

Ruaschenberg Trustee Fee Determination

Judge Rosman Ruling

**IN THE CIRCUIT COURT FOR THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR
LEE COUNTY, FLORIDA** **PROBATE DIVISION**

IN RE: The Estate of Robert Rauschenberg

CASE NO.: 08-CP-2479

ORDER GRANTING TRUSTEES' FEES

THIS CAUSE comes before the Court following a trial to determine the reasonable trustees' fees for the Trustees of the Robert Rauschenberg Revocable Trust (Trust). Having reviewed testimony and evidence presented at trial, the case file, and the applicable law, and having heard argument by the parties, the Court finds as follows:

ROBERT RAUSCHENBERG

1. Robert Rauschenberg was born on October 22, 1925, in Port Arthur, Texas. He died on May 12, 2008, at the age of 82 at his home on Captiva Island, Florida. Rauschenberg was an iconic, highly respected, prolific artist, producing pieces in a variety of formats, including painting, photographs, silkscreening, collage, and what he called combines – combinations of painting and sculpture, using found materials. He also provided costumes and set designs for various performances. The prominence of Rauschenberg as an artist has been compared to that of artists such as Picasso. His artwork has been exhibited, and sought after by museums and galleries for exhibition, all over the world. Robert Rauschenberg is regarded as one of the most influential American artists and influential forces in Twentieth Century art.

2. Robert Rauschenberg was well known for his philanthropy. He donated artwork to organizations and causes he supported. He created Change, Inc., an organization that provided grants to artists. He founded the Rauschenberg Overseas Culture Interchange to foster art in countries around the world, initiating cross-border communication and promoting peace. One of

Rauschenberg's long term goals was the creation of the Robert Rauschenberg Foundation (Foundation), to continue his philanthropic efforts after his death.

PROCEDURAL BACKGROUND

3. Rauschenberg appointed the Trustees, Darryl Pottorf, Bennet Grutman, and Bill Goldston, in the 1990s, and withdrew himself as a trustee in 2005.

4. After his death on May 12, 2008, a Petition for Administration of his estate was filed on September 5, 2008. The will devised the residuary estate to the Trust. The Trust assets at the time of Rauschenberg's death were valued at \$605,645,595.00. Upon disbursement to the Foundation in 2012, the Trust assets were valued at approximately \$2,179,000,000.00.

5. The Foundation filed a "Petition to Determine Trustees' Fees" on June 21, 2011.

6. On July 22, 2011, an agreed order was entered consolidating this case with 11-CA-1985, in which the Trustees had filed a complaint to determine their reasonable fee.

7. The parties attended voluntary mediation on January 26, 2012, but were unable to reach a resolution. The parties attended court-ordered mediation on October 1, 2013, and were unable to reach a settlement.

8. After a lengthy period of discovery, along with a number of pre-trial motions and hearings, trial was held on the issue of a reasonable trustees' fee on June 10, 2014 through June 18, 2014. The Court heard testimony, in person and through deposition, of 21 witnesses, and over 300 exhibits were admitted.

TRUSTEES' ARGUMENT

9. The Trustees argued that the method to be used to determine their reasonable fee should be a consideration of the factors set forth in West Coast Hospital Association v. Fla. National Bank of Jacksonville, 100 So. 2d 807, 811 (Fla. 1958). Those factors are:

- a. The amount of the capital and income received and disbursed by the trustee;
- b. The wages or salary customarily granted to agents or servants for performing like work in the community;
- c. The success or failure of the administration of the trustee;
- d. Any unusual skill or experience which the trustee in question may have brought to his work;
- e. The fidelity or disloyalty displayed by the trustee;
- f. The amount of risk and responsibility assumed;
- g. The time consumed in carrying out the trust;
- h. The custom in the community as to allowances to trustees by settlors or courts and as to charges exacted by trust companies and banks;
- i. The character of the work done in the course of administration, whether routine or involving skill and judgment;
- j. Any estimate which the trustee has given of the value of his own services; and
- k. Payments made by the cestuis to the trustee and intended to be applied toward his compensation.

10. The Trustees argued, and their experts opined, that based on the West Coast factors, a fee between \$51,000,000.00 to \$55,000,000.00 was reasonable.

