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Designated by Order of the Court for the publication of court and other legal notices, the Franklin County Legal Journal (USPS 378-950), 100 Lincoln Way East, Chambersburg, Franklin County, PA 17201–2291, contains reports of cases decided by the various divisions of the Franklin County Branch of the Court of Common Pleas of the 39th Judicial District of Pennsylvania and selected cases from other counties.

In Re: Estate of Elmer E. Naugle
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch, Orphans Court Division No. 152-OC-2009

HEADNOTES

Estates – Legal Fees – Fee Schedule

1. The legislature has delegated legislative authority to the court to create a graduated fee schedule.

2. To this court's knowledge the judges of the 39th Judicial District have never adopted a fee schedule since the enactment of 20 Pa.C.S. § 3537.

3. Pennsylvania Supreme Court has established certain parameters for corporate fiduciaries fees, which are adequate precedent. In re Reed's Estate, 462 Pa. 336, 341 A.2d 108 (Pa. 1975).

4. A majority of practitioners usually submit accounts which request approval of executor and attorney's fees consistent with the schedule outlined in Johnson Estate, 4 Fiduc.Rep. 2d 6 (Chest.1983).

5. A 3% executors fee is an acceptable administration fee as a minimum percentage fee from which all other graduated fees could be derived, although it should be taken only as a "rule of thumb" because the "true test" is "what the services actually were worth." Where "there is evidence that the services are actually worth more or less than what is prima facie reasonable…the amount of compensation may be increased or decreased accordingly." In re Reed's Estate, 462 Pa. 336, 341 A.2d 108 (Pa. 1975).

Estates – Legal Fees – Court Approval & Review

1. Astute practitioners file detailed explanations of the reasoning for a requested fee along with the accounting, which may quickly allay any concerns the court may have regarding the fee.

2. "The Court shall allow such compensation to the personal representative as shall in the circumstances be reasonable and just, and may calculate such compensation on a graduated percentage." 20 Pa.C.S. § 3537.

3. The Court is mandated to allow such compensation to the personal representative as shall be reasonable and just d*epending upon the circumstances as presented* to it as to each and every case.

4. To ensure that a fee is appropriate the court reviews the entire Orphans' Court file and all documents on any public docket to appreciate whether or not the estate was required to file petitions for sale of real estate, initiate or defend ancillary litigation to secure assets or settle claims, if acrimonious heirs or creditors require substantially greater time on the part of the executor or estate attorney to settle the estate, or if there appears on its face that an executor or attorney is taking a small fee given the relative little work or in consideration of the size of an estate for which a fee may leave little to nothing for an heir to inherit.

5. While trial courts are granted discretion to approve and modify both executor and attorney's fees a trial court's "mere naked conclusion that under the testimony the amount of the charge for services . . . [is] excessive,' was disapproved by the Pennsylvania Supreme Court in In re Reed's Estate, 462 Pa. 336, 341 A.2d 108 (Pa. 1975), *citing* Moore's Estate (No. 1), 228 Pa. 516, 522-23, 77 A. 899, 902 (1910).

6. Although this court may informally use the *Johnson* schedule as a short hand method to identify estates in which the court may proceed to approval without making any further

inquiry of an executor or attorney's fee, the court exercises its discretion when reviewing the estate accounting if fees greatly exceed *Johnson* or are substantially less than *Johnson*.

7. Where "there is evidence that the services [performed by an administrator] are actually worth more or less than what is prima facie reasonable…the amount of compensation may be increased or decreased accordingly." In re Reed's Estate, 462 Pa. 336, 341 A.2d 108 (Pa. 1975).

Appearances:

Aaron Jackson, Esq.

Jerry Weigle, Esq.

Michael T. Foerester, Esq.

Bruse R. Beemer, Esq.

Mark A. Pacella, Esq.

OPINION

Before Meyers, J.

RELEVANT FACTUAL FINDINGS AND PROCEDURAL HISTORY

This court is asked to determine the appropriateness of a proposed executor's fee for the Estate of Elmer E. Naugle. Mr. Naugle a resident of Chambersburg, Franklin County, Pennsylvania, died December 1, 2013. Orrstown Bank, (hereinafter "Orrstown"), was appointed the administrator of Mr. Naugle's estate by his will dated June 24, 2009. Orrstown applied for and received Letters Testamentary on December 11, 2013. Mr. Jerry Weigle, Esquire, Weigle & Associates, P.C., Shippensburg and attorney for the estate, filed the First and Final Accounting with the Orphans' Court on September 29, 2015. As there were multiple charitable beneficiaries, Mr. Weigle, provided notice of the filing of the accounting to the Office of the Attorney General for the Commonwealth of Pennsylvania, (hereinafter "Attorney General"), pursuant to O.C. R. 5.5. On October 30, 2015, the Attorney General filed an objection to the executor's fee of $283,443.24, as "being higher than usually seen for an estate of this size and asset mix". This Court issued a rule upon the Administrator to file a response and hearing was scheduled for December 18, 2015. In advance of the hearing both Orrstown's counsel and the Attorney General filed briefs in support of their respective positions.

