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Re: I/M of the Estate of Harold Lynn Howell
Folio No. 117657
I/M of the Revocable Trust Agreement of
Harold Lynn Howell, dated May 8, 1997
C.A. No. 17760-VCN
Date Submitted: November 13, 2007

Dear Counsel:

Perhaps with this letter opinion, this estate and trust administration matter will come to a close. Pending are motions for attorneys' fees and trustee's commissions.

Petitioners Laura Lynn Howell and Sarah Sue Howell (the "Petitioners") and their brother, Respondent Jon L. Howell (the "Trustee"), were the only children of

Harold Lynn Howell whose assets, except for certain items of tangible personal property, were passed on in equal shares to his children through his estate or his revocable trust. The Petitioners were unhappy with the Trustee's efforts and brought this action. They asserted numerous claims, including an allegation that the Trustee unfairly valued and allocated a valuable collection of firearms, a dispute as to whether certain joint bank accounts between the decedent and the Trustee were assets of the estate, an assertion that fiduciary fees sought by the Trustee were excessive, a contest to the disposition of the "Mr. Lincoln" pistol, the "Howell rifle," and a vase, and an argument that the Trustee improperly insisted upon the signing of an indemnification letter by the Petitioners before disbursing assets to them.¹

Following trial, the Petitioners prevailed on only two of their claims. First, the Court found that the fiduciary fees sought by the Trustee were excessive; those fees were reduced from the \$35,000, which he sought, to \$8,000. Second, the Court concluded that the process chosen by the Trustee for valuing the gun

¹ The Court's post-trial letter opinion appears as *In re Estate of Howell*, 2002 WL 31926604 (Del. Ch. Dec. 20, 2002) (the "2002 Opinion"). The reader's familiarity with the 2002 Opinion is presumed.

collection carried a risk of unfair advantage to the Trustee—two of the three appraisers chosen by the Trustee were personal friends. The Trustee was more interested in the guns than were his sisters and, with friends doing the appraising, it would have been possible for the Trustee, who had the right to decide which guns to allocate to which heir, to skew the system in his favor. There was no evidence that any untoward conduct had occurred; the Court's concern was prompted simply by the circumstances of the appraisal process. To address those concerns, the Court directed that a new appraisal be conducted. That new appraisal process, which no one has challenged, resulted in the Trustee's receiving more guns than what he would have under the original appraisal. The new appraisal gave lower values to the firearms and, as a general matter, indicated that there was no fundamental flaw in the appraisal process initially implemented by the Trustee.² In short, the second appraisal, as ordered by the Court, conferred no demonstrable benefit upon the trust, except that it removed the concerns about the fairness of the appraisal process and allowed for greater confidence in the outcome.

² It may be that the overall reduction in value was a product of the different appraiser; it may also be that the value of firearms had diminished during the time between the first appraisal and the second appraisal. Of course, with the first appraisal, the Trustee's use of friends and acquaintances allowed for a less costly appraisal.

A. *The Petitioners' Application*

The Petitioners seek an award of attorneys' fees and expenses in the amount of \$32,388.50. They argue that their efforts have benefited the trust in two principal ways. First, the firearms appraisal is now more accurate and reliable. Second, by challenging the Trustee's initial fee application, the trust saved more than \$25,000. The Court deferred consideration of Petitioners' application for attorneys' fees in the context of the 2002 Opinion until the new firearms appraisal had been performed. It was thought that the outcome of the new appraisal might inform the question of whether the Trustee's failure in judgment in determining how to achieve the appraisal was "more technical in nature or afforded him substantial personal benefit."

The award of attorneys' fees to the Petitioners is a matter for the Court's discretion:

The American Rule, which is of general application, requires each side to bear the costs of its attorney's fees. . . . The Court of Chancery may exercise its discretion to award attorneys' fees as an exception to this Rule where a fund is created or . . . the distribution of a trust is in dispute. Appropriate factors may include: (i) whether the trustees' breach of fiduciary duty was fraudulent or in bad faith; (ii) the nature

and extent of the wrongful conduct; and (iii) whether the action resulted in a benefit to the trust.³

The Trustee's selection of friends and acquaintances to perform the firearms appraisal was not in bad faith or fraudulent. It was, the Court is now satisfied, a process undertaken without a full understanding of how it would be viewed and the risks that could flow from it. The second appraisal resulted in different numbers, but the numbers are simply different; there is no pattern or other basis from which to infer that anything untoward was contemplated or had been achieved by the first appraisal. Indeed, as a consequence of the second appraisal, the Petitioners actually received fewer firearms and, thus, they achieved no quantifiable benefit from the new appraisal. Despite the expenditure of time and money, the new appraisal brought only the impression of reliability and fairness—important, but intangible considerations in this instance.

