COURT OF COMMON PLEAS OF PHILADELPHIA
ORPHANS' COURT DIVISION

Alice D. Jones, Deceased
20190023905024

Estate of Alice Jones, Deceased
O.C. No. 239 DE of 2019
Control No. 190908

Sur First Interim Account of Alice Towles, Executor

The account was called for audit April 1, 2019 **Before: Herron, J.**
Counsel appeared as follows:
Danielle Yacono, Esquire, for the Accountant
Daniel Muklewicz, Esquire, for the Objectant

ADJUDICATION

Alice Jones ("Decedent") died testate on March 13, 2018. By will dated November 8, 2013, Decedent named her daughter Alice Towles ("Accountant") as executor. Decedent was not survived by a spouse, but she was survived by three children: Accountant, Edward Cephas, and Barbara Haywood. Under Article IV of the will, Decedent specifically devised her real property located at 5907 Ellsworth Street, Philadelphia, Pennsylvania 19143 (the "Property"), to her daughter, Barbara. Under Article V of the will, Decedent bequeathed the residue of her Estate to her son, Edward.

On April 6, 2018, the Register of Wills granted letters testamentary to Accountant. Proof of their publication accompanies the Account.

On February 26, 2019, Accountant filed an interim Account of her administration of the Estate covering the period of April 6, 2018, through February 19, 2019. According to the Account, the Principal Receipts total $93,021.00 based on the appraisal of the Estate's sole asset, the Property. Decedent's debts total $36,758.66—including fees, commissions, and taxes.

The Account was placed on the April audit list, and notice of the audit was given to all parties in interest.

Objections to the Account were filed by Barbara Haywood ("Objectant") on March 29, 2019. The Court rephrases the objections as follows:

1. Accountant fails to account for Decedent's personal property;
2. Accountant improperly claims a credit against the Estate for payment of Decedent's in-home care during her lifetime;
3. Accountant incorrectly claims the Property should be sold to pay the debts of the Estate;
4. Accountant fails to provide proof of payment of the remainder of Decedent's funeral bills;
5. Accountant fails to account for Decedent's 403(b) Retirement Savings Plan; and
6. Accountant claims unreasonable attorney's fees.

See Objections ¶¶ 1–7.

A hearing on the above objections was held on August 14, 2019. In addition to the testimony of Accountant and Objectant, the Court heard testimony from Kelly Barse, an attorney from Klenk Law who participated in the administration of the Estate and prepared the Account, and Carol Hayward, Decedent's cousin and in-home care provider. The Court also received into evidence several exhibits in support of their testimony.

First, the objection regarding Accountant's failure to account for Decedent's personal property. Both Accountant and Objectant testified to the existence Decedent's personal property—a television, a stove, a washing machine, costume jewelry, etc. N.T. 08/14/19, at 29, 65. No appraisal of this personal property has ever been undertaken and its value, if any, is not reflected in the Account.[1] The failure to appraise Decedent's personal property was an error on

[1] The Court notes the sale of any or all of Decedent's personal property is unlikely to fetch enough money to pay off Decedent's debts. The sale of the Estate's principal asset, the Property, will almost certainly have to happen in order to satisfy any outstanding debts, expenses, fees, etc. See *infra* page 3 for further discussion of this point.

Accountant's part. Nonetheless, Objectant offered no testimony establishing the age, condition, or value of Decedent's personal property. Therefore, in the absence of evidence establishing the value of the personal property, the objection is OVERRULED.

Second, the objection regarding Accountant's claim against the Estate for payment of Decedent's in-home care during her lifetime. Courts generally regard with suspicion claims against an estate made by those in a position to assert their rights before the decedent's death at a time when there was sufficient money on hand to satisfy the debt. *In re Estate of Schleich*, 132 A. 442, 443 (Pa. 1926); *see also In re Estate of Conrad*, 3 A.2d 697, 701 (Pa. 1938) ("[A] claim which could have been made against a decedent during his lifetime [but] is not presented until after his death . . . is viewed with the greatest suspicion. Normally, creditors and obligees are prompt to assert their claims and press them during the lifetime of the debtor."). To establish a claim against a decedent's estate under these circumstances, the claimant must offer "direct and positive" proof of the debt, and the terms of the decedent's liability must be "certain and definite." *Schleich*, 132 A. at 443.

