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

**#12 May 95**

**No. 184 of 1995**

**Estate of ESTHER M. NICELY, Deceased**

**Sur account entitled: First and Final Account of First Western Trust Services Company, Successor to Beaver Trust Company, and Inez C. Nicely, Attorney-in-Fact for Esther M. Nicely**

**Before PAWELEC, J.**

**This account was called for audit: May 1, 1995; July 30-31, 1996**

**Counsel appeared as follows:**

**ARTHUR R. G. SOLMSSEN, JR., ESQ., of DECHERT PRICE & RHOADS - for First Western Trust Services Co. Accountant/Attorney-in-fact**

**ANTHONY W. NOVASITIS, JR., ESQ. - for Inez M. Nicely, Executrix of the Estate of Esther M. Nicely, Deceased**

**NINA BOOZ STRYKER, ESQ. - for Donald A. Nicely, Beneficiary**

**Before the court for adjudication is the first and final account of First Western Services Co., successor to Beaver Trust Company and Inez C. Nicely, attorneys-in-fact for Esther M. Nicely. The account is actually stated by First Western Services Company. Inez C. Nicely has refused to join in or sign the account. Instead, acting in her capacity as**

**Executrix of the Estate of Esther M. Nicely, Deceased, Inez C. Nicely has filed Objections to the Bank's accounting as attorney-in-fact.**

**On May 11, 1988, Esther M. Nicely and her husband, Daniel J. Nicely, executed separate but identical powers of attorney which appointed Beaver Trust Company and their daughter, Inez C. Nicely, as attorneys-in-fact, to act either jointly or individually, as they may agree. Copies of the powers have been admitted into evidence as Exhibits O-13 and O-12 respectively.**

**Having appointed the Bank and their daughter as attorneys-in-fact, the Nicelys delivered assets valued at more than $1,000,000.00 into the hands of the Bank. These assets included, inter alia: more than $700,000.00 in bank deposits and securities titled in the names of Daniel J. Nicely and Esther M. Nicely, his wife; more than $100,000.00 in bank deposits titled in the names of Daniel and his daughter, Inez; more than $100,000.00 in securities titled in the names of Esther and her daughter, Inez; more than $15,000.00 in securities titled in the names of Daniel and his wife and son, Donald A. Nicely; and, more than $90,000.00 in securities titled in the names of Esther and son, Donald.**

**Among the securities titled in the names of Daniel J. Nicely and Esther M. Nicely, his wife, and delivered to the Bank, as attorney-in-fact, was a certain Subordinated Capital Note of Colony Savings Bank which bore: an issue date of April 16, 1987; a maturity date of April 16,**

**1997; a face value of $30,000.00; and, a 12.5% rate of interest. On its reverse side, said Subordinated Capital Note bore the following language,**

> **“ In addition, upon the death of any Noteholder, whether or not the Subordinated Capital Note was held jointly, the Bank, if requested, will redeem any Subordinated Capital Note tendered to it within 180 days of the Noteholder’s death by the personal representative of the Noteholder’s estate or by the surviving joint holder. Such redemption will be made at 100% of the principal amount plus accrued interest.”**

**Having appointed the Bank and their daughter as attorneys-in-fact, the Nicelys also delivered their original Wills into the hands of the Bank. By his Will, dated August 20, 1985, Daniel J. Nicely, gave all of his estate to his wife, Esther M. Nicely, and, appointed her to act as executrix. In the event of the death of Esther in his lifetime, Daniel made bequests of stock, gave the residue of his estate to his children, Donald Alvin Nicely and Inez C. Nicely, and, appointed Inez to act as executrix. By her Will, dated August 21, 1985, Esther M. Nicely gave all of her estate to her husband, Daniel J. Nicely, and, appointed him to act as executor. In the event of the death of Daniel in her lifetime, Esther made bequests of stock, gave the residue of her estate to her children, Donald Alvin Nicely and Inez C. Nicely, and, appointed Inez to act as executrix.**

**Daniel J. Nicely died on July 29, 1988 and his Will of August 20, 1985 was duly admitted to probate by the Register of Wills of Beaver County. Because Esther M. Nicely and Inez C. Nicely renounced their**

**rights to administer the decedent's estate, Beaver Trust Company was appointed Administrator d.b.n.c.t.a. of the Estate of Daniel J. Nicely, Deceased. Because there was no change in the titles of the assets which had been delivered to the Bank as attorney-in-fact, Esther M. Nicely became sole owner of those assets which had been titled in the names of herself and her late husband. Acting as Administrator, the Bank filed an Inventory in the Estate of Daniel J. Nicely, Deceased, which Inventory showed a total estate of $46,950.00, consisting of an automobile valued at $2,850.00, and, a Capital Note of First Western Bancorp valued at $44,100.00. On August 1, 1988, acting as attorney-in-fact for Esther M. Nicely, the Bank acknowledged receipt of said Capital Note.**

**On January 9, 1989, again acting as attorney-in-fact for Esther M. Nicely, the Bank changed the title of the aforementioned Subordinated Capital Note of Colony Savings Bank from Daniel J. and Esther M. Nicely, joint tenants, to Esther M. Nicely, individual. Said Subordinated Capital Note became worthless when, on or about April 5, 1990, the Office of Thrift Supervision of the U.S. Department of the Treasury placed Colony Savings Bank into receivership.**

