

IN THE CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

In re: Estate of Eva Clark, an
incapacitated adult

Fiduciary No. FI-2006-0000936
Commissioner's Report

To the Honorable Judges of the Circuit Court of Fairfax County, Virginia:

On June 16, 2006, this Court entered an order appointing Needham Mitnick & Pollack, PLC as guardian and conservator over the estate of Eva Clark, an incapacitated adult. In its order of appointment, the Court directed that the fiduciary "shall be entitled to be compensated for services as fiduciary in connection with the administration of the Estate of Eva Clark at the then current hourly rate of the person performing the services at the time the services are rendered."

The fiduciary filed an inventory with your commissioner listing assets over which it has control as \$461,205.69. The fiduciary filed four accounts with your commissioner listing billing and disbursements for fiduciary compensation totaling \$180,586.80. The allowable fiduciary fee for the same period for an estate of this size under Court's Fiduciary Compensation Schedule for Conservator for Incapacitated Adult would be \$30,742.52. Your commissioner has approved the first account, but has not yet approved accounts two, three or four. The breakdown of fiduciary fees taken and guideline fiduciary fees for each account is as follows:

Account	Fiduciary Fees Taken	Guideline Fiduciary Fees
1 (4 month account)	\$49,665.15	\$2,442.57
2	\$29,845.48	\$6,560.59
3	\$85,903.99	\$11,539.33
4	\$15,172.18	\$10,198.03
Total	\$180,586.80	\$30,740.52

The fiduciary's fifth account is now due but not yet filed.

On July 24, 2009, your commissioner notified the fiduciary of concerns regarding the reasonableness of its compensation, noting that "[t]he above named estate is one in which the amount of fiduciary fees charged is significantly higher than the amount otherwise allowed by the Court's guidelines in similar situations." Your commissioner requested that the

fiduciary provide your commissioner with an analysis of the reasonableness of the fees using the criteria set forth in Virginia Rules of Professional Conduct 1.5. The fiduciary did not respond and your commissioner sent a further letter to the fiduciary on October 30, 2009, requesting a response to his July 24, 2009 inquiry.

On November 12, 2009, the fiduciary responded, indicating that the earlier letter had not been received as the fiduciary had relocated to a new address. The fiduciary noted that it was aware that the fees were high in this matter and referred your commissioner to earlier explanations of the fees that had accompanied the filing of each of the first three accounts. A similar explanation accompanied the fourth account.

The court order appointing the fiduciary permits the fiduciary to charge for its services “at the then current hourly rate of the person performing the services at the time the services are rendered.” Such Court authorization does not preclude your commissioner’s review of the reasonableness of those fees. The Virginia Code provides that the commissioner of accounts “shall have a general supervision of all fiduciaries admitted to qualify in such court or before the clerk thereof and make all ex parte settlements of their accounts.”¹ A commissioner, as a quasi-judicial officer charged with responsibility for fiduciary matters, has a duty to render a complete opinion on the matters that are before him. When a party brings an action to settle an account, the court has a duty “to try all the issues, administer full relief to the parties, and to either render an order for the amount found to be due, or to issue an order showing that there is nothing due. The court enjoys broad discretionary power in account matters to make any order or decree as justice requires.”² The commissioner of accounts has a similar duty. The Circuit Court for the City of Norfolk had occasion to consider the limitations upon the inquiries of the commissioner of accounts in the matter of *Trustee’s Sale of the Property of Willie Brown*.³ The Court stated

To perform his duties on behalf of the court, a Commissioner’s authority must extend to every aspect of law or fact related to a fiduciary’s duties, qualifications, and actions that may affect the rights of a beneficiary of an estate or a fund before him. No

¹ VA. CODE ANN. § 26-8.

² 1 AM. JUR. 2d *Accounts and Accountings* § 67 (2006).

³ 67 Va. Cir. 204 (2005).

question of law, equity, or disputed fact concerning an account should be insulated from a Commissioner's inquiry. Were a Commissioner of Accounts to be prohibited from considering such matters, how could he accurately and effectively assist the court?

Thus, within the scope of the commissioner's statutory duties, the commissioner has broad authority to address all the issues affecting those duties.

