COURT OF COMMON PLEAS OF PHILADELPHIA
ORPHANS' COURT DIVISION

No. 544 of 1997
#1 Oct 97

Estate of ROBERT LESLIE ALLOWAY, Deceased

Sur account entitled:
First and Final Account of Dessen, Moses & Sheinoff, Executor

Before PAWELEC, J.

This account was called for audit: October 6, and November 25 & 26, 1997

Counsel appeared as follows:

MITCHELL H. SHEINOFF, ESQ., and MAUREEN A. YOUNG, ESQ. of DESSEN, MOSES & SHEINOFF - for the Accountant

DAVID J. BALCER, ESQ. - for Florence Waters, Objectant

Robert Leslie Alloway died on January 11, 1996, leaving a will dated December 29, 1995, which was duly probated. He was unmarried at the time of his death and was not survived by issue.

Letters Testamentary were granted to the accountant on April 9, 1996; proof of publication of the grant of same was submitted and is annexed hereto.

Payment of transfer inheritance tax, $25,725.00 on October 11, 1996, was duly vouched.

By the terms of his will, a copy of which is annexed hereto, the testator gave his entire estate to his niece, Florence Evelyn Waters. Item SIXTH of the will reads as follows, in pertinent part,

> **" SIXTH: Appointment of Fiduciary: I nominate, constitute and appoint such individual or series of individuals, including one of its own partners, as designated by the law firm of DESSEN, MOSES & SHEINOFF, and/or its successors, as Executor of my entire estate."**

By letter dated April 4, 1996, a copy of which is annexed hereto, Bonnie Smith Moses, Esquire, of Dessen, Moses & Sheinoff, made the following statement to the Register of Wills: "This will confirms that this firm has assigned Maureen A. Young to serve as executrix of the Estate of Robert Leslie Alloway." Item SIXTH of the will and the letter of Ms. Moses notwithstanding, the Register then appointed the law firm of Dessen, Moses & Sheinoff to serve as executor of this testator's estate.

It is stated that notice of the audit has been given to all parties having a possible interest in the estate.

Florence Waters, niece and sole beneficiary under the testator's will, has appeared by counsel and filed Objections to the First and Final Account of Dessen, Moses & Sheinoff, Executor, which is stated to July 31, 1997.

In its First and Final Account, the accountant charges itself with principal receipts totaling $248,599.42, being: $160,194.80 in cash on deposit with an "Educational Credit Union"; $20,913.40 in "Unused

Vacation Pay" due from the School District of Philadelphia; $416.54 in miscellaneous reimbursements and refunds; a 1991 Volkswagen Jetta automobile valued at $7,050.00; miscellaneous tangible personal property valued at $7,024.68; premises 1615 and 1617 Fairmount Avenue, Philadelphia, at a combined value of $36,500.00; and, premises 917 West Duncannon Street, Philadelphia, at a value of $16,500.00. The Accountant also charges itself with income receipts totaling $1,809.53, being interest earned on deposits in the "Educational Credit Union" and Mellon PSFS Bank.

In its First and Final Account, the accountant takes credit for principal disbursements totaling $69,262.08, being: $9,258.33 in "Debts of Decedent"; $11,571.36 in "Administrative Expenses"; $26,788.39 in "Federal & State Taxes"; and, $21,644.00 in "Fees and Commissions". In addition, the Accountant takes credit for principal distributions totaling $54,941.68, being: $40,000.00 in cash; and, $14,941.68 in tangible personal property. There are no disbursements or distributions of income.

The First and Final Account shows a "Combined Balance on Hand" of $126,205.19.

In a "Memorandum in Support of Objections", the sole beneficiary seeks surcharges totaling $16,239.50, being: $7,019.00 in reduced "Fees and Commissions"; $1,105.00 in discount which was allegedly lost because nothing was paid on account of transfer inheritance tax within three months of the date of death; $3,437.00 in interest which

was allegedly lost because the estate's cash was deposited in non-interest bearing accounts; and, $4,678.40 in fees of counsel for the beneficiary. In addition, the beneficiary seeks surcharges, in unspecified amounts, for: such interest and penalty as may be imposed on late payments of testator's income taxes for Calendar Years 1995 and 1996, and, for such interest and penalty as may be imposed on late payment of transfer inheritance tax.