**Esther M. Nicely died on November 29, 1994, testate and a resident of Philadelphia. Her Will of August 21, 1985 was duly admitted to probate by the Register of Wills of Philadelphia County who granted Letters Testamentary to her daughter, Inez C. Nicely. Acting as Executrix, Inez C.**

**Nicely has filed numerous objections to the instant account which was filed by the Bank, her co-attorney-in-fact, on March 3, 1995.**

**The objections are enumerated in three separate filings: 1) Objections to account, 2) Supplemental Objections, and 3) Second Supplemental Objections. They are then restated at pages 2 and 3, and, pages 59 through 63 of her brief. All other objections or claims were withdrawn or waived.**

**By her Objections and brief, Inez C. Nicely raises the following questions for adjudication:**

**1) Reimbursement to the Estate of Esther M. Nicely of $187,616.20 plus interest from date of payment for Federal Estate Tax unnecessarily paid caused by breach of First Western's fiduciary duty and negligence. By this Objection, the objectant seeks to surcharge the accountant in the full amount of Federal Estate Tax which was paid on the death of Esther M. Nicely, being $187,616.20, together with interest from the date of payment of such tax, being August 29, 1995. This Objection is premised on the theory that the Bank was negligent and breached its fiduciary duty in failing to inform and advise the principal and her husband, Daniel J. Nicely, of the opportunity to minimize or eliminate the payment of Federal Estate Tax on the death of the surviving spouse. The objectant contends that Esther's estate would have paid no Federal Estate Tax if the accountant had advised the Nicelys to implement a simple estate plan of splitting their assets so that each held the amount of the Unified Credit for**

**Federal Estate Tax purposes in his or her sole name, and, creating trusts of said amounts which trusts would not be in the estate of the surviving spouse on his or her death. The objectant views the bank's failure to give advice on estate planning as negligence and a breach of fiduciary duty which resulted in the unnecessary payment of $187,616.20 in Federal Estate Tax by the estate of the surviving spouse, Esther.**

**2) Included in 1) above is the overpayment of both Federal Estate Tax and Pennsylvania Inheritance Tax by reason of the breach of the fiduciary duty and negligence of First Western in the failure to disclaim an asset in the amount of $44,100.00 which remained an asset of the principal and unnecessarily included in the Federal and Pennsylvania Estate Tax Returns. By this Objection, the objectant seeks to surcharge the accountant in the amount of $18,643.22, being Federal Estate Tax and Pennsylvania transfer inheritance tax which were paid by the estate of Esther M. Nicely on the aforementioned Capital Note of First Western Bancorp, together with interest from the date of payment of such taxes, being August 29, 1995. Said Capital Note was valued at $44,100.00 on the death of Daniel J. Nicely. Acting as administrator of Daniel's estate, the Bank distributed said Capital Note to itself as attorney-in-fact for Esther. According to the objectant, the inclusion of said Capital Note in Esther's estate resulted in unnecessary payments of $15,888.07 in Federal Estate Tax and $2,755.15 in Pennsylvania transfer inheritance tax. This Objection is premised on the theory that the Bank was negligent and breached its**

**fiduciary duty in failing to disclaim said Capital Note on behalf of Esther, or, in the alternative, in failing to advise her or her daughter, the co-attorney-in-fact, of the availability of a disclaimer as a means of eliminating the payment of death taxes on said Capital Note on the death of Esther.**

**3) Reimbursement to the Estate of Esther M. Nicely of $30,000.00 plus interest from March 28, 1990 for the negligent management of the aforementioned Colony Savings Bank Subordinated Capital Note due 4/16/97. Acknowledged as received in the Account but carried erroneously in the Account at p. 27(b) at face value, but which is without value. By this Objection, the objectant seeks to surcharge the accountant in the amount of $30,000.00, together with interest from the last payment of interest on the Colony Note. Objectant argues that the Bank should have redeemed the Colony Note and not had it reissued. This argument is premised on the theory that the accountant, especially considering its financial expertise, knew or should have known that Colony Savings Bank was an unsound financial institution, and, accordingly, this investment was unsound. Further, objectant argues that when the accountant had the Colony Note reissued in the name of Mrs. Nicely instead of redeeming it, the accountant, in fact, made an investment decision for which it is responsible.**

**4) Reimbursement to the Estate of Esther M. Nicely for overpayment of individual federal income tax of principal for the tax years 1988 through 1993. By this Objection, the objectant seeks to surcharge the accountant in the amount of**

**$868.00, being overpayments of federal income taxes allegedly caused by understatement of the Bank's compensation as deductions on the principal's Forms 1040 for calendar years 1988 to 1993. In its brief, the Bank asserts that $868.00 is a de minimis amount, and, agrees to have said amount deducted from its request for compensation.**

**5) Reimbursement to the Estate of Esther M. Nicely of interest and**

**penalties paid by reason of the late filing of 1993 and 1994 Personal Property Tax Returns with Philadelphia County. By this Objection, the objectant seeks to surcharge the accountant in the amount of $290.03, being payments of interest and penalties on delinquent payments of Philadelphia Personal Property Taxes for calendar years 1993 and 1994. In its brief, the Bank asserts that $290.03 is a**

