

PHILADELPHIA COURT OF COMMON PLEAS  
ORPHANS' COURT DIVISION

Estate of Michael Milavitch, Sr., Deceased  
O.C. No. 531 DE of 2009  
Control No. 092871

AUDIT MEMORANDUM

Michael Milavitch Sr. died intestate on May 29, 2006. He was survived by his son, Michael Milavitch, Jr. ("Michael"), his daughter, Helen Lombardo, and three minor grandchildren from a child who predeceased him, Sammiejo Kling. Helen Lombardo obtained letters of administration on February 12, 2007, but on December 23, 2008 Michael filed a petition with the Register of Wills seeking her removal as administratrix. He alleged that Ms. Lombardo failed to include the names of the decedent's three minor grandchildren or notify him when she filed for the letters of administration.<sup>1</sup>

After a hearing before the Register, Ms. Lombardo was removed as administratrix by decree dated March 26, 2009. Initially, the Register had expressed an intent to name both Ms. Lombardo's attorney, Seymour Kivitz, and Michael Jr.'s attorney, Amanda DiChello, as Co-Administrators of the estate. Seymour Kivitz, however, declined to serve, while Amanda DiChello requested that the principal of her firm, Peter Klenk, be appointed in her place. Consequently, by decree dated April 1, 2009, Peter Klenk was granted letters of administration to become the sole successor Administrator.<sup>2</sup>

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<sup>1</sup> 4/7/10 Objectant's Brief at 1; 5/3/09 Accountant's Brief at 1-2. According to the accountant, Ms. Lombardo omitted the three minor grandchildren as heirs of the Estate when she filed the petition to be appointed Administratrix. 5/3/10 Accountant's Brief at 1. In his response to Ms. Lombardo's petition seeking to appeal the decree of the register of wills, the accountant clarifies that in applying for Letters of Administration, Ms. Lombardo had stated that his whereabouts were unknown. 9/11/09 Accountant's Answer to Petition for Citation to Appeal Register's Decree, ¶ 14(d).

<sup>2</sup> 6/9/09 Lombardo Petition for Citation to Appeal Register's Decree, ¶12; 9/11/09 Accountant's Answer, ¶¶11-13; 4/17/09 Emergency Petition by Administrator, Peter Klenk, ¶9. Mr. Klenk has stated that he does not represent Michael Milavitch, Jr. See 9/11/09 Accountant's Answer to Petition for Citation to Appeal Register's Decree, ¶19.

From the inception of his administration, there was tension between the new and prior administrators. Within weeks of his appointment, the accountant attempted to retrieve estate assets by filing an emergency petition seeking a court order to compel Ms. Lombardo to turn over all estate assets, information and funds including those she transferred to herself.<sup>3</sup> By the end of May, Ms. Lombardo sought to remove Mr. Klenk as administrator by filing an appeal from the Register's decree.

A conference was scheduled to consider these issues, after which this court issued a decree dated July 15, 2009 ordering Ms. Lombardo to provide all books, records, accounts and assets of the Estate to Mr. Klenk. Ms. Lombardo was also ordered to deposit the following sums in her attorney's escrow account: the Administratrix fee of \$7,980; the partial distribution to herself of \$28,909.33; the \$5,000 mistaken distribution to herself and the \$413.10 representing the penalty and interest incurred for failing to file a timely Pennsylvania Inheritance Tax Return. Finally, Ms. Lombardo was ordered to appear at a hearing scheduled for September 14, 2009 to show cause why she should not be held in contempt.<sup>4</sup>

At the September 2009 hearing, counsel for Ms. Lombardo informed the court that she had complied with the discovery aspects of the July 15, 2009 order but she had not turned over all the assets to his escrow account because it was not "in the best interest of the estate."<sup>5</sup> Mr. Klenk announced that he would resign as administrator because "there just isn't enough money to spend fighting" over the various issues raised, inter alia, by Ms. Lombardo's appeal.<sup>6</sup> He noted, however, that his firm had engaged in extensive research regarding the various issues posed by the Milavitch estate that could be used by a new administrator who might, perhaps, be a

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<sup>3</sup> See 4/17/09 Emergency Petition by Administrator.

