

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

1 May 98

No. 1610 of 1997

Estate of ESTELLE E. ENGELBACH, Deceased

**Sur accounts entitled: First Account of Peter A. Engelbach,
Executor**

and

First Restated Account of Peter A. Engelbach, Executor

Before PAWELEC, J.

This account was called for audit May 4 and 21, 1998

Counsel appeared as follows:

EDMUND P. BUTLER, ESQ. - for the Accountant

**STEPHEN H. GREEN, ESQ. - for Elsa Ann Stutman,
Barbara Sue Kates and Lynne E. Lynn, Objectants**

Estelle E. Engelbach, also known as Estelle Engelbach, died on November 13, 1995, leaving a will dated August 27, 1994, which was duly probated. She was unmarried at the time of her death and was not survived by issue.

Letters Testamentary were granted to the accountant on November 27, 1995; proof of publication of the grant of same was submitted and is annexed hereto.

Payments of transfer inheritance tax, \$14,963.95 on January 22, 1996, \$8,397.42 on November 5, 1996, and, \$192.49 on February 20, 1998, were duly vouched.

By the terms of her will, a copy of which is annexed hereto, the testatrix gave her entire estate in trust for the benefit of her sister, Anne Cohn, giving the trustee sole discretion to use and apply net income and principal for Anne's benefit during her lifetime. On the death of Anne Cohn, the balance of principal and any accumulation of income remaining in the trust is given as follows, to wit, fifteen percent (15%) to Dorothy Reinhart, sister of the testatrix; thirty percent (30%) to Elsa Ann Stutman, niece of the testatrix and daughter of Anne Cohn; ten percent (10%) to Perle Engelbach, sister of the testatrix and mother of the trustee, Peter A. Engelbach; twenty-two and one-half percent (22-1/2%) to Barbara Sue Kates, niece of the testatrix; and, twenty-two and one-half percent (22-1/2%) to Lynne E. Lynn, niece of the testatrix. She appointed Peter A. Engelbach to serve as executor and trustee.

A copy of the will is annexed.

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

It is stated that Dorothy Reinhart, sister of the testatrix and remainderman of the trust, died on June 28, 1998.

It is stated that Perle Engelbach, sister of the testatrix and remainder-man of the trust, died on October 15, 1998.

Elsa Ann Stutman, Barbara Sue Kates and Lynne E. Lynn, nieces of the testatrix and remaindermen of the trust, appeared by counsel and filed Objections to the First Account of Peter A. Engelbach, Executor, which is stated to December 31, 1997. After a hearing held sur said Objections, Peter filed a Restated Account, which is stated to May 31, 1998.

Objectants contend that the Account and Restated Account omit a certain checking account at First Union National Bank. In addition, Objectants contend that the Accounts omit the sum of \$13,000.00 which was allegedly transferred from the decedent's brokerage account into said First Union checking account. One 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). Objectants offered no documents or other evidence in support of their objections regarding the First Union checking account and alleged transfers thereto. On direct

examination by his own counsel, Peter A. Engelbach gave the following testimony in regard to the account,

“Q. Mr. Engelbach, one of the Objections that has been filed indicates that there was a checking account of the decedent at First Union Bank. The account number referred to in the Objections is number 3015246261. Can you identify that bank account.?”

A. Well, I can’t remember the number, but I think that was a bank account that I had opened -- it was my account at Fidelity, that because of a situation that I found myself in back in 1992, I wanted to basically hide myself. What had happened was I had a loan with PSFS Bank. It was a very good loan. I had gotten some money for my wife for her business. I was very close to Roger Hollis at PSFS. PSFS was -- basically, the bank said that I would only have to be paying interest on the loan, and that every year they would look at my balance sheet to see if they were happy. It was not collateralized or anything. It was a signature loan.” NT 107

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“Q. Let’s get back to the First Union Bank account.

A. What happened was, PSFS was taken over by Mellon. Mellon asked me to pay off the loan at that time. They didn’t like the loan that PSFS had created. I did not have the assets to do it. I was concerned that at some point they might try and go after all my banking assets and any money that I had. So I went to my aunt and said, ‘Can we open up an account that would have your name and Social Security number as the lead number?’ She said, ‘Fine,’ and that became an account that I had. Almost all of the money that went into the account was my income from working.

Q. Was there any money of the decedent's in that bank account?

A. I don't think so." NT 108

On cross-examination by counsel for Objectants, Peter insisted that he had no record or recollection of any transfers of funds from the decedent's brokerage account to the First Union checking account. As a trier of fact, this Court does not believe a word which is said by a witness who would hide himself, i.e., deceive a bank, by placing his assets in the name of his aunt. Nevertheless, in the absence of any evidence from Objectants in support of their objections, this Court has no basis upon which to surcharge the accountant for omitting the First Union checking account and alleged transfers from the instant Accounts. Allegations are no substitute for competent evidence. Objectants have not met their burden of proof regarding the First Union checking account and alleged transfers thereto.

