THIRD DIVISION
September 27, 2017

No. 1-16-2463

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re ESTATE OF PHILIP L. ZEID, Deceased	)	Appeal from the
	)	Circuit Court of
(FIFTH THIRD BANK, as Co-Trustee of the Philip L. Zeid Trust dated October 3, 2006,	)	Cook County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 11 P 1656
	)	
JASON ZEID, as Trustee of the Zeid Family Trust,	)	Honorable
	)	Mary Ellen Coghlan,
Defendant-Appellant).	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Cobbs and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the circuit court of Cook County is affirmed; the court did not abuse its discretion by finding plaintiff's trustee fees reasonable.

¶ 2 Plaintiff, Fifth Third Bank, was named co-trustee of the Philip L. Zeid Trust in May

2012. In March 2014, defendant, Jason Zeid, filed a petition with the trial court arguing plaintiff's fee was unreasonable. Defendant contended that because he was the advisor of the special securities in the trust and had managerial responsibility over the special securities, plaintiff had almost no liability as trustee. Plaintiff had two separate fee schedules - one for "managed" accounts and one for "directed" accounts. Plaintiff's fees were higher for managed accounts than for directed accounts. Defendant argued plaintiff's fee was unreasonable because it was based on the rate for a managed account where plaintiff would manage the assets instead of defendant. Plaintiff replied to this petition and filed its own petition to verify trustee compensation in June 2014. After holding evidentiary hearings concerning the reasonability of the fee plaintiff assessed, the court found plaintiff proved by a preponderance of the evidence its fee was reasonable. For the following reasons the judgment of the circuit court is affirmed.

¶ 3 BACKGROUND

¶ 4 Philip L. Zeid (Philip) created the Philip L. Zeid Trust dated October 3, 2006 (PLZ Trust) and served as its trustee. Philip died on February 8, 2011, survived by his spouse, Paula S. Klein Zeid (Paula), and his son from a prior marriage, defendant, Jason Zeid. According to Philip's will, the residue of his estate was to pour over into the PLZ Trust. The PLZ Trust provided for the distribution and management of Philip's assets upon his death. The PLZ Trust provided $1 million to fund the creation of the Philip L. Zeid Family Trust (Family Trust) for the benefit of Jason and his heirs, and the residue of the trust estate to fund the creation of the Philip L. Zeid Marital Trust (Marital Trust) for Paula's benefit during her lifetime. Upon Paula's death, the assets of the Marital Trust are to be distributed to the Family Trust.

¶ 5 The PLZ Trust contains more than $20 million in assets, and designates $13.6 million worth of assets relating to Philip's scrap metal businesses as "Special Securities" to be managed

by an "Advisor." Philip designated defendant as this advisor in the PLZ Trust. Defendant, in his role as the advisor of the special securities, had the rights and responsibilities for managing those companies and their assets. Section 7.7 of the PLZ Trust contained advisor provisions:

> "(a) The Advisor shall have the sole right to vote the Special Securities and the sole right to make any elections for and on behalf of the owner of the special securities. The Trustee shall not be responsible for the voting of the Special Securities or the making of any elections on behalf of the owners of the special securities.
>
> (b) The Advisor shall have the sole right to consent to: (i) any reorganization, consolidation, merger, sale of stock or sale of assets relating to the Special Securities; or (ii) any change in the financial structure of any entity whose securities constitute Special Securities. The Trustee shall have no liability with respect to such actions of the Advisor.
>
> (c) An Advisor may resign at any time or from time to time and may waive or delegate to any person any or all of such Advisor's rights and powers by written notice to the Trustee.
>
> (d) The Trustee is relieved of any duty to review from time to time the investment in any Special Securities comprising a portion of the trust assets."

Though Philip named defendant as the advisor of the special securities, the PLZ Trust failed to name a successor trustee of the PLZ Trust upon Philip's death.

¶ 6 In the ensuing litigation over Philip's estate, defendant petitioned for the appointment of a corporate trustee for the PLZ Trust. Paula, through her attorney, sought a corporate co-trustee to serve along with her and defendant as co-trustees of the PLZ Trust. Paula's attorney inquired

with various individuals and institutions about serving as a trustee of the PLZ Trust, and eventually chose plaintiff, Fifth Third Bank. In an agreed order on May 29, 2012, plaintiff was appointed co-trustee of the PLZ trust with the consent of Jason and Paula. Factoring into plaintiff's decision to act as a corporate fiduciary was the probability of settlement early in the litigation. When Paula's attorney solicited plaintiff's services, he informed plaintiff that while there was some litigation there were talks between the parties to settle the dispute.