FOUNDATION'S ARGUMENT

11. The Foundation argued that the federal lodestar method should be used to determine the reasonable fee for the Trustees. See Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985). The Foundation's experts opined that under this analysis, the Trustees would be entitled to a total of \$375,000.00 for all three Trustees.

12. The Foundation further raised Daubert issues pertaining to some of the Trustees' witnesses and evidence, and moved to strike some of the Trustees' witnesses based on the issue of the Trustees performing corporate actions.

ANALYSIS

West Coast versus lodestar analysis

13. The lodestar method has been used for attorneys' fees and fees in bankruptcy cases. The Foundation argued that recent case law held that the lodestar method could be used to determine reasonable fees for guardians or personal representatives, and thus should also be

applied to other fiduciaries such as trustees. However, no authority was presented to the Court which applied the lodestar standard to trustee fees. The Court finds that there is no precedent for use of the lodestar analysis to determine a reasonable fee for trustees, and further finds that use of the lodestar analysis would be unreasonable under the particular facts and circumstances of this case. The Court respectfully declines to apply the lodestar standard in this case.

Daubert Issue

14. In July 2013, Florida adopted the Daubert standard, and §90.702, Fla. Stat. (2013) provides that:

If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:

- (1) The testimony is based upon sufficient facts or data;
- (2) The testimony is the product of reliable principles and methods; and
- (3) The witness has applied the principles and methods reliably to the facts of the case.

15. Before the jury can consider expert testimony over the adverse party's objection, the trial judge, serving as "gatekeeper," must determine whether the testimony satisfies the relevant foundational requirements. See Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 597 (1993). While the party seeking to introduce the testimony bears the burden of proving its admissibility, the burden is not especially onerous, since the Daubert standard has been interpreted liberally in favor of the admission of expert testimony. Levin v. Dalva Bros., Inc., 459 F.3d 68, 78 (1st Cir. 2006). Expert testimony, like all evidence, is admissible only if it is relevant, i.e., if it has any tendency to make a fact of consequence to the action more or less probable than it would be without the testimony.

16. An opinion is unreliable if the expert employed no discernable scientific procedure to support the opinion. U.S. v. Hutchinson, 253 Fed.Appx. 883 (11th Cir. 2007). Nor may the

expert simply repeat another's opinion or recite the opinions of other experts. Id. It is not inherently unreliable to rely on the opinion of other experts and synthesize that opinion with other knowledge, and such reliance goes to the weight, not admissibility of the testifying expert's opinion. West v. Bell Helicopter Textron, Inc., 967 F.Supp.2d 479, (D.N.H. 2013); Khorrami v. Mueller, No. 07-C-812 Slip Copy, 2013 WL 4087559 *7 (E.D.Wis. 2013).

17. To the extent the Foundation argued that various appraisal or valuation methods testified to by the Trustees' experts are unreliable, the Court denies this argument. Based on the authority cited above, the Court finds that the experts relied on their own experience, and synthesized the opinions of others, to reach opinions based on knowledge and procedures common in the art industry. The Court finds the experts' opinions and evidence presented to be admissible. The Court took into consideration the Foundation's disagreement with the methods and results of the appraisals and valuations, and considered the testimony and evidence of the experts, and weighed the experts' opinions accordingly.

Motion to strike

18. The Foundation moved to exclude experts and objected to testimony and evidence based on the argument that the Trustees were also directors of Untitled Press Inc. (UPI) and Robert Rauschenberg Inc. (RRI), corporations formed by Rauschenberg during his lifetime, during trust administration. Those corporations owned most of the artwork and intellectual property, and employees of the corporations were responsible for maintaining, curating, exhibiting and selling the artwork. The Foundation argued that the majority of services provided by the Trustees were corporate services, not trust services, and the Trustees are not entitled to payment of trustee fees for those corporate services.

19. The Court finds these services were relevant in this case. Bennet Grutman testified that the Trustees appointed themselves as directors of UPI and RRI because they had a strategic plan; and, if they hired others, the Trustees would have to manage and watch over them; and, if other persons hired were not implementing the plan, the Trustees would have to remove them and hire others. This would have been inefficient, expensive, cumbersome, and would have delayed the implementation of the plan. Mr. Grutman testified that “from our perspective, we were always wearing our trustee hats, we were doing this with respect to the benefits to the beneficiary ... there were too many decisions that were interrelated to allow for different people in these roles.”