Judge Lamb described the commissioner of accounts eloquently, stating

If the probate courts are "the courts of widows and orphans", as they are sometimes called, the Commissioner of Accounts is the executive arm of the court, supporting the shield by which protection is afforded to those inadequately armed to protect themselves.⁴

Fundamental to the commissioner's oversight of fiduciaries is the review of the reasonableness of the fees fiduciaries charge. Virginia Code § 26-30 provides that "The commissioner, in stating and settling the account, shall allow the fiduciary any reasonable expenses incurred by him as such; and also, except in cases in which it is otherwise provided, a reasonable compensation . . ." In the *Estate of Hyman J. Fine*, the Circuit Court of the City of Norfolk reviewed the commissioner's determination to reduce Crestar Bank's executor's fee from the amount dictated in its standard fee schedule to an amount that the commissioner determined to be reasonable.⁵ The Court stated that the testator's agreement that the fee should be in accordance with the Bank's fee schedule did not establish a definite and ascertainable provision concerning the amount of the fee, as the fee schedule could change from time to time and there was no limit upon the amount of that fee.⁶ The Court held that

Absent a clear, definite provision setting the compensation of an executor, the Court had not only the authority but also the duty to inquire as to the reasonableness of the executor's

⁴ Lamb, VIRGINIA PROBATE PRACTICE § 107 (1957).

⁵ In re Estate of Hyman J. Fine, 41 Va. Cir. 597 (Norfolk Cir. Ct. 1995).

⁶ 41 Va. Cir. at 598-599.

compensation, This inquiry is normally done through the Commissioner of Accounts, the officer of the Court to whom this responsibility is delegated. His findings and recommendations are subject to review by the Court.⁷

In the opinion of your commissioner, when the Court authorizes a lawyer fiduciary to charge his or her standard hourly rate in connection with a matter under the supervision of your commissioner, the Court has not determined that that hourly rate is the standard for determining the reasonableness of compensation to that lawyer for acting as a fiduciary. To the contrary, any fee calculated pursuant to that hourly rate is indefinite, subject to change, and without limit as to amount. In such circumstances, the Court and its commissioner have both the authority and the duty to review the reasonableness of the fees which the lawyer fiduciary seeks.

Rule 1.5 of the Virginia Rules of Professional Conduct governs the determination of the reasonableness of a lawyer's fee.⁸ The rule requires that "a lawyer's fee shall be reasonable." In *Trotman v. Trotman*,⁹ the Court stated that the word "reasonable" as used in Virginia Code § 26-30 "is but another way of saying that they [commissions] are to be measured by the conscience of the court."¹⁰ While there is no hard and fast rule regarding the proper amount of fiduciary fees, the Court has stated that factors to be considered include: the value of the estate, the character of the work, the difficulties encountered, the results obtained, the responsibilities assumed, and the risks incurred.¹¹ These factors, however, do not stand alone. The Court has further instructed that said factors are to be evaluated in light of the fiduciary's duty to exercise "the highest fidelity and utmost good faith" in their administration of the estate.¹²

While Virginia law does not forbid a fiduciary from hiring his own company to perform services for the estate he is administering, the Virginia

⁷ In re Estate of Hyman J. Fine, 41 Va. Cir. 597, 599 (Norfolk Cir. Ct. 1995). It should be noted that in 2005, the General Assembly amended Virginia Code § 26-30 to provide an express provision authorizing the adoption of institutional fiduciaries fee schedules in a will or trust; nevertheless, the General Assembly still allowed review of that fee for reasonableness if "such compensation is excessive in light of the compensation institutional fiduciaries generally receive in similar situations."

⁸ See *Dickerson v. Ford Motor Company*, 74 Va. Cir. 509 (Roanoke Cir. Ct. 2008); *O'Neil v. Chrysler Corp.*, 54 Va. Cir. 64 (Loudoun Cir. Ct. 2000).

⁹ 148 Va. 860 (1927).