¶ 7 As compensation for its services as a co-trustee, plaintiff and Paula agreed to a fee of 65 basis points on the value of all assets held by the PLZ Trust. However, defendant was never informed of the amount of plaintiff's fee and did not consent to the 65 base point rate. Influential in plaintiff's decision to charge this rate was plaintiff's fee schedule for irrevocable trusts. Plaintiff's fees for acting as a trustee of an irrevocable trust depend on whether the account is a "managed account" or a "directed account," and the amount of money in the account. For a managed account, where plaintiff directly manages and orders trades for the account, the fee rate is 1.45% for the first $1 million, 1.15% for the next $2 million, 0.90% for the next $2 million, 0.70% for accounts over $5 million, and a negotiable rate for accounts over $10 million. For directed accounts, where plaintiff is directed to make investments but does not take an active role in managing the account, the fee rate is 1.00% for the first $1 million, 0.75% for the next $2 million, 0.55% for the next $2 million, 0.40% for accounts over $5 million, and a negotiable rate for accounts over $10 million.

¶ 8 In March 2014, defendant filed a "Petition to Set 'Reasonable Compensation' for Corporate Trustee and to Recover Excess Compensation Paid to Date." Plaintiff replied to this petition, and eventually filed a "Verified Petition for Trustee Compensation" in June 2014. The trial court held hearings and reviewed evidence concerning the reasonableness of plaintiff's fees.

At the evidentiary hearing, Paula's attorney testified about why plaintiff was selected as co-trustee. After contacting a number of banks about serving as co-trustee of the PLZ Trust, Paula's attorney stated plaintiff was the only institution willing to serve as trustee due to the nature of the litigation over the estate. Defendant raised a hearsay objection to this testimony. The trial court admitted the testimony, not for the truth of the matter asserted, but for the nonhearsay purpose of explaining the steps Paula's attorney took in selecting plaintiff as the trustee.

¶ 9 Three of plaintiff's employees from its Unique Asset Division with knowledge of the PLZ Trust also testified at the evidentiary hearing. Plaintiff provided testimony that it charges miscellaneous fees for serving as a corporate co-trustee and another fee for closely-held assets. Plaintiff did not assess those fees. Instead, when Paula, her attorney, and plaintiff discussed the fee arrangement, they decided a flat rate would best serve the PLZ Trust. Plaintiff initially estimated its rate would be between 60 and 70 base points, and they ultimately agreed on 65 base points, based on the value of the entire PLZ Trust. Under the agreement, plaintiff was to annually reassess its fee and lower it if management of the PLZ Trust proved less costly. Plaintiff has not reassessed its fee. Plaintiff brought out testimony that the continuing complexity of the litigation justifies a greater fee and that was why it had not lowered the fee. Plaintiff reviews the filings in the litigation, and here there were over 300 different filings. Plaintiff's rates for serving as corporate fiduciary do not simply depend on the amount of money in the account: "it's not necessarily the size [of the account], it's the circumstances."

¶ 10 Plaintiff had numerous obligations as a trustee. Plaintiff routinely had to pay trust bills, file tax returns, verify insurance was paid on properties, pay the various attorney fees from the numerous law firms involved in this case, review financial statements, and gather information concerning the trust assets. Plaintiff provided testimony that these last few tasks, seemingly

simple, involved significant work due to the contentious nature of the litigation over the estate. Plaintiff had to file motions with the probate court to obtain financial statements and basic information concerning the assets listed as special securities. Additionally, Paula's attorney requested plaintiff monitor the defendant's actions as advisor of the special securities. Plaintiff's review of the financial statements of the special securities led plaintiff to request more information from defendant, some of which it has still not received. Plaintiff's Unique Asset Division grew concerned over restructuring of debt between the different entities among the special securities (devaluation of one company in favor of a different company held by the PLZ Trust).

¶ 11 Defendant countered that plaintiff did not have all of these obligations because it had diminished liability as an "excluded fiduciary" under Illinois law, and that plaintiff's fee did not reflect this diminished liability. The Illinois Trusts and Fiduciaries Act (Act) (760 ILCS 5/7 (West 2016)) provides for trustee compensation: "The trustee shall be reimbursed for all proper expenses incurred in the management and protection of the trust and shall be entitled to reasonable compensation for services rendered." *Id.* Section 16.3 of the Act (760 ILCS 5/16.3 (West 2016)) provides the obligations and liabilities for parties in directed trusts.