<sup>4</sup> See 7/15/09 Decree.

<sup>5</sup> 9/14/09 N.T. at 4 (Green).

<sup>6</sup> 9/14/09 N.T. at 9 (Klenk).

family member willing to serve without pay. In resigning, he nonetheless disputed the representation by Ms. Lombardo's attorney that she had complied with the discovery mandates of the July 15<sup>th</sup> order.<sup>7</sup> In light of Mr. Klenk's resignation, however, the hearing was adjourned. Ms. Lombardo's appeal from the Register's decree and the accountant's emergency petition were both dismissed as moot.

Mr. Klenk thereafter filed an account of his administration of the Milavitch estate on November 4, 2009. Ms. Lombardo filed objections to the counsel fees totaling \$24,074.88 on an estate with only \$60,501.88 in principal and \$93.14 in income. She objected, as well, to the threatened increase in fees by \$12,001 if any objection was filed to the account. She asserted finally that the administrator had added no value to the estate and had a conflict of interest since his firm continued to represent Michael, Jr.<sup>8</sup> A hearing was scheduled for February 2, 2010 to consider these objections to the attorney fees.

### *Legal Analysis*

It is well established that an attorney or administrator seeking fees for his services to an estate bears the burden of proof. Estate of Sonovick, 373 Pa. Super 396, 400, 541 A.2d 374, 376 (1988). Fiduciaries are entitled to reasonable and just compensation based on actual services rendered. Id., 373 Pa. at 399. Attorneys, likewise, are entitled to reasonable compensation based on their services to an estate. Estate of Preston, 385 Pa. Super. 48, 56, 560 A.2d 160, 164 (1989). The standard for reviewing the reasonableness of fees claimed by an attorney was outlined by the Pennsylvania Supreme Court in LaRocca Estate, 431 Pa. 542, 246 A.2d 337 (1968). Both parties agree that the LaRocca test applies, which provides:

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

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<sup>7</sup> 9/14/09 N.T. at 12 (Klenk).

<sup>8</sup> 12/4/09 Lombardo Objections.

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. at 548-49, 246 A.2d at 339.

According to the account, the estate of Michael Milavitch, Sr. had total principal receipts of \$60,501. The administrator paid \$10,000 in attorney fees on June 10, 2009 and \$14,074.88 on July 14, 2009 for a total of \$24,074.88.<sup>9</sup> An additional claim for \$12,000 in attorney fees was also presented at the hearing.<sup>10</sup> In support of these attorney fees, the accountant presented testimony by Mr. Klenk as well as attorney time sheets from his firm for the period March 5, 2009 through December 3, 2009. According to those time sheets, various attorneys or staff members at the accountant’s law firm spent 211.1 hours working on the estate matters.<sup>11</sup> One of the more frequently listed attorneys on the time sheets is Amanda DiChello who represented Michael Milavitch at the February 2009 hearing before the Register of Wills.<sup>12</sup>

While these time sheets give an indication of the amount of work performed, “[t]he 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, 586, 389 A.2d 986 (1991). Time spent on a matter is only one factor in determining the reasonableness of an attorney’s fee because it is also necessary under the LaRocca test to consider as well the character of the services, the results obtained and the amount of money in question. It is therefore necessary to analyze what benefits the estate received from the efforts of the administrator’s attorney. Estate

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<sup>9</sup> Account at 4.

<sup>10</sup> 2/2/10 N.T. at 4-5 (Murphy). Mr. Klenk did not seek payment of any administrator’s fee.

<sup>11</sup> See Ex. R-1. The time records consist of invoices dated April 13, 2009, May 6, 2009, June 10, 2009, July 13, 2009, August 14, 2009 and December 1, 2009. See also 5/3/10 Accountant’s Brief at 8.

