

PHILADELPHIA COURT OF COMMON PLEAS
ORPHANS COURT DIVISION

Estate of Paul Strittmatter, Deceased
O.C. No. 1761 DE of 2008
Control No. 092112

Sur Account of Denis J. Lawler, Administrator Pendente Lite

The account was called for audit: September 14, 2009 By: **Herron, J.**

Counsel appeared as follows:

Shari J. Odenheimer, Esquire – for the Accountant
Marc L. Davidson, Esquire – for the Remaindermen

ADJUDICATION

The issue raised by the account filed for the Estate of Paul Strittmatter, Deceased, is the reasonableness of the attorney fees and administrator commissions where the administrator is an attorney who employs his law firm to provide legal services for the estate. Based on the record presented, a fee of \$70,000 is reasonable for the legal services provided by Blank Rome and a commission of \$70,000 is reasonable compensation for the distinct services provided by Denis Lawler, in his sole capacity as administrator to the estate.

Paul Strittmatter died on October 15, 2006. On October 23, 2006, Mr. Strittmatter's nephew, Anthony Smith, Jr. filed a petition for Letters of Administration with the Register of Wills. PNC Bank ("PNC") proffered for probate will dated August 2, 2006 by Mr. Strittmatter that named PNC and Dorothy D. Gwozdecki as executors and trustees. Anthony Smith responded by filing a formal caveat, and on November 22, 2006, a preliminary conference was held before the Register with counsel for Anthony Smith, Jr., counsel for Dorothy Gwozdecki and Denis Lawler, Esquire, as counsel for PNC. On December 9, 2006 the Register granted

letters of administration pendente lite to Denis J. Lawler. Mr. Lawler then retained his law firm, Blank Rome, as counsel for the estate.¹

Lengthy negotiations took place to resolve the dispute among the parties in interest concerning the proffered will. On December 31, 2008, this dispute was finally resolved with a family settlement agreement. The accountant attached a letter dated December 16, 2008, by Lawrence Barth, Senior Deputy Attorney General, which stated that “[a]fter reviewing these documents, and based on my understanding that Pennsylvania Hospital has specifically agreed to the reduction in its bequest, I am able to advise you, on behalf of this Office as *parens patriae*, that we are without objection to the draft settlement Agreement provided.” The administrator subsequently made distributions as set forth in the settlement agreement. He prepared and filed an amended federal estate tax return as well as an amended Pennsylvania inheritance tax return. He also prepared additional fiduciary income tax returns for the estate.² On August 12, 2009, Mr. Lawler, as administrator, filed an account of his administration of the Strittmatter Estate.

Questions for Adjudication: Attorney and Fiduciary Fees

Objections were raised to the account by James Fagnani, Michael Fagnani, Lauren Smith, Mackenzie Gifford, Riley Gifford, Patricia Fiorella, Sandra Fiorella and Roman Fiorella, as remaindermen under Paul Strittmatter’s will. They objected to the accountant’s claim for additional administrator commissions in the amount of \$47,500 in excess of the original claim of \$22,500. They also objected to the claim for additional attorney fees for Blank Rome in the amount of \$35,212.99 in excess of the original claim of \$50,000.

¹ See Ex. A-1 (Administrator’s Expert Report) at 2; Ex. O-2 (Objectors’ Expert Report) at 2. The expert reports disagree as to the date when PNC proffered the will. According Ex. A-1, PNC proffered the will on October 20, 2006; according to Ex. O-2, PNC filed its petition for letters testamentary on October 30, 2006.

² See Ex. A-1 at 2-3; Ex. O-2 at 2-3.