The First and Final Accounting filed by Mr. Weigle revealed that Mr. Naugle's estate had a value as of the time of his date of death of $11,544,598.15. Of the assets accounted for by Orrstown there was

$714,762.63 in cash, $300.00 in personal property, $1,591,322.40 in listed stocks, $146,940.00 in both U.S. Savings Bonds Series EE and Series I, and a balance of $8,887,902.89 comprised of no less than 24 mutual fund or other stock related accounts. Through the liquidation of the multiple investments including the listed stocks, bonds or mutual funds by the executor, there was a net loss of $26,274.87, leaving a balance of $11,518,323.28 for distribution. By the court's calculation the net loss of assets from the date of death valuation to the date of liquidation was .0025 percent. The accounting reveals debts of the decedent of approximately $66,000.00,the majority of which was $5,500.00 in state income tax payable to the Pennsylvania Department of Revenue and approximately $55,500.00 of federal income tax payable to the United States Treasury. Mr. Naugle had little to no personal debt aside from a final monthly nursing home bill. Needless to say he lived a frugal life. The accounting reveals that the Administrator made a payment on February 27, 2014 of $513,000.00 within the statutory "discount period" to the Franklin County Register of Wills to be credited to the total Pennsylvania Inheritance Tax obligation of the estate.

Attached to the accounting was a copy of Mr. Naugle's last will and testament. Given the size of his estate, all of Mr. Naugle's debts and expenses could be paid and all of his specific bequests could be honored. In fact under the terms of his will, as each specific bequest was satisfied, thus reducing the size of his estate, Mr. Naugle provided for extra percentage distributions to be made to many of the beneficiaries who already received specific bequests, such that three local fire and emergency services companies that had already received sizeable gifts would receive the rest, residue and remainder of his estate.

The First and Final Accounting lists Orrstown's proposed Executor's Commission as $283,443.24. According to the court's calculation, Orrstown's proposed executor's fee would be2.46% of the total estate assets listed on the accounting. Mr. Weigle, as the estate attorney was listed as receiving a total attorney's fee of$226,758.59. (Mr. Weigle and the Attorney General's Office reached a settlement on or about October 22, 2015, subsequent to the filing of the account, but prior to the hearing in which Mr. Weigle cut his fee to $132,000.00. The Attorney General having struck a settlement with Mr. Weigle did not file an objection to the attorney's fee.) In addition KPMG, LLC is listed as receiving $8,700.00 for fees preparing both the Federal Estate Tax Return and the Fiduciary Income Tax Return.

At the hearing conducted on December 18, 2015, Orrstown called two of its employees as witnesses, Mr. Brent Liner, J.D., MTWN, and Susan Russell, Vice President and Fiduciary Services Manager.

Mr. Liner testified that the entire wealth management team of advisors at Orrstown devoted substantial if not hundreds of hours reviewing each and every investment in Mr. Naugle's estate with the goal of making informed and educated decisions when to sell or retain his individual holdings with a goal of maximizing gains where possible and minimizing losses. A review of the accounting reveals that 31 out of 53 investments were liquidated with a net gain, supporting Mr. Liner's testimony. He also testified that Orrstown had to convert a series of bonds and also redeem 8 or more original stock certificates in the possession of the decedent at the time of his death. The administrator had to also sell a used car. Mr. Liner testified that there were approximately 19 beneficiaries that had to be located across the United States and who bank staff kept informed of the progress of the administration of the estate. Mr. Liner also advised the court that the investment team secured the services of KPMG, LLC to prepare the Federal Estate Tax Return and the Federal Fiduciary Income Tax Return given their complexity. He also asserted that Orrstown staff performed tasks in the management and asset collection and accounting of the estate that estate lawyers usually perform. Orrstown gathered the assets, liquidated them and prepared detailed reports for use by KPMG, LLC in preparing the Federal Estate Income Tax Return and the Federal Fiduciary Income Tax Return. Orrstown hired Mr. Naugle's estate planning attorney, Jerry Weigle, to serve as the estate's attorney.

