THE STATE OF NEW HAMPSHIRE

ROCKINGHAM COUNTY PROBATE COURT

IN RE ESTATE OF NORMAN P. BOLDUC, JR.

Docket Number 2000-1299

ORDER

The parent legatees of Norman P. Bolduc, Jr., Norman P. Bolduc, Sr. and Cecile Bolduc, object to the final account filed by the executor, Father George Soberick. In addition, they seek to surcharge the executor for his alleged failure to timely sell certain stock holdings belonging to the decedent. Mr. and Mrs. Bolduc also seek removal of Father Soberick as fiduciary and an order of distribution from their son's estate. For the foregoing reasons, the Bolducs' motion to surcharge Father Soberick is **granted**, subject to the limitations set forth. The Bolducs' Motion to Remove the Executor is presently **denied.**

Facts

Monsignor Norman P. Bolduc, Jr. died unexpectedly in a motorcycle accident on September 30, 2000. At the time of his death, he held securities in fifteen publicly traded companies valued at over $6.5 million, but subject to a margin debt of nearly $4 million (net value approximately $2.5 million). Nearly 3 million of the securities were in just two companies, Cisco Systems and Sun

Microsystems. He left a simple will with a codicil naming his best friend, Father George J. Soberick, executor. In the will, he named his parents, Norman P. and Cecile Bolduc, sole legatees of his estate. At the time of his death, the will was in the possession of the Catholic Diocese of Manchester.

Following the monsignor's death, Father Soberick did not learn from the Diocese that he had been nominated executor in the will until October 2. The Diocese also informed him at that time that someone from the law firm of Devine, Millimet and Branch (hereafter "DMB") would be calling him to set up an appointment. When Father Soberick did not hear anything from DMB after a few weeks, he contacted DMB on October 23. On October 26 he met with Attorney Patricia McGrath and paralegal Susan St. Germain of DMB for the first time. Father Soberick brought to this meeting a stack of unopened mail addressed to the decedent. Included in this mail were account statements from various stock brokerage houses reflecting that the decedent had a large estate. It appeared, at that time, that the net value of the decedent's estate was about $2.2 million. Also included in the unopened mail were urgent notices of margin calls from the brokerage houses. During the meeting Father Soberick did not inform DMB of the existence of other assets belonging to the Monsignor, including a safety deposit box and some artwork in an apartment in Montreal. He did not inform DMB of these items for several weeks.

In any event, a petition for estate administration was prepared, signed and mailed to the Rockingham County Probate Court on November 1. The Court

received the mailing in the normal course on November 3. The will was allowed and the petition was granted on November 13, on condition that Father Soberick file a fiduciary bond in the amount of $2.2 million within 30 days, after which letters of appointment would issue. The bond was received by the court for filing on December 1. It was approved by the court on December 6. A certificate of appointment was prepared and sent to DMB by the court on December 6. It was received on December 8.

Meanwhile, there were a number of events taking place, and non-events not taking place, that complicated administration of the estate. For one, Father Soberick refused to open the decedent's mail. Instead, he would gather it for later periodic delivery to DMB for review and processing. As already noted he neglected to tell DMB about all of the decedent's assets until weeks after first meeting with DMB. In addition, almost immediately after the decedent's death, he entered the decedent's home (which he commonly shared) and removed computers for data retrieval by the Diocese. He removed several other items from the home, and artwork from the decedent's apartment in Montreal (which he also shared). At hearing he expressed his strong desire to keep the decedent's affairs private as his reason. During his first meetings with DMB, the evidence shows that he knew something of the scope of the decedent's investments. He testified that he understood only the basics of what margin debt entailed and that he thought such an investment strategy was dumb. He maintained that he did not understand the full ramifications of the margin debt and prevailing market volatility until a few weeks into the administration of the estate, despite having pooled several tens of

thousands of dollars of his own money with that of the decedent in an apparent effort to accumulate shared investment wealth. Before the Monsignor's death, Father Soberick took messages for the Monsignor at their retreat from brokers calling about his investments. Even after the death, he did not question DMB, or apparently anyone else, concerning the calls or his responsibilities in relation to the investments or the estate generally. He also never inquired why the accounts were not being addressed or liquidated sooner. Instead, he tacitly cooperated with, and acquiesced to, DMB's various requests for signatures and other documentation only when called upon. He acted without any urgency. To the contrary, at one point he urged DMB to hold onto the stocks and sell them slowly.