<sup>12</sup> 9/11/09 Accountant’s Answer to Petition for Citation to Appeal Register’s Decree, ¶11.

of Lux, 480 Pa. 256, 273 A.2d 1053, 1061 (1978). The ultimate issue therefore is what attorney fees can be properly charged to the estate.

In support of the attorney fees claimed, the accountant testified that administering the Milavitch estate had been complicated and difficult due to several factors: family tensions, the interests of three minors; and litigation. Because Ms. Lombardo had been removed as administratrix, it was difficult obtaining information from her. Likewise, her brother Michael distrusted Ms. Lombardo because she had held herself out as the sole beneficiary. Shortly after his appointment, the administrator therefore had to file an emergency petition to obtain the estate assets. He also had to deal with irate calls from Ms. Lombardo's husband, and had to respond to litigation that Ms. Lombardo initiated shortly after his appointment to challenge the Register's appointment of him and seeking her own reappointment as Administratrix. In an effort to deal with these issues, he attended a conference and a hearing.<sup>13</sup> Ultimately, the accountant's tenure as administrator lasted only six months.<sup>14</sup>

As a threshold issue, the administrator appears to be claiming one-half of the estate's value of approximately \$60,000 in attorney fees of \$36,074.88. In response to this court's skepticism about seeking such a large percentage as fees, the administrator's attorney estimates that the real value of the estate is closer to \$200,000.<sup>15</sup> This argument, however, cuts two ways because one of the primary responsibilities of a fiduciary is to amass all of the assets of an estate. Indeed, a fiduciary may be surcharged for losses to an estate caused by the fiduciary's failure to collect an estate's assets. See, e.g., Estate of Lux, 480 Pa. at 263-64, 389 A.2d at 1056-57. The

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<sup>13</sup> 2/2/10 N.T. at 16-21 & 33 (Klenk)

<sup>14</sup> The Administrator was granted letters of administration on April 1, 2009 and he announced his decision to resign at the September 14, 2009 hearing.

<sup>15</sup> 2/2/10 N.T. at 6 (Murphy).

inability of an attorney to assist in the identification of those assets would therefore reflect negatively as to his services to the estate.

In light of the administrator's responsibility to garner the estate assets despite familial tensions, the emergency petition that he filed to obtain estate assets was clearly necessary based on the facts of record. The fees related to this petition and to efforts to obtain estate assets after the accountant's appointment may therefore be charged to the estate.<sup>16</sup> Fees totaling \$ 2,745.00 incurred in attempting to amass the estate assets as supported by the time sheets and testimony by the accountant may be charged to the estate.<sup>17</sup> Similarly, the attorney fees incurred relating to the emergency discovery petition, conference and hearing in the amount of \$ 4,005.50 were reasonable.<sup>18</sup> The attorney fees charged for performing customary administrative tasks such as obtaining the letters of administration, notifying beneficiaries and contacting banks are also reasonable in the amount of \$ 1,756.<sup>19</sup>

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<sup>16</sup> Fees charged for the period before April 1, 2009 cannot be charged to the estate.

<sup>17</sup> *Fees Incurred in Amassing Asset*

4/17/09	\$ 120.00	6/1/09	\$195.00
4/20	475.00	6/3	62.50
4/24	100.00	6/12	357.00
5/1	20.00	6/17	140.00
5/4	180.00	8/18	65.00
5/18	100.00	8/29	37.50
5/19	75.00		
5/20	37.50		
5/22	175.50		
5/27	300.00		
5/28	305.00		

<sup>18</sup> *Fees Related to Emergency Petition, Conference & Hearing*

4/15/09	\$ 140.00	5/19/09	\$300.00
4/16	1,275.00	5/28	380.00
4/17	222.50	7/14	495.00
4/22	180.00	7/22	293.00
5/18	190.00	9/14	530.00

<sup>19</sup> *Fees incurred in Customary Administrative Tasks*

4/7/09	\$ 360.00
4/8	930.00
4/10	10.00
4/13	245.00
4/14	20.00
4/15	40.00
4/16	40.00
4/17	20.00
4/22	31.00
4/24	40.00
4/28	20.00