Here, Accountant contends she covered the cost of Decedent's in-home care provided by Ms. Hayward with the understanding she would be repaid. N.T. 08/14/19, at 43. Yet, no writing signed by Decedent exists to corroborate such an agreement, only the vague testimony of Accountant. *Id.* This, without more, does not rise to the level of "direct and positive" proof, and Decedent's liability is far from "certain and definite."

Moreover, Accountant's testimony asserting the existence of such an agreement on the part of Decedent is exactly the sort of testimony that should be disregarded pursuant to the Dead Man's Act. *See* 42 Pa. C.S. § 5930 ("Except as otherwise provided, in this subchapter in any civil action or proceeding, where any party to a thing or contract in action is dead, . . . and his

right thereto or therein has passed, either by his own act or by the act of the law, to a party on the record who represents his interest in the subject in controversy, neither any surviving . . . party to such thing or contract, nor any other person whose interest shall be adverse to the said right of such deceased . . . shall be a competent witness to any matter occurring before the death of said party . . . ."); *see also L. B. Foster Co. v. Charles Caracciolo Steel & Metal Yard*, 777 A.2d 1090, 1093 (Pa. Super. Ct. 2001) ("In a non-jury trial, the factfinder is free to believe all, part, or none of the evidence . . . .").

Finally, this alleged debt of the Estate is problematic in that receipts provided by Accountant indicate she paid Ms. Hayward in cash for Decedent's in-home care. Ex. P-E (in-home care receipts); *see also* N.T. 08/14/19, at 37. However, on or around the time of these cash payments, identical amounts were withdrawn from a joint account at Santander Bank titled in both Decedent's and Accountant's names. *Compare* Ex. P-E *with* Ex. R-A (joint account statements); *see also* N.T. 08/14/19, at 38–43. The statements for this joint account show the only funds entering the account were Decedent's Social Security income. *See* Ex. R-A. According to the Probate, Estates, and Fiduciaries Code, a joint account, during the lifetime of all parties, belongs to the parties "in proportion to the net contributions by each to the sum on deposit, unless there is clear and convincing evidence of a different intent." 20 Pa. C.S. § 6303. That means, absent clear and convincing evidence to the contrary, the money in the joint account was Decedent's as it was her money funding the account.

All this raises several questions. Why, if there was money on hand, did Decedent herself not pay Ms. Hayward for her in-home care? Why the meticulous, business-like practice of keeping receipts for the cash payments to Ms. Hayward but no signed writing from Decedent promising to repay Accountant? Assuming Accountant did pay for Decedent's in-home care,

why, if there was money on hand, did she not seek reimbursement from Decedent during her lifetime? What were the withdrawals from the joint account used for if not to pay Ms. Hayward? And if the withdrawals were used to pay Ms. Hayward, would that not mean Decedent paid for her own in-home care? Suspicion abounds.

Therefore, the objection regarding Accountant's claim against the Estate for payment of Decedent's in-home care during her lifetime is SUSTAINED.

Third, the objection regarding Accountant's claim the Property should be sold to pay the debts of the Estate. No one disputes the Estate has debts. There are questions over the amounts for some debts and the legitimacy of others, but the Estate has debts. Moreover, no one disputes the fact the Estate has only one asset of any real value: the Property. Estate assets must be used in order to cover estate debts, even those that have been specifically devised. *See* 20 Pa. C.S. § 3541(a). Therefore, in order to pay the Estate's debts, the Property will most likely need to be sold and the proceeds used to satisfy all creditors. Therefore, the objection is OVERRULED.