20. Charles Ranson testified that it was customary to put the fiduciary officer on the board of a closely held corporation because the trust must be the dominating factor, and acting in that role is part of the general service of a trustee. Gary Ruttenberg testified that any fiduciary would have taken over some part of the board of the corporation, so they could manage trust assets held by the corporation, and this falls under other services rendered by the trustee. The Court finds the services of the Trustees were inextricably intertwined with their actions as directors of UPI and RRI necessary to manage the art and other trust assets held by those corporations. The testimony indicates that by appointing themselves as directors, the Trustees actually saved money in expenses and salaries, increasing the benefit to the Foundation. The Court denies the motion to strike.

Compensation

21. “If the terms of a trust do not specify the trustee’s compensation, a trustee is entitled to compensation that is reasonable under the circumstances.” §736.0708(1), Fla. Stat. (2007).

The evidence established that the Trust provides only that the Trustees are entitled to a reasonable fee for their services.

22. The witnesses at trial testified that the Trustees rendered many services during administration. Upon Rauschenberg's death, the Trustees planned, advertised, and managed several exhibitions and memorials. The Trustees developed a strategic plan to withdraw Rauschenberg's art from the market, in order to prevent a decline in value from speculators or collectors flooding the market with his art. Mr. Grutman testified that this decline in value had occurred following the death of other famous artists, such as Andy Warhol. The Trustees contacted all galleries holding art on consignment, and directed that the art be returned. They contacted insurance agents regarding insurance on all assets. The Trustees moved all artwork to the Mount Vernon warehouse in New York for inventory and appraisals. They hired an art advisor. They then interviewed companies regarding a formal appraisal of all artwork, and hired Christie's to perform the appraisal. The Trustees reviewed the collection to determine which pieces should remain in the Foundation's permanent collection. The Trustees oversaw security, maintenance and conservation of the art and properties. The Trustees handled litigation of employment and intellectual property issues, and managed authentication requests. The Trustees managed placement of art in museums and galleries for exhibitions when the time was right to re-introduce the art on the market. They interviewed galleries and selected the Gagosian Gallery to hold exhibitions worldwide. The Trustees curated, set prices, negotiated with the galleries and museums, and were involved in all aspects of each exhibition, such as advertisements and catalogs.

23. With respect to the West Coast factors, the Court makes the following findings:

a. The amount of capital and income received and disbursed: The value of the assets upon Rauschenberg's death was \$605,645,595.00. Upon disbursement to the Foundation, the value was estimated to be approximately \$2,179,000,000.00, which is approximately three and one-half (3 ½) times the original value of the estate. While the majority of assets were artwork, there was also significant real property including his home and 20 acres on Captiva Island, houses in California and New York, and an art warehouse.

b. The wages or salary customarily granted for like service in the community: Both Mr. Ranson and Mr. Ruttenberg testified that this was a unique case, and neither could find anyone who had handled such a complex trust.

c. The success or failure of the administration: The Court finds that the performance of the Trustees contributed to the increased value of the assets during their administration. Mr. Ranson testified that "this was a pretty significant administration, and I've never seen anything like it." Rauschenberg's artistry was recognized in the marketplace, and some of that recognition is attributable to the Trustees's management of his "brand." It should be noted, however, that the talent of Robert Rauschenberg and favorable market conditions were also contributing factors towards the increased value of the estate assets.

d. Any unusual skill or experience held by trustee: Mr. Ranson testified that the Trustees were an extraordinary selection by Rauschenberg, since they had knowledge of him, his art, his businesses, and they had experience with the estates of other artists and the art world. The record reflects that the Trustees were close friends and business associates of Rauschenberg. Mr. Pottorf was an artist who lived and worked with Rauschenberg for over 25 years, collaborating on pieces of art. Mr. Grutman was Rauschenberg's accountant for 18 years, assisting him with business, investments, tax and estate planning, as well acquisition and

disposition of property. Mr. Grutman had experience in the art world, and had served as trustee for the estates of other artists. Mr. Goldston operated a fine art publishing company and was Rauschenberg's business partner. He collaborated with Rauschenberg on several pieces of art, and was experienced with the art market. The Court finds that Rauschenberg made a wise and deliberate decision, and picked the best possible Trustees for the estate.