The court notes that Orrstown did not contest Mr. Weigle's requested attorney's fee. Mr. Liner did not provide any time sheets, employment logs, notes of administration or a list of who were assigned to work on Mr. Naugle's estate. Despite a lack of specificity, the court accepted Mr. Liner's testimony as being credible.

Ms. Russell testified that in her opinion, Mr. Naugle was a shrewd and skilled investor. She had worked with him personally for many years, sitting on boards of foundations with him and gaining an understanding of his investment philosophy and goals. He was a member of local foundation boards. During his employment with Shippensburg University, he had worked with investment professionals and stock brokers. She testified she believed that Mr. Naugle, given his frugal lifestyle and careful money management, was well aware of the banking industry's management fees and was aware of the fees Orrstown would be charging his estate. He had ongoing relationships with many local banking institutions and would not have appointed Orrstown to handle his estate and manage his affairs if he had reached a conclusion prior to his death that the fees of Orrstown were excessive. Ms. Russell also testified that an industry analyst had audited Orrstown's fee schedule and found it to be within industry standards. She did not provide specifics of what fees were actually discussed with Mr.

Naugle and did not provide the court with Orrstown's fee schedule at the hearing. Despite the lack of specificity, the court accepts her testimony as credible.

The court made a general inquiry of whether or not any of the charitable beneficiaries had informally objected to either the Administrator or the Attorney General's Office and was advised that no protest was made to the accounting and the fees listed therein.

DISCUSSION

The arguments before the court are interesting in light of the nature of the objection, the arguments made by both sides and the proof that has been offered. The Attorney General has filed an objection to Orrstown's executor's fee as being excessive for what they normally see for estates comparable to the size and asset mix of Mr. Naugle's estate. The objection is not that by reducing fees there will be a benefit to any particular heir, rather that the executor's fees should be reduced to something that Orrstown can justify as reasonable. In response to the single paragraph objection filed by the Attorney General, Orrstown filed a single paragraph answer, suggesting the fee is reasonable and the objection of the Attorney General ought to be dismissed. Subsequently both the Attorney General and the Orrstown filed briefs which set forth facts and arguments as if they had already fully vetted the issues outside the presence of the court and without any record having been made before the court. After Orrstown's counsel presented its two witnesses, he offered an oral argument beyond that which was set forth in his brief. He asserted that when large estates are subject to probate, if the court fails to approve adequate fees, such rulings may have a "chilling effect" upon responsible and skilled corporate fiduciary administrators who would reconsider whether or not they should take on the risk of handling large estates if the fees will be subject to substantial reduction.

Should a personal representative fee of a corporate fiduciary be reduced from 2.46% by the court for not being reasonable under 20 Pa.C.S. §3537 and existing case law?

The court first starts its evaluation by observing that the legislature has enacted a statute that expressly provides for court approval of personal representative or executor's commissions. "The Court shall allow such compensation to the personal representative as shall in the circumstances be reasonable and just, and may calculate such compensation on a graduated percentage." 20 Pa.C.S. § 3537. The Court is mandated to allow such compensation to the personal representative as shall be reasonable and

just *depending upon the circumstances as presented to it* as to each and every case. In order to make things easier upon the courts who may be confronted with approving numerous accounts, the legislature adopted language that delegated legislative authority to the court to create a fee schedule on a graduated scale. To this court's knowledge the judges of the 39th Judicial District have never adopted a fee schedule since the enactment of 20 Pa.C.S. § 3537. The court knows from reviewing accounts for the last seven years, that a majority of practitioners usually submit accounts which request approval of executor and attorney's fees consistent with the schedule outlined in Johnson Estate, 4 Fiduc.Rep. 2d 6 (Chest.1983). the court exercises its discretion when reviewing the estate accounting if fees greatly exceed *Johnson* or are substantially less than *Johnson*. The court reviews the entire Orphans' Court file and all documents on any public docket to appreciate whether or not the estate was required to file petitions for sale of real estate, initiate or defend ancillary litigation to secure assets or settle claims, if acrimonious heirs or creditors require substantially greater time on the part of the executor or estate attorney to settle the estate, or if there appears on its face that an executor or attorney is taking a small fee given the relative little work or in consideration of the size of an estate for which a fee may leave little to nothing for an heir to inherit. Astute practitioners file detailed explanations of the reasoning for a requested fee along with the accounting, which may quickly allay any concerns the court may have regarding the fee. Of course the court also accepts that it is rare for any estate to be properly handled by counsel or an executor, unless there is a basic fee of at least $500.00 approved by the court, even if it is a small or insolvent estate. The *Johnson* schedule over time has become a common point of reference for Orphans' Court jurists in opinions published in the *Fiduciary Reporter* and cases reported in various county legal journals. Since no fee schedule has been adopted for use in the 39th Judicial District, this court will not apply the *Johnson* fee schedule and its graduated scale when reviewing this case. However, as explained hereafter, the Pennsylvania Supreme Court has established certain parameters for corporate fiduciaries fees, which this court considers adequate precedent and justifies the ultimate decision reached in this case.

