

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

IN RE:) CASE NO. 88-30038-INH
)
RANDY L. KAUER and)
MERRY M. KAUER,) CHAPTER 7
)
) MEMORANDUM OF DECISION
) RE: COMPENSATION OF
Debtors.) ATTORNEY FOR TRUSTEE

The matter before the Court is the Application for Compensation of John S. Lovald, Attorney for Trustee Under 11 U.S.C. § 331¹, filed by Mr. Lovald as Chapter 7 Trustee and the objections thereto filed by the United States Trustee. This is a core proceeding under 28 U.S.C. § 157(b)(2). This ruling shall constitute Findings and Conclusions as required by Bankr. R. 7052.

I.

On August 22, 1988, Chapter 7 Trustee John S. Lovald (Trustee) filed an Application for Approval of Employment of Attorney. The Application requested authorization to employ an attorney, himself, to "carry out collection of the outstanding accounts receivable of debtor's business." The Application had been submitted on August 5, 1988 to the United States Trustee (UST) for his recommendation before submission to the Court, as required by local procedure. The UST recommended the employment and forwarded the Application to the Court on August 11, 1988. An Order authorizing employment of the attorney was entered August 22, 1988.

¹ While Mr. Lovald denominates 11 U.S.C. § 331 as his authority for compensation, it appears 11 U.S.C. § 330 is more appropriate since this is not an "interim" fee application.

On September 17, 1990, Trustee filed an Application for Compensation of John S. Lovald, Attorney for Trustee Under 11 U.S.C. § 331. Therein he requested fees of \$700.00, sales tax of \$35.00, and expenses of \$47.60. Appended to the Application was a letter from Trustee to the office of the UST dated September 14, 1990 that was intended as further documentation of the fee Application.

An Amended Application was filed October 5, 1990, apparently in response to concerns of the UST. The Amended Application sought fees of \$1,008.00, sales tax of \$50.40, and expenses of \$210.10. On November 8, 1990, the UST filed an objection to the Amended Application. The UST argues that: Trustee is impermissibly seeking compensation for services rendered before authorization of the attorney's employment; while the Amended Application corrected a "lumping" problem in the original application, the time itemized for services in the Amended Application for that same period inexplicably exceeds the time itemized in the original application; services rendered on several stated dates were trustee duties, not legal services for which the attorney may be compensated; exorbitant time was spent preparing a form pleading relating to employment of an auctioneer; and photocopying and postage expenses incurred ten months after all legal services were rendered are not justified as related to the attorney's services.

Trustee filed a response on November 8, 1990. He argues that: the "gap" period from the time the attorney first rendered legal services to the time his employment application was submitted was

only one week and, therefore, compensation for those "gap" services should be allowed; he appropriately included additional items of service in the Amended Application that were not requested in the original application, as explained in the September 14, 1990 letter to the UST; services contended not to be legal in nature included necessary negotiations with Debtor's family to protect against commingling of assets at the time the estate was auctioned and a final accounting to the Trustee by the attorney; no form pleadings were used; and the photocopying and postage expenses to which the UST objected were costs incurred in filing and serving the Amended Fee Application. Further, Trustee summarized his response to the UST's objection that not all services rendered were legal services.

[T]he U.S. Trustee is attempting to imply that applicant's efforts in terms of first securing, and then liquidating a difficult asset should all be compensated out of the 3% fee available for Trustee compensation, on the net amount of the asset ultimately recovered, which would equal approximately \$120.00. If this is to be the position, the only logical approach for Trustee the next time an issue such as this presents itself is to request abandonment. The compensation sought in this case still leaves a large percentage net recovery for the creditors of this case.

A hearing on the Amended Application and the UST's objections was held November 13, 1990. Charles L. Nail, Jr., Assistant U.S. Trustee, appeared for the UST. He identified three types of services performed by Mr. Lovald that he argued should be denominated as trustee, not legal, services. He argued that sending "demand" letters are within a trustee's duty to collect, as required by 11 U.S.C. § 704(1). He further argued that locating

an auctioneer and filing the necessary application to employ the auctioneer are standard trustee duties. Finally, Mr. Nail argued that correspondence between Mr. Lovald and Debtor or a creditor must be considered ministerial trustee duties, not legal, where the applicant made no showing of the legal nature of the correspondence.

At the hearing, Mr. Lovald said his authorization for employment of an attorney related to all activities to pursue accounts receivables and that the UST was "sandbagging" on his recommendation that an attorney be employed for that function. Lovald also stated that trustee compensation available in this case was insufficient for the trustee work performed and that he could be adequately compensated only through remuneration to him as the attorney for Trustee.

II.

Under 11 U.S.C. § 330(a), a professional employed by the estate may receive reasonable compensation for actual, necessary services and reimbursement for actual, necessary expenses. Under 11 U.S.C. § 326, a trustee is limited to "reasonable compensation" that may not exceed a specified percentage of disbursements from the estate. Section 328 refines § 330 by delineating the compensation an attorney, who also serves as the trustee, may receive:

If the court has authorized a trustee to serve as an attorney ... for the estate ..., the court may allow compensation for the trustee's services as such attorney ... only to the extent that the trustee performed services as

attorney ... for the estate and **not for performance of any of the trustee's duties that are generally performed by a trustee without the assistance of an attorney** ... for the estate.