> "(a) Definitions. In this Section:
>
> (1) 'Directing party' means any investment trust advisor, distribution trust advisor, or trust protector as provided in this Section.
>
> (2) 'Distribution trust advisor' means any one or more persons given authority by the governing instrument to direct, consent to, veto, or otherwise exercise all or any portion of the distribution powers and discretions of the trust, including but not limited to authority to make discretionary distribution of income

or principal.

(3) 'Excluded fiduciary' means any fiduciary that by the governing instrument is directed to act in accordance with the exercise of specified powers by a directing party, in which case such specified powers shall be deemed granted not to the fiduciary but to the directing party and such fiduciary shall be deemed excluded from exercising such specified powers. If a governing instrument provides that a fiduciary as to one or more specified matters is to act, omit action, or make decisions only with the consent of a directing party, then such fiduciary is an excluded fiduciary with respect to such matters. Notwithstanding any provision of this Section to the contrary, a person does not fail to qualify as an excluded fiduciary solely by reason of having effectuated, participated in, or consented to a transaction, including but not limited to any transaction described in Section 16.1 or Section 16.4 of this Act, invoking the provisions of this Section with respect to any new or existing trust.

* * *

(e) Duty and liability of directing party. A directing party is a fiduciary of the trust subject to the same duties and standards applicable to a trustee of a trust as provided by applicable law unless the governing instrument provides otherwise, but the governing instrument may not, however, relieve or exonerate a directing party from the duty to act or withhold acting as the directing party in good faith reasonably believes is in the best interests of the trust.

(f) Duty and liability of excluded fiduciary. The excluded fiduciary shall act in accordance with the governing instrument and comply with the directing party's

exercise of the powers granted to the directing party by the governing instrument. Unless otherwise provided in the governing instrument, an excluded fiduciary has no duty to monitor, review, inquire, investigate, recommend, evaluate, or warn with respect to a directing party's exercise or failure to exercise any power granted to the directing party by the governing instrument, including but not limited to any power related to the acquisition, disposition, retention, management, or valuation of any asset or investment. Except as otherwise provided in this Section or the governing instrument, an excluded fiduciary is not liable, either individually or as a fiduciary, for any action, inaction, consent, or failure to consent by a directing party, including but not limited to any of the following:

(1) if a governing instrument provides that an excluded fiduciary is to follow the direction of a directing party, and such excluded fiduciary acts in accordance with such a direction, then except in cases of willful misconduct on the part of the excluded fiduciary in complying with the direction of the directing party, the excluded fiduciary is not liable for any loss resulting directly or indirectly from following any such direction, including but not limited to compliance regarding the valuation of assets for which there is no readily available market value;

(2) if a governing instrument provides that an excluded fiduciary is to act or omit to act only with the consent of a directing party, then except in cases of willful misconduct on the part of the excluded fiduciary, the excluded fiduciary is not liable for any loss resulting directly or indirectly from any act taken or omitted

as a result of such directing party's failure to provide such consent after having been asked to do so by the excluded fiduciary; or

(3) if a governing instrument provides that, or for any other reason, an excluded fiduciary is required to assume the role or responsibilities of a directing party, or if the excluded party appoints a directing party or successor to a directing party, then the excluded fiduciary shall also assume the same fiduciary and other duties and standards that applied to such directing party.

* * *

(h) Duty to inform excluded fiduciary. Each directing party shall keep the excluded fiduciary and any other directing party reasonably informed regarding the administration of the trust with respect to any specific duty or function being performed by the directing party to the extent that the duty or function would normally be performed by the excluded fiduciary or to the extent that providing such information to the excluded fiduciary or other directing party is reasonably necessary for the excluded fiduciary or other directing party to perform its duties, and the directing party shall provide such information as reasonably requested by the excluded fiduciary or other directing party. Neither the performance nor the failure to perform of a directing party's duty to inform as provided in this subsection affects whatsoever the limitation on the liability of the excluded fiduciary as provided in this Section." 760 ILCS 5/16.3 (West 2016).