¹⁰ *Trotman* at 868

¹¹ *Pritchett v. First Nat. Bank of Danville*, 195 Va. 406, 432, 78 S.E.2d 650, 653 (1953)

¹² *Id.* at 412

Supreme Court has repeatedly stated that “[A fiduciary cannot] unite his personal and fiduciary character in the same transaction without consent of the *cestui que* trust.”¹³ Indeed, it is a long standing principle that

as long as the confidential relation lasts, the trustee or other fiduciary owes an undivided duty to his beneficiary, and cannot place himself in any other position which would subject him to conflicting duties, or expose him to the temptation of acting contrary to the best interests of his original *cestui que* trust. The rule applies alike to agents, partners, guardians, executors and administrators, directors and managing officers of corporations, as well as to technical trustees.¹⁴

When the fiduciary engages itself to perform services for the ward’s estate, it places itself in a position which inherently subjects it to conflicting duties.

Your commissioner has significant concerns about the reasonableness of the fees charged in connection with the first account that covered only a four month period. The fiduciary charged \$49,665.15 during that period. The Court’s guideline fee schedule for an estate of this size during that the first four months would be \$2,442.57. In the instant case, the fiduciary was also counsel for the petitioner in connection with the petition to appoint a conservator and guardian. Its billing included \$11,724.50 in fees related to the petition itself. The Court made no allowance for such fees in its order appointing the fiduciary. In its letter dated December 16, 2006, transmitting the first account, the fiduciary stated “[a]s you can see our bills for acting as Guardian and Conservator have been high because Mrs. Clark has required a great deal of hands on attention.” Based upon your commissioner’s review of the billing records in connection with the first account, the “hands on attention” consisted of items such as 5.6 hours primarily to drive the ward to McDonald’s and back home and visit with the ward in her home; 5.6 hours primarily to visit the ward and take her to an eyeglass center for repairs; 6.2 hours primarily to visit the ward and take her to the podiatrist; 13 hours to meet with a new caregiver, take the caregiver to get coffee, and wait with the ward to transport her to Woodburn; 4.3 hours to pick up the ward and transport her to Sunrise; and 3.25 hours on one occasion, 3.4 hours on another, and 1.75 hours on a third occasion to travel to the ward’s house, water the plants, check the dehumidifier, and collect mail. Nevertheless,

¹³ *Rowland v. Kable*, 174 Va. 343 at 368 (1940)

¹⁴ *Id.* at 367

your commissioner did approve the first account on December 3, 2007. Unlike decedent's estates, fiduciary fees in conservatorships are calculated separately for each accounting period. Your commissioner is of the opinion that his approval of the first account constrains his review of the fiduciary fees in that account. Therefore, your commissioner declines to revisit the reasonableness of those fees.

The fiduciary billed \$15,172.18 and received \$14,967.48 in the period covered in the fourth account (the balance of \$1,064.26 carrying over to the fifth account). The Court's guideline fee schedule for an estate of this size during that period would be \$10,198.03. Your commissioner is of the opinion that the difference between the amount charged in the fourth account and the Court's guideline fee schedule is not shocking to the conscience. Your commissioner therefore finds the fees charged in the fourth account to be reasonable without further review.

Your commissioner has significant concerns about the reasonableness of the fees charged in connection with the second and third accounts. The fiduciary received \$29,845.48 during the period covered in the second account. The fiduciary received \$85,903.99 during the period covered in the third account. There were significant differences between amounts billed and amounts paid during the period covered in the second and third accounts, as the ward's liquid assets had been exhausted and there were no funds with which to pay the fiduciary until the fiduciary sold the ward's house. This is set out in more detail hereinafter.

In its letter dated March 31, 2008, transmitting the second account the fiduciary provided two sets of bills - one related to litigation to sell the ward's home and the second related to its services as conservator and guardian. The billing for legal services in connection with the litigation totaled \$20,359.11. No payments were made in connection with these bills during the accounting period, leaving a balance unpaid of \$20,359.11. The billing for conservator and guardianship services for the second account totaled \$61,175.82. Of this sum, \$29,845.48 was disbursed in payments, leaving a balance unpaid of \$31,330.34. The Court's guideline fee schedule for an estate of this size during that period would be \$6,560.59. In its letter dated February 26, 2009, transmitting the third account, the fiduciary noted that the litigation expenses incurred during the period of the second account were paid during the period of the third account, after sale of the ward's house. Similarly, the outstanding unpaid balance of conservator and

guardian fees in the amount of \$31,330.34 was paid during the period covered in the third account. During that period the fiduciary billed \$35,074.10 in additional fees for conservator and guardian services, and received payment for \$34,214.54 of such services (the balance of \$859.56 carrying over to the fourth account). The Court's guideline fee schedule for an estate of this size during that period would be \$11,539.33.