e. The fidelity or disloyalty displayed by the trustee: The Court finds that the Trustees were loyal to Rauschenberg and his vision. Mr. Grutman testified that the focus of the Trustees was always on maximizing benefits to the Foundation, as Rauschenberg would have wanted. The success of the administration reflects that this was true.

f. The amount of risk and responsibility assumed: The evidence established that the Trust contained exculpation clauses, insulating the Trustees from financial risk. However, both Mr. Ranson and Mr. Ruttenberg testified that the Trustees shouldered enormous responsibility. Neither witness believed that a bank or trust company would have been willing to handle this estate. Mr. Ruttenberg also testified that the Trustees put their reputations on the line.

g. The time consumed in carrying out the trust: There was some dispute as to whether four years was a reasonable or lengthy period for administration. Based on the testimony and evidence presented that the Foundation was not set up and prepared for turnover for a few years, this Court finds the time was reasonable under the unique circumstances of this estate.

h. The custom in the community as to allowances to trustees, and charges exacted by trust companies and banks: This Court was presented with expert testimony from a number of witnesses as to fees. Mr. Ranson and Mr. Ruttenberg testified that if a bank or trust company

had accepted this case, it would have charged 1% to 2% of the trust assets per year, plus 40 to 60 basis points in fees for extraordinary services. As a matter of fact, this Court finds that an application of the percentage plus basis points formula to be unreasonably high. These fee estimates are based on trust company or bank practices that recognize the issue of profit to the company, as well as overhead and salaries for employees. Moreover, these standards were not intended for multi-billion dollar estates. The Court considered these rates, but finds they would be unreasonable in this case, considering the testimony that there are sliding fee scales for fees charged by banks and trust companies for large estates. The Court also considered basis points, both as a stand-alone application in a range depending on the circumstances and as an additional application along with a percentage consideration. The testimony was that additional basis points could be considered for the performance of extraordinary services. The Court finds that the Trustees made very good decisions and rendered very good service. It should be noted, however, that they rendered the services Rauschenberg selected them to perform and requested they perform. Their services were those expected of them by Rauschenberg.

i. The character of the work done in the course of the administration: The evidence at trial supports a finding that the Trustees did an exemplary job.

j. Any estimate which the trustee has given of the value of his services: The evidence established that the Trustees had informed the Foundation prior to turnover that the estimate of their fees was between \$36,000,000.00 and \$54,000,000.00. The Trustees originally requested \$60,000,000.00 in fees during this proceeding. At trial, the Trustees requested \$51,000,000.00 to \$55,000,000.00. The Court notes that the Foundation has maintained throughout these proceedings that a total amount of \$375,000.00 was a reasonable fee for all three Trustees.

k. Payments made to trustee to apply towards compensation: The Trustees received \$8,035,199.00 during administration.

CONCLUSION

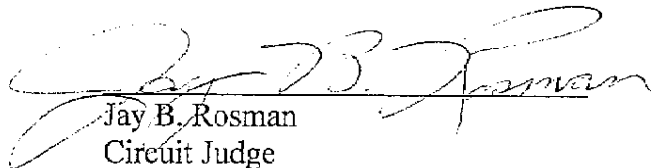
24. Having reviewed the testimony and evidence admitted at trial, the arguments by the parties, and the West Coast factors, the Court finds that a reasonable fee for the services of the Trustees under the particular facts and circumstances of this case is \$24,600,000.00.

Accordingly, it is

ORDERED AND ADJUDGED that the Trustees are entitled to \$24,600,000.00 in total trustees' fees to be divided among all three Trustees, less the \$8,035,199.00 already received by the Trustees.

DONE AND ORDERED in Chambers in Fort Myers, Lee County, Florida this

1st day of August, 2014.


Jay B. Rosman
Circuit Judge

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the above order has been furnished to: **Robert W. Goldman, Esq.**, 745 12th Ave. S., Ste. 101, Naples, FL 34102; **Richard W. Winesett, Esq.**, P.O. Drawer 610, Ft. Myers, FL 33902-0610; and **Michael Gay, Esq.** and **Ted B. Edwards, Esq.**, 111 N. Orange Ave., Ste. 1800, Orlando, FL 32801, this 1st day of August, 2014.

By: 
Cindy Trammell
Judicial Assistant