The attorney fees charged for certain other services, however, cannot be allowed because they did not result in any practical benefit to the Milavitch estate. Throughout the time sheets there are numerous entries for working on the account or schedule of distribution. But the accountant conceded that he did not file a formal account due to the uncertainty of the assets that should be included. The task of filing a formal account, he suggested, should be left to his successor.<sup>20</sup> Moreover, the account that was filed was deficient in various aspects. It did not contain all the assets that the administrator believed belonged to the estate. It did not contain a statement of proposed distribution. It did not identify the issues that required adjudication or the particular assets in dispute. For these reasons, the fees charged for preparing the account and schedule of distribution—which were never filed—cannot be charged to the estate.

The accountant also claimed that much work was required to deal with the issues of the estate's three minor beneficiaries by preparing a petition for the appointment of a guardian *ad litem* to protect the minors' interests.<sup>21</sup> On cross-examination, however, he conceded that this petition was never actually filed.<sup>22</sup> Consequently, those fees cannot be charged to the estate.

Another aspect of the Milavitch estate that the administrator testified required a great deal of attorney work was “rehashing” the Pennsylvania Inheritance Tax form because there was information missing on the return prepared by the prior administratrix.<sup>23</sup> The results of these efforts, however, were never formalized in the filing of an amended inheritance tax return, and thus may not be charged to the estate.<sup>24</sup>

In explaining the basis for other claimed attorney fees, the administrator testified that much time was spent attempting to determine whether certain “in-trust” bank accounts in the

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<sup>20</sup> 2/2/10 N.T. at 34-36.

<sup>21</sup> 2/2/10 N.T. at 34.

<sup>22</sup> 2/2/10 N.T. at 55.

<sup>23</sup> 2/2/10 N.T. at 32.

<sup>24</sup> 2/2/10 N.T. at 56-57.

names of the decedent, his father (Samuel Milavitch) and Ms. Lombardo, belonged in the estate. He acknowledged, however, that these issues remain open to be determined either by his successor administrator or by the court.<sup>25</sup> Unfortunately, the exact accounts in dispute were not identified either at the hearing, in the account or the briefs.

At the hearing, moreover, Ms. Lombardo provided evidence that the Samuel Milavitch's name had been removed from an ostensibly disputed account with the Police and Fire Federal Credit Union in May 1999 and that Helen Lombardo remained as a joint owner of the Police and Fire Federal Credit Union Account together with her father.<sup>26</sup> Under Pennsylvania law, such signed signature cards have been held to create a prima facie case that the joint account was valid. Estate of Lux, 480 Pa. at 265, 389 A.2d at 1057. See generally 20 Pa.C.S. §6304(a). It appears, however, that this information was withheld from the administrator, thereby thwarting his efforts to garner the estate's assets.<sup>27</sup>

A more difficult issue is presented by the attorney fees incurred in responding to Ms. Lombardo's appeal from the decree of the Register of Wills. In her petition appealing the decree of the Register of Wills, Ms. Lombardo essentially sought to remove Mr. Klenk as administrator so that she could resume that role as Administratrix. It is well established that fees incurred in the successful defense of a fiduciary from a surcharge action are recoverable and may be charged to the estate. Browarsky Estate, 437 Pa. 282, 263 A.2d 365 (1970). Ms. Lombardo's petition, however, did not seek to surcharge the administrator but sought instead to replace him.

Unfortunately, there is a dearth of precedent as to whether the fees incurred in responding to Ms. Lombardo's petition can be charged to an estate. In some ways, such a

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<sup>25</sup> 2/2/10 N.T. at 39-42 (Klenk).

<sup>26</sup> See Ex. P-1 (August 20, 1009 letter from Mitchell Klein to Stephen Green) & P-2 (Police and Fire Federal Credit Union Application Agreement for account # 50673701).