In the March 31, 2008 letter the fiduciary explained that the litigation expenses were incurred when the Court required an evidentiary hearing upon the fiduciary's motion to sell the ward's house. The ward had indicated to the judge that she opposed the sale of her home. The fiduciary presented evidence of alternative costs for the in-home or institutional care of the ward, as well as medical testimony related to the ward's capabilities and recommended living environment. Your commissioner finds that the hourly rate at which the fiduciary billed for such services to be reasonable, in accordance with the Court's order of appointment. The sole issue before your commissioner is the number of hours billed. A detailed examination of the time records reveals preparation for the first hearing at which the sale was presented as an uncontested motion, significant time expended in preparation for the evidentiary hearing after the Court required such hearing and attendance at the evidentiary hearing. Your commissioner is reluctant to second-guess the trial preparation and strategy of counsel and finds the time expended to be within a reasonable range for preparation for a contested evidentiary hearing. Therefore, your commissioner finds the billing in connection with the legal services for the evidentiary hearing in the second account to be reasonable.

In the letter of March 31, 2008, the fiduciary again explained that the "bills for acting as Guardian and Conservator for Mrs. Clark continue to be high because Mrs. Clark is a "hands on" ward, i.e. needs lots of attention." Briefly, the fiduciary indicates that during the period covered in the second account the ward was sometimes uncooperative, that the family was dysfunctional, that the ward was aggressive to her suitemates, that she had health problems during the period, that the sale of the home was a difficult endeavor, and that the ward had a male companion who is also strong willed. In the fiduciary's letter dated February 26, 2009, the fiduciary explained the high fees as "Mrs. Clark continues to be a ward who needs lots of attention." During the period covered in the third account, the fiduciary emphasized health problems, the male companion and family issues as the main concerns.

The billing statements reported in the second and third accounts included services as guardian as well as legal services and conservator services. While legal services to the estate and the services that a conservator routinely performs, such as the management and investment of assets, the accounting for receipts and expenditures, and the protection of the ward's estate, involve professional judgment and require a certain level of expertise, not all the services that a guardian routinely performs require the same level of skill or judgment. The guardian of the person of the ward often acts as a companion, a caretaker, and a personal assistant to the ward. The tasks can be as routine as accompanying the ward on a shopping trip, planning a birthday party or scheduling a hair appointment.

This Court has adopted fiduciary compensation guidelines for conservators but not for guardians. The Code does provide that a guardian is entitled to reasonable compensation for his or her services.¹⁵ In the opinion of your commissioner, to the extent the conservator pays himself for services that the fiduciary rendered as guardian, there is an inherent conflict of interest which requires special scrutiny. *See discussion infra.* When the fiduciary engages itself to perform services for the ward's estate, it placed itself in a position which inherently subjected it to conflicting duties.

As a general rule, when the conservator and the guardian are the same person, your commissioner requires separate time records to support fees for guardian services. Moreover, as a general rule, your commissioner does not allow a professional fiduciary to charge at his or her professional hourly rate for guardian services. It is the opinion of your commissioner that any such compensation paid to a professional fiduciary serving as guardian should be commensurate with the fees charged by lay firms or individuals who routinely provide such services. In the instant case, the Court has allowed that the fiduciary may bill for guardian services at its hourly rate; however, these fees must be reasonable and the Virginia Supreme Court has determined that any fees must be evaluated in light of the fiduciary's duty to exercise "the highest fidelity and utmost good faith" in their administration of the estate.¹⁶

¹⁵ VA. CODE ANN. § 37.2-1022.

¹⁶ *Pritchett v. First Nat. Bank of Danville*, 195 Va. 406 at 412 (1953).