**de minimis amount, and, agrees to have said amount deducted from its request for compensation.**

**6) Reimbursement to the Estate of Esther M. Nicely for the unnecessary expenses, costs, including attorney fees, incurred by the Estate for the failure of First Western to turnover upon proper demand the assets of the principal following the death of Esther on November 29, 1994 causing expenses of legal proceedings to compel turnover. By this Objection, the objectant seeks to surcharge the accountant in the amount of $7,750.00, being attorney's fees and costs incurred by the objectant in**

**the period December 7, 1994 to March 29, 1995, together with interest from the date of payment of such fees and costs, being April of 1995. The objectant argues that this is a claim for damages sustained by the principal's estate as a result of the allegedly egregious conduct of the Bank in failing and refusing to deliver the assets of the deceased principal to the duly appointed and qualified executrix of her estate.**

**7) Costs and expenses including attorney fees incurred by the Executrix in the prosecution of the within proceedings to recover from First Western the losses to the estate of the principal caused by the breach of fiduciary duties owed to the principal. By this Objection, the objectant seeks to surcharge the accountant, in an undetermined amount, for counsel fees, costs, expert witness fees and all other expenses of her efforts to prosecute the aforementioned surcharge claims. In her brief, the objectant seeks leave to file a Petition to determine the amount of this surcharge.**

**8) A denial of the requested termination fee of $16,134.00 because of (a) lack of written fee agreement and (b) the breaches of the fiduciary duties by First Western owed to the principal. In its Petition for Adjudication, the Bank seeks a "termination fee" of $16,134.08, being one (1%) percent of the market value of the principal on the death of Esther M. Nicely, that is, on November 29, 1994. By this Objection, the objectant opposes said claim for a "termination fee".**

**9) First Western is not entitled to counsel fees, costs and filing fees. By this Objection, the objectant opposes said claims to counsel fees, costs and filing fees. The objectant argues that the Bank did not have to file an account, and, that it did so only to protect its own interests.**

**Surcharge is a penalty for failure to exercise common prudence, common skill and common caution in the performance of the fiduciary duty and is imposed to compensate beneficiaries for loss caused by a fiduciary's want of due care. *Estate of Dobson*, 490 Pa. 476, 478; *Presumptions and the Burden of Proof in the Orphans' Court,* (Tredinnick, J.), 7 Fiduc. Rep. 2d 102, 127.**

**In general, one who seeks to surcharge a fiduciary bears the burden of proving that the trustee breached an applicable fiduciary duty. *Estate of Dobson,* supra; *Estate of Stetson,* 463 Pa. 64; *Linn Est.,* 435 Pa. 598; *Maurice Est.,* 433 Pa. 103. The one seeking the surcharge must prove his or her case by a preponderance of evidence. Further, a "corporate fiduciary is presumed to possess greater competence in the management of estates than a man of ordinary prudence." See *Kelsey Trust,* 12 Fiduc. Rep. 2d, 209. We shall examine the objections in accord with the aforesaid standards.**

**Objectant contends that when her parents executed their individual powers of attorney designating objectant and the Bank as attorneys-in-fact, they not only empowered these agents to act on their**

**behalf in regard to all the matters enumerated in the powers, but, when the attorneys-in-fact accepted the said designation, a concomitant duty was imposed upon the attorneys-in-fact to affirmatively exercise the enumerated powers set forth in the powers for the benefit of the principals.**

**Alternatively, objectant contends that by agreeing to act as an agent pursuant to said powers, and, by taking action pursuant to said powers, the Bank assumed an affirmative obligation to use the full range of its expertise, including but not limited to its expertise in estate planning and investment management, for the benefit of the Nicelys.**

**In support of this theory, counsel for objectant cites much law in his extensive brief. He states "that the Power of Attorney created and established a principal and agency relationship between the parties. *3 Am.Jur. 2d Agency, §23; In Re Shahan*, 429 Pa. Super 91, 631 A.2d 1298 (1993); *In re: Miller's Estate*, 18 D.&C. 141, 7 P.S. §§102 and 402. The person holding a power of attorney is known and designated as an 'attorney-in-fact' while the person appointing the attorney-in-fact is generally designated and known as the 'principal'."**

**Counsel for objectant cites numerous cases dealing with the relationship of agent to principal, and, the duties and obligations of an agent to his principal.**

**An agency is not a trust. The term "fiduciary", as defined in Section 102 of the Probate, Estates and Fiduciaries Code, 20 Pa.C.S.A. §102, does not expressly include an "attorney-in-fact" or an "agent".**

**Similarly, the statute under which the Bank has been granted its trust powers does not include "agent" or "attorney-in-fact" within its definition of the term "fiduciary". Nevertheless, it has been recognized that the relationship of agent to principal is a "fiduciary" relationship. *Restatement of Trusts, 2d §28.***

**I find no quarrel with the law as set forth in objectant's brief. However, the cited cases and statutes do not address the seminal issue, i.e. does an attorney-in-fact have an affirmative duty to exercise each and every power which is conferred upon him in a power of attorney? Stated in the alternative: does the enumeration of powers in a power of attorney, in and of itself, impose an affirmative duty upon the attorney-in-fact to exercise each and every one of those powers? Counsel for objectant has cited no precedent, in statute, case law, or legal treatise, which supports the proposition that such an affirmative duty exists. My independent research has likewise failed to find legal precedent for the existence of any such affirmative duty.**