In its brief, the Commonwealth directs the court to the case of Estate of Geniviva, 450 Pa.Super. 54, 675 A.2d 306 (1996), alloc. denied, 546 Pa. 666, 685 A.2d 545 (1996), as supporting its argument that the executor's fees are to be reasonable and that Orrstown's fees under the standards set forth in *Geniviva* should not be found to be reasonable. A review of the facts in *Geniviva*, reveal that the executor failed to file tax returns for approximately 4 years. He was derelict in his duties as a personal representative in almost every conceivable way. After taking possession of approximately $187,000

of investments that needed to be liquidated, his decisions resulted in a loss of over 40% of the value of the investments. Not only did the trial court deny his requested executor's fee of $40,000.00, the court also found his request for executor's fees was unconscionable, outrageous and illegal given his dilatory actions and dismal performance. Thus the quality of the services rendered by the executor was not reasonable under the circumstances. *Geniviva* offers little guidance to the court, except to emphasize that when an estate has investments that require specialized skill to make sure that losses are minimized and assets are preserved, the skill of the personal representative and the quality of their work is an important consideration. This court will also note that problematic accountings or Orphans' Court petitions are submitted to address issues that often arise out of trusts or estates in which lay persons attempt to "go it alone" or ignore probate of decedent's estates all together, thus leading to subsequent issues of a failure to pay inheritance tax, difficulties titling and transferring assets, actions to quiet title to real estate and forfeiture of assets to the Division of Unclaimed Property of the Pennsylvania Treasury for safekeeping until they can be claimed by rightful heirs.

Unlike insuring that a decedent's house is locked and casualty insurance is maintained, that a car is garaged, that jewels are locked in a safe, or that personal property or papers and vital documents are not left to be gathered up and destroyed, all of which a layperson/ personal representative with the guidance of counsel can adequately perform, when an estate is composed principally of investments, it's proper for the court to assume the average layperson serving as personal representative and faced with the size and asset mix of Mr. Naugle's estate will consult with or hire financial professionals like those on staff at Orrstown to perform the services rendered in this case. Such actions by a layperson to employ financial professionals would be prudent and this court would surmise if not done and substantial losses incurred, a claim for surcharge or a reduction of fees would likely be argued by the heirs of the estate or the Attorney General.

In the alternative, Orrstown has directed the court to the case of In re Reed's Estate, 462Pa. 336, 341 A.2d 108 (Pa. 1975), in which an Orphans' Court judge reduced a corporate fiduciary's fees even though the trial court and the court en bane (sic) found that the "work performed by appellant, [executor], was done with a `high degree of competency"'. Id. at 339, 341 A.2d at 110. Furthermore, the Court found that the evidence proved that "(1) the executors' commissions charged were in accordance with the appellant's, [executor's], regular schedule of fees, (2) the fees were no greater, and in some cases less, than amounts charged by other corporate fiduciaries in Western Pennsylvania for estates of comparable size, and (3) the Department of Revenue and the courts had permitted comparable

deductions for inheritance tax purposes of fees in estates of comparable size, leads us to conclude that, based on the record below, the court erred in disallowing the claimed deduction." Id. at 340, 341 A.2d 110. In addition, the Pennsylvania Supreme Court found that as a prima facie matter, a 3% executor's fee was an acceptable administration fee. The highest court of the Commonwealth took it upon itself to establish a minimum percentage fee from which all other graduated fees could be derived, although Chief Justice Jones acknowledged that such a presumption was simply a "rule of thumb." Id. The court explained that

> "the true test being what the services actually were worth. Therefore, it follows that where there is evidence that the services are actually worth more or less than what is prima facie reasonable, as, for example, where the fiduciary performed extraordinary duties (Garner's Estate, supra; Wolfsohn Estate, supra) or where the performance falls below accepted norms (Lohm Estate, 440 Pa. 268, 273-74, 269 A.2d 451, 456 (1970)), the amount of compensation may be increased or decreased accordingly." Id.
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> In the present case, the lower court was presented with no evidence compelling departure from the prima facie rule. Rather, the only evidence presented indicated appellant had in a timely and competent fashion discharged the `regular' set of fiduciary obligations in estates of this size. Nevertheless, in the face of this evidence, the court, without explanation, found that the 2.7% charged by appellant [executor] exceeded the normal and usual fee charged by executors. Id.