The testatrix and her sister, Anne Cohn, owned and occupied condo-minium unit No. 1803 at 3600 Conshohocken Avenue, Philadelphia, as tenants in common. Anne Cohn continued to reside in said condominium unit after the death of the testatrix on November 13, 1995. In his Restated Account, Peter A. Engelbach takes credit for \$28,583.00 in payments to Anne Cohn, including: \$20,800.00 in the form of eleven checks dated from December 22, 1995 to May 18, 1998; and, \$7,783.00 in the form of thirty-five cash payments made from January 2, 1996 to January 28,

1997. The checks are listed as follows: \$1,500.00, each, on December 22, 1995 and March 13, 1996; \$4,000.00 on April 9, 1996; \$3,000.00 on May 29, 1996; \$1,500.00 on August 13, 1996; \$1,800.00 on April 16, 1997; and, \$1,500.00, each on June 20, 1997, October 16, 1997, February 26, 1998, April 7, 1998 and May 18, 1998. The cash payments appear as distributions of income, and, all read as follows: "Anne E. Cohn - Mastercard Cash advance". The cash payments include: three payments totaling \$600.00 in January of 1996; two payments totaling \$400.00 in February of 1996; five payments totaling \$1,020.00 in March of 1996; three payments totaling \$700.00 in April of 1996; four payments totaling \$900.00 in May of 1996; one payment of \$100.00 in June of 1996; three payments totaling \$600.00 in August of 1996; eleven payments totaling \$2,962.00 in September of 1996; one payment of \$201.00 in October of 1996; one payment of \$100.00 in November of 1996; and, one payment of \$200.00 in January of 1997. Peter A. Engelbach testified that he never got a receipt for any payment of cash to his Aunt Anne. Objectants deny that Peter made any cash payments to Anne Cohn. 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 vouched and justified 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 the payments in his Restated Account, Peter A. Engelbach stated that his ninety-three year old Aunt, Anne Cohn, scrubbed floors, on her hands and knees, because she refused to spend her own money to hire someone to clean for her. According to Peter, he arranged for someone to come in, on a weekly basis, and, gave Aunt Anne cash to pay this person. Peter stated that Aunt Anne needed cash to pay

her workers. Peter never got a receipt from Aunt Anne. Peter testified that he never saw Aunt Anne pay her workers. Instead, he saw her put the cash into a pocketbook which she kept in a drawer in her bedroom. Peter stated that not all of the "Mastercard Cash advances" were paid over to Aunt Anne. According to Peter, he used some of the cash to buy things for Aunt Anne. Peter had no idea of why he made \$2,962.00 in "Mastercard Cash advances" in September of 1996.

Objectant Elsa Ann Stutman is the daughter of Anne Cohn. Elsa testified that her mother did, indeed, scrub floors immediately after the death of the testatrix. However, Elsa stated that her mother got dizzy, fell, and, spent ten days in the hospital in January of 1996. From the hospital, Anne Cohn went to a rehabilitation facility for a stay of twenty days. According to Elsa, her mother has had a live-in health care worker since the mother was discharged from the rehabilitation facility on February 16, 1996. Elsa testified that, as of February 16, 1996, her mother had a hard time hearing sounds; had difficulty understanding the spoken word; could only read large print with the aid of a magnifying glass; and, needed a walker and the assistance of another person to get around. Her mother's condition has gotten worse since February 16, 1996. Elsa stated that she has received her Mother's income and paid her mother's bills since February 16, 1996. The income consists of social security payments; interest on securities; and, payments received, by check, from the estate of her deceased Aunt Estelle. According to Elsa, since February 16, 1996,

Elsa has been the person who has paid her mother's mortgage and condominium fees, and, her mother's workers. Elsa has never seen Peter A. Engelbach give any cash to her mother. Elsa is unaware of her mother receiving any "Mastercard Cash advances" from Peter. As far as Elsa knows, the only cash in her mother's condominium is that which has been left by Elsa for the use of the resident workers.

By agreement of the parties, Objectants have submitted the deposition testimony of Rita Battle. In her deposition, Rita described herself as a "Nurse's Aide" who had lived with Anne Cohn since Anne was discharged from Sanders House Nursing Home on February 16, 1996. Rita stated that her care of Anne Cohn included: assistance with washing and bathing; making meals; giving medicine; doing laundry and housekeeping; and, shopping, when necessary. Rita admitted that she had taken thirty-five days off in 1996, but, testified that she had been replaced by other girls in her absences. Rita recalled that Peter A. Engelbach would usually visit his Aunt Anne on Mondays and Thursdays. Rita testified that she never saw Peter give any money to Anne Cohn. She never saw Anne put money into a bureau drawer. Rita stated that she was always paid by Elsa Ann Stutman. She was never paid by Anne Cohn. Rita described a practice whereby Elsa would put a sum of money, usually \$35.00 to \$40.00 per week, into a bureau drawer in the living room of the condominium unit. This money was to be used for shopping, but, there were no records kept of its use. Rita testified that neither she or Elsa ever told Anne Cohn of the

money which Elsa left in the bureau drawer. According to Rita, Anne was unaware of this money.

Having considered the testimony of Peter A. Engelbach, Elsa Ann Stutman and Rita Battle, this Court finds: that the unsupported testimony of Peter is insufficient to prove that he made any cash payments to Anne Cohn; and, that Peter's testimony is no substitute for receipts. This Court is convinced that Anne Cohn ceased making payments, to workers or anyone else, when she entered the hospital in January of 1996. This Court is convinced that Elsa Anne Stutman paid all of her mother's bills, including those for compensation of live-in companions, from the time her mother left Sanders House Nursing Home on February 16, 1996. This Court finds the testimony of Peter A. Engelbach, that his Aunt Anne needed cash to pay her workers, to be incredible. Having observed the demeanor of Peter A. Engelbach on the witness stand, and, considering his deceitfulness in hiding behind his Aunt Estelle to avoid payment of a bank loan, this Court is convinced that Peter is now hiding behind his Aunt Anne to avoid liability for "Mastercard Cash advances" which he made from the estate's account for his own purposes. This Court does not believe the testimony of Peter A. Engelbach that he used the proceeds of "Mastercard Cash advances" to buy things for his Aunt Anne. Accordingly, this Court will strike \$7,783.00 in distributions of income to Anne Cohn, in the form of "Mastercard Cash advances", from the Restated Account. The accountant is thus surcharged in the amount of \$7,783.00.