**Clearly, when a person executes a power of attorney, he designates, empowers and authorizes his attorney-in-fact to act on his behalf. However, standing alone, a power of attorney is not a contract of employment. The mere existence of a power of attorney, without more, imposes no duty to exercise any of the powers which are conferred therein. An attorney-in-fact is only required to perform such actions and provide such services as he agrees or undertakes to perform or provide.**

**The agreement or undertaking may encompass all or only some of the powers which are enumerated in the power of attorney. The agreement or undertaking may be express or implied. It may be written or verbal. It may arise from the conduct of the principal and agent, as in the case where one acts or fails to act in justifiable reliance upon another's action or inaction.**

**If the agent agrees or undertakes to exercise a power which has been conferred upon him in a power of attorney, then he must act with due care for the benefit of his principal. An agent is a fiduciary with respect to matters within the scope of his agency and is required to act solely for the benefit of his principal in all matters concerned with the agency. *Onorato v. Wissahickon Park, Inc.,* 430 Pa. 416, 244 A.2d 22 (1968). But, again, this is so only in matters in which the agent has agreed or undertaken to act.**

**Accordingly, I find the argument advanced by objectant to be without merit. An attorney-in-fact does not have an affirmative duty to exercise any of the powers set forth in a power of attorney unless he has agreed or undertaken to do so.**

**This is the current law and the common experience. It would not be difficult to envision the mischief and difficulties which would ensue if there was an affirmative duty on the part of every attorney-in-fact to exercise every power which is enumerated in every power of attorney. Is an attorney-in-fact obligated to make gifts or create trusts simply because such powers are enumerated in a power of attorney? The answer must be**

**no. What if the principal is sui juris and capable of acting alone? What if the principal's assets and family situation indicate that gifts and trusts are totally unwarranted?**

**Now, we must examine the facts to determine if there was any agreement or undertaking to act, and, if there was, what were the terms of the agreement or the nature of the undertaking? It is undisputed that the Nicelys executed powers of attorney designating the Bank and their daughter as their attorneys-in-fact and that the Bank agreed to act in this capacity for a fee.**

**Inez Nicely first approached the Bank for the purpose of getting help for her parents. She testified that when she met with the Bank representative, Coleman Clougherty, she explained that "my father was getting forgetful; we (her parents) needed help with the administration of income, bills; we needed someone to follow the assets, to invest, reinvest; also, we needed income for my parents for the rest of their lives to take care of their financial needs." [NT 320] She further testified that Mr. Clougherty told her that the Bank could certainly take care of paying the bills, receivables, watching over her parents, that they had what they needed, and, that they (the Bank) could take care of the assets they had. They (the Bank) would invest and reinvest. Subsequently, there was a meeting at the home of Mr. and Mrs. Nicely when the powers of attorney were executed and many of the securities and investments were handed**

**over to the Bank as well as the Wills that Mr. and Mrs. Nicely had previously executed.**

**Mr. Clougherty, the trust officer from the Bank, was present at both of the aforesaid occasions. After the documents were executed, he took possession of many of the assets and the Wills. He testified that 75% to 85% of the assets were in the joint names of Mr. and Mrs. Nicely, and, that the Wills were received as a safekeeping service. [NT 143] He did read the Wills and noted that they were simple Wills leaving everything to the surviving spouse and then to the children.**

**Mr. Clougherty was responsible for getting the account opened, seeing it was properly set up, and, he became the administrator of the account. During the administration of the account, he determined that a trust might be a more appropriate vehicle for the management of this account. A trust agreement was prepared and sent to Inez Nicely and Donald Nicely, the children, for review and discussion. There was no further action in regard to the trust.**

**Jo L. Shane, a trust officer who was familiar with the account, also testified. She stated that when the assets were received, a custodian account, without investment advice, was set up. She stated that this was different than a custodian account with an investment advisor and generated lower fees. She stated that the Bank agreed to hold assets, collect income, pay bills, reinvest cash, reinvest funds when financial investments came due and make provisions for the health, welfare and**

**comfort of the Nicelys. She testified that the assets were never reviewed for suitability of investment but they did look to determine if there were sufficient funds to pay bills. She further testified that the assets were never put in street name as they would have been if the Bank were managing them but remained titled as they were when they were received, i.e. in the names of the Nicelys. Many were in the name of husband and wife. Some were titled jointly with one of the children. The Bank did make recommendations to Inez Nicely for the investment of excess cash or when Certificates of Deposit or Treasury bills matured. She further testified that it was her understanding that the investments were to remain the same as they were when they came into the account. [NT 115-117]**

**In addition, as attorney-in-fact, the Bank arranged and paid for snow removal and lawn care. They arranged for a cleaning service to be provided to the Nicely residence. They arranged for home nursing and personal care for Mr. and Mrs. Nicely when that became necessary. They collected mortgage payments on a mortgage held by the Nicelys.**

**Richard Markson and Edwin S. Henry testified on behalf of objectant as experts. They opined as to the powers and duties of the Bank under the powers of attorney, and, as to damages which were allegedly caused by the Bank's performance or lack thereof.**

**There is nothing in the entire record to support a finding that the Bank agreed or undertook to act as an estate planner or trustee for the Nicelys. It did not breach any duty. Nor was it negligent. The Bank was**