An evidentiary hearing was held on these objections on May 11, 2010. At that hearing, both the accountant and the objectors agreed to forgo any testimony, relying instead on expert reports.³ The objectors relied on an expert report O-2 prepared by their former counsel, Marc Davidson.⁴ The accountant presented an expert report Ex. A-1 prepared by a partner of his firm, Bernard Glassman, as well as invoices marked Ex. A-2.⁵ Since these reports were both prepared by members of the firms representing the opposing parties, they are in reality adversarial briefs that set forth the opposing arguments. After the hearing, counsel for the accountant submitted copies of the invoices with yellow highlights underscoring interactions between Denis Lawler, as administrator of the estate, and Blank Rome lawyers.⁶

In disputes over attorney or fiduciary fees, the accountant bears the burden of proving the reasonableness of the fees claimed in the account. Estate of Sonovick, 373 Pa. Super. 396, 400, 541 A.2d 374, 376 (1988). As a general rule, both attorneys and administrators are entitled to reasonable compensation based on their actual services to the estate. Id., 373 Pa. at 399-400, 541 A.2d at 376; Estate of Preston, 385 Pa. Super. 48, 56-57, 560 A.2d 160, 164 (1989). The standard applied in Pennsylvania for determining the reasonableness of claims for attorney fees was set forth by the Pennsylvania Supreme Court in LaRocca Estate, 431 Pa. 542, 246 A.2d 337 (1968):

The facts and factors to be taken into consideration in determining the fee or compensation payable to an attorney include: the amount of work performed; the character of the services rendered; the difficulty of the problems involved; the importance of the litigation; the amount of money or value of the property in question; the degree of responsibility incurred; whether the fund involved was “created” by the attorney; the professional skill and standing of the attorney in his profession; the results he was able to

³ 5/11/10 N.T. at 6 & 9.

⁴ 5/11/10 N.T. at 6-7. Mr. Davidson formally withdrew as counsel for the objectors so that they could be represented by an associate of his firm.

⁵ 5/11/10 N.T. at 7-9.

⁶ See 5/11/10 N.T. at 24-26 & 47 and letter dated 5/24/2010 (Odenheimer).

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. at 546-47, 246 A.2d at 339.

To support the requested attorney fees, the accountant presented invoices and time sheets from January 1, 2007 to November 17, 2009. According to a cover letter dated December 7, 2009 that was introduced at the hearing as Ex. A-2, these invoices sought legal fees in the amount of \$35,925.00 by invoice dated December 11, 2007, legal fees of \$13,862.04 by invoice dated December 8, 2008, legal fees of \$39,773.50 by invoice reflecting unbilled time through November 17, 2009 for a total of \$89,560.54 in legal fees.⁷ The timesheets reflect the work of various attorneys as follows: 99 hours for the December 11, 2007 invoice; 51 hours for the December 8, 2008 invoice; and 143 hours for the unbilled time through November 17, 2009 for a total of 293 hours.

It is, of course, axiomatic, that while these time sheets give some indication of the amount of work performed, “determination of reasonable compensation to an attorney for an estate is not relegated to a clock and computer.” Estate of Burch, 402 Pa. Super. 314, 318-19, 586 A.2d 986, 988 (1991). As Judge Drayer perceptively noted, “using hours as the sole measure is not a good solution to fixing compensation” because “[s]uch a system penalizes the efficient attorney.” Wohlpart Estate, 21 Fid. Rep. 2d 103, 106 (Mont. Cty. O.C. 2000).

In fact, the accountant in this case agreed to compromise the attorney fee claim. While the accountant’s expert report sought to justify an attorney fee in the amount of \$85,212.99 for Blank Rome as reasonable and appropriate,⁸ at the hearing the accountant’s counsel reduced the attorney fee claim to \$70,000.⁹ This concession resolves the dispute over the claimed attorney

⁷ See Ex. A, 12/7/09 Letter by Odenheimer.

⁸ See Ex. A-1 at 1.

⁹ 5/11/10 N.T. at 5 (Odenheimer). At the hearing, the objectors withdrew their objections to \$8,880.30 in attorney fees for Pepper Hamilton. 5/11/10 N.T. at 4.

fees because the objectors' expert report ultimately concludes that an attorney fee in the amount of \$72,563.00 would be acceptable: as they explain, "[a]lthough still high when analyzed under LaRocca standards, it would appear to be reasonable and appropriate."¹⁰ Based on this record, therefore, an attorney fee in the amount of \$70,000 for Blank Rome is hereby approved.