¶ 12 The trial court entered its order on August 29, 2016, finding the trustee fees paid to plaintiff as co-trustee were reasonable and fair. In its ruling the court cited the complexity of administering the PLZ Trust: "To characterize the Zeid estate and trust as large and complex is

an understatement." Though defendant maintained plaintiff had little liability or responsibility for a majority of the trust assets, the trial court found plaintiff's attempts to perform even rudimentary functions (e.g. requesting financial documents regarding assets in the trust) required litigation when defendant failed to voluntarily consent to disclosing that information to plaintiff without a valid court order.

> "The Court notes that the administration of the Philip Zeid estate and the PLZ trust is extremely complex. The decedent's wife Paula and his son Jason have an acrimonious, distrustful, litigious relationship. Since this estate was opened over five years ago the court has been inundated with petitions for instructions, petitions for rules to show cause, citations to recover, motions for declaratory judgment, motions to compel, motions for sanctions, motions for protective orders, motions for attorneys' fees, motions for trustee fees, motions to dismiss, and motions to strike various motions. To date, literally thousands of pages of pleadings have been filed by the parties. Without the involvement of a corporate trustee, successful administration of the PLZ Trust would be unlikely, if not impossible."

The trial court found, even with plaintiff's reduced responsibility for managing the special securities, plaintiff's fee was reasonable compensation based on the amount of work plaintiff performed, the complexity of administering the estate, the negotiated fee taking into account waiver of other fees normally assessed, and that this fee rate was not outside the norm of what plaintiff charges for trust administration of a trust this large and with this much litigation concerning it. The court concluded plaintiff "administered the PLZ Trust professionally, effectively and diligently. To reduce the compensation agreement negotiated in good faith under

the facts and circumstances of this case would constitute an abuse of discretion." Defendant appealed, contending plaintiff's fee was unreasonable.

¶ 13 ANALYSIS

¶ 14 The issue here is whether the trial court abused its discretion when it found the fee plaintiff charged the PLZ Trust for serving as a corporate fiduciary was reasonable. Plaintiff had the burden at trial of proving by a preponderance of the evidence the fee it charged the PLZ Trust was fair and reasonable. *Smith v. Stover*, 15 Ill. App. 2d 78, 92 (1957). The trial court found plaintiff met its burden because of the complexity of administering Philip's estate due to the acrimonious nature of the litigation and because plaintiff provided testimony indicating it waived fees normally associated with litigation. Defendant contends plaintiff failed to meet its burden of proving its fee was reasonable.

¶ 15 Jurisdiction

¶ 16 We have jurisdiction to hear this matter under Rule 304(b)(1) because this is a final order resolving the rights of parties in the administration of an estate or similar proceeding. Ill. S. Ct. R. 304(a) (eff. Mar. 8, 2016); *Marsh v. Evangelical Covenant Church of Hinsdale*, 138 Ill. 2d 458, 464 (1990). Under Supreme Court Rule 304(b)(1), a party may appeal "[a] judgment or order entered in the administration of an estate, guardianship, or similar proceeding which finally determines a right or status of a party." Ill. S. Ct. R. 304(b) (eff. Mar. 8, 2016). While the present case deals with an independently administered trust, the court's involvement with the administration of the trust as part of the administration of the estate make the trust "public to an extent sufficient for Rule 304(b)(1) to apply." *Lampe v. Pawlarczyk*, 314 Ill. App. 3d 455, 472 (2000).

¶ 17 Standard of Review

¶ 18 The amount a trustee shall be compensated lies within the discretion of the trial court, therefore we review the trial court's decision to award compensation to plaintiff for abuse of discretion. *Lampe*, 314 Ill. App. 3d at 464. "Because 'the probate court has the requisite skill and knowledge to decide what is fair and reasonable compensation' [citation], a probate court's determination of such fees will not be overturned on appeal unless it is 'manifestly or palpably erroneous.' " *In re Estate of Coleman*, 262 Ill. App. 3d 297, 299 (1994).

¶ 19 The Trial Court Did Not Abuse its Discretion by Awarding Plaintiff Fees

¶ 20 Defendant maintains the trial court abused its discretion because plaintiff did not provide sufficient evidence of the reasonableness of its fees. He argues: (1) plaintiff did not provide evidence of how much time it spent administering the PLZ Trust's assets; (2) plaintiff did not provide sufficient evidence of work it performed or skill required to perform the work; (3) plaintiff computed the fee schedule based on the total assets in the PLZ Trust, and not simply those assets plaintiff directly managed; (4) plaintiff did not use the correct fee schedules; (5) plaintiff's fee did not consider the provisions of the PLZ Trust and the Act, which diminished plaintiff's liability; and (6) plaintiff did not provide evidence of its success in the administration of trust assets. While defendant makes a case for why an evaluation of the evidence could lead to a different outcome, defendant's arguments fail to demonstrate the trial court abused its discretion (i.e. defendant fails to point out why no reasonable court would reach the conclusion of the trial court). Determination of what constitutes reasonable trustee compensation depends on the circumstances of each individual case.