In his Restated Account, Peter A. Engelbach takes credit for \$10,100.00 in payments to Dorothy Reinhart, including three “Mastercard Cash advances” of \$200.00, each, made on January 9, January 11 and May 9, 1996; and, thirty-five checks, totaling \$9,500.00 and dated from February 15, 1996 to February 26, 1998. Objectants contend that Dorothy Reinhart was not entitled to receive payments from the testamentary trust in the lifetime of Anne Cohn. In his testimony, Peter A. Engelbach admitted that his Aunt Dorothy had no right to receive payments in the lifetime of his Aunt Anne; that no beneficiary gave him written authorization to make payments to Aunt Dorothy; and, that he got no receipt for any payment to Aunt Dorothy. Nevertheless, Peter insisted that he was only continuing a practice of his late Aunt Estelle, to wit, making payments to her needy sister, Dorothy, in Florida. According to Peter, he made payments to Aunt Dorothy because Aunt Estelle had done so in the past, and, because Aunt Dorothy needed the money. While admitting that he had no idea whether or not he had ever told his Aunt Anne of the payments to Aunt Dorothy, Peter insisted that all of the other beneficiaries, including the Objectants, were aware of said payments, and, never voiced any objections thereto. On direct examination by her counsel, Objectant Lynne E. Lynn gave the following testimony on information provided by Peter A. Engelbach, to wit,

“Q. Did he ever provide you with any information about the administration of this estate?

A. Nothing.

Q. Did he ever tell you why he couldn't or wouldn't?

A. Each time I called, I was given a reason.

Q. Can you tell the Court what some of those reasons were, that you believe.?

A. The first time I called, I was given some kind of story about he needed to talk to the people who were on the board of his organization and get their permission to release information. That was the first time. The second time, it was -- I'm trying to remember the second time. The second time was -- I can't go in order. I don't remember all of it. At one point, he said that he was moving and couldn't find the information. At one point he said that some of it must have been moved, and Fran may have had some of the information. That's his ex-wife. And he asked me why I needed it, and I said that we wanted to see where the stocks started and where they were, and we wanted an accounting, and I never got anything.

Q. He provided no information to you?

A. Nothing." NT 234-235

On direct examination by her counsel, Objectant Barbara Sue Kates gave the following testimony on information provided by Peter A. Engelbach,

"Q. Did he ever provide you with information about the administration of this estate?

A. I spoke to him on one of the conversations, and he said he was in the process of moving, and everything was in boxes. And then the last time, I did not speak with him directly. When I returned home one day, there was a message on the tape, my machine tape, and it stated that the checks were in order numerically, but not chronologically, and, therefore, he could not do anything, and that was it.

Q. He could not provide you with any information that was chronological, only numerical? That was on the message?

A. I believe so, yes.

Q. Did he ever give you any reasons why he couldn't provide, other than what you just testified on a phone message, in you direct conversations with him?

A. No, that was it." NT 244-245

Where a beneficiary is without knowledge of improper payments, and, a fiduciary does not file periodic accountings, laches and acquiescence do not bar objections to said payments. Rothermel's Estate, supra. at 480. Having considered the testimony of Peter A. Engelbach, Lynne E. Lynn and Barbara Sue Kates, this Court finds the unsupported testimony of Peter to be incredible and insufficient to prove that the Objectants were aware of the improper payments to Dorothy Reinhart. This Court is convinced that Objectants Lynne and Barbara Sue were not aware of the payments to their Aunt Dorothy. Since the payments to Dorothy Reinhart were patently violative of the terms of the trust, this Court will strike \$10,100.00 in distributions of income to Dorothy from the Restated Account. The Accountant is thus surcharged in the amount of \$10,100.00.

Exhibit "O-1" is a copy of a document headed "Promissory Note" whereby Peter A. Engelbach agrees to pay the sum of \$70,000.00 to Estelle E. Engelbach. The Note is dated November 6, 1995 and requires payment of the entire debt due thereunder thirty-six months from the date

of execution of the Note, but, gives the maker an option to extend the due date for an additional thirty-six months. The Note provides for payment of interest at a floating rate known as the "Libor" rate which appears in the Wall Street Journal. The Note appears to bear the signatures of Peter A. Engelbach, as maker, and Estelle E. Engelbach. The Note appears to bear the seal and signature of a Notary Public named Carol Blandes. The Note appears at two places in the Restated Account, to wit: as a principal receipt at

page 2, and, as part of the "Principal Balance On Hand" at page 18. Each entry reads as follows, "Loan to Peter Engelbach - Per Note dated 11/6/95". Peter A. Engelbach admits that he owes \$70,000.00 to the decedent's estate, but, asserts that the debt is not due and payable, at the present time, according to the terms of the Note. Objectants contend that Estelle E. Engelbach never signed the Note, and, that the Note is a fabrication which has been constructed by Peter to delay payment of his obligation. Objectants further contend that, if Estelle did sign the Note, she did so at a time when she lacked sufficient mental capacity to understand what she was doing. Finally, Objectants contend that, if Estelle did sign the Note, she did so as a result of undue influence and duress which were practiced upon her by Peter. Objectants take the positions: that Peter A. Engelbach has breached his fiduciary duty by failing to collect the sum of \$70,000.00 from himself, and, that Peter should pay simple interest on said sum of \$70,000.00, at the rate of six per cent, until it is repaid.