A thornier issue is presented by the claimed administrator's fee of \$70,000.¹¹ Although the objectors concede that a fiduciary is entitled to reasonable fees based on actual services rendered,¹² they properly observe that "[c]loser scrutiny is required in situations where an attorney also serves as a fiduciary."¹³ Relying on various older Orphans' Court cases in Chester and Montgomery Counties, the objectors urge this court to embrace the legal principle that "a sole fiduciary who is also an attorney may not receive both a commission as fiduciary and a fee as an attorney, unless the attorney's fees are for compensation for performing extraordinary services."¹⁴ The objectors' argument is unpersuasive for several reasons.

First, Mr. Lawler is requesting a fee for serving in the fiduciary role of administrator. Importantly, he is not asking for a fee as a lawyer even though he is one. He is, as well, not asking for a fee for performing legal services; he is not basing his request for commissions on his firm's billable rate for legal services; and he is not basing his claim on the number of hours expended in his fiduciary role as administrator. This court will not approve a legal fee for Mr. Lawler and a legal fee for his firm and no such claim has been made in this estate.

Second, the precedent cited by the objectors to support their argument that an attorney serving as a fiduciary should not receive a commission for those services is not as clear as the

¹⁰ Ex. O-2 at 7.

¹¹ At the hearing, counsel for the accountant stated that the executor fee claimed for this matter was also \$70,000. See 5/11/10 N.T. at 5 (Odenheimer).

¹² Ex. O-2 at 3 ("Fiduciaries' commissions and attorneys' fees must be reasonable and clearly not excessive.").

¹³ Ex. O-2 at 4.

¹⁴ Ex. O-2 at 4. The objectors rely on the following cases: Himes Estate, 16 Chester 27 (O.C. 1967); Perry Estate, 27 Chester 37 (O.C. 1979); Eckel's Estate, 37 Pa. D & C 383 (Mont.Cty. O.C. 1940) and Michener Estate, 6 Fid. Rep. 2d 345 (Chest. Cty. O.C. 1986).

objectors suggest. In fact, several of the cases cited by the objectors ultimately concluded that the attorney fees and executor commissions in dispute were reasonable based on the facts presented; hence, the purported principle that an attorney should not receive fees for services as both executor and administrator was set forth more as dicta.¹⁵ More importantly, there is strong, contrary Pennsylvania precedent that an attorney who performs distinct services for an estate as both legal counsel and fiduciary is entitled to reasonable fees based on the services performed in both capacities. In an early case, the Pennsylvania Superior Court addressed this issue head on in Griffith's Estate, 96 Pa. Super. 242, 1929 Pa. Super. LEXIS 138 (1929) where it observed:

The appellant argues that even if the amount fixed as compensation to the accountant as attorney be reasonable, an attorney serving in a fiduciary capacity cannot charge commissions and attorney fees. In some jurisdictions, this rule prevails, in others, the contrary, 24 C.J. 547, **but in Pennsylvania the matter seems to be definitely settled. An executor who also is an attorney and thereby has broadened the field of his activities in the settlement of the estate, should receive what his services are worth, irrespective of any particular designation which may be applied to such services.** In Winsel's Estate, 19 Pa. District Court 659 the late Judge Penrose, judge of the orphans' court of Philadelphia County stated, "That counsel was also one of the executors, does not under well settled principles deprive him of the right to proper counsel fees." Griffith's Estate, 96 Pa. Super. at 245-46 (emphasis added).

This principle that an attorney who performs services for an estate as both a fiduciary and an attorney is entitled to reasonable payment for both kinds of services has been embraced in numerous orphans' court opinions. In Phillips' Estate, 21 Pa. D. & C. 464, 469 (O.C. Beaver Cty. 1934), for instance, the orphans' court concluded that an attorney who served as executor of the estate was entitled to both an executor's commission and to legal fees for what "those services were worth." See also Wohlpart Estate, 21 Fid. Rep.2d 103 (Mont. Cty. OC.