11 U.S.C. § 328(b) (emphasis added). Congress' intent in enacting § 328(b) is clear:

The purpose of permitting the trustee to serve as his own counsel is to reduce costs. It is not included to provide the trustee with a bonus by permitting him to receive two fees for the same service or to avoid the maxima fixed in section 326. Thus, this subsection requires the court to differentiate between the trustee's services as trustee, and his services as trustee's counsel, and to fix compensation accordingly.

H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 328-29 (1977); S.Rep. No. 95-989, 95th Cong. 2d Sess. 39 (1978), U.S.Code Cong. & Admin.News 1978, pp. 5787, 5825, 6285 (cited in In re McKenna, 93 B.R. 238, 240 (Bankr. E.D. Cal. 1988), and cited in part in In re Gem Tire & Service Co., 117 B.R. 874, 879 (Bankr. S.D. Tex. 1990)).

When applying §§ 328 and 330 to fee applications by an attorney for the Chapter 7 trustee, courts have developed several standards to insure that the attorney is not compensated for services that should be performed by the trustee. The trustee is compensated under § 326 for performance of all ministerial and administrative duties of the estate². In re Air Vermont, Inc., 114

² The trustee's duties are set forth at 11 U.S.C. § 704 and include:

- (1) collect and reduce to money the property of the estate ... as expeditiously as is compatible with the best interest of parties

B.R. 48, 50 (Bankr. D. Vt. 1988). These statutory duties include some that are legal by nature but within the realm of a competent trustee. In re Gary Fairbanks, Inc., 111 B.R. 809, 811 (Bankr. N.D. Iowa 1990). As Congress clearly dictated in § 328, "A trustee may not be paid an attorney's fee for any task that ordinarily would be performed by a competent trustee without assistance from counsel." McKenna, 93 B.R. at 240.³

The attorney is hired to handle situations where he must exercise professional legal skills and expertise beyond the ordinary knowledge and skill of the trustee. Air Vermont, 114 B.R. at 50; Gary Fairbanks, Inc., 111 B.R. at 811; In re King, 88 B.R. 768, 770 (Bankr. E.D. Va. 1988).

The fee applicant has the burden to prove that the compensation and reimbursement sought is justified under §§ 328 and 330. In re Riker Industries, Inc., 122 B.R. 964, 977 (Bankr. N.D. Ohio 1990); Air Vermont, 114 B.R. at 51; McKenna, 93 B.R. at 242;

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- in interest;
 - (2) be accountable for all property received; ...
 - (4) investigate the financial affairs of the debtor;
 - (5) ... examine proofs of claims and object to the allowance of any claim that is improper;
 - (6) if advisable, oppose the discharge of the debtor;
 - (7) ... furnish ... information concerning the estate and [its] administration ...;
 - (9) make a final report and file a final account of the administration of the estate with the court and with the United States Trustee.

11 U.S.C. § 704 (in pertinent part).

³ A person who is not competent to perform all statutory duties of a trustee with a "modicum of proficiency" is not eligible to be a trustee. McKenna, 93 B.R. at 241 (citing 11 U.S.C. § 321(a)(1)).

King, 88 B.R. at 771. The "demarcation" between the trustee's services and the attorney's services must be clear and distinct in the application. Gary Fairbanks, Inc., 111 B.R. at 811; King, 88 B.R. at 770. The nature of the problem that made necessary the legal services must be apparent from the record. King, 88 B.R. at 770. All services must benefit the estate to be compensable. In re Reed, 890 F.2d 104, 106 (8th Cir. 1989); King, 88 B.R. at 773.

While courts have acknowledged that differentiating between trustee and attorney work is not easy, they have ruled that attorneys may **not** be allowed compensation for services related to: the sale of estate assets, collection of accounts, examination of estate records, preparation of sale notices and advertisements, license renewals, routine telephone calls and correspondence with information seekers, arranging insurance coverage, obtaining appraisals, and employing estate professionals. King, 88 B.R. at 770 (citations omitted); McKenna, 93 B.R. at 241-42. However, work inherently associated with allowed legal services, such as dictation of letters, telephone calls, and setting hearings need not be deferred to the trustee; the trustee is not the alter-ego of the attorney who must perform the attorney's ministerial legal tasks. Air Vermont, 114 B.R. at 53.

If the court fails to scrutinize carefully the application to insure that compensation for trustee work is not allowed, it "would be countenancing an unwarranted double dipping, depletion of the estate, as well as aiding a breach of the trustee's fiduciary duty

to the estate." Air Vermont, 114 B.R. at 51; see also McKenna, 93 B.R. at 242; King, 88 B.R. at 770.

III.

A.

