4, Schedule I. During the hearing, Ms. Dickerson admitted that while she was a licensed real estate broker in Florida, she is not licensed in Pennsylvania.⁷ Respondent claims entitlement to a percentage fee of the total gross estate which she considers to be comprised of both the probate and non-probate assets based upon Johnson Estate, 4 Fid. Rep. 2d 6 (O.C. Chester Cty., 1983). In addition, in Respondent’s answer to the petition for a citation for a trust accounting, Ms. Dickerson argues that her fee was based upon a 20-year period, the life of the trust.⁸ Petitioner argues in response that any such calculation unjustly enriches Respondent for services she has yet to perform and may never do so and that Respondent is not entitled to claim a fee based on a percentage of the gross estate including the trust assets.⁹

Petitioner testified at length to her efforts to restore her father’s personal residence to a condition maximizing its value and testified that she spent considerable time cleaning the premises and gathering information which she supplied to Respondent for purposes of administering the estate and converting the one stock which had been in the joint names of Decedent and his second wife who predeceased him. She testified that she actually previewed the house to the eventual purchaser and thereby was personally involved in the sale effort to a

⁵ See 7/28/11 Amended Account, O.C. No. 679 DE of 2011 (setting forth both estate and trust assets).

⁶ See 7/28/11 Amended Account at 5; 8/24/11 Dickerson Response to Objections, ¶1.

⁷ 8/24/11 N.T. at 54 (Dickerson).

⁸ 6/28/11 Dickerson Answer, O.C. No. 680 IV of 2011, ¶ 11.

⁹ See, e.g., Objections to First Account, ¶2;

much greater extent than the Respondent.¹⁰ The Respondent testified at length to her efforts regarding the sale of the property and claimed, although she did not produce them, over 42 emails directed to the real estate agent. Respondent also testified to several trips from her home in Florida to Philadelphia to complete estate work, meet with counsel, the accountant and other typical duties performed during the administration of the estate. She conceded, however, that she did not personally attend the settlement but monitored it by phone.¹¹ None of these efforts or duties appeared difficult or complex in nature.

With regard to the legal fee claimed by the executrix of \$41,200, the testimony revealed that in actuality only \$20,000 has been paid to counsel with the remainder, or \$21,200, held in reserve for payments likely as a result of the instant litigation. Petitioner argues that this fee is excessive and is unrelated to the work actually performed. Respondent argues that the fee represents a 6% fee based on Johnson and is therefore lawful.

Respondent testified that she paid a counsel fee of \$20,000. She testified: “I think, with Mr. Harper’s experience and expertise, I think, and I am guessing that a reasonable rate would probably he would charge \$300 an hour.”¹² Later, she corrected the hourly rate charged as \$250.¹³ The remaining portion of the legal fee claimed of \$21,200 is premised on a guesstimate of the fees involved in this litigation and cannot be approved by this Court. Ms. Dickerson conceded that she did not enter into a fee agreement with an attorney based on a percentage nor did she add up the hours the attorney spent on the estate.¹⁴ In the testimony presented, counsel would have expended 80 hours to earn the fee of \$20,000, however, no time records were produced by Respondent’s counsel and no evidence was offered by counsel supporting a fee for 80 hours of work performed ($\$20,000 / \$250 = 80$ hours). The controversy over the legal fee charged reflects the confused and inconsistent theories advanced by Respondent to justify the amounts. She offered inconsistent hourly rates of \$300 and \$250 per hour. She claimed payments were made on the basis of monthly statements and offered none. She claimed deductions for fees of \$41,200 but admitted that only \$20,000 was paid and the addition of \$21,000 was for representation in this litigation. Finally, she claimed that the total fee of \$41,200 was actually based on a percentage of the estate and trust assets.

¹⁰ 8/24/11 N.T. at 17-18 (Butler).

¹¹ 8/24/11 N.T. at 39-41 (Dickerson).

¹² 8 /24/11 N.T. at 49 (Dickerson).

¹³ 8/24/11 N.T. at 50 (Dickerson).

¹⁴ 8/24/11 N.T. at 47-48 (Dickerson).

