

adjudication 12/10/98

***COURT OF COMMON PLEAS OF PHILADELPHIA
ORPHANS' COURT DIVISION***

1 March 98

No. 808 of 1996

Estate of LARRY A. COLSTON, Deceased

Sur accounts entitled First and Final Account of Earl W. Trent, Jr., Esquire, Executor, and Amended First and Final Account of Earl W. Trent, Jr., Esquire, Executor

Before PAWELEC, J.

This account was called for audit March 1 and 25, 1998

Counsel appeared as follows:

EARL W. TRENT, ESQ., Accountant - appeared p.p.

**EDWARD J. QUINN, ESQ., of QUINN & QUINN
- for Christina Armstrong, Objectant**

Larry A. Colston, also known as Larry Colston, died on December 10, 1995, leaving a will dated July 21, 1980, 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 December 18, 1995; proof of publication of the grant of same was submitted and is annexed hereto.

It is stated that the accountant has paid \$17,947.85 on account of transfer inheritance tax, being \$17,264.39 paid on January 20, 1998, and, \$683.46 paid on January 26, 1998. However, said payments have not been duly vouched by presentation of receipts therefore.

By the terms of his will, a copy of which is annexed hereto, the testator gave his entire estate in the following manner: one-half (1/2) to his mother, Mildred Colston; one-fourth (1/4) to his sister, Donna Colston; and, one-fourth (1/4), in equal shares, to Lennie Colston, Jr., Monica Colston, Edward Armstrong, Jr., Christine Colston (also known as Christine Armstrong), Matthew Snead, Michael Snead, Stephanie Snead and Kay Kay Colston (also known as Khadaji Colston). He provided that, if his mother should not survive him, her one-half (1/2) share of his estate shall pass to the aforementioned Lennie Colston, Jr., Monica Colston, Edward Armstrong, Jr., Christine Colston (also known as Christina Armstrong), Matthew Snead, Michael Snead, Stephanie Snead and Kay Kay Colston (also known as Khadaji Colston). He appointed Earl Trent, Esquire, to serve as executor of his estate.

It is stated that Mildred Colston, mother of the testator, died on October 26, 1987.

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

Christina Armstrong, niece of the testator and beneficiary of a gift of three-thirty-seconds (3/32) of his estate, has appeared by counsel and filed Objections to the Amended First and Final Account, which is stated to March 25, 1998.

The decedent was a practicing attorney. The Amended Account makes no mention of a law practice. Objectant seeks a surcharge, in an unspecified amount, representing the value of the decedent's law practice. She who would surcharge a personal representative for failure to marshal and administer property of a decedent must identify the missing property; prove that it was owned by the decedent at death; prove the value of said property at the time of death; prove that failure to marshal and administer the missing property constituted breach of a fiduciary duty; prove that said breach of fiduciary duty resulted in a loss to the estate; and, prove the amount of said loss. See Cutler's Estate, 225 Pa. 167 (1909), Schwartz Estate, 68 D.&C. 154 (O.C., Phila., 1949), Conway Estate (No. 2), 12 Fiduc. Rep. 283 (O.C., Montg., 1962), Dunn Estate, 54 D.&C.2d 760 (Mercer, 1972), Estate of Stetson, 463 Pa. 64 (1975), and, Miller's Estate, 345 Pa. 91 (1942).

The Accountant is a practicing attorney. The Amended Account indicates that he has charged \$8,989.20 in executor's commissions, and, \$12,584.88 in counsel fees. Objectant suggests that the accountant should receive \$6,908.25 for his services as executor, and,

\$6,908.25 for his services as attorney. Objectant would thus reduce commissions and fees by \$7,757.56, that is, from a total of \$21,574.08 to a total of \$13,816.52. 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 our 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).

Objectant questions an entry in the Amended Account which indicates that the Accountant has charged \$2,343.00 for,

“Reimbursement of costs advanced for moving, storing, retrieving, returning, cleaning, and disposing of office furniture, equipment, fixtures, books, files, etc. and costs of duplicating, delivering, mailing and long distance calling.”