As to the Trustee's initial commission application, the 2002 Opinion did conclude that it should be reduced substantially. The reduction was premised upon the product of two factors: the Trustee's time records did not inspire confidence

³ *McNeil v. McNeil*, 798 A.2d 503, 514 (Del. 2002). In the 2002 Opinion, the Court recognized that the Petitioners "may be entitled to their fees if they demonstrate that [the Trustee's] conduct was in bad faith or if they demonstrate that their efforts created a 'common fund.'" 2002 WL 31926604, at *7.

and his assessment of his worth as a trustee (*i.e.*, an hourly rate as a measuring stick) was overblown. Although substantially reduced, the application for commissions was not the product of fraud or other ill-motivated conduct. Indeed, the Trustee had sought the Court's approval.

Thus, the Petitioners achieved only a marginal benefit in assuring the fairness of the appraisal; there is, however, no basis to conclude that the first appraisal was, in fact, unfair. They also achieved, with minimal effort, the denial of a substantial portion of the Trustee's initial commission application.⁴ Otherwise, they were unsuccessful.

Under the circumstances, the Petitioners are entitled only to a modest award of fees. Those fees cannot be substantial because of the narrow scope of the benefit conferred and, with respect to the reduction in the Trustee's commission, the principal quantifiable benefit, the relatively small effort required to achieve the benefit. After considering all of the factors, an award of fees and expenses, combined, to Petitioners from the Trust in the amount of \$6,000 is warranted.

⁴ Because they are entitled to two-thirds of the Trust's assets, those savings substantially benefited them.

B. *The Trustee's Application for Commissions and Payment of his Attorneys' Fees*

Although the Trustee's performance was not without its problems, the source of those problems was not fraud or other wrongful animus. Indeed, the Trustee prevailed on numerous claims against him. Moreover, in order to be allowed his counsel fees as trustee, "success is not test."⁵

The Trustee's application for attorneys' fees has three components. The first is the payment of the fees and expenses of the attorney who represented him through trial. The second involves the fees of the attorney who has recently worked on the matter because the first attorney was unable to continue in that role. The third is an estimate for the balance of the work that the current attorney would be required to do to complete this matter. I have reviewed the time records, evaluated the hours spent, considered the nature of the work involved, and assessed the hourly rates sought by counsel; on that basis, I conclude that the fee applications are reasonable. Accordingly, (1) the sum of \$26,454.20 will be awarded for Mr. Thompson's fees;⁶ (2) the sum of \$5,663.50 will be awarded to

⁵ *McNeil*, 798 A.2d at 515.

⁶ This sum shall be paid to Norman Levine, Esquire, as receiver for Mr. Thompson.

pay Mr. Gruver's fees through the date of the application; and (3) a maximum of \$2,300 for ten hours of work (together with expenses and costs advanced not to exceed \$250) will be approved for the balance of the work required of Mr. Gruver to complete this matter.

I turn next to the Trustee's commissions. In the 2002 Opinion, the Trustee was awarded \$8,000 in commissions. That award is reconfirmed. Since that time, the Trustee has submitted sufficient documentation evidencing that he has devoted 136.4 hours to his work as trustee. Consistent with the 2002 Opinion, he will be awarded approximately \$26 per hour for his services. In reviewing the Trustee's work since the 2002 Opinion, I am satisfied that his efforts were necessary and that \$3,500 is a reasonable commission for those efforts.

The Petitioners argue that the Trustee's commission should be reduced because the second appraisal was necessitated by the conduct questioned in the 2002 Opinion. Although there undoubtedly was some duplication of effort, it was not substantial, and the crux of the Petitioners' claim is that the Trustee should have done earlier what he ended up doing through the independent appraisal. Thus, the work of overseeing the independent appraisal was a necessary step for him to take as Trustee, and there are no objections as to how he did that work.

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The Trustee also has asked for authorization to perform up to ten hours of work following his application to resolve this matter. That application will be approved at the same hourly rate. Finally, authorization to incur accounting expenses on behalf of the Trust up to \$500 has been sought. That request is both reasonable and necessary and, accordingly, will be approved.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap

cc: Register in Chancery-K
Register of Wills-NC