Fourth, the objection regarding Accountant's failure to provide proof of payment of the remainder of Decedent's funeral bills. An accountant bears the burden of "vouching" their account, especially credits for disbursements made by them such as paying for a decedent's funeral expenses. As the Supreme Court of Pennsylvania explained, "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.*" *In re Estate of Strickler*, 47 A.2d 134, 135 (Pa. 1946) (emphasis added); *see also In re Kelsey Trust*, 12 Fid. Rep. 2d 209, 212 (O.C. Phila. 1992) ("If there is an objection to a credit, then the accountant must offer some documentary evidence

to show that the payment was made and was proper. This is logical since the proof thereof would be in the possession of accountant and most readily available to him.").

Accountant has vouched for most, but not all, of Decedent's funeral expenses. Attached to the Account is a receipt from Francis Funeral Home. The receipt shows Accountant paid the full $8,485.00 owed to the funeral home for goods and services rendered Decedent. Strangely, Accountant only claims $3,481.86 paid to Francis Funeral Home as a debt of the Estate.[2] Account at 8. Nevertheless, in light of the receipt from the funeral home, the credit of $3,481.86 for funeral expenses is properly vouched.

However, the Account lists an additional $1,300.00 in funeral expenses allegedly paid by Accountant for a funeral service at Sharon Baptiste Church, flowers, and clothes for Decedent. *Id.* at 8–9. Other than their appearance in the Account, no receipts were offered in support of these additional funeral expenses. To the extent these additional expenses are unsubstantiated and have not been vouched, the objection is SUSTAINED.

Fifth, the objection regarding Accountant's failure to account for Decedent's 403(b) Retirement Savings Account. According to Accountant, the 403(b) Retirement Savings Account at issue was not Decedent's; rather, it is Accountant's own retirement fund. N.T. 08/14/19, at 51; *see also* Ex. P-D. Accountant need not account for assets other than those that are part of Decedent's Estate. Therefore, the objection is OVERRULED.

Lastly, the objection regarding Accountant's attorney's fees. The Estate has incurred $8,471.11 in attorney's fees related to the administration of the Estate plus an additional $3,521.00 in attorney's fees related to the litigation over the Account. *See* Ex. P-A, P-B.

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[2] The balance of $5,003.14 came from life insurance proceeds. According to Exhibit P-C, Decedent was insured under the AARP Life Program from New York Life in the amount of $5,003.14. Accountant was the beneficiary of the life insurance proceeds and directed the insurer to forward the money to Francis Funeral Home. These two sums total $8,485.00, the full amount charged by Francis Funeral Home.

At an informal conference on April 16, 2019, the Court advised the parties to study the case law on the question of reasonable attorney's fees, in particular *In re Trust of LaRocca*, 246 A.2d 337 (Pa. 1968). *LaRocca* identifies eleven factors a court should consider when determining the reasonableness of attorney's fees.

> The facts and factors to be taken into consideration in determining the fee or compensation payable to an attorney include: [1] the amount of work performed; [2] the character of the services rendered; [3] the difficulty of the problems involved; [4] the importance of the litigation; [5] the amount of money or value of the property in question; [6] the degree of responsibility incurred; [7] whether the fund involved was "created" by the attorney; [8] the professional skill and standing of the attorney in his profession; [9] the results he was able to obtain; [10] the ability of the client to pay a reasonable fee for the services rendered; and, very importantly, [11] the amount of money or the value of the property in question.

Id. at 339. Nonetheless, neither side prepared testimony that addressed all, or even most, of the *LaRocca* factors. By their own admission, the attorneys on both sides did not read *LaRocca* or its progeny. N.T. 08/14/19, at 23–24.

Focusing only on Accountant's attorney's fees incurred from administering the Estate, how reasonable are they light of the *LaRocca* factors? Well, the services rendered by Klenk Law were routine, not extraordinary—drafting letters, reviewing documents, answering phone calls, preparing tax forms, etc. These services were provided in connection to problems that are in no way novel or particularly complex. Further, the size of the Estate was small, not astronomical, thus Klenk Law assumed a normal amount of responsibility when it agreed to aid Accountant in administering the Estate. Moreover, the results obtained by Klenk Law are nothing exceptional, and that goes double for the skill of the attorneys involved.

