

IN THE CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

In re: Estate of Edward Cynar, an
incapacitated adult

Fiduciary No. FI-2007-0002070
Commissioner's Report

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

On December 28, 2007, this Court entered an order appointing Needham Mitnick & Pollack, PLC as guardian and conservator over the estate of Edward Cynar, an incapacitated adult. In its order of appointment, the Court directed that the fiduciary "shall be entitled to compensation for its services as fiduciary in connection with the administration of the Estate of Edward Cynar 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 \$992,415.95. The fiduciary filed a first, second and third account with your commissioner listing disbursements for fiduciary compensation totaling \$43,694.26. 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 \$23,487.70. Your commissioner has approved the first account but has not yet approved the second and third accounts.

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 \$19,725.87 during that period. The Court's guideline fee schedule for an estate of this size during that the first four months would be \$3,846.26. Nevertheless, your commissioner did approve the first account on December 9, 2008. 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.

On March 18, 2010, your commissioner notified the fiduciary of concerns regarding the reasonableness of its compensation in the second account. Your commissioner requested the fiduciary provide your commissioner with a categorization of the fees whether they were for

guardian, conservator or legal services; and to 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.

On April 12, 2010, the fiduciary responded to your commissioner. The fiduciary challenged whether your commissioner had the authority to require such a review, stating that “[t]he court order permits us to charge at our hourly rate for fiduciary services.” Your commissioner respectfully disagrees. 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 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.

¹ VA. CODE ANN. § 26-8.

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

³ 67 Va. Cir. 204 (2005).

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 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 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

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.

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.”

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.

In its response of April 12, 2010, the fiduciary did address your commissioner's questions with regard to the fees billed in the second account. The fiduciary indicated that expenses advanced on behalf of the ward for postage, carpet cleaning and furnace repair were included in the legal bills and that the actual fiduciary fees charged were \$12,672.50. Of this amount, the fiduciary estimated that \$9,800.00 represented fees in connection with its role as conservator and \$2,872.50 were fees related to its role as guardian. The fiduciary noted that its billing system did not permit it to distinguish between services by category and that the allocation was "our best estimate of how our time has been allocated between our work as Guardian and as Conservator." As the conservatorship fees reported in the second account are within this Court's guideline fee schedule, your commissioner approves the conservatorship fees in the amount of \$9,800.00 shown in the second account.

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." Your commissioner notes that the fiduciary makes no distinction in its hourly rates between conservatorship and guardian services. While 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

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).

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.⁹ 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. While Virginia law does not forbid a fiduciary from hiring his own company to perform services for the estate he is administering, the Virginia 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.”¹⁰ 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.¹¹

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.

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 charge 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

⁹ VA. CODE ANN. § 37.2-1022.

¹⁰ *Rowland v. Kable*, 174 Va. 343 at 368 (1940)

¹¹ *Id.* at 367

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.¹²

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, arranged for care of the ward's pet, driven the ward to the grocery store, visited the ward's neighbors, scheduled veterinarian appointments, issued change of address letters, visited the ward and his caregivers, made arrangements for appliance and plumbing repairs, trimming of shrubs, and the ward's birthday party, prepared instructions on cleaning the dryer's lint trap, and renewed dog licenses. 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 . . ." ¹³ 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. ¹⁴ 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. ¹⁵ The fiduciary has recognized the requirements of prudent management, noting that "we use the services of a geriatric care management agency to reduce costs in many instances." Nevertheless, there are substantial fees incurred at professional rates for non-professional services.

¹² *Pritchett v. First Nat. Bank of Danville*, 195 Va. 406 at 412 (1953).

¹³ VA. CODE ANN. § 26-45.1.

¹⁴ 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.

¹⁵ *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").

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*,¹⁶ 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.¹⁷

In the instant case, the fiduciary billed \$2,872.50 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 \$1,000 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 \$1,872.50 to the ward's estate.

Your commissioner notes that the fiduciary has filed a third account in this estate showing fiduciary fees of \$10,489.52. The Court's guideline fee schedule for an estate of this size during that period would be \$9,137.19. The fiduciary is directed to provide your commissioner with similar information to that provided in connection with the fiduciary fees in the second account, to-wit: a categorization of the fees whether they were for guardian, conservator or legal services; and an analysis of the reasonableness of the fees using the criteria set forth in Virginia Rules of Professional Conduct 1.5.

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.

¹⁶ In re Estate of Beulah Mae Stokes, 37 Va. Cir. 3 (Warren County 1995).

¹⁷ *Accord*, In re Larry Banton, FI-2004-72484, CL-2006-999, Circuit Court of Fairfax County (Letter opinion dated June 26, 2007).

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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