**aware of the composition of the Nicely's assets and the dispositive schemes in their wills. Nevertheless, such knowledge did not impose an affirmative obligation on the Bank, as attorney-in-fact, to advise the Nicelys to divide their assets and execute new Wills in order to minimize death taxes. While the Bank may be presumed to have more expertise in the management of assets than the ordinary man, it had no obligation to do more than it agreed or undertook to do. When it acts, the Bank may be judged by a higher standard. But, it was not required to act. Nor is there any evidence that the Nicelys, at the time the powers of attorney were executed, expected more from the Bank than they received. Income was collected, the bills were paid, excess cash was reinvested, and, matters concerning health and welfare were looked after. Accordingly, Objection 1 is dismissed.**

**Objection 2 contends that the Bank breached its fiduciary duty to disclaim the interest of Mrs. Nicely in the estate of her husband. If this had been done, the funds would have passed directly to the children and would not have remained available to Mrs. Nicely and would not have been in her estate at the time of her death. It is true that the power of attorney, in No. 16, did empower the attorney-in-fact "to disclaim any interest in property" on behalf of the principal. However, I have already determined that there was no affirmative duty on the part of the attorney-in-fact to exercise any of the listed powers unless there was an agreement or undertaking to do so. I have found no agreement that would impose such a**

**duty nor do I find anything that the Bank did pursuant to the "power" that would impose any extended fiduciary duty on the Bank. The Bank, as Mrs.Nicely's attorney-in-fact and custodian of her assets, simply received assets due her from the estate of her husband pursuant to his Will. Accordingly, I find that the Bank did not breach any fiduciary duty nor was it negligent in not disclaiming Mrs. Nicely's interest in her husband's estate. Objection 2 is dismissed.**

**Objection 3 deals with the $30,000.00 Colony Savings Bank Note which turned out worthless when the Bank was taken over by the Resolution Trust Company. This note was purchased by the Nicelys on April 16, 1987, and held in both their names as joint tenants. It was a 10 year Note and paid interest at the rate of 12.5%. It was one of the assets turned over by the Nicelys to the Bank in May of 1988. The Note paid interest until March of 1990. Thereafter, Colony Bank was taken over by Resolution Trust Company, and, at that time it became worthless. Prior to that, the Note could have been sold if a buyer could be found. The Note by its terms also provided that upon the death of any Note holder, Colony Savings Bank, if requested, would redeem the Note at face value plus accrued interest. Following the death of Mr. Nicely on July 29, 1988, the accountant had the Note reissued by Colony Savings Bank in the name of Mrs. Nicely, the surviving joint tenant.**

**Objectant argues that the accountant should have redeemed the Colony Savings Bank Note instead of having it reissued.**

**In support of this objection, objectant offered the testimony of Richard Markson, CFA, as an expert witness and called Jo Shane as of cross examination. Mr. Markson testified that the Bank should have liquidated the security rather than having it reissued. His conclusion was based on the fact that the note paid 12 1/2% interest, which indicated a speculative security [NT 231] and that pursuant to his analysis, Colony Saving had a negative net worth [NT 230]. He also considered the reissuance of the note in the name of Mrs. Nicely to be an investment decision by the Bank. He also testified that his testimony and opinion are based on the assumption that the Bank had been hired to perform, supervise and give management advice. [NT 248]. However, he went on to say that the Bank also violated its duty as custodian in not informing the principal of the available choice, i.e. reissue or redeem. [NT 248]. He agreed that in 1987 and 1988, Colony Savings Bank was a solvent institution. [NT 251]. It was his opinion that the Note was not of investment quality when it was purchased by Mr. Nicely in 1987. [NT 255-256]. However, he went on to opine that even if the Bank had investment supervisory authority over the account, it did not make economic sense to conduct an investigation of the safety of this hard to value investment when it was such a small component of the total assets in the account. [NT 259-262]. In his opinion, if the security does not seem to meet investment guidelines and the size of the holding does not warrant analysis, a sale recommendation is appropriate. [NT 262]**

**Ms. Shane testified that many of the assets received from the Nicelys were in the joint names of Mr. and Mrs. Nicely. Upon Mr. Nicely's death, they were transferred into the surviving owner's name, including the Colony Savings Bank Note. [NT 127]. The Note had been purchased by Mr. Nicely. It provided a good rate of income. It had paid the interest regularly. It was a small portion of a large portfolio. [NT 127] And, upon consideration of their understanding that the preference was to keep all investments as they were [NT 110], the Bank simply transferred this asset into the sole name of the surviving owner.**

**Upon consideration of all the evidence, I find that objectant has failed to prove that the accountant was negligent or breached a fiduciary duty in regard to the Colony Savings Bank Note. Objection 3 is dismissed.**

**Objection 6 concerns counsel fees and costs expended by Inez in getting the Bank to turn the assets over to her in her capacity as executrix of her mother's estate. After the death of Esther Nicely, a dispute arose between Inez and her brother as to who was entitled to certain assets which the Bank had in its possession pursuant to the power of attorney. As a result, the Bank requested authorization from Inez to release $76,000.00 from the power of attorney account to Donald Nicely and to execute a receipt and release in regard to the administration of the power-of-attorney account. The Bank also submitted an accounting of its**

