UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	CHAPTER 7
	)	
	)	
LEONA ROSE HARMON,	)	CASE NO. 99-61311
	)	
Debtor.	)	JUDGE RUSS KENDIG
	)	
	)	
	)	**MEMORANDUM OF DECISION**
	)	

Before the court is the final report of the Chapter 7 trustee Anne Piero Silagy (hereafter "trustee"), including a request for this court to authorize trustee compensation of $2,858.42 and trustee expenses of $39.34, and the First and Final Application of Roetzel & Andress for Compensation and Reimbursement seeking attorney fees of $304.00 and attorney expenses of $5.60 in representation of the trustee. For the reasons that follow, the court orders that the trustee receive compensation of $665.00 and reimbursement for expenses of $39.34. The court orders that Roetzel & Andress receive compensation of $243.20 and reimbursement for expenses of $5.60

I. JURISDICTION AND VENUE

The court has jurisdiction of this matter pursuant to 28 U.S.C. § 1334 and the General Order of Reference entered in this district on July 16, 1984. This is a core proceeding over which the court has jurisdiction pursuant to 28 U.S.C. § 157(b)(2)(A). Venue is proper in this judicial district pursuant to 28 U.S.C. § 1408.

II. FACTS

Leona Rose Harmon ("Debtor") filed her Chapter 7 petition on May 4, 1999. The schedules accompanying the petition disclose secured debts of $4,956.07, unsecured debts of $23,060.42, personal property of $9,245.00, and no real property. The meeting of creditors was held on June 15, 1999. The minutes of that meeting bear the notation "preference to daughter," and the "asset" box is checked. On July 6, 1999, the trustee asked the court to notify creditors that there would be assets for distribution, and this was promptly completed on July 9, 1999. The claims bar date was set as October 7, 1999.

No unsecured claims were filed by the bar date. Thereafter, on March 1, 2000, the trustee hired outside counsel to pursue the preference. One telephone call and one demand letter later, Debtor's daughter surrendered the entire preference amount in a $20,000 check that the trustee deposited on May 2, 2000.

Over four months passed after receipt of the check. On September 18, 2000, the trustee requested a supplemental notice to file claims. On September 19, 2000, the clerk's office called the trustee and told her that this would require a motion and an order. Almost three months later, the trustee responded and filed a motion on December 11, 2000. The court entered an order approving a second bar date on December 15, 2000, and that date was set for February 16, 2001. In response to the second notice, one claim for $2,958.81 was filed on February 2, 2001. A claim in the amount of $6,748.55 appeared without explanation on August 20, 2001, nearly six months after the second bar date.[1]

Years passed. Nothing happened. Every six months the trustee prepared a semi-annual report predicting that case closing was imminent. Interim reports were received by the court on March 30, 2001, October 11, 2001, April 2, 2002, and October 15, 2002. The projected date of the trustee's final report was extended by the trustee three times, to December 31, 2002. Without explanation, even the reports stopped. The trustee prepared her final report on April 29, 2004, nearly four years after the preference had been fully repaid to the bankruptcy estate. The United States Trustee completed its review on June 15, 2004 and filed the final report on June 22, 2004.

One additional development occurred in a strangely coincidental fashion. On April 23, 2004, *Debtor's attorney* filed a proof for claim for the *daughter*, Kelly Wyss, for the claim arising from repayment of the preference. Debtor's attorney signed the claim form. The claim was amended to include support documentation on April 29, 2004, the date of the trustee's final report. The proof of claim appears to evidence a conflict of interest. If this claim had not been filed, a literal reading of 11 U.S.C. § 726 requires that the funds remaining after payment of administrative expenses and the previously filed claims be returned to debtor. Likewise, Section 326 prohibits payment of commissions to the trustee on funds returned to a debtor.[2] The proof of claim benefitted debtor, assuming she is working in concert with her daughter, by reducing the amount paid to other creditors.

On September 8, 2004, this court requested the comments of the United States Trustee on the trustee's final report and matters of administration related thereto. The United States Trustee responded that the final report "complies with the requirements of the United States Trustee and is in accordance with applicable law. " The United States Trustee had no further comments regarding administration of this case. See Dkt. #33.

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The claim for $6,748.55 was that of Discover Financial Services which is docketed, but no proof of claim is in the court file. In the months since the time set for hearing trustee's final report, court staff have scoured other files and contacted the creditor and others, but have been unable to locate the claim or even a copy of it.

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Unless otherwise stated, references to "the Code" or "the Bankruptcy Code" are to Title 11 of the United States Code. Unless otherwise stated, a reference to a "Section" is a reference to a section within the Bankruptcy Code.