¹⁵ In Eckels' Estate, 37 Pa.D & C. 383 (Mont.Cty. O.C. 1940), for instance, the court recognized the line of precedent that an attorney who serves alone as fiduciary may not also recover attorney fees, but on the facts before it, the Eckels court allowed the attorney to collect both fees because he was not the sole fiduciary and he performed extraordinary services. Significantly, the court noted that precedent on this issue was conflicting and confusing. In Michener Estate, 6 Fid. Rep. 2d 345 (Chest.Cty. O.C. 1986), the court's analysis concerning the joint fee claimed by the attorney as executor and attorney is not clear; it appears to reduce—but not deny-- the commission of the sole executor who was an attorney while finding a fee based on 7 1/2% of the value of the probate estate as reasonable.

2000)(Drayer, J.)(claims by attorney for both attorney fees and executor commission approved with certain reductions based on the nature of the services actually performed); Finnerty Estate, 18 Fid. Rep. 2d 121(Lackawanna Cty. O.C. 1997)(where an attorney served as both executor and estate attorney, he is entitled to reasonable payment based on the actual services rendered).

Other recent cases have approved the award of both legal fees and an executor commission to an attorney serving as a fiduciary by focusing on the actual services rendered and on fee schedules based on percentages of the gross estate as outlined by In re Johnson, 4 Fid. Rep. 2d 52 (Chester Cty 1983). In Bealer Estate, 26 Fid. Rep. 2d 434 (O.C. Chester Cty. 2006), for instance, the court approved an attorney's fees requested for his services as the estate's executor and legal counsel because the fees were well within the Johnson guidelines and the attorney had "performed his duties as co-executor in good faith and with the judgment, skill, care and diligence that a prudent man would use in managing his own affairs." Bealer Estate, 26 Fid. Rep. 2d at 440. See also Crowers Estate, 26 Fid. Rep. 2d 518 (O.C. Phila. 2006)(Lazarus, J.)(Attorney awarded fees in dual capacities as executor and attorney where fees claimed were less than those allowed under Johnson and where services were "beyond the call of duty").

Section 3537 of the PEF code, which establishes compensation guidelines for personal representatives, is in accord with this general precedent. Under section 3537, therefore, the "court shall allow such compensation to the personal representative as shall in the circumstances be reasonable and just, and may calculate such compensation on a graduated scale." 20 Pa.C.S. § 3537. In a very recent case, the Pennsylvania Superior Court applied this standard to approve reduction of an executor's fee so that it reflected the value of actual services rendered that fell

within the prima facie percentage that was presumed reasonable. See In re: Estate of Harper, 2009 Pa. Super. 104, 975 A.2d. 1155, 1163 (2009).¹⁶

In the instant case, Denis Lawler, as administrator, is not requesting compensation in the form of legal fees at his normal hourly rate as an attorney. Instead, he is seeking compensation for the services he performed in overseeing the administration of the Strittmatter estate and in supervising the estate's attorneys in the same manner that a nonlawyer would seek reasonable compensation for services performed as an estate administrator or executor.

In this vein, the accountant argues that the requested administrator's commission of \$70,000 where the gross estate is valued at \$3,281,322.78 is well within the presumptive percentage guidelines of In re Johnson Estate, 4 Fid. Rep. 2d 6 (Chester Cty. O.C. 1983), which would allow \$71,563.23.¹⁷ The accountant does not, however, rely solely on this presumption; instead, he has outlined the actual services performed by the administrator and has submitted attorney time sheets that highlight the fiduciary's interactions with the estate's counsel. According to the accountant, as the administrator of the estate he "managed the assets of the estate, monitored their investment and handled the responsibility of the administration with professionalism and diligence."¹⁸ The highlighted attorney time sheets document the administrator's intimate involvement in the administration of the estate and supervision of its counsel. These time sheets note that the administrator conferred with counsel concerning estate administration on numerous occasions;¹⁹ processed bank forms;²⁰ telephoned counsel regarding

¹⁶ The Harper court noted that the "orphans' court determined that appellant's performance as executor did not merit any deviation from the norm in terms of what is a reasonable commission" Harper, 975 A.2d at 1163. It concluded: "We find no abuse of discretion in reducing appellant's requested commission to \$16,324.85, which represents approximately 3% of the estate (the inventory value of the estate was approximately \$544,000)." Id.