**administration. Said account included a termination fee and additional income fees payable to the Bank. Inez refused to sign the receipt and release and did not agree to the payment of the fees. Instead, she filed a petition to compel the turnover of the assets. The Bank then filed the instant account with the Clerk. After the account had been filed with the Clerk, counsel for Inez and Donald reached an agreement as to how the dispute as to the $76,000.00 should be resolved. After a conference with counsel, I entered an order on May 5, 1995 directing the delivery of the assets and reserving the other questions for determination at the audit of the Bank's account. The order of May 5, 1995 permitted Inez to administer the assets as executrix. It expressly reserved determination of other issues to the instant audit. It did not determine any of the other issues.**

**In Objection 6, the objectant suggests that the Bank improperly refused to deliver the assets in that it demanded that she, in her capacity as executrix and as an individual, and her brother, execute a receipt, release and indemnification agreement which, in essence, would hold the Bank harmless for its administration of the power-of-attorney account. She argues that this only protected the interest of the Bank and not the interest of the principal.**

**In determining whether or not the objectant should recover counsel fees and costs for her efforts to compel delivery of the assets, 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.C. Div. Phila., 1983), Judge Shoyer expressed the opinion that,**

**"....the orphans' court, as a court of equity, has always had the power to sur charge 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.C. Div. Allegh. 1986); and, *Garrano Estate,* 11 Fiduc. Rep. 2d, 302 (O.C. Div. Bucks, 1991). Considering the facts that Esther died on November 29, 1994; that Inez qualified as executrix of her estate on January 4, 1995; that Inez filed her Petition for turnover of assets on February 14, 1995; and, that the Bank filed its account on March 3, 1995,**

**this Court holds that Inez is not entitled to recover the counsel fees and costs which she seeks in Objection 6. The Bank had every right to file an account and seek confirmation thereof and a discharge from this Court. The Bank acted expeditiously in filing its account. Under the circumstances extant in this matter, this Court holds that the Bank did not engage in dilatory, obdurate or vexatious conduct. Nor did the Bank act in bad faith. Accordingly, the general rule enunciated in *Wanamaker*, supra, applies, and, objectant must pay her own counsel fees and costs incurred in gaining possession of her mother's assets. Objection 6 is dismissed.**

**In Objection 7 objectant request costs, expenses and counsel fees for this litigation to surcharge the Bank for breach of fiduciary duties. Having found that the Bank did not breach any fiduciary duty; that it did not engage in dilatory, obdurate or vexatious conduct; and, that it did not act in bad faith, this Court will apply the general rule of *Wanamaker*, supra, and, dismiss Objection 7.**

**Objection 8 concerns the Bank's request for a "termination fee" of one (1%) percent of the market value of the principal on the death of Esther M. Nicely. It is well settled that a fiduciary or agent claiming a fee or commission has the burden of proving that the said request is fair and reasonable and that it is based on services actually performed and not on some arbitrary formula. *In Re Ischy Trust, Etc.,* Pa., 415 A.2d 37, 42; *Sonovick Estate,* 373 Pa. Super 396, 400; 541 A.2d 374, 376. Just as well settled is the principle that fiduciaries are entitled to fair and just**

**compensation for services they perform. The absence of a compensation agreement is not a bar to compensation. The amount of compensation to be awarded is the actual worth of the services rendered. *In Re Reed,* Pa., 357 A.2d 138.**

**In the instant matter, there is nothing in writing in regard to fees to be paid to the Bank for its services. No fee agreement was ever executed. Inez testified that fees were never mentioned in either of her two meetings with Mr. Clougherty. [NT 322, 323]. Mr. Clougherty testified that at the first meeting, he told Inez that the Bank would charge six (6%) percent of the income for its services. He did not remember if he told Inez about any fee to be charged to principal nor did he remember if he told her about the Bank's fee schedule. [NT 195]. As to the second meeting with Inez and her father, Daniel J. Nicely, which took place at the Nicely home, Mr. Clougherty testified that Mr. Nicely "asked what it was going to cost", to which he replied, six (6%) percent of the income. [NT 196]. He did not recall saying**

**anything about principal commissions nor did he recall if he gave them a fee schedule. [NT 196].**

**The statement of proposed distribution states that the Bank received a fee for its services of six (6%) percent of income from the inception of the account in 1988 through 1992. From 1993 through 1995, the Bank received a fee of six (6%) percent of the first $50,000.00 of income and five (5%) percent of income in excess of $50,000.00. There is no**

**explanation anywhere in the record of the reasons or circumstances which brought about this change in compensation. It is undisputed that the Bank received $39,75.00 in income commissions and tax preparation fees. [NT 55] There was no objections to these payments. The Bank is now requesting an additional $16,124.00 as a termination fee. This is one (1%) of the market value of the principal.**

**Jo L. Shane and Coleman J. Clougherty testified on behalf of the Bank in support of this claim for additional compensation. In addition, Exhibits A-2 and A-3 were received into evidence. A-2 is the fee schedule in effect when the power of attorney account was opened. It provides for a fee of six (6%) percent of the income received by the Agent or custodian with a one (1%) percent fee upon termination of the account." A-3 is a computation of the entries that were made during the tenure of the account and a log showing dates and services that were provided on behalf of the account. Also, included in A-3 are dates and events which occurred after the death of Esther Nicely and concern the present litigation.**

**Ms. Shane testified that during the administration of this account there were 722 principal entries posted in the Nicely account and 2,108 income entries. She stated much work was required because there were many assets, some held in various combinations of names and in many different institutions. In addition, other services were performed for the Nicelys such as having nurses for the nursing and personal care of Mr. and Mrs. Nicely, arranging for cleaning services, grass cutting, collecting**