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III. ISSUES

A. Emphasis on Timeliness

"The trustee shall . . . collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of the parties in interest . . ." 11 U.S.C. § 704. The importance of timeliness is recognized by the United States Trustee and specifically referenced in its written guidance to Chapter 7 trustees:

> Section 704(1) provides that a trustee shall close an estate as expeditiously as is compatible with the best interests of the estate. Delays in case closure diminish the return to creditors, undermine the creditors' and public's confidence in the bankruptcy system, increase the trustee's exposure to liability, raise the costs of administration, and, in cases involving non-dischargeable pre-petition tax liabilities, expose the debtor to increased penalties and interest. Delays also give rise to public criticism of the bankruptcy process. *To ensure compliance with § 704(1), the United States Trustee monitors the number and age of open cases and the reasons they remain open.*

Executive Office for United States Trustee, Handbook for Chapter 7 Trustees (July 1, 2002) at 8-42 (emphasis added) (hereafter "Handbook").

Reported cases also emphasize the significance of timeliness in performing the trustee's duties. The trustee collects and reduces to money property of the bankruptcy estate, and is obligated to do so as expeditiously as possible. See Yadkin Valley Bank & Trust Co. v. McGee (In re Hutchinson), 5 F.3d 750, 753 (4th Cir. 1993) (trustee must expeditiously perform each task necessary to close the estate); In re Moon, 258 B.R. 828 (Bankr. N.D. Fla. 2001) (trustee fee reduced due to failure to maximize return on assets and delay in paying taxes owed by the estate); In re Biskup, 236 B.R. 332 (Bankr. W.D. Pa. 1999) (trustee not automatically entitled to maximum fee because court must consider various factors, including timeliness); In re Dorn, 167 B.R. 860 (Bankr. S.D. Ohio 1994) (trustee fee reduced because of delay in administration of estate); In re Williams, 159 B.R. 936 (Bankr. D. Co. 1993) (trustee denied compensation due to six-year delay in administering estate); In re The Kitchen Lady, Inc., 144 B.R. 544 (Bankr. M.D. Fla. 1992) (trustee fee reduced by fifty percent due to lack of appreciable activity for more than three years during case); In re Harris, 143 B.R. 957 (Bankr. M.D. Fla. 1992) (three and one-half year delay resulted in significant prejudice to creditors and debtor, trustee fee reduced by half); In re Leedy Mortgage Co., Inc., 126 B.R. 907 (Bankr. E.D. Pa. 1991) (trustee fee reduced because of delay in administration); In re Samson Indus., Inc., 108 B.R. 545 (Bankr. E.D. Pa. 1989) (trustee fee reduced where assets were easily recovered but trustee delayed administration); In re Crawford Hardware, 82 B.R. 885 (Bankr. S.D. Ohio 1987) (trustee fee reduced forty-two percent due to six-year delay in administering estate).

B. <u>Oversight Reponsibility of the United States Trustee</u>

Prior to the Bankruptcy Reform Act of 1978, bankruptcy courts handled both judicial and administrative functions. Congress concluded that this duality of function eroded public confidence in the integrity and impartiality of the process, and consequently established the office of the United States Trustee as a pilot program in a limited number of judicial districts, giving the office statutory authority to supervise the administration of bankruptcy cases and trustees. <u>See</u> Pub. L. No. 95-598 at § 224, <u>codified as amended at</u> 28 U.S.C. § 586. The United States Trustee program became a permanent part of the bankruptcy landscape with the passage of Pub. L. No. 99-554, the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986 (hereafter "1986 Act").

The legislative history to the 1986 Act repeats the Congressional determination that "the handling of both administrative and judicial functions by the bankruptcy courts has eroded public confidence in the bankruptcy system." H.R. Rep. No. 99-764, at 17 (1986), <u>reprinted in</u> 1986 U.S.C.C.A.N. 5227, 5231. By creating the United States Trustee program and housing it within the Department of Justice, Congress felt it was placing "the administrative duties in bankruptcy in the Branch of Government most capable of executing the laws." <u>Id</u>. at 18. Separation of administrative and judicial functions was viewed as the best way to allow bankruptcy judges to be "free to resolve disputes untainted by knowledge of administrative matters unnecessary and perhaps prejudicial to an impartial judicial determination." <u>Id</u>.

The Administrative Office of the United States Courts and the Executive Office for the United States Trustee further documented the United States Trustee's responsibility for oversight and delineated respective roles and responsibilities of the court and the United States Trustee in a Memorandum of Understanding that was issued in 1991 and amended in 1999 (hereafter "1999 MOU"). The 1999 MOU states that "as the degree of creditor participation in a Chapter 7 liquidation case is often minimal, review by the United States Trustee of the manner a particular estate is being administered is important." 1999 MOU at 2. "Pursuant to 28 U.S.C. section 586, the United States Trustee has the responsibility to appoint private trustees, oversee their performance, and generally supervise the administration of estates." <u>Id</u>.