Legal Analysis

It is well established that an attorney or administrator seeking fees for his services to an estate bears the burden of proof. Estate of Sonovick, 373 Pa. Super 396, 400, 541 A.2d 374, 376 (1988). Fiduciaries are entitled to reasonable and just compensation based on actual services rendered. Attorneys, likewise, are entitled to reasonable compensation based on their services to an estate. Id., 373 Pa. at 399-400, 541 A.2d at 376. The standard for reviewing the reasonableness of fees claimed by an attorney was outlined by the Pennsylvania Supreme Court in LaRocca Estate, 431 Pa. 542, 246 A.2d 337 (1968):

The facts and factors to be taken into consideration in determining the fee or compensation payable to an attorney include: 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. LaRocca Estate, 431 Pa. at 546, 246 A.2d at 339.

In applying the analysis found in LaRocca Estate, this Court must consider eleven separate factors in order to assess the reasonableness of the fee and commission. In her account and amended accounts, Cheryl Dickerson draws distinctions between “probate” and “nonprobate” assets. More specifically, Ms. Dickerson lists the “probate” assets as having a principal value of \$245,562.48 and the “nonprobate” assets as having a principal value of \$1,915,907.49.¹⁵ Upon closer analysis, the bases for these distinctions are unclear. They are unexplained and inconsistent with the relevant trust document. The amended account lists, for instance, the real property located at 3722 Spring Garden Street as a “probate asset”¹⁶ even though it was listed as a trust asset in schedule A of the trust document. Rather than digressing into an analysis of these distinctions, the clearest course is to focus on the total value of the assets set forth in the accounts in evaluating the reasonableness of the fiduciary fees claimed in the amended account. See e.g., Estate of Preston, 385 Pa. Super. 48, 56, 560 A.2d 160, 164 (1989)(attorney and executor fees paid out of the estate should have been calculated “from the

¹⁵ See Amended Account, O.C. No. 679 DE of 2011 at 1.

¹⁶ See Amended Account, O.C. No. 679 De of 2011 at 2 (Real Estate(Probate Asset)).

total assets of the estate as reported in the first and final accounting”).

A. The Fiduciary Fee of \$106,806 claimed in the Accounts and the “Closing Costs, Executor Commission” of \$7,100 Set Forth in the Inheritance Tax Form Are Unreasonable and Must Be Reduced

Determining the appropriate executrix and/or trustee commission is difficult given the inadequate evidence offered by the accountant. The amended account lumps these fees or commissions together and claims \$106,806.00 as a fiduciary commission.¹⁷ As previously discussed, the accountant also claimed an additional \$7,100 as “closing costs, executor commission” related to the sale of decedent’s real property. This commission was not set forth in the amended account but was listed instead in the REV-1500 Inheritance Tax form admitted as Ex. P-4 at the hearing. This “executor” closing cost commission was claimed in addition to the realtor’s commission of \$14,100. Ex. P-4. This “closing costs, executor commission” not reflected in the account is clearly improper and if actually received must be returned to the estate or trust.

Based on the record presented, the accountant has failed in her burden of proof to convincingly demonstrate entitlement to the total fiduciary fee she claims in the amended account. There is no question but that Ms. Dickerson did expend time and effort to complete the administration of the estate and trust for which she deserves a commission. Unfortunately, she maintained no time records and can only guess that she spent in excess of 100 hours in completing her duties. The decedent’s real estate was in poor condition and required considerable work prior to listing for sale. Petitioner and Respondent argue over who did more work. A realtor was involved and paid a 6% commission. The inheritance tax return and inventory were simple and easily prepared and, in fact, an accountant was hired and paid to assist Respondent. In short, this relatively simple estate had no problems or peculiarities warranting any degree of extraordinary effort by either counsel or the executrix. Neither was able during the hearing to point to a single issue or problem encountered during the administration of the estate

¹⁷ See Amended Account at 5 (listing \$106,806.00 as “Fiduciary Commission” which is “anticipatory”)the Estate rather than the Trust provide better tax advantage.”

which would account for the large fee and commission claimed relative to the actual labor required to administer this simple estate and trust.