> " 'It is generally held that trustees are entitled to fair, just, and reasonable compensation in the discretion of the court; and the question of what is a reasonable compensation to trustees depends largely on the circumstances of each

> particular case, taking into consideration the risk and responsibility incurred, the amount and character of the estate, and the nature and extent of the services necessarily performed, and the statutory rates of compensation for executors and administrators. Proper elements for consideration in fixing compensation have been more specifically stated, and include the value of the property, the size of the income whether large or shall [*sic*], the amount of interest earned, the nature and value of services rendered, the usual price of such services or the amount reasonably contemplated, the ability of the trustee to render a special service, good faith in administering the trust, unexpected profit earned through skill of the trustee, the object which the trust was established to attain, and sometimes, but not usually, the giving of a bond by the trustee.' " *Stover*, 15 Ill. App. 2d at 93.

Whether a trustee's compensation is reasonable therefore depends on the trial court's factual inquiry.

¶ 21 Here the trial court found the complexity of litigation a compelling issue for why plaintiff's fee was reasonable. Defendant protests because plaintiff did not provide information for how much time it spent administering the PLZ Trust. Defendant notes how plaintiff has the burden of proving its fees are reasonable and that "[t]he amount of time expended by a party requesting a fee is the most important factor in determining reasonable compensation." *Coleman*, 262 Ill. App. 3d at 299. Defendant's argument that plaintiff did not calculate total time billed fails to refute the evidence plaintiff provided concerning the amount of work it performed and the complexity of performing even rudimentary functions.

¶ 22 "In determining what is a reasonable fee, no clear-cut rules exist. Rather, the determination must be based on the facts and circumstances of the particular case." *Coleman*,

262 Ill. App. 3d at 299. In *Coleman*, the executor of the estate claimed he worked 400 hours on the estate and charged $200 an hour for his services. *Id*. at 298. The trial court evaluated the executor's narrative of how much work he performed on the estate, as well as expert testimony concerning how much the executor should have been paid, and determined the executor had worked 106.45 hours. *Id*. at 299. The trial court also determined a reasonable fee was $150 an hour because that was the standard in the jurisdiction and the executor was not experienced in probate matters. *Id*. at 301. The trial court's determination was found reasonable on appellate review even though the trial court did not explain how it reached its calculation for time spent. *Id*. at 300. "[T]he trial court is not bound by the opinion of expert witnesses as to the reasonableness of fees, but may rely on its own knowledge and experience and exercise its independent judgment." *Id*. at 299. Defendant's arguments in this case are inapposite to the court's conclusion in *Coleman*. The appellate court there deferred to the trial court, finding its determinations reasonable.

¶ 23 Relying on *Matter of Kottrasch's Estate* (63 Ill. App. 3d 370, 375 (1978)), defendant further maintains the trial court erred in determining plaintiff's fee was reasonable without testimony concerning the amount of time spent administering the estate.

> "While some facts relating to the services performed, the nature of the estate's assets, the responsibility assumed, the complexity of the duties and the results obtained are present, and would be helpful in judging the appropriateness of an executor's fee in this case, there is a basic, glaring omission of evidence relating to the time spent by various representatives of the Bank in administering the estate. In recent cases which review the reasonableness of fees set by a trial court, the element of time expended by the party requesting the fee, as shown by their

time records, has been regarded as the factor of greater importance." *Id*. However, it was not simply the lack of testimony about time spent administering the estate that led the appellate court to reverse the trial court's determination of reasonable compensation. "No records or estimates of the amount of time involved in rendering these services *** were presented to the trial court, nor were any expert opinions introduced relating to the reasonable value of the services performed." *Id*. at 374. The problem in *Kottrasch* was not simply that the bank failed to provide evidence of time spent administering the estate. The trial court also improperly relied on evidence outside the record to find the bank was not liable for certain losses to the trust. *Id*. at 377.

¶ 24 Defendant's argument also ignores there is "no legal duty imposed upon an executor to reflect the number of hours spent in each activity that it has performed." *Estate of Brown*, 58 Ill. App. 3d 697, 709 (1978).