The challenged "Fees and Commissions" appear at page 7 of the Account. At page 7, the accountant takes credit for payment of the following items to itself: $10,822.00 in "legal fees", and, $10,822.00 in "Executor's Commission". The beneficiary suggests that the accountant should receive $9,750.00 for its services as attorney, and, $4,875.00 for its services as executor. The Objectant would thus reduce "Fees and Commissions" by $7,019.00, that is, from a total of $21,644.00 to a total of $14,625.00. In passing upon objections to commissions and fees, this Court has previously noted, in Strand Estate, 3 D.&C. 3d 457, at 459-460 (1976), that:

> **" It is well settled that a fiduciary is entitled to 'fair and just' compensation. What is 'fair and just' depends upon the extent and character of the labor and responsibilities involved: In re Reed Estate, 462 Pa. 336, 341 A. 2d 108 (Pa., 1975); Rauch Estate, 44 D. & C. 2d 674 (1968); Anderson Estate, 77 D. & C. 74 (1951). Counsel fees are also compensation for services rendered. In La Rocca Estate, 431 Pa. 542, 246 A. 2d 337 (1968), the Supreme Court, in setting forth the factors to be considered in determining the compensation of the attorney for the estate, stated, at page 546:**

> **‘ 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.’"**

See also Estate of Lux, 480 Pa. 256 (1978) and Conti Estate, 8 Fiduc Rep 2d 272 (O.Ct., Phila., 1988). Where, as here, the accountant claims compensation for services rendered as both fiduciary and attorney, we look to pages 4 and 5 of the adjudication of Judge Gutowicz in the Estate of Edward L. Phillips, Deceased, No. 2024 of 1990, which is quoted by a panel of our Superior Court in Estate of Phillips, 420 Pa.SuperiorCt. 228, at 231-232 (1992), to wit,

> **“This Court cannot fix compensation as a percentage of the assets of an estate without some knowledge of the work actually done. The fiduciary and his attorney have the burden of proving facts which will enable the Court to make an informed judgment as to the work actually done by each and the reasonableness of the requested commissions and fees. See Preston Estate, 385 Pa.Super.Ct. 48 [560 A.2d 160] (1989), Sonovick Estate, 373 Pa.Super.Ct. 396 [541 A.2d 374] (1988) and Reed Estate, 462 Pa. 336 [341 A.2d 108] (1975). Where one person serves as both executor and counsel, he may be entitled to**

> **compensation for services rendered in each capacity which do not duplicate each other. He cannot be paid twice for the same work. The accountant has the burden of showing what work he did in each capacity so that this Court may avoid awarding double compensation for duplicated services. See Shillito Estate, 8 Fid.Rep.2d 365 (O.Ct., Allegh., 1988).”**

See also Hassal Estate, 15 Fid.Rep.2d 251 (O.Ct., Chester, 1995).

In the case at bar, the accountant called its former employee, Maureen A. Young, Esquire, to testify about the administration of this decedent’s estate. Ms. Young testified that she spent more than 130 hours in administering this estate. She probated the will; collected the assets; paid the bills; sold the real estate; prepared and filed the decedent’s income tax returns for 1995 and 1996; prepared and filed the Inventory and Inheritance Tax Return; prepared and filed a fiduciary income tax return for 1996; stayed in regular contact with the beneficiary; made distributions to the beneficiary; and, prepared and filed the instant account.

Ms. Young’s efforts are chronicled in a computerized billing statement which has been marked and received as Exhibit “A-1". While the accountant has never prepared a separate billing for its services as executor, Exhibit “A-1" shows that it took the following fees: $16,177.18 on July 5, 1996, and, $5,466.82 on October 14, 1996. Ms. Young testified that her usual billing rate was $150.00. She offered no explanation as to why her hourly rate on Exhibit “A-1" is only $100.00. According to Ms. Young, Exhibit “A-1" does not include all of the time which was spent in

administering this estate. Specifically, Ms. Young insists that Exhibit "A-1" does not include a lot of time which she and the accountant's partners spent acting as executors. Exhibit "A-1" does not include 75 minutes which Ms. Young spent in driving by premises 1615-17 Fairmount Avenue to keep an eye on the properties. Nor does it include 15 minutes spent getting signatures of partners on documents in connection with sales of real estate.

