

IN THE CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

In re: Wallace C. Love, deceased

Commissioner's Report
Fiduciary No. FI-2007-0001152

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

On July 11, 2007, Needham Mitnick & Pollack, PLC qualified before this Court as administrator of estate of Wallace C. Love, deceased. The fiduciary filed an inventory with your commissioner listing assets over which it has control as \$560,405.69, which your commissioner approved on December 20, 2007. The fiduciary has filed two accounts with your commissioner, neither of which has been approved. The fiduciary has not yet filed the third account which was due on November 21, 2010.

In the first and second account, the fiduciary reported billing for fiduciary compensation totaling \$82,058.92 and disbursements for such services of \$80,544.03, with a balance of \$1,514.89 carried forward to the final account. The fiduciary provided your commissioner with a proposed schedule of distribution for the final account showing a proposed disbursement of an additional \$6,500.00 to the fiduciary for fees and expenses. Thus, the fiduciary has paid itself or proposes to pay itself a total compensation for this estate of \$88,558.92. The allowable fiduciary fee for an estate of this size under Court's Fiduciary Compensation Schedule for Executors and Administrators would be \$27,094.45.

On April 14, 2009, your commissioner advised the fiduciary that your commissioner would approve fiduciary fees in the amount of \$13,867.84 incurred in the pursuit of certain estate litigation. The fiduciary charged approximately \$8,676.84 seeking to recover \$50,000 from the decedent's former attorney-in-fact. This litigation was settled for a payment from the former attorney-in-fact of \$17,000, together with a promissory note for an additional \$8,000.00. The fiduciary charged approximately \$5,191.00 additional to evict one of the heirs from the decedent's condominium so that the unit could be sold.

In that same letter, your commissioner advised the fiduciary that the other fees shown and proposed were "significantly higher than the amount otherwise allowed by the Court's guidelines in similar situations." Your commissioner requested 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.

On May 5, 2009, the fiduciary responded, attaching two prior letters in the estate file addressing estate issues. These letters dealt with the litigation matters, difficulties in marshalling the decedent's assets, and attempting to address issues with unmarketable timeshare units. In the fiduciary's letter of May 5, 2009, the fiduciary discussed these matters again and indicated that "we spent considerable amount of time dealing with the beneficiaries and sorting out how to distribute the balance of the Estate." The decedent died intestate, leaving his two siblings as his sole heirs at law. One of the heirs was effectively homeless and difficult to contact. The fiduciary obtained the heir's consent to receive distributions through a Custodial Trust established with her sister as trustee.

The fiduciary notes that it entered into a Retainer Agreement with one of the two heirs-at-law providing for payment at its hourly rate. The agreement is between Rose Ford and the fiduciary. It provides that the heir has engaged the fiduciary to perform its fiduciary duties as administrator of the estate and that the heir agrees to pay the fiduciary at its hourly rate. Your commissioner notes that such an agreement does not bind the remaining heir at law, nor does it override the Court's guidelines for fiduciary compensation. Your commissioner notes that the fiduciary evicted the non-signatory heir from the premises when she was the tenant in common in possession of the real estate. Your commissioner has some question whether the Retainer Agreement is appropriate in light of the inherent conflict between the duty of the fiduciary to the estate as a whole and the representation of the interest of only one of the two heirs.

In the opinion of your Commissioner, an agreement with less than all the heirs at law of an intestate estate does not constrain the Court's duty to determine whether the fees charged in that estate are reasonable. Even in cases in which the Court expressly authorizes a fiduciary to bill at hourly rates, the commissioner has the authority and the responsibility to 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

¹ VA. CODE ANN. § 26-8.

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.

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

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

³ 67 Va. Cir. 204 (2005).

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

§ 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

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 the instant case, in which there is no authority to bill at hourly rates and where the Court has established specific guidelines for fiduciary compensation, the fiduciary compensation is subject to your commissioner's

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.”

review. To the extent that the Court may determine the fees to be unreasonable, it is without prejudice to the fiduciary to seek to enforce its Retainer Agreement against the signatory to that agreement.

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

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

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)

¹⁴ *Id.* at 367

When the fiduciary engages itself to perform services for the decedent'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 this estate. In the first and second accounts, after deduction of the fees for legal services, the fiduciary reports \$65,978.85 in fees in connection with its role as administrator. It seeks an additional \$6,500.00 at the time of the filing of the final account. The allowable fiduciary fee for an estate of this size under Court's Fiduciary Compensation Schedule for Executors and Administrators would be \$27,094.45. The fiduciary notes a number of problems in the administration of the estate, but most of these problems relate to litigation issues, for which the fiduciary is amply compensated. Issues affecting the estate itself, such as the sale of real estate and marshalling of assets are not unusual for any administrator with power of sale over real estate. The only novel issue presented was the extrication of the estate from the ongoing costs of two timeshare units. Your commissioner approved the exchange of those units for a smaller less expensive unit in correspondence with the fiduciary on March 4, 2008.