In the instant case, the fiduciary has, as a part of its duties and as a part of its charges to the ward's estate in the second and third accounts, managed family visits with the ward, assisted the ward in selecting personal belongings to take to assisted living, shopped at Home Depot for downspouts, made arrangements for the ward's Christmas outing, shoveled the walkway at the house, counseled the ward on her treatment of her suitemate, supervised home movers, waited two hours for the gas company to come to the home, scheduled appliance repairs and supervised those repairs, moved the ward to a new room and hanged her pictures, traveled to the home to meet a tow truck, visited the ward, discussed among the fiduciary's principals how to deal with administration of laxative to the ward, test drove the ward's car with a potential buyer, and counseled the ward and managed surgical procedures and subsequent rehabilitation, including waiting at the hospital during the procedures. These are necessary and reasonable services for the care and maintenance of the ward; however, it is neither necessary nor reasonable that such services be performed by lawyers billing at \$250 per hour.

A conservator has a fiduciary duty to manage the property of his ward with "the judgment of care, skill, prudence and diligence . . . that a prudent person familiar with such matters and acting in his own behalf would exercise . . ." ¹⁷ In the opinion of your commissioner, it is reasonable that the fiduciary charge its normal hourly rate for the management of guardian services and for undertaking those guardian services that require professional skill and judgment; however, not all guardian services require such professional skill and judgment. In the case of guardian services that require no professional skill or judgment, such services are more properly delegated to commercial services which bill at substantially lesser rates, usually, in the experience of your commissioner, between \$25 to \$50 per hour. ¹⁸ Rates for managers of such care services are also less than the fiduciary's hourly rates, usually in the experience of your commissioner between \$70 to \$100 per hour. ¹⁹ The fiduciary has recognized the requirements of prudent management, using the services of a geriatric care management agency and placing the ward in an assisted living facility to

¹⁷ VA. CODE ANN. § 26-45.1.

¹⁸ According to the American Association of Homes and Services for the Aging, the national average hourly rate in 2008 for a certified home health aide was \$32. The average hourly rate for non-certified workers was \$19.

¹⁹ *Cf.* In re Larry Banton, FI-2004-72484, CL-2006-999, Circuit Court of Fairfax County (Letter opinion dated June 26, 2007)(allowed \$70 per hour as "reasonable fee").

reduce costs in many instances. Nevertheless, there are significant charges at the fiduciary's hourly rate for services not requiring professional judgment or expertise.

The fiduciary does not distinguish in its billing between its services as a conservator and those as a guardian. Its individual time entries may often contain overlapping services under a single entry. Your commissioner has reviewed the bills in detail and it is his best estimate that the billing records reflect charges for guardian services equal to approximately 46% of the total billed; conservator services represent approximately 54% of the total billed. Based upon that estimate, \$44,095.52 of the fiduciary's charges in the periods covered in the second and third accounts would be for guardian services and your commissioner so finds.

To the extent that the fiduciary elects to perform such services through legal professionals, it has a fiduciary duty to the ward not to bill at rates in excess of those rates commercially available for the same services. As the Circuit Court of Warren County decided in the *Estate of Beulah Mae Stokes*,²⁰ when a fiduciary engages services at a rate significantly above the market rate charges for such services, the fiduciary fails to manage the estate with reasonable prudence. In such cases, the fiduciary will be responsible for the difference between the rates charged to the estate and the market rates for the same services.²¹

In the instant case, the fiduciary billed \$44,095.52 for guardianship services at rates 2 to 5 times as high as market rates for the same services. Your commissioner finds that such charges are unreasonable and not a prudent management of the ward's estate notwithstanding the Court's authorization that the fiduciary may bill for guardian services at its usual and customary hourly rate. In the opinion of your commissioner, a fee of \$15,000 is a reasonable fee for the guardian services that the fiduciary rendered to the ward as reported on the second account. The fiduciary is directed to restore the sum of \$29,095.52 to the ward's estate.

In the second and third account, after deduction of the fees for litigation and for services as guardian, the fiduciary reports \$52,154.40 in fees in connection with its role as conservator. Your commissioner finds

²⁰ In re Estate of Beulah Mae Stokes, 37 Va. Cir. 3 (Warren County 1995).