The UST's first objection that no compensation should be awarded for services rendered before the Court's approval of the attorney's employment will be overruled. The Application to employ Lovald was submitted to the UST on August 5, 1988 and approved by the Court on August 22, 1988. He first rendered services as Trustee's attorney on August 1, 1988. Ideally, Mr. Lovald should not have performed services as the estate attorney until his employment was authorized. However, the application and authorization dates are sufficiently contemporaneous so that the Court need not deny compensation due to the time gap. Also, it must be remembered that the Application had to travel to the UST's office in Minneapolis for his approval before it was filed with the Court.

B.

Mr. Lovald has sufficiently explained the source of the additional entries to his Amended Application and no deductions regarding these "late" requests for compensation appear necessary. That objection of the UST will be overruled. Mr. Lovald is cautioned, however, that his initial fee application should have included all services and expenses. The Court will not condone additions to amended applications that seek to cover or avenge potential losses arising from objections to an initial application.

C.

The Court sustains the UST's objection that services rendered on March 14, 1989 regarding employment of an auctioneer and on February 27, April 4, April 14, April 20, September 22, and November 22, 1989 regarding the auction of estate property represent trustee duties for which Mr. Lovald should not be separately compensated as the estate attorney. See McKenna, 93 B.R. at 241. The Court also finds that reviewing accounts receivable and mailing collection letters on August 1, 1988⁴, reviewing a resistance to his attorney employment application on August 26, 1988, and addressing an accounts receivable query in September and November of 1989 are not compensable legal services. Neither the fee Application nor Mr. Lovald's comments at the hearing enlightened the Court on the legal nature of these services. Absent a showing that these services required legal expertise more than that necessarily possessed by a Chapter 7 trustee in the performance of his statutory duties, compensation and related expenses must be denied.

This Court agrees with the sentiments expressed in Air Vermont.

The difficult task of separating trustee's duties and attorney's duties is further complicated by the common bankruptcy practice of the trustee retaining himself or herself as the attorney, pro se. While we personally

⁴ Mr. Lovald's work in August and September 1988 regarding collection work on **specific** accounts is more clearly denominated as legal services.

believe this is not the best practice because of the proverb "he who is always his own counsel has a fool for his client," The Port Folio, Philadelphia, Aug. 1809, we will not lay down a judicial principle in this District that the practice should be discontinued. [Congress, by enacting § 328, has clearly said that it may.] Rather, ... The burden is entirely on the attorney requesting compensation to demonstrate the professional compensation sought involves some necessary and actual legal service beyond the scope of the trustee's statutory duty.

Air Vermont, 114 B.R. at 51.

The Court recognizes the fact that Mr. Lovald's compensation as Trustee in this case may have been insufficient to reward his efforts. However, the Court may not ignore the parameters of § 328(b). As the Court, the UST, and Trustee realize, some Chapter 7 cases are money makers for the trustee, others are not. Trustee must fulfill his duty in all cases.

D.

The Court will allow Mr. Lovald reimbursement for photocopying and mailing his Amended Application **in this case**. This is the first time that objections to a Chapter 7 estate attorney's fee application have been litigated before this Court. To the extent that it serves as a learning experience for Trustee and the UST, as well as other trustees who appear before this Court, Mr. Lovald will not be penalized for his efforts to meet the UST's concerns. In the future, reasonable compensation for preparing and the necessary expenses for filing and serving an initial fee application will generally be allowed but subsequent amended

applications will be submitted on the applicant's time and at his expense.

As this Court noted in In re Hanson, Bankr. No.386-00136, slip op. at 6 (Bankr. D.S.D. March 8, 1989), the "machinery" necessary to insure appropriate scrutiny of fee applications, including those of Chapter 7 estate attorneys, is now in place with the advent of a United States Trustee's office within this District. That Office's continued efforts to educate trustees, such as its Trustee Compensation Guidelines memo to Chapter 7 trustees dated March 1, 1990⁵, as well as case by case discourse on fee applications between the trustees and their attorneys and the UST, is encouraged.

On order awarding Mr. Lovald fees as the estate attorney in compliance with these Findings and Conclusions will be entered.

Dated this 27th day of March, 1991.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By _____
Deputy Clerk

⁵ The UST's office provided the Court with a copy of its Panel Trustee Manual for the District of South Dakota at its June 1, 1990 Trustee Seminar. The Trustee Compensation Guideline memo was a part of that Manual.

(SEAL)

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IN RE:) CASE NO. 88-30038-INH
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RANDY L. KAUER and)
MERRY M. KAUER,) CHAPTER 7
)
) ORDER ALLOWING COMPENSATION
) OF SERVICES AND
Debtors.) REIMBURSEMENT OF EXPENSES
) FOR JOHN S. LOVALD,
) COUNSEL FOR TRUSTEE

In compliance with and recognition of the Memorandum of Decision Re: Compensation of Attorney for Trustee entered this day,

IT IS HEREBY ORDERED that John S. Lovald, attorney for the Chapter 7 Trustee, is awarded \$350.00 for compensation of services, \$17.50 for sales tax on these services, \$196.20 for reimbursement of expenses.

So ordered this _____ day of March, 1991.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By _____
Deputy Clerk

(SEAL)