> "[T]he trial court need not consider the number of hours expended as the determinative factor in deciding whether a certain fee is reasonable. The problems inherent in the utilization of this standard have been described by this court in the past: 'The hourly rate procedure does not take into consideration that the greater the value of property involved ***. It tends to reward the slower practitioner.' " *Id*. at 708.

While time spent may be an important factor in determining the reasonability of a trustee's compensation, the burden on appeal is on defendant to show no reasonable court would make the same finding as the trial court. In the present case, "the objectors have not demonstrated that the fee is patently unreasonable." *Id*. at 709.

¶ 25 Defendant next argues legal work performed by defendant and its attorneys "is of no

consequence to whether its fee for acting as Co-Trustee of the Trust is reasonable." He contends defendant's work on litigation was limited to reviewing pleadings and attorney bills. However, the trial court factored this into its decision to award fees. The trial court heard testimony regarding how even simple matters of obtaining information about financial statements required court orders when defendant did not comply with all requests for the information outside of court.

> "To date, literally thousands of pages of pleadings have been filed by the parties. Without the involvement of a corporate trustee, successful administration of the PLZ Trust would be unlikely, if not impossible."

It was not simply the performance of legal work that resulted in plaintiff claiming its fees were justified. Instead of awarding a fee to plaintiff based on the amount of legal work performed by its attorneys, the trial court factored in the complexity of the litigation based on the way the litigation created complications for plaintiff performing even simple functions like requesting financial statements. We cannot say no reasonable court would find the complex nature of the litigation here would not factor into its decision finding plaintiff's fees reasonable.

¶ 26 Defendant notes plaintiff failed to call two employees from plaintiff's Unique Asset Group who could have testified to the amount of time, effort, and skill required for the administration of the PLZ Trust. Defendant's contention is that we should draw inferences from the lack of testimony in defendant's favor.

¶ 27 We find the presumption is not applicable in this case because the two witnesses who were not called were not the only witnesses who could testify regarding the amount of time, effort, and skill required for the administration of the PLZ Trust. Moreover, their testimony would be cumulative of other testimony at trial. In *Schaffner* (*Schaffner v. Chicago & North*

Western Transportation Co., 161 Ill. App. 3d 756 (1987)) the plaintiff filed a negligence suit against a railroad company and a bicycle company brought by the parents of a 15 year-old for serious injuries he sustained while riding his bicycle across a railroad crossing. The teen was injured when his front wheel became disengaged while riding across a railroad crossing. *Id*. at 748. Replying to an interrogatory, the defendant railroad identified one of its agents as an individual who had knowledge of the conditions of the crossing after the incident. *Id*. at 755. The defendant bicycle company's counsel, over the objections of the defendant railroad company, commented in closing arguments about the absence of this witness and how that was adverse to the railroad. *Id*. It was permissible for the bicycle company to reference the missing-witness presumption against the railroad company because the witness would have been biased in favor of the railroad company and involved the railroad company's only employee that had knowledge of the conditions of the crossing after the accident.

> "Where an individual has knowledge of the facts and is accessible to a party, but is not called by that party, a presumption arises that his testimony would be adverse to that party if the witness was not equally available to the other party. As a result, references regarding that presumption may be made in closing arguments. [Citation.] A witness is not considered equally available to a party if there is a likelihood that he would be biased against that party. [Citation.] In the present case, [the witness] was an employee of the railroad and had investigated the accident for the railroad, yet the railroad chose not to call him as a witness. There is a likelihood that he would have been biased in favor of the railroad, his employer, and thus we cannot say that [the witness] was equally available to the parties." *Id*. at 756.

Schaffner can be distinguished from this case. Here, the two witnesses not called by plaintiff were not the only individuals with knowledge of the PLZ Trust's administration. Three other members of plaintiff's Unique Asset Division with knowledge of the PLZ Trust's administration testified.

¶ 28 Plaintiff counters that the presumption against a missing witness should not apply when the testimony of that witness is merely cumulative, relying on *Board of Regents of Regency Universities v. Illinois Educational Labor Relations Board*, 208 Ill. App. 3d 220, 233 (1991). Defendant points out the *Regents* court upheld application of the missing-witness rule because the testimony in question in that case was not cumulative. However, defendant does not prove the trial court's decision here was erroneous because defendant has not shown the missing witnesses here were the only individuals who could have provided information about work conducted in managing the estate. "The 'missing-witness' rule is based on the principle that failure of a party to produce evidence favorable to it gives rise to a presumption against that party. [Citation.] The rule does not apply if it appears that the testimony of one not called as a witness would merely have been cumulative." *Id*. In *Regents*, we found the testimony of the missing witness was not cumulative because the witness was "the only person who could have rebutted [the union's local chapter president's] testimony." *Id*.