²¹ Accord, In re Larry Banton, FI-2004-72484, CL-2006-999, Circuit Court of Fairfax County (Letter opinion dated June 26, 2007).

that the hourly rate at which the fiduciary billed for such services to be reasonable, in accordance with the Court's order of appointment. Your commissioner is concerned, however, with the hours billed. The fiduciary notes a number of problems related to the estate, but most of these problems related to guardianship issues or litigation issues, for which the fiduciary is amply compensated. Issues affecting the conservatorship itself, such as market difficulties in selling the home were not unusual for any fiduciary during this time period. A detailed examination of the time records reveals charges disproportionate to the services in many instances. The estate required the issuance of about 12 checks each month, one of which was payable to the fiduciary. Other than the sale of the home and the administration of the fiduciary's chosen account manager, there were not significant additional tasks to consume the fiduciary's time. The fiduciary noted that certain of the ward's relatives complicated its role; however, your commissioner finds that such conflicts are not unusual or novel in the administration of a conservatorship and there is nothing that the fiduciary has presented that indicates any undue complication in the estate.

Your commissioner is of the opinion that the analysis of Judge Ney in *Unger v. Beatty*²² is on all fours with the instant case. Judge Ney stated

The major reservation the Court has with the amount of fees claimed is that the total amount of the fees - albeit legitimately incurred - seem out of proportion to the nature of the lawsuit. The underlying suit, its successful defense, the fee claim were straightforward matters involving nothing especially complex. Simply put, this litigation should not have cost this much.²³

In the instant case, this administration should not have cost this much. The total amount of the fees is out of proportion to the size of the estate and the administration was a straightforward matter involving nothing especially complex. As the Circuit Court of the City of Richmond noted, in *Iuorno v. Ford Motor Co.*, "[a]ttorneys should not be rewarded for excessively working a case simply because they know that their requested fees will be forthcoming."²⁴ This is the general rule throughout the United States.²⁵

²² 52 Va. Cir. 289 (Fairfax 2000).

²³ 52 Va. at 293.

²⁴ 40 Va. Cir. 387 (1996).

²⁵ See, e.g., *In re Comstock*, 664 N.E.2d 1165 (Ind. 1996); *In re Estate of Langland*, 2006 WL 1752261 (Mich. Ct. App. 2006); *In re Coffey's Case*, 880 A.2d 403 (N.H. 2005); *In re Dorothy*, 605 N.W.2d 493 (S.D. 2000).

Simply put, there was nothing novel or difficult in the instant proceeding; the fees charged exceeded the fee guidelines that this Court adopted more than threefold; the fees exhausted the liquid resources of the ward; there was no long term professional relationship with the ward; and the fiduciary bore no risk for payment of its fees other than its own actions in exhausting the ward's estate.²⁶ Your commissioner finds that the charges for conservatorship services in this estate are unreasonable and not a prudent management of the ward's estate notwithstanding the Court's authorization that the fiduciary may bill for conservatorship services at its usual and customary hourly rate. Your commissioner is of the opinion that a reasonable fee for the services rendered is \$30,000.00. The fiduciary is directed to reduce its claim for conservator services to the ward's estate by the sum of \$22,154.40.

In summary, your commissioner finds that the fiduciary is entitled to reasonable compensation for the periods covered in the second and third accounts as follows: for legal services rendered to the above estate: \$20,359.11; for conservator services rendered to the above estate: \$30,000.00; and for guardian services rendered to the above estate: \$15,000, a total of \$65,359.11. The fiduciary has been paid \$116,609.03. Your commissioner directs that the fiduciary restore to the ward's estate the sum of \$51,249.92. There remain outstanding exceptions to the second and third accounts that prevent the approval of the accounts at this time.

Your commissioner is of the further opinion that any fees, costs or expenses incurred in any objection to the findings in this report as to the reasonableness of the fiduciary fees are not properly expenses of the estate. Your commissioner directs that the fiduciary may not bill for its time or for any expense it may incur with respect to any exception to this report or other objection to the determination of reasonable fees herein without the express authorization of the Court or your commissioner.

²⁶ See Rule 1.5, Virginia Rules of Professional Conduct, setting out eight factors to be considered in determining the reasonableness of attorney's fees.

Respectfully submitted this 18th day of March, 2011.

John H. Rust, Jr.
Commissioner of Accounts
19th Judicial Circuit

CERTIFICATE OF MAILING

I hereby certify that on this 18th day of March, 2011, a true and correct copy of the above Commissioner's Report was mailed, first-class mail, postage prepaid, to the following persons at the addresses shown below:

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