During this same period, Mr. Bolduc, Sr. began expressing, initially to Father Soberick, and then later to Ms. St. Germain and Attorney McGrath, concern over the nature and their handling of his son's assets. Father Soberick had invited Mr. Bolduc, Sr. to directly contact DMB to communicate his concerns over the margin debt. Mr. Bolduc, Sr. urged DMB and Father Soberick to act quickly in disposing the stocks because of the margin debt. By the end of November 2000, Attorney Nicholas Forgione of DMB was himself urging the legal team working on the estate to "SELL, SELL, SELL!" because of the magnitude of margin debt and the extreme volatility of the stock market prevailing at the time (especially in so-called "hi-tech" stocks).

DMB only then commenced in earnest to communicate with the brokerage houses to close the accounts and to stop the margin calls. However, DMB

frequently sent the wrong paperwork to the brokerage houses, or sent correct paperwork to the wrong brokerage house address. To further compound matters, on at least one occasion, a brokerage house failed to respond once it had finally received the correct paperwork and then later lost the package altogether. Throughout this, the margin calls kept coming in the mail. Nine were sent in October 2000, eight in November 2000 and thirty-seven in December 2000. Between November 7, 2000 and January 2, 2001, the net stock value had fallen to approximately $593,000. Nearly 1.5 million was lost the first week of December, 2000, alone. All of the accounts were liquidated between February 20 and April 30, 2001. Unfortunately, over the course of intervening months, the net value of the stocks had declined to just under $500,000. The greatest part of the devaluation took place between about early November 2000 and mid-December 2000 — the period of preparation for and receipt of administration authority.

In their objection to the first and final account, Mr. and Mrs. Bolduc argue that Father Soberick failed to act reasonably or prudently in liquidating Monsignor Bolduc's stock. The Bolducs seek to surcharge Father Soberick for the resulting loss. In support of their claims, the Bolducs further allege that Father Soberick, in failing to act promptly, has breached his fiduciary duties as executor and should be removed. Finally, the Bolducs argue that an order for a $50,000 distribution should be made regardless of their other claims. Each of these claims is addressed in turn below.

Resolution of the issues presented in this case largely follows the analysis presented in *In re* Estate of McCool, 131 N.H. 341 (1988). McCool makes clear that the timing in which an executor must act depends on the facts and circumstances of the case:

> An executor must handle estate assets with that degree of prudence and diligence that a man of ordinary judgment would bestow on his own affairs of like nature. Unlike the trustee, whose responsibility is to hold assets, the executor must exercise prudence and diligence in the timely liquidation of assets. What constitutes reasonable conduct with respect to estate assets varies with the circumstances of the case. [S]urcharge is the penalty for failure to exercise common prudence, common skill and common caution in the performance of the fiduciary's duty and is imposed to compensate beneficiaries for loss caused by the fiduciary's want of due care.

Id. at 346. (Citations and quotations omitted). In McCool, the executor never acted and faced surcharge for non-action. Here, the executor acted and surcharge hinges on whether he should have acted sooner. The Bolducs argue that expedited or special appointment and administration should have been sought so that the stocks might have been disposed of and liquidated within six weeks of the Monsignor's death in mitigation of loss associated with the margin debt, and maximization of value, given the predominant declining market at the time. Father Soberick counters that the Monsignor's stock was liquidated within just over six months from the date of death. He further claims that this is, *per se*, a reasonable timeframe as no one could have predicted the downturn in the market between November and December 2000.

While this Court acknowledges and accepts Father Soberick's assertion that no one can predict with precision what the stock market will do, the facts of this

case are still troubling. Father Soberick turned a blind eye to the reality presented and DMB did not act with any urgency. A combination of things went very wrong for the decedent's estate early on. Neither Father Soberick nor DMB seemed to comprehend or, if they did, they ignored the urgent need to address the decedent's stockholdings. The decedent's portfolio: (1) predominantly consisted of high risk, "high-tech" stock; (2) was not diversified to any appreciable degree — that is to say that the vast majority of stock was in but two "high tech" corporations, Sun Microsystems and Cisco; and, (3) was subject to significant margin debt. Beyond this, by the fall of 2000 it had become apparent that the stock market was trending downward at a fairly precipitous fold and had become extremely volatile, especially in the "high-tech" sector.