Ms. Young testified that the beneficiary met with one of the accountant's paralegals on January 15, 1996. At this time, the beneficiary handed the decedent's will and bank statements to the paralegal. On February 12, 1996, the accountant's partners, acting as executors, assigned Ms. Young to handle this estate. According to Ms. Young, she and the partners agreed upon an attorney's fee of 5% of the gross assets of the estate. Nevertheless, Ms. Young kept time records which formed the basis of Exhibit "A-1".

Ms. Young testified that, shortly after February 12, 1996, she went to the Register of Wills and attempted to probate the decedent's will. The Register refused to act on the Petition for Probate because the decedent's death certificate bore an incorrect social security number. It was too late for the funeral director to make the necessary correction, but Ms. Young nevertheless asked him to obtain corrected death certificates from the Bureau of Vital Statistics. Corrected death certificates were issued on March 12, 1996. They were sent to the funeral director. The

funeral director sent them to Ms. Young who cannot recall why probate was not completed until April 9, 1996. According to Ms. Young, delay in probate made it impossible to obtain a discount by making a payment on account of transfer inheritance tax on or before April 11.

Prior to his death, the decedent was represented by the accountant in the collection of $3,500.00 from Anthony Fester of Portsmouth, Maryland. Said sum was due on a Promissory Note, and, Mr. Fester made payment to the accountant by his check dated January 3, 1996. Said check was deposited into the accountant's escrow account. However, Mr. Fester stopped payment on his check, and, the accountant, as executor, obtained a Judgment by Default against Mr. Fester in the amount of $3,500.00. Ms. Young testified that one of the accountant's paralegals spent lots of time in a fruitless effort to collect on the Judgment against Mr. Fester. Eventually, Ms. Young decided that the expenditure of time was not worth $3,500.00, and, she abandoned efforts to collect said sum from Mr. Fester. According to Ms. Young, she did not seek the assistance of a Maryland attorney in the collection effort. The said sum of $3,500.00 has never been collected by the decedent's estate.

Ms. Young testified that she marshaled more than $160,000.00 from the decedent's accounts with "Educational Credit Union" in June of 1996. These funds were deposited into a non-interest bearing estate checking account with MellonPSFS Bank. On October 25, 1996, the proceeds of sale of premises 1615-17 Fairmount Avenue were deposited

into the same non-interest bearing checking account. The balance on deposit in the estate checking account never fell below $90,497.00. Nevertheless, the executors did not place the estate funds into an interest bearing account until April of 1997. The account shows that, as of July 31, 1997, the estate had earned $226.62 on its deposits with MellonPSFS Bank, but, had paid $112.42 in fees and charges to the Bank.

Ms. Young testified that, in spite of her experience as an attorney in providing legal services to members of the School District's Legal Services Plan, which had a contractual arrangement with the accountant, it took some 20 months to marshall $20,913.40 in "Unused Vacation Pay" from the School District of Philadelphia. Due to "inadvertence" in not sending a copy of the corrected death certificate to the District, said "Unused Vacation Pay" was not received by the estate until July of 1997.

Ms. Young testified that she was in regular contact with the beneficiary throughout the administration of the estate. The beneficiary insisted upon handling the tangible personal property herself. The accountant voiced no objection as the beneficiary arranged for the transport and sale of the tangible personal property. The beneficiary received statements and checks from the auctioneer. Ms. Young received only copies of the auctioneer's statements.

Ms. Young testified that the decedent owned and resided in premises 1615 Fairmount Avenue, but, that he owned only a one-half

interest, as joint tenant with right of survivorship, in premises 1617 Fairmount Avenue. The accountant agreed to honor the decedent's promise to buy the outstanding interest in 1617 for $5,000.00. While 1615 was in decent shape, 1617 was dilapidated and little could be done to improve it. The condition of 1617 made it difficult to sell the properties. After dismissing the offers of an aggressive neighbor who had been referred to her by the beneficiary, Ms. Young initially hired Steve Williams of Century 21 University Realtors to sell both properties. When Mr. Williams moved too slowly, Ms. Young listed the properties with another broker on September 13, 1996. Ms. Young's concerns about the properties lead her to drive by it on five occasions. These visits lasted 15 minutes each. If she saw something amiss, Ms. Young would bring it to the attention of the Realtor or the beneficiary. Ms. Young regarded said visits as work of the executor. According to Ms. Young, Exhibit "A-1" does not include her time in driving by the properties.