This Court reluctantly has to set a reasonable hourly fee. Petitioner argues that Respondent's commission based on the total assets should be no more than .3% or \$10,000¹⁸ which would represent a fee of approximately \$100 per hour assuming 100 hours of work performed. Respondent presented no educational credentials or life experience which would warrant a greater fee and presented no testimony convincing this Court that any degree of expertise was required especially since she relied upon and paid fees from estate funds for both legal counsel and an accountant. There is no entitlement to a commission on the principal value of the trust assets and indeed the Will and trust documents are silent on the question of compensation. Decedent in his wisdom anticipated his death and funded the trust with cash assets requiring minimal effort to transfer to the trust and administer thereafter. There is no doubt that a fee for trustee services is warranted but an anticipatory claim of such a fee based on the 20 year term of the trust but prior to the rendering of any significant service smacks of bad faith and unwarranted fee gouging. The testimony of Respondent with regard to the handling of the trust assets is simply that she moved \$500,000 to a Morgan Stanley investment portfolio account, reinvested \$500,000 in 4% CDs and established a savings account for the deposit of \$800,000 at a 1% interest rate and left \$80,000 in an interest bearing checking account at a lower rate of interest. Petitioner claims that she has yet to receive a single payment towards the required 80% distribution of income annually even though the trust is one and one half years old. Respondent claims that she will make such a distribution as soon as she is supplied the social security number of Petitioner which has yet to occur. There is no testimony offered by Respondent that she was required to take any difficult or time-consuming action with regard to establishing the trust and fully funding the trust with the liquid assets in cash accounts held by Decedent at the Police and Fire Credit Union.

Under the LaRocca Estate analysis, Respondent's services must be evaluated under the several factors listed for computing a fair and reasonable fee. In this matter, there were no difficult decisions required although there was a substantial sum involved. All the assets utilized to fund the trust were in checking and savings accounts at the Credit Union and were easily transferred and reinvested. A fair degree of responsibility was involved and warrants

¹⁸ 8/24/11 N.T. at 71 (Newman).

recognition. In short, the fee and commission fail the first (amount of work performed), second (character of services rendered), third (difficulty of the problems involved), sixth (the degree of responsibility incurred) and the ninth (the results obtained) factors set forth in LaRocca Estate. On this record, this Court believes that a fair and reasonable fiduciary fee is \$30,000. The accountant is surcharged for any commission or fee taken in excess of that sum.

Respondent's reliance on Johnson Estate to justify a 5% commission is misplaced for several reasons.¹⁹ Johnson Estate is a 1983 Chester County decision with little precedential authority. Johnson Estate dealt with executor fees charged by a corporate fiduciary based on its fee schedule and the Decedent's will expressly allowed fees based on the corporate fiduciary's standard fee schedule. The instant dispute over fees involved neither a corporate fiduciary, a standard fee schedule or an express direction by Decedent on commissions.

B. The Legal Fees Claimed In the Amount of \$41,200 Are Unreasonable and Must Be Reduced

In the amended account, the accountant claims \$41,200.00 as legal fees, noting that those fees are "anticipatory based on expected litigation with the beneficiary." The legal fee actually paid of \$20,000²⁰ representing 80 hours of legal services rendered is disallowed in part since there was no evidence that such a fee was fair and reasonable. Respondent, although having the burden of proof, failed to offer any evidence to support the fee, failed to offer any time records and relied on Johnson Estate to support a fee based on a percentage of the gross estate and trust. It is difficult to imagine 80 hours of legal work being expended in this estate and Respondent offered no evidence that such a significant number of hours were in fact devoted to this estate. Thus, the Court is left to guess and conjecture on the amount of legal time and concludes that, at most, 60 hours might be justified. On this record the Court grants a legal fee of \$15,000.00 and further orders that no additional legal fees be charged to the Estate or trust.

C. Cheryl Dickerson is Not Removed as Executrix Under the Will of Donald Butler But She Is Removed as Trustee of the Inter Vivos Trust

With regard to Petitioner's request to remove Respondent as executrix, this Court declines to do so since she has completed most of the duties and does not appear to have breached her fiduciary duties in any significant fashion.

¹⁹ See 8/24/11 Dickerson Answer to Objections to Account, ¶2.

²⁰ 8/24/11 N.T. at 48-49 (Dickerson).