Peter A. Engelbach testified that he is a stockbroker who changed his employment from Prudential Securities to Delaware Bay Company in 1994. Peter acted as broker for his Aunt Estelle, and, brought her brokerage account with him from Prudential to Delaware Bay. Peter stated that, early in 1995, the head of Delaware Bay suggested that he and Peter should start their own brokerage firm. Peter is now a principal in a firm known as "J. Alden Associates". Peter testified that, in the first week of February, 1995, he told his Aunt Estelle that he might be leaving Delaware Bay to form his own firm. Aunt Estelle asked if she could be of any help in this endeavor. Peter replied that he did not know yet. Peter stated that, in the Spring or Summer of 1995, he went back to his Aunt Estelle and asked her if she would give him \$70,000.00 for his new business. Aunt Estelle said yes. Peter testified that he again approached Aunt Estelle, in October of 1995, and asked if she was prepared to give him \$70,000.00. Aunt Estelle said yes. On direct examination by his own counsel, Peter gave the following description of the situation,

“..... The mechanics she left to me as to how it was done. Yes, in fact, she had offered to give me the money, and I thought that was not the right thing to do, and I borrowed the money with the idea of paying it back within a period of time, and at basically a low interest rate. But that was her feeling. She wanted to give me the money, and I said, ‘Well, I’ll borrow it, but it will be at a low interest rate,’ and that was acceptable to her.” NT 106

On cross-examination by counsel for the Objectants, Peter gave the following responses regarding the “Libor” rate of interest in the Note,

“Q. I note that this promissory note also called for payment at the Interbank Libor Rate shown in the Wall Street Journal. What is that?”

A. It’s a low interest rate. It’s a fluctuating interest rate.

Q. Did Miss Engelbach suggest that rate to you?”

A. Well, of course she did. No, of course not. To her, she just said, ‘Well, take an interest rate,’ and she didn’t even say take an interest rate. She didn’t even want to charge me an interest rate, and I thought that was unfair, and if she was going to be generous, then I ought to take a low rate.” NT 136-137

Peter A. Engelbach testified that Exhibit “O-1” is a copy of the Note which was signed by himself and his Aunt Estelle on November 6, 1995. Peter can’t find the original, executed Note. Peter stated that the Note was drafted by a New Jersey attorney who was helping to form Peter’s new firm. Peter testified that he and his employee, Carol, visited Aunt Estelle in the Aunt’s hospital room. Carol was a notary public. Peter stated that he and Carol took two documents with them on this visit to Aunt Estelle’s hospital room, to wit: the original Note, and, a separate letter authorizing Peter to withdraw \$70,000.00 from the Aunt’s brokerage account at Delaware Bay Company. Peter testified that Aunt Estelle was lying in bed when she signed the original Note. Peter put a tray under her so that she could write. At the time of signing, Peter did not explain to his

Aunt that the Note called for no payments for a period of three to six years. Nor did he explain the concept of the “Libor” rate of interest to her. This was because, in Peter’s words, “We had talked about it in times past, how I would structure it.” NT 143 Peter admitted that his Aunt Estelle was in her nineties, and, in the hospital, when she signed the original Note. Nevertheless, he insisted that, when she signed the Note: she was not confused; she was aware of her surroundings; and, she was responsive to questions.

Peter A. Engelbach testified that he created a “margin loan” of \$70,000.00 against his Aunt Estelle’s brokerage account at Delaware Bay Company. He wired the proceeds of the margin loan to a checking account and then deposited them into his own account at Delaware Bay. He used the proceeds of the margin loan to start his new firm. Peter stated that the margin loan was paid off within a month or two of its creation. Acting as executor, Peter liquidated stocks in the estate account to get funds to terminate the margin loan. Peter did not know the date of death balance of the margin loan. Nor did he know whether any payments had been made on account of the loan in his Aunt’s lifetime. Under the heading of “Debts of Decedent”, the Restated Account reflects a payment of \$65,374.74 to Delaware Bay Company, on November 13, 1995, for “Margin Account”. Under the heading of “Administrative Expenses”, the Restated Account reflects a payment of \$261.90 to Delaware Bay Company, on November 22,

1995, for "Loan Interest". Another payment of \$2.71 in "Loan Interest", on December 29, 1995, also appears under "Administrative Expense".

On cross-examination by counsel for the Objectants, Peter A. Engelbach admitted that he did not keep good records of his administration of this decedent's estate. He further admitted that he did not read or review the following documents before he signed them, to wit: the inventory; an inheritance tax return which was filed on January 22, 1996; and, the First Account of the executor. He could not explain why the existence of the Note is not reflected in the inventory or inheritance tax return of January 22, 1996.

Objectant Elsa Ann Stutman testified that she used to visit her mother and Aunt Estelle, in their apartment, several times a week. According to Elsa, her Aunt Estelle never stopped talking during these visits to the apartment. Elsa testified that Aunt Estelle never borrowed money. Aside from a loan of \$2,000.00 to Elsa, some ten or twenty years ago, which went unpaid, Elsa was unaware of any loans which had been made by Aunt Estelle to relatives. As for gifts, Elsa stated that Aunt Estelle made birthday gifts to Elsa and her children of \$25.00 to \$100.00. When asked about a possible loan of \$70,000.00, Elsa gave the following responses,

"Q. If Miss Engelbach had loaned \$70,000.00 to someone, is it likely that she would have told you?

