

IN THE CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

In re: Estate of Herta Schofield, an incapacitated adult | Commissioner's Report
Fiduciary No. FI-2009-0000407

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

On March 6, 2009, this Court entered an order appointing Needham Mitnick & Pollack, PLC as guardian and conservator over the estate of Herta Schofield, an incapacitated adult. In its order of appointment, the Court directed that the fiduciary "shall be compensated for services as fiduciary in connection with the administration of the Estate of Herta Schofield 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 \$56,157.85. The fiduciary filed two accounts with your commissioner listing billing for fiduciary compensation totaling \$38,253.47 and disbursements for such services of \$37,775.04, with a balance of \$478.43 carried forward to the third account. 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 \$8,667.57. Your commissioner has not yet approved the two accounts. The breakdown of fiduciary fees taken and guideline fiduciary fees for each account is as follows:

Account	Fiduciary Fees Billed	Guideline Fiduciary Fees
1 (4 month account)	\$18,159.26	\$1,774.85
2	\$20,094.21	\$6,892.72
Total	\$38,253.47	\$8,667.57

The fiduciary's third account is not yet due.

On March 25, 2010, your commissioner advised the fiduciary of concerns regarding the reasonableness of its compensation in the first account, noting that "[t]he fees charged for fiduciary services are well outside of the court's guidelines." 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.

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.” The fiduciary states that “[d]espite the Order’s language we are denied the right to compensate ourselves according to its terms for the services we have performed. If you believe any of the services were unnecessary we request that you bring those specifically to our attention.” Your commissioner respectfully disagrees. The Court authorization to bill at hourly rates 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 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?

¹ VA. CODE ANN. § 26-8.

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

³ 67 Va. Cir. 204 (2005).

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 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

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 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 principal that

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

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

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 two accounts. During the first account period that covered only four months, the fiduciary charged \$18,159.26 during that period. The Court's guideline fee schedule for an estate of this size during that the first four months would be \$1,774.85. Your commissioner does recognize that disproportionate time is required at the beginning of a conservatorship to take charge of the assets of the ward and arrange for his care; however, an allowance of disproportionate charges is not the same as an allowance of exorbitant charges. In the second account, the fiduciary billed \$20,000. The Court's guideline fee schedule for an estate of this size during that period would be \$6,892.72. There were significant differences between amounts billed and amounts paid during the period covered in the first and second accounts, as the ward's liquid assets were exhausted and there were no funds with which to pay the fiduciary until the fiduciary placed a reverse mortgage upon the ward's house.

On May 27, 2010, the fiduciary responded to your commissioner's inquiry concerning the first account, indicating that the fiduciary expended considerable time and effort "to provide Ms. Schofield both the supportive services and financial means to remain living at home, as Ms. Schofield requested." The correspondence addressed services the fiduciary rendered in connection with the ward's medical needs, daily care, maintenance of her home, and transfer of her financial accounts to the control of the fiduciary. In particular, the fiduciary noted that it had arranged for placement of a reverse mortgage on the ward's home to facilitate her remaining in the home. The fiduciary noted that this work constituted legal work on behalf of the ward. On September 3, 2010, the fiduciary supplemented its explanation

¹⁴ *Id.* at 367

with a breakdown of fees among legal, conservator and guardian services. This breakdown included bill for July 2009 which is reported as a part of the second account. For purposes of the allocation, your commissioner has excluded those amounts related to that billing. The fiduciary reports total billing of \$17,535.00 (\$624.26 represented out of pocket expenses), allocated as follows: conservator fees - \$6,622.00; guardian fees - \$8,363.00, and legal fees - \$2,550.00. 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 well as legal work." The fiduciary stated that "we are bothered by your assertion that we have been paid more than 30% of the value of the estate." The fiduciary argued that the value of the real estate should be included in its fee calculation as it was maintaining the property. The fiduciary did not have a power of sale over the real estate.

On January 14, 2011, the fiduciary provided an explanation of the fees charged in the second account, indicating that total fees were \$20,000.00 (\$94.21 represented billing for out of pocket expenses), allocated between conservator services: \$12,601.25, guardian services: \$5,936.25 and legal fees: \$1,462.50. 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." The fiduciary noted that the conservator services included work related to maintenance of the ward's home. The fiduciary also noted that the ward resented her loss of independence that made the fiduciary's work more difficult. The fiduciary noted that "[w]e had to spend time developing a relationship with [the ward] so we could obtain information without further upsetting her."

The fiduciary reports legal services in the first account in the amount of \$2,550.00 and legal services in the second account of \$1,462.50, both amounts principally in connection with the placement of a reverse mortgage on the ward's property. Your commissioner is of the opinion that the fiduciary's hourly rate for legal services was reasonable, as set forth in the Court's order, and that the services were reasonably necessary to the administration of the estate and were in proportion to the task at hand. Therefore, your commissioner finds the legal fees in the first and second account to be reasonable and your commissioner approves the same.

In the first account, the fiduciary reports fees for guardian services of \$8,363.00. In the second account, the fiduciary reports fees for guardian services of \$5,936.25. 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

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 first and second accounts,

¹⁵ VA. CODE ANN. § 37.2-1022.

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

scheduled medical appointments and consulted with physicians concerning those appointments, met with the ward and her neighbors, made application for an Alzheimer's bracelet, scheduled automobile service, made arrangements for Sunday outings, waited with the ward at the hospital for various tests to be performed, made arrangements for Thanksgiving celebrations, and arranged for dental services. 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 to reduce costs in many instances. Nevertheless, there are significant charges at the fiduciary's hourly rate for services not requiring professional judgment or expertise.