In this case, the trustee failed to expeditiously perform the administrative responsibilities with which she was entrusted, despite the fact that she was repeatedly alerted to the existence of funds on deposit each time she prepared and filed an interim report. The docket of this case contains no less than four interim reports prepared and signed by the trustee during 2001 and 2002, accompanied by bank statements initialed by the trustee. These interim reports are submitted to the United States Trustee no later than thirty days after the end of the reporting period. <u>See</u> Handbook, *supra*, at 9-8.

The United States Trustee also failed to perform its statutory responsibilities, as evidenced by its repeated inaction when presented with repeated interim reports in a Chapter 7 asset case showing that the trustee was holding $20,000 on deposit, yet failing to properly administer the case. Because the Handbook emphasizes the importance of case progress and states that "the United States Trustee monitors the number and age of open cases and the reasons they remain open," the court is mystified as to why this case languished untended for nearly four years, and can only conclude there was a massive failure of information systems or a complete absence of meaningful staff followup.

Not only did the United States Trustee fail to act, either it does not understand or does not care. When asked for comments regarding the administration of this case, the United States Trustee responded that a paralegal specialist had reviewed and signed the report, and that "the electronic signature on the Final Report of [the] paralegal specialist, on behalf of the United States Trustee, reflects the United States Trustee's position that the Final Report complies with the requirements of the United States Trustee and is in accordance with applicable law." There are several reasonable interpretations of this cryptic response, all of which indicate a failure to understand the issues or admit the obvious failure. The United States Trustee failed to fulfill its statutory mandate.

C. Trustee and Attorney Compensation Requested

The court must address the fee requests in this case in light of the facts previously stated. The trustee has requested compensation of $2,858.42 and reimbursement for expenses of $39.34. Counsel for the trustee seeks compensation of $304.00 and expenses of $5.60. Trustee compensation is governed by the interplay of 11 U.S.C. §§ 326 and 330, which set percentage maxima constrained by the requirement of reasonableness. Section 326(a) reads, in pertinent part:

> In a case under Chapter 7 or 11, *the court may allow reasonable compensation* under section 330 of this title of the trustee for the trustee's services, payable after the trustee renders such services, not to exceed 25 percent on the first $5,000 or less, 10 percent on any amount in excess of $5,000 but not in excess of $50,000, 5 percent on any amount in excess of $50,000 but not in excess of $1,000,000, and reasonable compensation not to exceed 3 percent of such moneys in excess of $1,000,000 upon all moneys disbursed or turned over in the case by the trustee to parties in interest, excluding the debtor, but including holders of secured claims.

11 U.S.C. § 326(a)(1) (emphasis added). The trustee's fee request of $2,858.42 is calculated using the statutory maximum within the relevant tiers, and requests twenty-five percent of the

first five thousand dollars, and ten percent of the remaining $16,084.20 on deposit at the time the trustee prepared her final report.[3]

Reasonable compensation is authorized only for actual and necessary services rendered by a trustee or attorney. 11 U.S.C. § 330(a)(1). The court may award compensation in an amount less than requested, and the court is to consider the nature, extent, and value of services, including whether the services were performed within a reasonable amount of time commensurate with the complexity of the task addressed. See 11 U.S.C. § 330(a)(1)-(3). The percentages authorized in Section 326 are neither a starting point nor an entitlement, and do not set forth presumptive or minimum standards. See Connolly v. Harris Trust Co. of California (In re Miniscribe Corp.), 309 F.3d 1234, 1241 (10th Cir. 2002). "[T]he cap of § 326(a) is implicated only when the compensation is reasonable, and reasonableness is a determination that must begin with 11 U.S.C. § 330." In re Butts, 281 B.R. 176, 178 (Bankr. W.D. N.Y. 2002). Like any other court appointee requesting compensation out of the assets of the estate, the trustee is obligated to bear the burden of proving all aspects of the worth of her services and the magnitude of her compensation award. See In re Leedy Mortgage Co., Inc., 126 B.R. 907, 917 (Bankr. E.D. Pa. 1991) (collecting cases).