Settlement was held on the sale of premises 1615-1617 Fairmount Avenue on October 25, 1996. At some time before Settlement, Ms. Young learned of the existence of a private mortgage on 1615. Acting as attorney for the estate, Ms. Young located the mortgagees; prepared a mortgage satisfaction piece and release of lien of mortgage; and, traveled to the properties, with a notary in tow, to see to the execution of the satisfaction and release. Exhibit "A-1" includes charges of $150.00 for an hour and a half of Ms. Young's time in the preparation and execution of the

satisfaction and release. None of the accountant's partners attended settlement. Instead, Ms. Young appeared as the authorized representative of the executors. Exhibit "A-1" does not contain any charges for Ms. Young's time, at settlement, on October 25, 1996.

Ms. Young testified that premises 917 Duncannon Street was owned by the decedent and occupied by the beneficiary at the time of his death. Finding no evidence of a lease between the decedent and beneficiary, the accountant: received and paid the bills in connection with said premises, but, made no attempt to collect rent from the beneficiary.

Ms. Young testified that the beneficiary was initially cooperative in the selling of premises 917 Duncannon Street. On October 2, 1996, the accountant entered into an agreement of sale which called for the buyer to take possession of a vacant property on the date of settlement, that is, on October 30, 1996. According to Ms. Young, she received assurances from the beneficiary that the property would be vacant on the date of settlement. Ms. Young stated that she spent an hour and a half in the broker's office, waiting for settlement, while the buyer conducted a pre-settlement inspection and found that the beneficiary was still occupying the property. Ms. Young stated that this sale was lost because the beneficiary did not vacate the property by settlement. Ms. Young further stated that she appeared for the abortive settlement in her capacity as attorney for the estate. Exhibit "A-1" includes charges of $150.00 for an hour and a half of Ms. Young's time, at "settlement", on October 30, 1996.

Ms. Young testified that, at some point after October 2, 1996, she learned of the existence of a private mortgage, in the amount of $9,000.00, on premises 917 Duncannon Street. While insisting that said mortgage had nothing to do with the failure to settle on October 30, Ms. Young stated that the mortgagees could not be found, and, that the accountant instituted a Quiet Title Action on January 17, 1997. Due to another "inadvertent" act of the accountant's staff, a Judgment of Non Pros was entered against the estate on April 29, 1997. The accountant filed a Petition to Open on May 14, 1997. The Non Pros was vacated on June 23, 1997. Finally, the mortgage was discharged, on July 11, 1997, when the absent mortgagees failed to appear. Another buyer was secured, and, final settlement was held on the sale of 917 Duncannon Street in October of 1997, that is, after the filing of the instant account. None of the accountant's partners attended settlement. Instead, Ms. Young appeared as the authorized representative of the executors. Exhibit "A-1" does not contain any charges for Ms. Young's time, at settlement, in October of 1997. Nor does it include any charges for time expended in opening the Judgment of Non Pros in the Quiet Title action.

Having considered the testimony of Ms. Young and Exhibit "A-1", this Court finds that the sum of $9,750.00, as suggested by the beneficiary, constitutes fair and reasonable compensation for all services of the accountant as attorney for this estate. While the sale of the decedent's real estate required some extraordinary effort of counsel, the

bulk of the assets were in the form of cash and tangible personal property which required little or no effort to administer. In fact, the beneficiary administered most of the tangible personal property herself. A larger attorney fee is simply not justified by the results obtained, including: the delay in probate; the loss of the inheritance tax discount; the failure to collect $3,500.00 on the Default Judgment; the failure to deposit the estate's cash in interest bearing accounts; the delays in marshaling monies from the "Educational Credit Union" and the School District of Philadelphia; and, the delay in the filing of the decedent's federal income tax return for Calendar Year 1995. The "legal fees" will accordingly be reduced from $10,822.00 to $9,750.00.