A. If she could remember it, she would have told me.

Q. Was her memory failing?

A. Her memory was nonexistent.

Q. As of what time?

A. At least the last year of her life. Before that, it was slipping.” NT 216

When asked about Aunt Estelle’s condition in the hospital, Elsa gave the following responses,

“Q. Did you have occasion to visit Estelle Engelbach in the hospital during her final illness?

A. I did, but not the final week, because I was in the hospital too at that time.

Q. How would you describe her condition?

A. Well, when I was there in October, towards the end of the month, she was as usual. She recognized me. She grasped my hand. She said it was nice of me to come, and then she closed her eyes and was unable to carry on any further conversation.

Q Was she mobile?

A. No.

Q. Was she able to feed herself?

A. No.

Q. Was she able to pick up the phone?

A. No.” NT 216-217

Objectant Barbara Sue Kates testified that she was very close to her Aunt Estelle. Nevertheless, Barbara Sue was not aware that her Aunt Estelle was in the habit of borrowing money or making loans to others. To the knowledge of Barbara Sue, her Aunt Estelle's gift giving consisted of birthday gifts of \$25.00 to children. When asked about Aunt Estelle's condition in the hospital, Barbara Sue gave the following responses, to wit,

“Q. Did you have occasion to visit with her during the last week of her life?

A. Every day I took my Aunt Anne.

Q. Every day?

A. Yes.

Q. Where was that?

A. Osteopathic Hospital.

Q. Is that the one we have heard about on City Line Avenue?

A. Yes.

Q. You were there every day for how long?

A. It might have been an hour; it could have been longer.

Q. Would it depend on Miss Engelbach's condition or --

A. Actually, on Aunt Anne. She would just sit there and hold my Aunt Estelle's hand.

Q. What was her condition during those last weeks, when you visited with Miss Engelbach?

A. Her final week, she was totally, I guess you would say, out of it. She would just lie there, and we would just hold her hand, give her a kiss, and if she was in pain, get the doctor or nurse for her.

Q. Was she engaging in conversation with anyone?

A. The last week? No.

Q. When you were there.

A. No.

Q. Was she mobile? Could she move around in bed or get up and walk around?

A. No.

Q. Did you ever see her sit up during any of your visits?

A. Not that last week, no.

Q. Was she able to feed herself?

A. No.

Q. Care for her own personal hygiene needs?

A. No.

Q. You have heard Mrs. Lynn testify that she couldn't even press the nurse's call button. Was that your impression also?

A. She could not." NT 239-241

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* * *

“Q. How would you describe her mental condition during that last week?

A. Nonexistent at that point.

Q. Could you elaborate somewhat?

A. She was lying there, and her eyes were shut, and she did not say anything. I'd say she was unaware." NT 241-241

Barbara Sue Kates gave the following response to a question from this Court, to wit,

"THE COURT: Can you tell us anything about the week prior to the week in which she died, if you remember?

THE WITNESS: She wasn't great. Initially, Aunt Stelle -- I call it her signature laugh. We all know it. So when we walked in, if she couldn't talk, you would walk in, and she would take your hand and say 'Hah,' but she would take your hand, and we all knew that she would do that. There really wasn't any conversation, but it wasn't as bad as the last week." NT 247

Objectant Lynne E. Lynn testified that she had a very close relationship with her Aunt Estelle E. Engelbach. When asked about Aunt Estelle's condition in the hospital, Lynne gave the following responses,

"Q. When and how often did you visit with her during the last weeks of her life?

A. I went there about three times a week for the last couple weeks of her life.

Q. What was her condition during those last couple weeks?

A. Awful.

Q. Would you describe it.

A. When I went there, she would know who I was. She would hold my hand and basically close

her eyes. She couldn't get off the bed. She couldn't -- the only way she could get help from the nurses is if the woman who was sharing the room with her got somebody, if she needed her.

Q. Do you mean she couldn't even press the buzzer herself?

A. No. And at the end, the last week of her life, she was awful. She was in tremendous stomach pain and had no control. She would throw up. She messed herself. She was in excruciating pain. And the last couple of times I went there, there was just no discussion between us at all. I just sat there with her.

Q. If you remember, when was the last time you visited with her?

A. I think I was there the day before she died, or the day before that. It was, like, right at the end.

Q. Either November 11th or 12th?

A. Yes.

Q. Had you been there during the week prior?

A. Yes.

Q. And her condition was as you just described during that entire period?

A. The whole last week of her life, she was not in good shape at all.

Q. Was she mobile?

A. No.

Q. Could she sit up in bed?

A. No, she couldn't press the button to get the nurse.

Q. Was she able to pick up a telephone?

A. No.

Q. Feed herself?

A. No. She wasn't eating. That's why they wanted to order a feeding tube.

Q. Was she able to do anything for herself?

A. No.

Q. Could she attend to her personal hygiene?

A. No. She couldn't even turn herself over.

Q. She could not move around in her bed?

A. No, not at the end.

Q. Was she communicative?

A. The last week, no.

Q. Was she lucid?

A. She was aware that I was there, and I'm sure she knew that it was me. But other than that, I didn't have much -- I would talk to her. I didn't get a response from her. She was in pain." NT 230-233

Peter A. Engelbach raises the terms of the Note as an affirmative defense to the claims that he has breached his fiduciary duty by failing to collect the sum of \$70,000.00 from himself, and, that he should pay simple interest on said sum, at the rate of six per cent, until it is repaid. Because Peter testified that his Aunt Estelle wanted to make a gift to him, and, that the "Libor" rate is a generous rate of interest, this Court

will judge the validity of the Note by the law of gifts. In the law of gifts, the donee of an alleged gift must prove donative intent and delivery by clear and convincing evidence. Estate of Clark, 467 Pa. 628 (1976) The definition of clear and convincing evidence is provided in the following language of our Supreme Court in La Rocca Trust, 411 Pa. 633 (1963), at 640,

" In Broida v. Travelers Ins. Co., 316 Pa. 444, 175 A. 492 (1934), at 448, in describing the meaning of the phrase, 'clear, precise and convincing,' we stated, 'the witnesses must be found to be credible, that the facts to which they testify are distinctly remembered and the details thereof narrated exactly and in due order, and that their testimony is so clear, direct, weighty and convincing as to enable the jury to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue ... It is not necessary that the evidence be uncontradicted [citing cases], provided 'it carries conviction to the mind' (Burt v. Burt, supra,) or 'carries a clear conviction of its truth'..."