¶ 29 Here, three other members of defendant's Unique Asset Group testified as to the work performed on the PLZ Trust account. Defendant argues the two witnesses not called "were in the best position to describe the work which they performed." Even if those witnesses were in the best position to describe the work, defendant does not explain how this testimony was only within the knowledge of those missing witnesses. Plaintiff argued those testimonies would be merely cumulative because other members of the Unique Asset Group had similar knowledge

and testified. Defendant has not shown how those two missing witnesses had distinct knowledge from the other witnesses, simply that they may have had better descriptions of work performed. Defendant fails to prove no reasonable court would find a missing-witness presumption against plaintiff when three other witnesses with similar knowledge testified on the matter. We do not find the trial court erred here.

¶ 30 Defendant contends plaintiff computed its "managed" account fee schedule based on the total assets in the PLZ Trust. Defendant argues plaintiff should have billed the special securities in the trust at the lower rate for directed trusts. A smaller portion of the assets in the trust were directly managed by plaintiff. Defendant argues this demonstrates an abuse of discretion because it is unreasonable to assess a fee for directly managing assets when plaintiff is only directly managing part of those assets. Defendant's argument ignores the trial testimony concerning the amount of work plaintiff undertook to complete even simple tasks to monitor the funds Jason directly managed and that the court did not rely solely on the fee schedules in determining the reasonableness of the fees. Plaintiff argues that its fee schedule based on the whole estate was a flat rate for its services as trustee, and accounted for waived fees (including waived litigation fees). Defendant has not shown the trial court abused its discretion by finding the fee schedule was reasonable due to the waived fees and expense of managing such an account given the contentious and complex litigation. For this same reason, defendant's argument plaintiff calculated its fee based on the wrong fee schedule is also unavailing.

¶ 31 Defendant's position is that plaintiff should have offered a lower rate for assets in the PLZ Trust which Jason directed. Defendant points out how plaintiff's fee schedule is .40% for irrevocable directed trust accounts with over $5 million, the fee schedule is negotiable for accounts over $10 million, and that the value of the special securities in the PLZ Trust is about

$13.6 million. Defendant infers plaintiff should offer a lower rate than the .40% because the rates charged decrease as the amount of money in the account increases. However, this ignores the trial testimony to the contrary. Plaintiff provided testimony that its negotiable fees are not necessarily lower the greater the amount of money in the account. Rather, plaintiff factors in the complexity of managing the account and serving as a co-trustee. The trial court found plaintiff demonstrated it was reasonable to assess its flat-rate fee of .65% because plaintiff waived other fees and still performed substantial work.

> "[T]he court may take into consideration its own knowledge of the value of the services rendered. [Citation.] In exercising its judicial discretion, the court is not governed by expert testimony regarding the value of services, but should utilize independent judgment in determining the amount of remuneration." *In re Estate of Marshall*, 167 Ill. App. 3d 549, 553 (1988).

Defendant's argument is contradictory – he requests the court evaluate the actual work done by plaintiff and reach a determination of what would be a reasonable fee based on that work. However, defendant claims a reasonable fee would follow plaintiff's fee schedule for irrevocable trusts, which would not factor in the specific amount of work conducted. Defendant's argument ignores the other enumerated fees plaintiff charges for serving as a corporate fiduciary. Defendant cannot claim this court should find a reasonable fee based purely on plaintiff's listed fee schedule while also claiming this court should ignore plaintiff's other listed fees. We note the fee schedule lists "negotiable" for accounts over $10 million, and based on the testimonies at the evidentiary hearing, Paula and her attorney negotiated with plaintiff to reach a flat fee. We cannot say no reasonable court would also reach the finding of the trial court that plaintiff's fee was reasonable.