Having considered the testimony of Ms. Young and Exhibit "A-1", this Court finds that the sum of $4,875.00, as suggested by the beneficiary, constitutes fair and reasonable compensation for all services of the accountant as executor of this estate. Ms. Young gave very little testimony of specific actions taken by the partners of the accountant as executor. A larger executor's commission is simply not justified by the size and composition of the estate, or, by the aforementioned results which were obtained by the executor. The "Executor's Commission" will accordingly be reduced from $10,822.00 to $4,875.00.

The failure to make a payment on account of transfer inheritance tax, on or before April 11, 1996, certainly resulted in the loss of the discount which was available for early payment of said tax. The

beneficiary seeks a surcharge of $1,105.00, being 5% of $21,000.00, for the loss of said discount. In disposing of this Objection, this Court notes that the Objectant has the duty of proving that the accountant has breached an applicable fiduciary duty, and, that a related loss has occurred. See Estate of Stetson, 463 Pa. 64, 84, 345 A.2d 679 (1975). This is because,

> **"Surcharge is the penalty for failure to exercise common prudence, common skill and common caution in the performance of the fiduciary's duty and is imposed to compensate beneficiaries for loss caused by the fiduciary's want of due care."**
> **Miller's Estate, 345 Pa. 91,**
> **93 (1942)**

Having considered the testimony of Ms. Young about the efforts to correct the death certificate, this Court is not convinced that the delay in probate is entirely chargeable to the conduct of the accountant as attorney or executor. While it may be argued that Ms. Young should have moved more quickly in opening the file and probating the will, this Court is not convinced that her conduct is the proximate cause of the loss of the inheritance tax discount. Nor is it convinced that the accountant should have had $21,000.00 in cash on hand on or before April 11, 1996. The Objectant has not met her burden of proof in regard to the loss of the discount.

Having considered the testimony of Ms. Young, this Court holds that the Objectant has not met her burden of proof in regard to the loss of $3,437.00 in interest which allegedly resulted from the failure to deposit the estate's cash in interest bearing accounts. The Objectant's reliance on

Sections 3543 and 3544 of the Probate, Estates and Fiduciaries Code, in support of this Objection, is totally misplaced. An executor does have a duty to deposit estate funds in an interest bearing account when administration of an estate is delayed for an extended period of time. See Pitone Estate, 489 Pa. 60 (1980) and Bireley Estate, 30 Fiduc.Rep. 522 (O.C., Chester, 1980). However, in the instant matter, the failure to earn interest persisted for only ten months, that is, from June of 1996 until April of 1997. This Court holds that failure to earn interest, for such a short period of time which was so close to the date of death, does not constitute a breach of fiduciary duty. Furthermore, the Objectant offered no evidence as to the rates of interest which were paid by Philadelphia Banks on estate savings accounts from June of 1996 to April of 1997. In the absence of evidence regarding available interest rates, the imposition of any surcharge would be an exercise in speculation. There being no proof of a breach of fiduciary duty and a related loss, this Court must dismiss the Objection in regard to the alleged loss of interest.

Having reviewed the entire record in this matter, this Court finds no basis for the imposition of a surcharge of $4,678.40 in fees of counsel for the Objectant. In determining whether or not the accountant should pay the counsel fees of the Objectant, this Court is mindful of the following statements of a panel of our Superior Court in Estate of Wanamaker, 314 Pa. Super. 177, 179 (1983),

> **" The general rule is that each party to adversary litigation is required to pay his or her**

> **own counsel fees. .... In the absence of a statute allowing counsel fees, recovery of such fees will be permitted only in exceptional circumstances. ...." (citations omitted)**

In the matter of Weiss Estate, 4 Fiduc Rep 2d 71, 77 (O.Ct., Phila., 1983), Judge Shoyer expressed the opinion that,

> **"....the orphans' court, as a court of equity, has always had the power to surcharge a party for counsel fees when it is apparent that the conduct of a party has been the cause of additional legal expenses: Schollenberger Ap., 21 Pa. 337"**