Peter A. Engelbach did not offer the original, executed Note. He did not offer the testimony of his employee, Carol, the notary. Because this Court does not find Peter to be a credible witness, it holds that he has not presented clear and convincing evidence of the validity of the Note. This Court holds that Peter A. Engelbach has breached his fiduciary duty by failing to collect the sum of \$70,000.00 from himself. In the exercise of its discretion, under Section 3544 of the Probate, Estates and Fiduciaries Code, this Court holds that Peter shall be liable for interest on the sum of \$70,000.00, at the legal rate, from November 13, 1995 until the debt is repaid.

In his Restated Account, Peter A. Engelbach takes credit for \$8,930.79 in "Fees and Commissions" which were paid to him or for his benefit. Said sum of \$8,930.79 can be broken down into the following components: \$6,216.58 in total charges made, from January 3, 1996 to May 23, 1997, by using the estate's "debit" card; \$1,200.00 in the form of a check dated August 19, 1996 and drawn to the order of Peter A. Engelbach; and, \$1,514.21 in the form of a check dated September 26, 1996 and drawn to the order of American Express. Objectants take the position that Peter is not entitled to receive any commissions because he mismanaged this estate, and, because he and his daughter used the estate's account as their personal expense account. In Strand Estate, 3 D. & C. 3d 457 (1976), at 459, this Court made the following observation about fiduciary commissions:

" 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:" (citations omitted)

On direct examination by his own counsel, Peter A. Engelbach gave the following testimony concerning use of the estate's "debit" card:

"Q. Would tell the Court why you made charges against the estate in this fashion?

A. For the most part, they were not charges made by me, but were inadvertently made by my daughter, who would do the shopping for the house. I had just separated from my wife. My youngest daughter was living at home. She did the shopping, and she would go in and take a credit card out of my wallet. I had two credit cards that are absolutely identical. You couldn't

tell the difference. They both had my name on it. The only difference was one belonged to the estate and one was mine, and if she took the wrong one, she just took the wrong one, and I wasn't even aware of that, because I had no reason to ever look at the -- when I looked at the statement, the stuff that I see on my computer screen does not give the same information that I get when I look at the actual statement, and I really wasn't aware of all of this until about a month or so ago.

Q. Were you intending to claim your commissions in the estate by making these withdrawals on an estate credit card?

A. Well, I could.

Q. What do you mean, you could?

A. Well, if it came out that would be a way of doing it, then there would be no reason why I wouldn't do it.

Q. When you did it, when you made the charges -- and let me just pick one. Here is an Amoco Station on 4/4/96, for \$17.04.

MR. BUTLER: I'm on page 14, Your Honor.

BY MR. BUTLER:

Q. If you made that charge, were you aware that you were using the estate's credit card?

A. No, sir.

THE COURT: Which one did you say? The Amoco?

MR. BUTLER: That was on page 14, 4/4/96, \$17.04.

THE COURT: How about at the top of the page, '3/16/96, Wine & Spirits, \$99.60'? Was that you or your daughter?

THE WITNESS: Actually, that was me for bringing liquor to Aunt Stelle -- Aunt Anne. Aunt Stelle didn't need it. She wanted to have some Scotch and stuff in the house, which she put on the top shelf. Why, I don't know." NT 118-120

On cross-examination by counsel for Objectants, Peter gave the following responses regarding use of the estate's "debit" card:

Q. With respect to the fees and commissions that appear in the Account, you testified earlier that you used a charge account or a credit card on the estate to pay these bills, pay these charges, and that your daughter sometimes used that credit card; is that correct?

A. Yes.

Q. Did you also testify that you didn't realize she was using the estate's credit card?

A. That's correct.

Q. And that on occasion you didn't realize that you were using the estate's credit card?

A. No, I knew I was using the estate's credit card when I used it, because of the two cards. It was the only card that I had my signature on the back.

Q. How did your daughter use it if only your signature was on the card?

A. Most people don't care.

Q. How would she get ahold of the card?

A. Just take it out of my wallet. She would say she was going to go shopping. I'd say, 'Okay. Take a card.'" NT 170-171

* * * * *

"Q. By the way, you said that one of those entries was for you to purchase liquor for Anne Cohn. Was that your testimony?