<sup>27</sup> In his brief, the accountant states that Ms. Lombardo never gave this information to him prior to the hearing. 5/3/10 Administrator's Brief at 5-6.



defense might be analogized to a fiduciary's role in a will contest. It is well established, for instance, that a fiduciary cannot charge to the estate attorney fees he incurs by engaging in a will contest. This is because:

Such a contest is between the testamentary beneficiary and the heirs or next of kin. An executor therefore is not a party. He is not required to defend the will. If, however, the executor does engage in the contest, he must look for compensation to those who authorized him to engage therein.

Faust Estate, 364 Pa. 529, 530, 73 A.2d 369, 370-71 (1950).

One case that has addressed the distinctions between petitions to remove an executor and an executor's involvement in will contests is Coffin Estate, 16 Fid. Rep. 627, 633 (Bucks Cty. O.C. 1965). While the Coffin court upheld the long-standing principle that an executor cannot charge an estate for fees he incurred in a will contest, it concluded that fees and expenses incurred in the successful defense of a fiduciary against a petition for removal could be charged to the estate. In so doing, the Coffin the court analogized the successful defense of an executor against removal to a successful defense against surcharge because in both instances "he should be provided the wherewithal to protect himself from unjustified attack." Id. at 633.

In the instant case, however, the petition filed by Ms. Lombardo was not so much an attack against the administrator as an appeal from a decree which she claims was issued without a proper representation of her interests before the Register.<sup>28</sup> Moreover, the ultimate outcome of the petition was undetermined due to the resignation of Mr. Klenk. Nonetheless, a citation had been issued against the administrator in his official capacity, and it was therefore incumbent upon him to file a response. As a practical matter, if he had not done so, the issues would not have been framed for review. In contrast to a will contest, a fiduciary's response to a petition seeking his removal raises differing factual issues which must be addressed on a case by case

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<sup>28</sup> See, e.g., 6/9/09 Lombardo Petition for Citation to Appeal Register's Decree, ¶14 (misnumbered).

basis. Based on the present record, fees in the amount of \$2,262.50 incurred in filing an answer to that citation were therefore reasonably charged to the estate.<sup>29</sup>

Finally, there was testimony that the decedent had failed to pay income tax returns for three years so it was necessary to prepare those.<sup>30</sup> Ms. Lombardo has conceded that \$1,709 should be credited to the accountant for the preparation of tax returns,<sup>31</sup> and a review of the time sheets indicates that fees in the amount of \$2,606.50 can be attributed as reasonable for this tax work.<sup>32</sup> Expenses in the amount of \$267.80 were also reasonable. Based on the entire record presented, the accountant established that total fees and expenses in the amount of \$ 13,643.30 were reasonably charged to the estate. Those fees paid in excess of that amount which total \$ 10,431.58 shall be returned to the estate of Michael Milavitch, Sr., Deceased.

The account shall be returned unaudited.

***Conclusion***

The effort by the Register of Wills to resolve the disputes between the decedent's two children over the administration of his estate by appointing their respective attorneys as co-administrators of the estate did not succeed. The unresolved tension between the prior and successor administrators thwarted peaceful administration of the estate. The accountant

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<sup>29</sup> *Fees Related to Lombardo's 6/9/09 Petition for Citation to Appeal Register's Decree and to " Revoke Letters of Administration DBN Issued to Peter Klenk"*

6/29/09	\$360.00
8/11	80.00
8/12	660.00
9/8	950.00
9/10	212.50

<sup>30</sup> 2/2/10 N.T. at 32 (Klenk).

<sup>31</sup> 4/7/10 Objectant's Brief at 9.

<sup>32</sup> *Fees Attributable to Preparation of Income Tax Returns*

5/5/09	\$180.00
5/7	680.00
5/14	100.00
5/26	37.50
6/10	82.50
6/12	37.50
7/2	760.00
7/14	580.00
7/16	149.00

showed good judgment and behaved reasonably in resigning once it became clear that these disputes rendered administration of the estate by him costly and divisive. The attorney fees claimed, however, must be trimmed by the standard of reasonableness outlined in LaRocca.

Date:

BY THE COURT:

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John W. Herron, J.