Bankruptcy courts have repeatedly reduced trustee compensation by as much as fifty percent and sometimes denied compensation where a trustee unjustifiably delayed administration of the estate. See In re Moon, 258 B.R. 828 (Bankr. N.D. Fla. 2001) (trustee fee reduced forty-two percent due to failure to maximize return on assets and delay in paying taxes owed by the estate); In re Dorn, 167 B.R. 860 (Bankr. S.D. Ohio 1994) (trustee fee reduced by fifty percent because of delay in administration of a single-asset estate); In re Williams, 159 B.R. 936 (Bankr. D. Colo. 1993) (trustee denied compensation in four separate cases due to delays in administering the estate); In re The Kitchen Lady, Inc., 144 B.R. 544 (Bankr. M.D. Fla. 1992) (trustee fee reduced by fifty percent due to lack of appreciable activity for more than three years during case); In re Harris, 143 B.R. 957 (Bankr. M.D. Fla. 1992) (three and one-half year delay resulted in significant prejudice to creditors and debtor, trustee fee reduced by half); In re Leedy Mortgage Co., Inc., 126 B.R. 907 (Bankr. E.D. Pa. 1991) (trustee's final request for compensation reduced by eighty-four percent because of delay in administration); In re Samson Indus., Inc., 108 B.R. 545 (Bankr. E.D. Pa. 1989) (trustee's hourly fee reduced where assets were easily recovered but trustee delayed administration); In re Crawford Hardware, 82 B.R. 885 (Bankr. S.D. Ohio 1987) (trustee fee reduced forty-two percent due to six-year delay in administering estate).

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The preference was deposited into the trustee's estate cash account and earned interest at 2.35% during 2000 and the first half of 2001, declining to 0.1% interest by April 2004. The court notes that the rate of return on these funds was less than 2% for thirty-two of the fifty-two months this money was on deposit at the time the trustee prepared her final report.

The unspoken rule regarding trustee compensation in Chapter 7 cases is that courts do not begrudge trustees occasional windfalls due to all the uncompensated and undercompensated work that trustees regularly perform, combined with the recognition that trustees necessarily incur overhead expenses for office space, systems, and personnel. Sometimes the trustee is paid the maximum fee permitted under 11 U.S.C. § 326(a), and in those cases the maximum fee allowance recognizes that in certain smaller cases and in no asset cases, trustees provide services that are of a value that is at least the amount capped by statute. See In re Computer Learning Centers, Inc., 285 B.R. 191, 230 (Bankr. E.D. Va. 2001). This is not such a case.

The trustee's fee request is unreasonable in several aspects. First, some of the money the trustee claims she has "administered" will be taken from and returned to the same person in a manner that can be described charitably as unusual. There are presently claims from other unsecured creditors (excluding the claim of debtor's daughter) that total $9,707.36. If those claims are paid as proposed by the trustee, and trustee and attorney fees are allowed as requested, the balance of $11,949.54 will be returned to debtor's daughter. The trustee will have taken the daughter's money, held onto it for years without any explanation, and returned a portion of it after deducting a handsome commission. This isn't right.

Second, the trustee's inaction has resulted in delay to all parties in interest - to the daughter who surrendered the entire $20,000 in May 2000, to creditors who received notice of the bankruptcy in 1999, and to debtor, who has waited five years to resolve all the issues related to her uncomplicated bankruptcy case. The trustee's unexplained delay resulted in prejudice to all parties in interest in this case. The court is required not to avert its eyes and pretend that everything has proceeded appropriately, even while all the insiders in the process whistle and pretend that this is how things are done.

An appropriate starting point for calculation of reasonable trustee compensation is the amount proposed to be paid to unsecured creditors other than the debtor's daughter, which is $5,799.92. Applying the statutory percentages to this figure results in a fee of $1,329.99. The trustee's extreme delay in administering this uncomplicated, single-asset case makes an award of the statutory maximum, even as modified, unreasonable. The court awards fifty percent of that possible fee, or $665.00, following the lead of other bankruptcy courts who have reduced trustee compensation in the face of comparable delay.

In its application for compensation and reimbursement of fees, the trustee's attorney has requested total compensation of $304.00, which represents two hours of service at an average rate of $152.00 per hour. See Dkt. #26. The court notes that 0.4 hours of the total hours billed is captioned as "office conference" to discuss a mortgage and there is no real property in this bankruptcy estate. The court is hard pressed to see how these conferences could have resulted in any benefit to the estate, and will disallow the portion of the total fee requested for those conferences. Consequently, the attorney for the trustee will be permitted a fee of $243.20 and expenses of $5.60.

V. CONCLUSION

The trustee shall receive compensation of $665.00 and reimbursement for expenses of $39.34. The attorney for the trustee shall receive compensation of $243.20 and reimbursement for expenses of $5.60.

An appropriate order shall enter.

/s/ Russ Kendig

Judge Russ Kendig DEC 22 2004
U.S. Bankruptcy Judge

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