With regard to Petitioner's request to remove Respondent as trustee of the trust, this Court grants that request. Section 7766(b) of the PEF code provides guidelines for when a trustee may be removed by the court at the request of a beneficiary:

(b) When court may remove trustee.—The court may remove a trustee if it finds that the removal of the trustee best serves the interests of the beneficiaries of the trust and is not inconsistent with a material purpose of the trust, a suitable cotrustee or successor trustee is available and:

- (1) the trustee has committed a serious breach of trust;
 - (2) lack of cooperation among cotrustees substantially impairs the administration of the trust;
 - (3) the trustee has not effectively administered the trust because of the trustee's unfitness, unwillingness or persistent failures; or
 - (4) there has been a substantial change of circumstances.
- 20 Pa.C. S. §7766(b).

The unwarranted payment of fiduciary fees for virtually no work performed and the reservation of the right to charge additional fees on an annual basis during the duration of the trust strikes at the heart of the trustee's fiduciary obligation to be fair and reasonable. In this instance, Respondent has utterly failed to convince this Court that a percentage fee is fair or reasonable and has further failed to convince this Court that the minimal efforts expended so far to move the liquid accounts held by Decedent on his death warrant payment of a 6% fee on principal. Moreover, the trustee's failure to distribute any income to the life beneficiary is a serious breach of trust as is the failure to file an account for the trust even though compelled to do so by Court Order. Accordingly, this Court grants Petitioner's request to remove Respondent as trustee and designates Susquehanna Trust and Investment Company as the trustee of the Donald Butler Trust as requested by Petitioner.

D. The Account and Amended Account Shall Be Returned as Unaudited Due to the Discrepancies as to Fees Expended

In the course of the litigation regarding the accounts, certain significant discrepancies between figures set forth in the accounts and those actually expended have been revealed. Ms. Dickerson conceded, for instance, that while the amended account and the Pennsylvania Inheritance Tax form sets forth attorney fees of \$41,000, in fact attorney fees in the amount of \$20,000 have actually been paid.²¹ More seriously, the separate commissions Ms. Dickerson took relating to the sale of decedent's real property were not reflected in the amended account,

²¹ 8/24/11 N.T. at 48-49 (Dickerson).

although those fees are set forth in a responsive pleading and the Inheritance Tax Form admitted as Ex. P-4.²² In fact, in her answer to the objections, the accountant specifically concedes that “[t]he account should reflect the \$7,100 in Executrix Commissions and all other closing costs. Some adjustment may be necessary to the accounting.”²³ For these reasons, the account as stated cannot be confirmed though it did provide a basis for determination of the fee, commission and removal issues raised in Dona Butler’s objections. The accountings therefore shall be returned unaudited. As set forth in a contemporaneously issued decree, the accountant shall return any fiduciary fees she received in excess of \$30,000, the attorney fee claimed is reduced to \$15,000, Ms. Dickerson is removed as trustee of the inter vivos trust, and Susquehanna Trust and Investment Company is approved as substitute trustee.

In Objection six to the Accounts, Ms. Butler seeks to surcharge the Executrix for all attorney fees incurred by the estate and petitioner due to Ms. Dickerson’s “failure to faithfully discharge her duties.” No evidence was presented to support this claim, which is hereby denied. In her objections to the Account, Ms. Butler also requests that the accountant be ordered to file an adjusted final account incorporating all the sustained objections. In light of this audit memorandum, however, the additional expenses attendant to the filing of an adjusted account may not be necessary. Ms. Butler may, of course, file a petition seeking such an accounting if warranted. In her remaining objections 1 through 6, Ms. Butler seeks recovery of taxes paid to the Commonwealth based on the fees and commissions set forth in the account. Since the figures presented could only be speculative until a ruling was made as to the appropriate fees due to the fiduciary and attorney, no ruling can be made as to those specific tax claims at this time. The substitute trustee, however, upon review of the accountings and this ruling may present such claims in an appropriate petition or revised tax return.

BY THE COURT:

Date: _____

John W. Herron, J.

²² 8/24/11 N.T. at 56-57 (Newman).

²³ 8/24/11 Dickerson Answer to the Objections to the Account, ¶ 4 (emphasis added).

BY THE COURT:

John W. Herron, J.

Bradley Newman, Esquire
for Petitioner

Ronald J. Harper, Esquire
for Respondent