A. Yes, it was.

Q. What kind of liquor was that?

A. A couple of bottles of stuff that she would have in the house for people. If she drinks, it might be a thimble full of Manieshewitz wine, but I don't think she drank at all. But I would come in, and she would always offer me a drink. There was nothing there. I bought her a couple bottles of Scotch that I like, and some Rye, and some other stuff, maybe, and put it up on the top shelf. As far as I know, it could still be there." NT 180-181

It has been stated that, "An unfaithful trustee is not to receive the rewards of a faithful one." Robinett's Appeal, 36 Pa. 174, 191 (1860). It has been noted that,

"Compensation to trustees is allowed in this and our sister states, as the reward of faithful execution of the trust confided. Integrity, industry, intelligence, and enlightened activity in the trustee, are the qualities which command reward. To compensate sloth, ignorance, reckless confusion, and procrastinating delay, by which the interests of the cestui que trust are impaired, instead of being promoted, would be to prevent the very object our system has in view in allowing compensation to trustees, by offering a premium to incapacity or dishonesty." Stehman's Appeal, 5 Pa. 413, 417 (1846)

It is the opinion of this Court that Peter A. Engelbach has forfeited his right to compensation by his dishonesty and incompetence. As a trier of fact, this Court find's much of Peter's testimony on the use of the estate's "debit" card to be totally incredible. This Court does not believe that Peter was unaware of his daughter's

use of the estate's "debit" card until one month before the hearing in this matter. If Peter was unaware that his daughter had used the card, for almost a year, such ignorance constitutes negligence and breach of fiduciary duty. The Restated Account indicates that the estate's card was used to charge \$569.82 in liquor purchases, on five occasions, from January 19, 1996 to August 20, 1996. This Court does not believe that Anne Cohn asked Peter to buy any liquor for her. This Court holds that the use of the estate's "debit" card, as recounted in the testimony of Peter A. Engelbach, constitutes an effective co-mingling of the assets of the estate with those of the fiduciary, and, a breach of fiduciary duty. This Court holds that Peter has forfeited his right to compensation, as executor and trustee, by making "Mastercard Cash advances" for his own purposes and characterizing said advances as distributions of income to his Aunt Anne; by making payments to Dorothy Reinhart in patent violation of the terms of the trust and without the knowledge of the other beneficiaries; by failing to collect the sum of \$70,000.00 from himself; by treating the assets of the estate as if they were his sole and separate property; by failing to keep

good records of his administration of the estate and trust; by failing to read or review the inventory, an inheritance tax return and the First Account; and, by giving false testimony before this Court. Accordingly, disbursements totalling \$8,930.79 in "Fees and Commissions" are disallowed; they will be stricken from the Restated Account; and, the sum of \$8,930.79 will be added back to the balances available for distribution. The Accountant is thus surcharged in the amount of \$8,930.79.

In his Restated Account, Peter A. Engelbach takes credit for payment of a fee of \$1,000.00 to Samuel Lander, Esquire. Objection is made to said payment on the grounds that Mr.Lander incorrectly prepared an inheritance tax return and failed to advise Peter of his fiduciary duties. In an appearance slip, Edmund P. Butler, Esquire, current counsel to Peter, claims counsel fee of \$8,000.00. Mr.Butler's fee would be in the nature of an additional disbursement. Objection is made to Mr.Butler's fee on the grounds that the estate should not pay for counsel's efforts in correcting Peter's mistakes and unsuccessfully defending Peter against surcharge. In passing upon requests for counsel fees, this Court considers 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." LaRocca Estate, 431 Pa. 542, 546 (1968) (citations omitted)

See also Estate of Lux, 480 Pa. 256 (1978) and Conti Estate, 8 Fiduc Rep 2d 272 (O.C., Phila., 1988). Attorney fees cannot be judged in the dark or in a vacuum. Reasonableness cannot be determined without knowledge of the work done. The fiduciary must present evidence as to the work done by his counsel. See Preston Estate, 385 Pa.SuperiorCt. 48 (1989), Sonovick Estate, 373 Pa.SuperiorCt. 396 (1988) and Reed Estate, 462 Pa. 336 (1975). "If several attorneys are retained to settle the estate, an aggregate of counsel fees charged to the estate should not exceed one reasonable fee for all the services performed: ..." Conti, supra. at 273 (citations omitted).

Peter A. Engelbach testified that Samuel Lander, Esquire, accompanied Peter for the probate of the decedent's will, and, prepared and filed an inventory and inheritance tax return. In addition, Mr.Lander prepared income tax returns for the estate. According to Peter, Mr.Lander made mistakes which necessitated the filing of an additional inheritance tax return and the payment of additional inheritance tax. Peter stated that he paid Mr.Lander \$1,000.00 and an additional, insignificant amount of cash, and, had no contact with Mr.Lander after Mr.Lander filed the second set of inheritance tax returns. Joanne Cicala is a paralegal in the office of Edmund P. Butler, Esquire. Ms.Cicala testified that she prepared Peter's

First Account on the basis of brokerage account statements and not on the basis of the inventory and inheritance tax returns which had been prepared by Mr.Lander. Ms.Cicala identified several mathematical errors in the documents which had been prepared by Mr.Lander, and, insisted that the figures in the First Account were mathematically correct. However, Ms.Cicala testified that Peter A. Engelbach provided inaccurate or incomplete information which led her: to carry \$2,714.21 in payments to or for the benefit of Peter as “Administration Expenses” when they should have been carried as “Fees and Commissions”; and, to carry several payments to Anne Cohn as “Distributions” when they should have been carried as “Reimbursements” of mortgage payments and condominium fees. Edmund P. Butler, Esquire, did not testify in support of his claim for counsel fees.

This Court finds that the testimony of Peter A. Engelbach and Ms. Cicala will not support an allowance of \$9,000.00 in fees to counsel for Peter in this matter. Some time and effort was certainly spent in performing the usual, customary and necessary duties of counsel to a fiduciary. Some time and effort was certainly spent in correcting the errors of Mr.Lander and Peter. Unfortunately, Peter has not provided sufficient factual information to support an allocation of counsel’s time and effort. Nevertheless, considering the size and composition of this decedent’s estate, and, without regard to alleged errors of Mr. Lander and Peter A. Engelbach and efforts to correct said errors, the Auditing Judge is satisfied

that \$6,000.00 represents fair and reasonable compensation for all services of a single attorney in representing Peter as executor and trustee. Since the Restated Account includes a payment of \$1,000.00 to Samuel Lander, Esquire, this Court will allow the sum of \$5,000.00 as an additional disbursement of counsel fees to Edmund P. Butler, Esquire. There will be no further allowances on account of counsel fees.