While trial courts are granted discretion to approve and modify both executor and attorney's fees, there is cautionary dicta within the In re Reed's Estate opinion which this court also finds instructive. The court observed:

> In a similar case, where the hearing judge disallowed counsel fees for services to the executor, this Court concluded:
>
> `Had reasons been given which fairly warranted the reduction, or had the items of service for which the charge was deemed too high been pointed out, or referred to, or had findings of fact upon disputed testimony or doubtful inferences as to the value of the services been set forth,

> we would be slow to question them. But with the mere naked conclusion that under the testimony the amount of the charge for services . . . was excessive, we cannot agree.' Moore's Estate (No. 1), 228 Pa. 516, 522-23, 77 A. 899, 902 (1910).
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> It is well-settled that the supervision of compensation is peculiarly within the discretion the Orphans' Court, Wallis Estate, supra; Williamson Estate, supra; Strickler Estate, supra; Taylor Estate, 281 Pa. 440, 126 A. 809 (1924). Nevertheless, where the ultimate conclusion of law is without record support, we cannot allow the decision to stand. See Crawford's Estate, 307 Pa. 102, 160 A. 585 (1931); Moore's Estate (No. 1), supra. Id.

In this case the court has determined that Orrstown's fees equal 2.45% of the total reported assets in the accounting. Acknowledging that the burden is upon Orrstown to show that its fees are reasonable, and the initial reaction may be to question the amount of time expended by Orrstown in its handling of Mr. Naugle's estate, this would ignore the second component when evaluating fees, which is the character and quality of the services provided. In re Rees Estate, 425 Pa.Super. 490, 497, 625 A.2d 1203, 1206 (Pa.Super. 1993). Here the quality of the service is unchallenged and the court finds that the evidence reveals care and attention to an orderly and competent administration of the estate. If an executor's actions cause significant losses in an estate's value or it appears that wrapping up the estate took little time or skill, then an argument for a reduction of executor's fees may have merit. If an executor performs substantially more services defending frivolous litigation or taking extraordinary measures to secure and preserve assets, or to avoid losses, or if the asset type demands specialized skill be employed to make sure that an orderly and competent administration is completed, then additional fees exceeding the 3% prima facie standard or the application of the *Johnson* schedule or fees exceeding the *Johnson* schedule may be warranted. No such factual concerns prompting deviation from what has been requested are present here.

The court now turns to the Attorney General's objection to the payment of KPMG, LLC's fees to prepare the Fiduciary Income Tax Return (Form 1041) and the Federal Estate Tax Return, (Form 706). Given the complexities of an estate comprised of multiple different investment accounts, and the various gains, losses, increases and decreases of income and basis issues that must be addressed, the court finds the hiring of qualified accountants and the payment of their fees to be justified. For the foregoing

reasons the Commonwealth's objections will be denied and the fees of Orrstown approved. The court will sign the First and Final Account as filed by Weigle and Associates, P.C., provided a revised accounting showing a modification of the attorney's fees and proposed revised distribution is also filed to properly reflect the negotiated settlement of attorney's fees struck by Attorney Weigle with the Attorney General's office.

Finally, the Court notes that Orrstown Bank's counsel cited an unpublished non-precedential opinion issued by the Pennsylvania Superior Court in support of it arguments. This court agrees with the Attorney General that the opinion is non-binding and should not be considered by this court in reaching its decision. The court did not read the decision when considering case law to rely upon when drafting this opinion. However, this court did consider approximately twenty two published opinions issued by fellow Orphans' Court jurists across the Commonwealth and published in the *Fiduciary Reporter*, if only to get a sense of how fellow Orphans' Court judges may be viewing and deciding these same issues. While this court appreciates the wisdom revealed in those opinions, in the end this court found the official published case law to be the most authoritative and influential source on which to base this opinion.

ORDER

AND NOW, March 16, 2016, IT IS HEREBY ORDERED THAT the Commonwealth's Objection to the Executor's Fees set forth in the First and Final Accounting for the Estate of Elmer E. Naugle is DENIED. The Executor's Fee requested by Orrstown Bank and the professional fees payable to KPMG, LLC set forth in the First and Final Accounting are approved.

IT IS FURTHER ORDERED that a supplemental accounting shall be filed to reflect the revision of attorney's fees payable to Jerry Weigle, Esquire and the corresponding revisions to the proposed distribution to the charitable beneficiaries.