A detailed examination of the time records reveals charges disproportionate to the services rendered in many instances. By way of example,

1. The fiduciary discovered that the decedent's mother still had property in her own name, despite her death ten years earlier. The assets were investment funds with a value of \$5,269.45. The fiduciary qualified on the mother's estate for the after-discovered assets, obtained the assets, and paid the sum of \$5,269.45 into the estate of Wallace C. Love. The fiduciary showed no fees paid in connection with the mother's estate. For its services, the fiduciary charged the estate of Wallace C. Love the sum of \$4,232.26 in fees and costs, which billing is at variance with the Court's fiduciary fee guidelines for an estate the size of the mother's estate. The net recovery to the decedent's estate was \$1,037.19.
2. The decedent died intestate. The probate estate consisted of \$205,405.69, most of which was held in liquid assets. The decedent's real estate was listed on the inventory at \$355,000.00. The real estate passed by operation of law to the heirs at law. In the two accounts

filed with your commissioner, the fiduciary reported total disbursements of \$145,231.41. Payments to the fiduciary accounted for \$80,544.03 of that amount. Thus, there were only expenses and charges to the estate of \$64,687.38 in excess of the fiduciary's bills. Therefore, the estate had ample liquid assets with which to satisfy its debts and obligations. The fiduciary sought and received authority from the Court to sell the real estate. A detailed examination of the billing records of the fiduciary reveals that the fiduciary spent 95.13 hours and billed \$20,711.75 to the estate for its services in connection with the management and sale of the real estate that passed by operation of law directly to the heirs at law. This is in addition to the \$5,191 billed in seeking the eviction of one of the heirs at law from the condominium. By comparison, the real estate agent that handled the sale of the real estate took a 6% commission of \$15,600.

3. The decedent owned a motor vehicle which the estate sold for \$16,000. A review of the billing records of the fiduciary shows that the fiduciary spent 9.6 hours and billed \$1,417 in connection with the sale of the automobile.
4. The fiduciary billed \$891.84 to the estate as interest charges upon its unpaid bills.

Your commissioner is of the opinion that the analysis of Judge Ney in *Unger v. Beatty*¹⁵ 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.¹⁶

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

¹⁵ 52 Va. Cir. 289 (Fairfax 2000).

¹⁶ 52 Va. at 293.

working a case simply because they know that their requested fees will be forthcoming.”¹⁷ This is the general rule throughout the United States.¹⁸

Simply put, there was nothing novel or difficult in the instant proceeding; the fees charged exceeded the combined fee guidelines that this Court adopted more than twofold; the fees paid to the fiduciary exhausted the liquid resources of the estate and appear to be the principal reason for the sale of the decedent's real estate; there was no long term professional relationship with the decedent; and the fiduciary bore no risk for payment of its fees other than its own actions in exhausting the decedent's estate.¹⁹ Your commissioner finds that the charges for fiduciary services in this estate are unreasonable and not a prudent management of the decedent's estate notwithstanding any agreement between the fiduciary and one of the heirs at law that the fiduciary may bill for its services at its usual and customary hourly rate. Your commissioner is of the opinion that a reasonable fee for the services rendered is \$35,000.00. The fiduciary is directed to restore to the decedent's estate the sum of \$30,978.85. In the opinion of your commissioner, the fiduciary is not entitled to any further compensation in this estate but is required to complete its administration and to file a final account. There remain outstanding exceptions to the first and second accounts that prevent the approval of the accounts at this time.

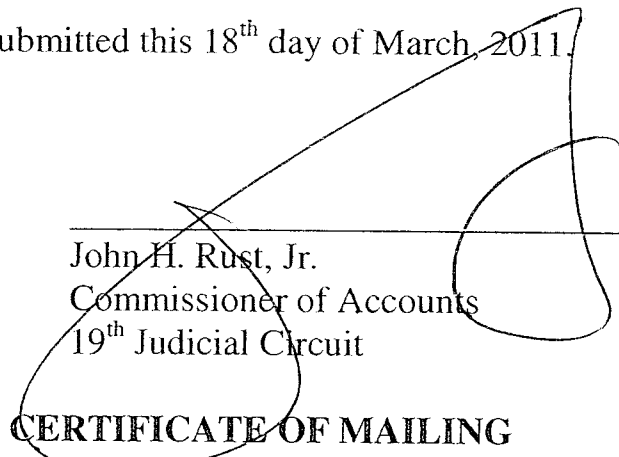
Your commissioner is of the further opinion that any fees, costs or expenses incurred in any objection to the findings in this report as to the reasonableness of the fiduciary fees are not properly expenses of the estate. Your commissioner directs that the fiduciary may not bill for its time or for any 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.

¹⁷ 40 Va. Cir. 387 (1996).

¹⁸ *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).

¹⁹ *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

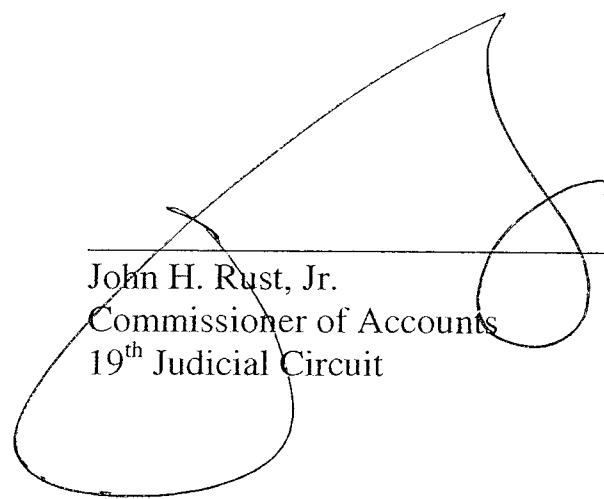
CERTIFICATE OF MAILING

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:

Needham, Mitnick & Pollack
1003 West Broad Street
Suite 200
Falls Church, VA 22046

Liberty Mutual Insurance Company
c/o Corporation Service Co.
11 S. 12th St.
P.O. Box 1463
Richmond, VA 23218

Liberty Mutual Insurance
Company
c/o Grimes Insurance Agency
P. O. Box 111
Fairfax, VA 22038



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