In his Restated Account, Peter A. Engelbach takes credit for three payments on account of transfer inheritance tax which payments total \$23,553.86. Said payments have been vouched by presentation of three receipts, as follows: a receipt for payment of \$14,963.95 on January 22, 1996; a receipt for payment of \$8,397.42 on November 5, 1996; and, a receipt for payment of \$192.49 on February 20, 1998. Objectants seek to surcharge the accountant in an "Undetermined amount" of interest and penalty for late payments of inheritance taxes and late filings of inheritance tax returns. Objectants take the position that the accountant must break his payments down into ascertainable amounts of principal, interest and penalty. However, since the payments have been duly vouched and some inheritance tax was certainly due by reason of the decedent's death, Objectants have the burden of proving that the questioned payments constituted a breach of fiduciary duty and resulted in loss to the estate. See Estate of Stetson, supra. Because Objectants have failed to prove that the estate has, in fact, paid any interest or penalty, this Court must dismiss

their objection in regard to an “Undetermined amount” of interest and penalty.

Objectants seek to surcharge Peter A. Engelbach in the amount of their counsel fees, being \$17,500.00, and their costs, being \$1,323.06, on the ground that Peter’s conduct has caused them to incur these expenses. In determining whether or not the accountant should pay the counsel fees of the Objectants, 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). 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. Objectants commenced this litigation by filing a Petition on October 21, 1997. The matter has proceeded without undue delay. This Court will not allow counsel fees or costs to the Objectants.

Objectants seek removal of Peter A. Engelbach from his offices as executor and trustee. Section 7121 of the Probate, Estates and Fiduciaries Code provides that the grounds for removal of a trustee are the same as those set forth in Section 3182 of the Code for removal of an executor, including: waste or mismanagement of the estate; failure to perform any duty imposed by law; and, likely jeopardy to the interests of the estate from continuance in office. In deciding whether or not to remove Peter as fiduciary, this Court is mindful of the admonition of our Supreme Court in Beichner Estate, 432 Pa. 150 (1968), at 156:

“ The removal of a personal representative chosen by the testator is a drastic action which

should be undertaken only when the estate within the control of such personal representative is endangered. To justify the removal of a testamentary personal representative the proof of the cause for such removal must be clear.”
(Citations omitted)

Nevertheless, our discussion of Peter’s claim to “Fees and Commissions” is equally applicable to the issue of removal. The record in this matter clearly proves that Peter A. Engelbach has mismanaged the decedent’s estate and violated his fiduciary duties. He has treated the assets of the estate as if they were his own. He has protected his interests at the expense of the estate. He has given false testimony to conceal his breaches of fiduciary duty. Considering the entire record in this matter, this Court is convinced that the interests of the estate will be jeopardized by Peter’s continuance in office as trustee. Accordingly, by separate Decree bearing even date with this Adjudication, this Court has removed Peter A. Engelbach from his office as trustee. Since the administration of the decedent’s estate is effectively complete, this Court will permit Peter to remain in office, as executor, so that he may make distribution of the assets in accordance with this Adjudication.

The appearance slip of counsel for the accountant notes an additional principal disbursement of \$560.00 for the filing of the First Account.

All Objections having been addressed, the First Restated Account, as stated to May 31, 1998, shows a balance of principal, personal property, of \$ 135,070.45 to which add surcharge of commissions, per discussion,

of 8,930.79 making \$144,001.24 from which deduct filing fees, per appearance slip, of 560.00 leaving a balance of principal, personal property, available for distribution of \$ 143,441.24 which, including \$70,000.00 due and owing from Peter A. Engelbach since November 13, 1995, per discussion, is awarded as follows: \$5,000.00 in counsel fees to Edmund P. Butler, Esquire; and, the balance then remaining to the succeeding trustee of the trust under the will of Estelle E. Engelbach, when duly appointed and qualified, for the uses and purposes of said trust.

The First Restated Account shows unconverted real estate appraised at \$ 31,250.00 being an undivided, one-half interest, as tenant in common, in condominium unit No. 1803 at 3600 Conshohocken Avenue, Philadelphia, Pennsylvania, which is awarded to the succeeding trustee of the trust under the will of Estelle E. Engelbach, when duly appointed and qualified, for the uses and purposes of said trust.

The First Restated Account shows a deficit in income of \$ (8,095.94)

to which add surcharges of distributions, per discussion, totaling 17,883.00 making a balance of income available for distribution of \$9,787.06 which, together with interest on the sum of \$70,000.00, at the legal rate, from November 13, 1995 until repayment of the debt of Peter A. Engelbach, per discussion, is awarded to the succeeding trustee of the trust under the will of Estelle E. Engelbach, when duly appointed and qualified, for the uses and purposes of said trust.

The above award of real estate is made subject to the mortgage which is reflected at page 3 of the First Restated Account.

A schedule of distribution, containing all certifications required by Rule *72, and, in conformity with this adjudication, shall be

filed with the Clerk within ninety (90) days of absolute confirmation of the account.

Leave is hereby granted to the accountants 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 First Restated Account, as amended by this Adjudication, is confirmed absolutely.

J.