So how did a relatively straightforward estate administration turn into an attorney-fee-generating machine? The preparation of the Account. According to Klenk Law's invoices, 7.6 hours were spent drafting both the Account and the Petition for Adjudication/Statement of

Proposed Distribution. Ex. P-A (invoice dated 03/08/2019). Of those 7.6 hours, 0.90 hours were billed at $390.00 per hour, and the remaining 6.7 hours were billed at $290.00 per hours—a total of $2,298.50. *Id.* This sum represents more than a quarter of all the fees generated from administering the Estate.

On cross-examination by Objectant's counsel,[3] Ms. Barse stated it took approximately six to seven hours to prepare the Account, *id.* at 12, but when cross-examined by the Court, there were at least two and a half hours of billed time related to preparing the Account which Ms. Barse could not explain. *Id.* at 14–22.

Here is a simple Estate with few debts and only one asset—a house with a market value of less than $100,000.00. Many of the pages in the Account are entirely or mostly blank. Ms. Barse insisted she does not "fudge" her time, *id.* at 20, but the Court has no doubt the time claimed is excessive given the nature of the tasks required to administer such a modest Estate. Therefore, the objection to the reasonableness of Accountant's attorney's fees is SUSTAINED, and Accountant's fees are reduced by $725.00—the sum billed for 2.5 hours at an hourly rate of $290.00 for unexplained time devoted to preparing the Account.[4]

As a final note, the Court understands the experience of executing a will is one fraught with challenges. First and foremost, it means confronting the taboo of death. And not death in the abstract, or someone else's death, but one's own. The experience can also be disorienting as inhuman jargon and foreign concepts bombard the would-be testator. Amid all this, the testator is asked to make choices that, if not thought through or poorly implemented, could cause strife in

[3] Objectant's counsel asked only eleven questions on cross-examination. N.T. 08/14/19, at 11–13. These questions were unfocused and accomplished little. Had counsel actually prepared a thorough cross-examination, the Court has little doubt the record would support a greater reduction of Accountant's attorney's fees.

[4] Despite the above reduction, Accountant's attorney's fees, including litigation costs, total $11,267.11—more than twelve percent of the value of the Estate. This figure does not include the attorney's fees related to the hearing on the objections to the Account nor the preparation and filing of an amended account in conformity with this opinion. Lest attorney's fees devour the entire Estate, the Court urges the parties to reach an amicable settlement.

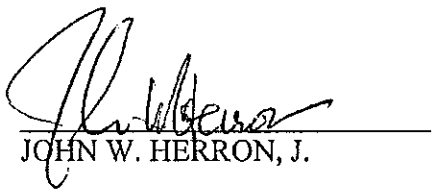
a family for years. Naturally, people seek competent attorneys to guide them through the estate planning process by foreseeing adverse outcomes, avoiding them whenever possible, and evaluating alternatives. One wonders whether that happened here.

If Accountant's attorneys find the Estate difficult to administer then Decedent's will is the most likely culprit. The Court does not understand why Klenk Law drafted a twenty-nine page will for Decedent when her Estate consisted of one asset. *See* Account (will attached thereto). To call this overkill is an understatement.

Alas, one would hope such a lengthy will would at least be well-drafted, but it is not. The will was bound to create tension between the parties. With the Estate's sole asset going to Objectant and any residue going to Decedent's son, the will appoints Accountant as Executor and she is to receive nothing for her trouble. No good deed goes unpunished, but the unpleasantness does not end there. Not only is conflict built into the will, but the will specifically devises the Estate's only asset to Objectant without considering how the Estate, deprived of its sole asset, will pay for everything from funeral expenses to estate taxes. Lawyers are not expected to consult crystal balls, tea leaves, or sheep entrails, but the sort of difficulties present here are not hard to predict or prevent. That no one considered this eventuality when drafting the will is baffling and inexcusable.

AND NOW, this 14th day of September 2019, the objections are OVERRULED IN PART and SUSTAINED IN PART, and the Account is rejected. Accountant shall file an amended account reflecting the above findings of the Court in thirty (30) days unless a compromise and settlement of all issues occurs prior thereto.

BY THE COURT:



JOHN W. HERRON, J.

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