¶ 32 Defendant argues plaintiff's fee schedule did not properly factor in its diminished liability under the PLZ Trust and the Act, and that the fee was therefore unreasonable. 760 ILCS 5/16.3 (West 2016). Defendant relies on *Stover* and *Kottrasch* for his argument that the level of responsibility assumed by the trustee was relevant to determining an appropriate fee, and that plaintiff failed to factor in its appropriate level of responsibility as trustee. Defendant contends plaintiff is an excluded fiduciary within the meaning of the Act, and under the Act plaintiff was not liable for monitoring, reviewing, inquiring, or recommending anything in regard to defendant's management of the special securities. While the Act limits the liability of excluded fiduciaries, it also requires the directing party to keep the excluded fiduciary informed:

> "Each directing party shall keep the excluded fiduciary and any other directing party reasonably informed regarding the administration of the trust with respect to any specific duty or function being performed by the directing party to the extent that the duty or function would normally be performed by the excluded fiduciary or to the extent that providing such information to the excluded fiduciary or other directing party is reasonably necessary for the excluded fiduciary or other directing party to perform its duties, and the directing party shall provide such information as reasonably requested by the excluded fiduciary or other directing party. Neither the performance nor the failure to perform of a directing party's duty to inform as provided in this subsection affects whatsoever the limitation on the liability of the excluded fiduciary as provided in this Section." 760 ILCS 5/16.3(h) (West 2016).

The trial court found a significant amount of litigation was required for plaintiff to stay reasonably informed of basic information about the special securities. Defendant claims the

Kottrasch court found the "responsibility assumed" by the trustee was relevant to determining the appropriate fee. *Kottrasch*, 63 Ill. App. 3d at 375. However, in that paragraph, the *Kottrasch* court indicated responsibility assumed was one of many factors considered in determining the reasonability of a trustee's fee, not that responsibility assumed was a dispositive factor. *Id*. According to defendant, the *Stover* court found responsibility assumed is an important factor: "the question of what is a reasonable compensation to trustees depends largely on the circumstances of each particular case, taking into consideration the risk and responsibility incurred." *Stover*, 15 Ill. App. 2d at 93. However, the court continued to list as relevant factors for reasonable consideration: "the amount and character of the estate, and the nature and extent of the services necessarily performed, and the statutory rates of compensation for executors and administrators." *Id*.

¶ 33 Defendant further argues plaintiff had no obligation to monitor the special securities so that Paula could make a decision regarding non-performing assets. The result, defendant contends, is that the trial court did not correctly state the scope of plaintiff's responsibilities. However, the trial court found plaintiff still had basic responsibilities under the PLZ Trust, such as filing tax returns, reviewing litigation, paying PLZ Trust bills. Paula's ability to make a decision about non-performing assets was not a dispositive reason plaintiff had responsibility.

¶ 34 Defendant also contends plaintiff failed to prove its fee was reasonable because it did not demonstrate it successfully administered the PLZ Trust. However, the trial court found plaintiff "administered the PLZ Trust professionally, effectively and diligently." Defendant has not shown error in the court's judgment, simply that plaintiff failed to "introduce what percentage increase it achieved." This does not controvert the trial court's finding of fact. As earlier noted, the "decision as to what constitutes reasonable compensation is a matter of peculiarity within the

discretion of the probate court." *In re Estate of Brown*, 58 Ill. App. 3d at 706. Defendant's argument fails to show no reasonable court would weigh the evidence as the trial court here did.

¶ 35 Finally, we note the trial court found plaintiff "was the only company contacted that was willing to further pursue this matter." However, the trial court only admitted this testimony concerning Paula's attorney contacting various banks for the purpose of showing why he took certain steps and not for the truth of the matter itself. Defendant argues the trial court abused its discretion by finding plaintiff's fee schedule reasonable in part due to plaintiff being the only company willing to take on the risk of acting as co-trustee of this contentious estate. While the trial court impermissibly relied on hearsay, we find the trial court's reliance on hearsay testimony was not prejudicial to the outcome. "It is not every error, of course, that will require a reversal. Where it appears that an error did not affect the outcome below, or where the court can see from the entire record that no injury has been done, the judgment or decree will not be disturbed." *Both v. Nelson*, 31 Ill. 2d 511, 514 (1964). Here the court based its decision plaintiff's fee was reasonable due to the complexity of the litigation over the estate and the work plaintiff performed to administer the estate throughout the litigation. The court's decision did not rest upon an assumption plaintiff was the only company willing to administer the estate, and therefore the court's use of testimony for a hearsay purpose did not affect the outcome. Defendant has not shown no reasonable court would make the same ruling as the trial court here. Thus, we find that defendant failed to prove the trial court abused its discretion.

¶ 36 CONCLUSION

¶ 37 For the foregoing reasons the judgment of the circuit court of Cook County is affirmed. Affirmed.