Objectant suggests that the Accountant should submit receipts or other evidence that he actually expended \$2,343.00 for the aforementioned purposes. In passing upon this objection, this Court will be guided by the statements of our Supreme Court in Strickler Estate, 354 Pa. 276 (1946), at 277, wherein it is said that,

" Where a fiduciary claims credit for disbursements made by him, the burden rests upon the fiduciary to justify them. Proper vouchers or equivalent proof must be produced in support of such credits. Accountant's unsupported testimony is generally insufficient: ..." (citations omitted)

This Court will also take note of the opinion of Hunter, J., for our court-en-banc, in Rothermel's Estate, 47 D & C 478 (1943), at 479-480, wherein it is said that,

" It has long been the rule that the orphans' court will not dispense with the exhibition by fiduciaries of proper vouchers for payments made: Book entries alone are not sufficient, nor can the oath of the fiduciary be substituted for the correct and business-like practice of taking receipts." (citations omitted)

Finally, this Court will take note of the statement of our Supreme Court in Commonwealth Trust Co. Case, 331 Pa. 569 (1938), at 575, wherein it is said that,

"It is, however, not a sufficient defense against surcharge for a trustee to show for what purpose

trust funds were spent; it must justify every expenditure as a proper one according to the terms of the instrument under which it is acting, or the power and authority conferred upon it."

Once a fiduciary has justified or vouched a disbursement which appears in his account, an objectant must prove that said disbursement should not have been made. See Estate of Stetson, supra.

Testifying in support of her Objections, Christina Armstrong stated that she worked in the decedent's law office. She did his banking, from June of 1993, because he was sick and couldn't go to the bank. She made deposits and withdrawals. She drafted checks for signature by the decedent. She could not recall if she had drafted any checks in payment of taxes. Christina Armstrong testified that the decedent practiced in the fields of bankruptcy, criminal law and business law, and, that he had at least fifty open files at the time of his death. Ms.Armstrong stated that she gave a list of the open cases to the Accountant. She could not recall if any clients owed money to the decedent. She did not know whether any clients had paid the decedent, in his lifetime, for his services.

Donna Colston is a sister of the decedent. Called by Objectant, Ms.Colston testified that she met with the Accountant on three occasions after the death. She signed a form authorizing the expenditure of more than \$2,000.00 on the funeral, but, she had not received reimbursement of the \$1,197.00 which she paid for the headstone.

Ms.Colston stated that the Accountant sent her to open the decedent's safe deposit box. He asked her to give him a list of the ages and

addresses of all of the beneficiaries. On the advice of her attorney, Ms.Colston stopped cooperating with the Accountant at some time in 1977.

The Accountant testified that he is fifty-two years old, and, has been a practicing attorney for some twenty-five years. He is a general practitioner who practices in the fields of corporate law, tax law, personal injury law and decedent's estates. The Accountant stated that the decedent was an attorney who practiced in the fields of bankruptcy and criminal law. According to the Accountant, he spent a great deal of time closing down the decedent's law practice. He retrieved, inventoried and stored the decedent's files. He closed the decedent's office about eight months after the death, and, got the Land Title Building to forgive \$7,000.00 in rent. He then stored the decedent's files in his basement. In the opinion of the Accountant, he saved the estate a monthly storage charge of \$79.00. The Accountant testified that he sent out more than one hundred letters to clients of the decedent. He appeared in federal bankruptcy court, on behalf of decedent's clients, at least twenty-four times. He collected no fees for said court appearances. Every week, he sent his paralegal to the decedent's former office to retrieve mail. The Accountant stated that he contacted criminal listings and learned that there were no fees due the

decedent. According to the Accountant, he was forced to re-construct the decedent's income and expenses back to 1985. The Commonwealth demanded \$29,000.00 in taxes, but, the Accountant got them to reduce their claim to \$21,000.00. The City of Philadelphia demanded more than \$10,000.00 in taxes, but, the Accountant got them to settle for \$2,900.00. The Accountant got one credit card issuer to accept \$2,400.00 in satisfaction of a bill of more than \$6,000.00.

The record in this matter will not support a surcharge of the Accountant, in any amount, representing the value of the decedent's law practice. The Objectant simply failed to prove that the practice had any value on the date of death.