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

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").

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

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 \$14,299.25 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 \$5,000.00 is a reasonable fee for the guardian services that the fiduciary rendered to the ward as reported in the first and second accounts. The fiduciary is directed to restore the sum of \$9,299.25 to the ward's estate.

In the first account, the fiduciary reports after deduction of the fees for legal services and for services as guardian, the fiduciary reports \$6,622.00 in fees in connection with its role as conservator. The Court's guideline conservator fee schedule for an estate of this size during that the first four months would be \$1,774.85. 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. Your commissioner does recognize that disproportionate time is required at the beginning of a conservatorship to take charge of the assets of the ward and arrange for his care. While your commissioner is of the opinion that the total charges made by the fiduciary in the first account are excessive, your commissioner is also of the opinion that the fiduciary's fees are within an acceptable range for the commencement of a conservatorship of this size and nature. Your commissioner finds the fees for conservator services in the first account to be reasonable.

In the second account, the fiduciary reports fees for conservator services of \$12,601.25. The Court's guideline fee schedule for an estate of this size during that period would be \$6,892.72. 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. Your commissioner is concerned, however, with the hours billed. The fiduciary

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

notes a number of problems related to the estate, but most of these problems related to guardianship issues, for which the fiduciary is amply compensated. Issues affecting the conservatorship itself, such as the inability to obtain information from the ward are not unusual for any conservator. A detailed examination of the time records reveals charges disproportionate to the services in many instances. By way of example, the fiduciary spent 4.6 hours negotiating with a car dealer to sell the ward's used car, 0.8 hours researching appraisal procedures at Carmax and making an appointment, and an additional 9.0 hours organizing paperwork and delivering the car to Carmax for an appraisal. The total charge for these services was \$2,362.50. The car sold for \$4,000.00. The billing records are replete with similar examples.

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

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 twofold; the fees paid to the fiduciary exhausted the liquid resources of the ward and required the placement of a reverse

²² 52 Va. Cir. 289 (Fairfax 2000).

²³ 52 Va. at 293.

²⁴ 40 Va. Cir. 387 (1996).

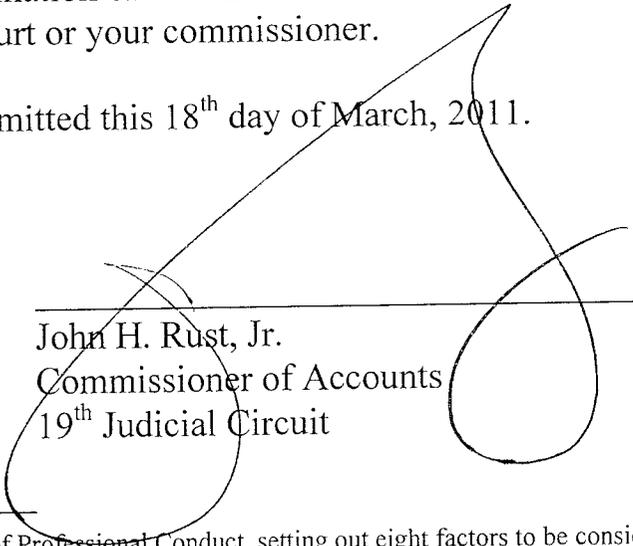
²⁵ See, e.g., *In re Comstock*, 664 N.E.2d 1165 (Ind. 1996); *In re Estate of Langland*, 2006 WL 1752261 (Mich. Ct. App. 2006); *In re Coffey's Case*, 880 A.2d 403 (N.H. 2005); *In re Dorothy*, 605 N.W.2d 493 (S.D. 2000).

mortgage on the home; 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 the second account 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 \$7,500.00. The fiduciary is directed to reduce its claim for conservator services to the ward's estate by the sum of \$5,101.25.

In summary, your commissioner finds that the fiduciary is entitled to reasonable compensation for the periods covered in the first and second accounts as follows: for legal services rendered to the above estate: \$4,012.50; for conservator services rendered to the above estate: \$14,122.00; and for guardian services rendered to the above estate: \$5,000.00, a total of \$23,134.50. The fiduciary has billed \$37,535.00. Your commissioner directs that the fiduciary restore to the ward's estate the sum of \$14,400.50. There remain outstanding exceptions to the first and second 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.

Respectfully submitted this 18th day of March, 2011.



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

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.

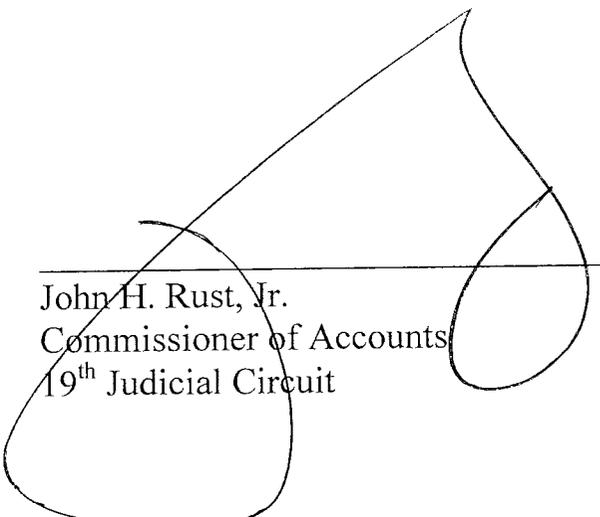
CERTIFICATE OF MAILING

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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