Counsel fees may be awarded as part of taxable costs of a matter, under 42 Pa.C.S.A. Section 2503 (7) and (9), which recognize a right of participants in litigation to receive counsel fees,

> **"(7) ....as a sanction .... for dilatory, obdurate or vexatious conduct during the pendency of a matter."; and,**
>
> *** * * * * ***
>
> **"(9) ....because the conduct of another party in commencing the matter or otherwise was arbitrary, vexatious or in bad faith."**

See Brenckle v. Arblaster, 320 Pa. Super. Ct. 87 (1983); Shoemaker Estate, 6 Fiduc Rep 2d 128 (O.Ct., Allegheny, 1986); and, Garrano Estate, 11 Fiduc Rep 2d 302 (O.Ct., Bucks, 1991). The Objectant argues that inaction on the part of the accountant forced her to retain an attorney, "....to collect what was rightfully hers." Brief, at 21. The beneficiary testified that she retained

an attorney because Ms. Young stopped returning her phone calls. However, this Court sees nothing in this record which would take this matter out of the operation of the general rule observed in Wanamaker, supra. The accountant might have been occasionally dilatory in the administration of this estate, but, no conduct of the accountant or Ms. Young can be fairly characterized as obdurate, vexatious, arbitrary or in bad faith. Letters Testamentary were issued on April 9, 1996. The account was filed on August 11, 1997. This Court must dismiss the Objection in regard to counsel fees for the Objectant.

The accountant filed the decedent's income tax returns, for Calendar Years 1995 and 1996, on July 9, 1997. With the 1995 returns, the accountant paid principal taxes due of $1,409.49 to the Internal Revenue Service, and, $174.00 to the Pennsylvania Department of Revenue. Ms. Young testified that said payments do not include interest and penalty which may be imposed on late payments. The Objectant seeks a surcharge in the unspecified amounts of such interest and penalty as may be imposed on said late payments. This Court will not impose a surcharge in an amount which may or may not be imposed in the future. However, in the absence of any evidence of a valid excuse for said late payments of 1995 taxes, this Court does hold that the accountant is liable for the full amount of such interest and penalty as may be imposed thereon. As to Calendar Year 1996, the account reflects receipt of a full refund of all sums withheld on account of federal income tax for 1996. Accordingly, this Court will

dismiss the Objection in regard to interest and penalty on late payment of 1996 income taxes.

The accountant filed an original inheritance tax return, and, paid principal tax due of $26,725.00, on October 11, 1996. The accountant filed an amended inheritance tax return, and, paid approximately $3,000.00 in additional principal tax and penalty, on November 4, 1997. Ms. Young testified that said amended return included: $20,913.40 in "Unused Vacation Pay" from the School District of Philadelphia, which was not received until July of 1997 due to "inadvertence"; $1,689.29 in additional receipts of proceeds of sales of tangible personal property; and, the late payments of 1995 income taxes on July 9, 1997. Ms. Young testified that the payment of November 4, 1997 included a penalty for late payment of the tax, but, she could not recall the amount of said penalty. The Objectant seeks a surcharge in the amount of such penalty. However, since the account is only stated to July 31, 1997, said late payment and penalty are not reflected therein. This Court will not impose a surcharge in an amount which has not been charged to the estate. However, this Court finds that there is no valid excuse for the failure to include all assets and deductions in the inheritance tax return which was filed on October 11, 1996, and, this Court holds that the accountant is liable for the full amount of such penalty as has been paid for late payment of inheritance tax in this estate.

All Objections having been addressed, the account, as stated to July 31, 1997, shows a balance of principal, including proceeds of the

sale of real estate (being premises 1615-1617 Fairmount Avenue, Philadelphia), and a balance of income, before distributions, of $ 181,146.87 to which add reductions in "Fees and Commissions", per discussion, totalling 7,019.00 making a balance available for distribution of $188,165.87 which, composed as set forth in the account, together with income received since the filing thereof, if any, is awarded to Florence Evelyn Waters.

The above awards are made subject to all payments heretofore properly made on account of distribution.

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

AND NOW, , unless exceptions are filed to this adjudication within twenty (20) days, the account, as amended by this Adjudication, is confirmed absolutely.

J.