**mortgage payments, snow removal, going to the hospital with Mrs. Nicely and arranging for repairs to some realty. [NT 21-26].**

**In regard to the value of the described services [NT 21-24], Ms. Shane, in her testimony, indicated that they were all performed in the custodian account at a fee of six (6%) percent of income. [NT 24] Subsequently, she stated that the fee schedule was the basis for the fees taken and the requested termination fee. [NT 56, 57] She further testified that the services proved were beyond regular services for a custodian account, that this is supported by the documentation contained in Exhibit A-3, and, thus, the Bank is entitled to the termination fee of $16,124.00 for the services rendered. [NT 57-63]**

**In summary, the Bank had a fee schedule in effect when the power of attorney was executed. It is undisputed that the Nicelys never executed a fee agreement. According to the record, the only fee discussed with the Nicelys was six (6%) percent of income received. The Bank received this fee and additional fees for the preparation of tax returns. These fees total $39,765. There was no objection**

**to these fees. Clearly the Bank cannot impose its fee agreement on the Nicelys unilaterally. Accordingly, the Bank argues that it performed the regular services pursuant to the custodian account and many extraordinary services which entitle it to the requested compensation. The requested additional compensation just happens to equal the one (1%) percent termination fee set forth in the Bank's fee schedule.**

**It is true that the Bank performed many services for the Nicelys. However, when Mr. Clougherty met with the Nicelys, he was aware that Mr. and Mrs. Nicely would need things done for their well being, e.g. "Something as simple as getting someone to cut the grass." [NT 191] The Bank in accepting this account, in essence, agreed to do such things. This does not mean they should not receive compensation for doing these things if it is warranted. We must also note that in administering the account, the Bank really acted in a ministerial fashion. It assumed no responsibility for investments and it proclaimed so throughout these proceedings. Thus, upon consideration of all the services performed by the Bank and the fees already received by the Bank, this Court finds that it is fair and just to award the Bank an additional $5,000.00 in terminal compensation. Said sum of $5,000.00 must be reduced, however, by the "de minimis" amounts which are the subject of Objections 4 and 5. Accordingly, the Bank will receive $3,841.97 in satisfaction of its claim for a termination fee.**

**Objection 9 concerns the Bank's claims for counsel fees and costs. After the death of Esther Nicely, when differences began to develop between the Bank and objectant in regard to the administration of the power of attorney account, the Bank retained the firm of Reed, Luce, Tosh, McGregor & Wolford of Beaver County. The Bank and objectant were**

**unable to resolve their differences and litigation commenced in Philadelphia County. As litigation in Philadelphia seemed imminent, the Bank retained the firm of Dechert Price & Rhoads. The Reed firm seeks a total of $11,189.00, being $10,040.00 in fees and $1,149.00 in costs, for its representation of the Bank from January 16, 1995 to July 1, 1996. Said sum of $1,149.00 in "costs" includes the sum of $1,000.00 which appears to have been advanced to the Dechert firm. The Dechert firm seeks a total of $21,469.78, being: $16,103.40 in fees and $1,866.38 in costs for its representation of the Bank from February 8, 1995 to July 19, 1996; and, $3,500.00 in estimated fees for its representation of the Bank at hearings on July 30 and 31, 1996. The Bank offered two Exhibits and the testimony of two witnesses in support of the aforementioned claims for counsel fees and costs.**

**Jo L. Shane testified that the Bank prepared its own form of account and submitted same to the Reed firm, in Beaver County, for review and presentation to a Court. While she could not testify as to the specific work which was done by Reed attorneys, Ms. Shane identified Exhibit "A-4" as the firm's bill for $11,189.00. No Reed attorney testified before this Court. An examination of Exhibit "A-4" shows that it claims $10,040.00 for 100.4 hours of work by two attorneys. Said 100.4 hours of work may be broken down into the following periods, to wit: 49.5 hours spent from January 16, 1995 to March 22, 1995; 15.5 hours spent from April 10, 1995 to**

**June 13, 1995; 7.6 hours spent from June 22, 1995 to November 2, 1995; and, 27.8 hours spent from November 7, 1995 to July 1, 1996.**

**Ms. Shane testified that the Dechert firm was hired to file the Bank's account in Philadelphia. She identified Exhibit "A-5" as Dechert's bill for $21,469.78. Arthur R.G. Solmssen, Jr., Esquire, a Dechert associate, testified that his firm was retained to resolve disputes which arose on the termination of the Bank's tenure as attorney-in-fact. Mr. Solmssen advised the Bank that the filing of an account, in this Court, was the simplest, easiest and cheapest means of resolving those disputes. The Bank submitted an account for review and filing by the Dechert firm. Mr. Solmssen further testified that his firm spent many hours answering questions from counsel for the executrix. When counsel for the executrix would not be satisfied, the Dechert firm filed the Bank's account and proceeded to audit. An examination of Exhibit "A-5" shows that it claims $19,603.40 for 126.4 hours of work by two attorneys and two paralegals. Exhibit "A-5" is broken down in the following manner, to wit: $3,961.40 for 31 hours spent from February 8 to March 31, 1995; $4,084.00 for 28 hours spent from April 13 to June 19, 1995; $8,058.00 for 47.4 hours spent from November 1, 1995 to July 19, 1996; and, $3,500.00 for 20 hours expected to be spent in preparation for and attendance at two Hearings on July 30 and 31, 1996.**