For his part, Father Soberick, continued to conduct himself more as a loyal friend to the Monsignor than an executor of his estate. He sought to keep secret the decedent's life outside the Church. He refused to open the Monsignor's mail because it was not his. He did not inform anyone, at least for a while, of the existence of some of the Monsignor's assets. Even while the Monsignor was alive, he failed to inquire into his own share of the investments. After the Monsignor's death, when he began to learn from Mr. Bolduc, Sr. and DMB to sell the stock in light of the circumstances of the market and the margin debt, he opted to proceed slowly, or at least with no sense of urgency.

For its part, DMB held itself out to be a firm that could provide responsible professional advice, representation and help to Father Soberick in handling the

Monsignor's estate. Yet, it proceeded without urgency to arrange for and establish Father Soberick's administration even after internal prodding in late-November 2000 to "SELL SELL SELL!" No special or expedited regular administration was sought to address the stock and margin debt quickly, and no letters were sent to two of the big brokerage houses holding the decedent's stock accounts until January 2, 2001, by which date the net value had fallen by some $2 million. The court was not asked to expedite the executor's appointment. Mail was employed to file pleadings and required documents rather than overnight mail, personal delivery or currier service. Moreover, despite letters to Father Soberick noting market decline and volatility, no urgency was expressed in any of the correspondence. Clearly Father Soberick was not supervising the estate. It seems that no one was – only standard, rote procedures were implemented when the estate (unadministered and administered) cried out for the non-routine. The circumstances of this estate dictated that the executor act swiftly. Father Soberick did not act with the reasonable degree of prudence and diligence that a man of ordinary judgment and care would show for his own affairs of a like nature. He had a duty to timely liquidate the Monsignor's assets. Here, by November 27, 2000, at the latest, he should have completely assessed the situation and disposed of the securities.

This does not quite end the discussion however. The parties dispute whether Father Soberick's reliance on DMB's guidance in handling the estate shields him from surcharge. Both sides have presented caselaw from many different jurisdictions discussing whether an executor should be held liable for the

acts of his or her attorneys in handling a case. This issue is certainly not clear in New Hampshire. The only case dealing with this issue was written in 1882:

> If it is reasonably necessary for a trustee to employ agents or attorneys, and if he uses ordinary care in their selection, and a proper supervision over the business entrusted to them, he cannot be held liable for their indiscretion resulting without fault on his part.

Dodge v. Stickney, 62 N.H. 330, 337 (1882). See also RESTATEMENT (SECOND) TRUSTS, §171 cmts. d and f. and §225 (liability for acts of agent). In this case, Father Soberick failed to properly supervise DMB. As already discussed in detail, while in this court's judgment DMB failed to act as it should have, Father Soberick himself failed to act as a dutiful executor. Instead, he continued to act as the Monsignor's friend. He never transitioned into his role as captain of "estate". When serving as a fiduciary, a friend's responsibilities must stand subordinate. Father Soberick failed to supervise DMB. He failed to timely inform DMB of all of the decedent's assets. He failed to keep up with the decedent's mail. Thus, regardless of DMB's handling of the estate, Father Soberick bears responsibility for failing to supervise the process and acting when he knew, or should have known, that the situation was urgent.

The parties' requested findings of fact and rulings of law are granted or denied consistent with the above order. See Clinical Lab Products, Inc. v. Martina, 121 N.H. 989, 991 (1981); R.J. Berke & Co. v. J.P. Griffin, Inc., 116 N.H. 760, 766-67 (1976). Any of the parties' requests for findings and rulings not granted herein either expressly or by necessary implication are hereby denied or determined to be unnecessary in light of the court's decision.

The executor is **surcharged** $1,256,000, together with interest of 5% calculated from November 27, 2000.

Subject to payment of the surcharge and interest the estate is ready for final settlement. It would therefore serve no purpose to appoint an administrator, d.b.n., w.w.a., unless it becomes necessary to sue on the bond, in which case the Bolducs may renew their motion. If it becomes necessary to appoint a administrator, d.b.n., w.w.a., the court reserves leave to charge the executor for the costs related to appointment and services rendered that would have been unnecessary but for his maladministration and removal.

The executor shall immediately disburse to the Bolducs $25,000 each.

The executor's first and final account is **disallowed**. He shall file an amended account reflecting payment of the surcharge and interest **no later than April 15, 2005**.

SO ORDERED.

Dated: 2·28·05

Gary R. Cassavechia, Judge