The record in this matter will not support a reduction in the amount of the Accountant's commissions and fees. The testimony indicates that the Accountant earned the commissions and fees which appear in the Amended Account. Said commissions and fees are justified by the Accountant's efforts in winding-up the decedent's law practice and successfully negotiating reductions in the decedent's tax liabilities.

The Accountant did not submit receipts or other evidence in support of his charge of \$2,343.00 for moving, storage, etc. While this Court finds the Accountant to be a credible witness, his testimony is no substitute for receipts. Accordingly, the disbursement of \$2,343.00 will be stricken from the Amended Account.

The Amended Account shows a disbursement of \$17,947.85 for transfer inheritance tax. Objectant would reduce this disbursement by \$3,229.80, that is, from \$17,947.85 to \$14,718.05. The Objectant argues that the Accountant should not have paid more than fifteen per cent of the Account's \$98,120.32 "Balance To Be Distributed To Beneficiaries". The Accountant argues that: if you add the inheritance tax payment of \$17,947.85 back to the balance of \$98,120.32, fifteen per cent of the resulting sum of \$116,068.17 results in a tax of \$17,410.22, that is, in a tax which is only \$537.63 less than that which has been paid by the Accountant. The Accountant testified that he did not make a payment on account of inheritance tax within ninety days of the date of death, and, that he believes that he paid a so-called "late filing" penalty of about \$1,800.00. Carrying Objectant's argument to its logical conclusion, this Court will reduce the disbursement for inheritance tax by \$537.63, that is, from \$17,947.85 to \$17,410.17. The Objectant offered no proof which would support a greater reduction in this disbursement.

The Amended Account shows receipts of interest totaling \$1,162.03. Objectant would increase this figure by \$13,575.59, that is, from \$1,162.03 to \$14,737.62. The Objectant offers the following argument in support of this Objection, to wit: the Account shows receipts of principal and income totaling \$184,220.18; and, at a rate of four per cent per annum, the sum of \$184,220.18 should have earned \$7,368.81, each, in calendar years 1996 and 1998. The Accountant argues that he never held

\$184,220.18 at any time, and, that he held no more than \$8,000.00 at any given time in calendar year 1996. The Accountant testified that the estate's bank balance never rose above \$139,000.00, and, that said figure was quickly drawn down by payments of bills. While on the witness stand, the Accountant produced the statements for the estate's bank account. Objectant offered no evidence in support of her Objection. The record in this matter will not support an increase in interest above the sum of \$1,162.03 which appears in the Amended Account.

The Amended Account shows payments of back income taxes of \$2,975.28 to the City of Philadelphia, and, \$20,920.73 to the Commonwealth. Objectant seeks a surcharge, in an unspecified amount, on the ground that timely action by the Accountant could and would have produced compromises and lower payments on account of back income taxes. The Accountant testified that he re-constructed the decedent's income and expenses back to 1985; that he got the City to accept \$2,975.28 in satisfaction of its claims totaling more than \$10,000.00; and, that he got the Commonwealth to accept \$20,920.73 in satisfaction of its claims totaling \$29,191.00. The Objectant offered no evidence in support of her Objection. The record in this matter will not support a surcharge of the Accountant, in any amount, representing potentially greater compromises of the decedent's income tax liabilities. The Objectant simply failed to prove that greater compromises could and would have been obtained.

All Objections having been addressed, the Amended First and Final Account, as stated to March 25, 1998, shows a balance of principal, personal property, and a balance of income, before distributions, of \$ 98,120.32

to which add unreceipted disbursements
and reduction in inheritance tax disbursement,
per discussion, totalling
2,880.63

making a balance available for distribution of
\$101,000.95

which, composed as set forth in the account, together with income received since the filing thereof, if any, is awarded as follows: one-fourth (1/4) to Donna Colston; and, three thirty-three seconds (3/32) to each of Lennie Colston, Jr., Monica Colston, Edward Armstrong, Jr., Christine Armstrong, Matthew Snead, Michael Snead, Stephanie Snead and Kay Kay Colston (also known as Khadaji Colston). 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 Amended First and Final Account, as amended by this Adjudication, is confirmed absolutely.

J.