¹⁷ Ex. A-1 at 4.

¹⁸ Ex. A-1 at 2.

¹⁹ See e.g., invoices for 2/12/07; 2/20/07; 2/22/07; 4/11/07; 7/3/07; 7/9/07; 9/18/07; 4/14/08; 7/2/08; 12/5/08; 1/26/09.

²⁰ See invoice for 3/28/07; 5/17/07; 2/2/09; 3/11/09.

estate matters;²¹ discussed issues related to tax preparation for the estate;²² received memoranda prepared by counsel;²³ engaged in numerous telephone conversations with counsel;²⁴ signed checks for the estate;²⁵ and was kept abreast of the settlement negotiations.²⁶

These time sheets are useful not as a basis for calculating the administrator's commission but in illustrating the nature of the functions he performed. As these records illustrate, the tasks of an estate administrator at once complement and differ from those of its counsel, since the administrator assumes responsibility—and liability—for overseeing the general process of estate administration, assuring that all critical tasks such as payment of taxes and distributions to beneficiaries are performed in a timely fashion. It is significant that the objectors raise no issue or objection as to the manner in which the estate was administered by Mr. Lawler. In contrast to other cases where distribution of assets was delayed or taxes were not paid,²⁷ the objectors raise no objection to any aspect of the estate's administration except for the fees claimed by the administrator and lawyers. Based on the record presented, therefore, the administrator's commission in the amount of \$70,000 is approved as reasonable.

The accountant states that Pennsylvania Transfer Inheritance Tax and Estate tax in the amount of \$440,000 was paid on July 9, 2007, and in the amount of \$4,494.90 on January 11, 2008, with a refund due of \$48,015.48. Official Pennsylvania tax receipts were attached. According to the account for the period October 17, 2006 through June 30, 2009, the balance of principal before distribution is \$2,678,860.89 while the balance of income before distribution is

²¹ See invoices for 5/17/07; 12/6/07.

²² See invoices for 7/3/07; 1/11/08; 1/6/09; 2/20/09.

²³ See invoices for 7/10/07; 7/19/07; 6/1/09.

²⁴ See invoices for 5/16/07; 7/3/07; 7/5/07; 9/18/07; 10/1/07; 10/5/07; 10/30/07; 11/6/07; 11/7/07.

²⁵ See invoices for 1/11/08; 1/13/09; 2/2/09.

²⁶ See invoices for 10/2/08; 12/16/08.

²⁷ See, e.g., Wohlpert Estate, 21 Fid. Rep. 2d 103 (Mont.Cty. 2000). In Wohlpert Estate, Judge Drayer allowed an attorney to receive fees for services performed both as administrator and counsel to the estate, although the fees were reduced for various reasons. The court noted, for instance, that there had been no cash distributions to the residuary beneficiaries.

\$222,207.71 for a total of \$2,901,068.60. This sum, composed as stated in the account, plus income received since the filing thereof and subject to the distributions already properly made and subject to the terms of the parties' settlement agreement as well as the modification of attorney and fiduciary fees set forth in this adjudication, is awarded as set forth in the accountant's petition for adjudication and statement of proposed distribution:

Income

PNC Bank, N.A., Trustee 100%

Principal

PNC Bank, N.A., Trustee 100%

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

AND NOW, this day of SEPTEMBER 2010, the account is affirmed as modified by this adjudication absolutely.

Exceptions to this Adjudication may be filed within twenty (20) days from the date of issuance of the Adjudication. An appeal from this Adjudication may be taken to the appropriate Appellate Court within thirty (30) days from the issuance of the Adjudication. See Phila. O.C. Rule 7.1.A and Pa. O.C.Rule 7.1 as amended, and Pa. R.A.P. 902 and 903.

John W. Herron, J.