**It is fundamental that an attorney seeking compensation has the burden of establishing facts which show that he or she is entitled to such compensation. *Wanamaker Estate*, *Supra*. In *LaRocca Estate,* 431 Pa. 542 (1968) at page 546, our Supreme Court enunciated the facts to be taken into consideration in determining the compensation payable to an attorney. These factors are so well settled and recognized that there is no need to repeat them.**

**The services performed by the Bank's counsel in this matter fall into four categories. First, the Bank retained counsel when disagreements arose about its management of the power of attorney account. Attempts to resolve said disagreements led to the preparation, review and filing of the account. Second, counsel represented the Bank in responding to Objections, that is, in resisting requested surcharges. Third, counsel prosecuted the Bank's claim for a termination fee. Fourth, counsel prosecuted the Bank's claim for counsel fees and costs.**

**Although the matter subjudice concerns a dispute between a principal and an agent, the law applicable to the compensation of counsel for fiduciaries is just as applicable here.**

**A fiduciary has authority to employ counsel and reasonable counsel fees are a just charge against the estate. *Hunter, Vol. 1 - Attorney & Client 1(a), p.206* and cases cited therein. Fees of counsel in successfully representing a fiduciary in resisting a surcharge are properly payable from the estate. *Browarsky Estate,* 437 Pa. 282; *Wormley Estate,***

**359 Pa. 295, 300. Accordingly, I hold that counsel fees ensuing from representation of the Bank in preparing, reviewing and filing of the account; in resisting the Petition for turnover of assets; and, in resisting requested surcharges, are properly payable from the estate. See *Fiduciary Review*, Feb. 1970, p.2.**

**However, counsel fees for services rendered in an attempt by the Bank to secure a termination fee and counsel fees are another matter. Clearly, as was stated previously, a fiduciary or agent claiming a fee or commission has the burden of proving that the said request is fair and reasonable and based on services performed. Also, an attorney seeking compensation has the burden of establishing facts that show that he or she is entitled to such compensation. Since they have the burden of substantiating their claims to compensation, in essence, the Bank and its counsel are claimants against the estate.**

**In prosecuting claims for compensation, a fiduciary and its counsel are subject to the general rule that a party who retains counsel to protect or advance his own interests must pay his own counsel fees. See *Wanamaker Trust,* 30 Fiduc. Rep. 240. Accordingly, I hold that the fees of an attorney employed to substantiate a fiduciary's claim for compensation are not compensable from the estate. *Powers Est.*, 58 D. & C. 379, 386; *Fiduciary Review,* Aug. 1977, p. 4. In the same vein, time expended by counsel in seeking its own compensation is of no benefit to the fund but only benefits counsel. Accordingly, it is not compensable from the fund.**

**In determining how much of the requested counsel fees are compensable from the assets of the principal, this Court is cognizant of its own observations in *Conti Estate*, 8 Fiduc. Rep. 2d 272 (1988), to wit,**

> **".....an executor may not substantially increase the legal fees to be paid by the estate by retaining different counsel who duplicate each other's efforts: ..... 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: ....." (citations omitted)**

**Having considered the record in this matter, this Court finds that the amount of**

**$20,000.00 represents one reasonable fee for the efforts of the Bank's counsel in preparing, reviewing and filing the account; in resisting the Petition for turnover of assets; and, in resisting requested surcharges. Counsel fees in excess of**

**$20,000.00 are not compensable from the assets of the principal: because they were incurred in the Bank's attempts to secure a termination fee and counsel fees; and, because they represent a duplication of effort of counsel. Having considered the record in this matter, this Court will make the following allocation of allowable fees of counsel for the bank, to wit: $5,000.00 to the firm of Reed, Luce, Tosh, McGregor & Wolford; and, $15,000.00 to the firm of Dechert Price & Rhoads. The awards will be made accordingly.**

**All Objections having been addressed, the account, as stated to January 30, 1995, that is, before the delivery of assets ordered by Decree of this Court dated May 5, 1995, shows a combined balance of principal and income**

**of**

**$ 1,371,146.01**

**which, composed as set forth in the account, together with income received since the filing thereof, if any, is awarded as follows: $3,841.97 to First Western Trust Services Company, in full and final satisfaction of its claim for a termination fee; $5,000.00 to First Western Trust Services Company, in full and final satisfaction of its claim for counsel fees due the firm of Reed, Luce, Tosh, McGregor & Wolford; $149.00 to First Western Trust Services Company, in full and final satisfaction of its claim for costs due the firm of Reed, Luce, Tosh, McGregor & Wolford; $15,000.00 to First Western Trust Services Company, in full and final satisfaction of its claim for counsel fees due the firm of Dechert Price & Rhoads; $1,866.38 to First Western Trust Services Company, in full and final satisfaction of its claim for costs due the firm of Dechert Price & Rhoads; and, the balance then remaining to Inez C. Nicely, Executrix of the Estate of Esther M. Nicely, Deceased.**

**The above awards to First Western Trust Services Company shall be paid by Inez C. Nicely, Executrix as aforesaid, from the assets of the estate of the deceased principal.**

**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.**