

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

IN RE:

ANGELA MICHELE YOUNCE

CASE NO. 09-70717

DEBTOR

MEMORANDUM OPINION AND ORDER

The issue before the Court is whether one of the two attorneys for the Chapter 7 Trustee should be awarded a one-sixth (1/6) contingency fee. For the reasons below, the Court holds that the attorney should be paid on a contingency basis, but subject to the proportion of the services that he performed.

FACTS

An Order Authorizing Trustee to Retain Attorney Maxie E. Higgason ("Higgason") [DOC 15] was entered on January 10, 2010. The order provided that he was employed under either a one-third (1/3) contingency fee or Lodestar determination. He was employed to prosecute a personal injury liability claim. An Order Authorizing Trustee to Retain Shane Hall ("Hall") as Co-Counsel [DOC 16] regarding the same personal injury claim was entered on January 26, 2010. That order likewise provided that Hall was employed under either a one-third (1/3) contingency fee or Lodestar determination. A Supplemental Order Authorizing Trustee to Retain Attorneys [DOC 21] was entered on March 16, 2010. The order provided that Higgason was the attorney, that Hall was co-counsel, and that their employment was under either a one-third (1/3) contingency fee or Lodestar determination. All three orders were entered after notice and opportunity to object, with no objections filed. None of the orders addressed the division of the contingency fee between Hall and Higgason.

An Order Approving Settlement [DOC 28] was entered on April 18, 2011. The settlement provided that the Trustee was to receive \$42,500.00 for settlement of a personal injury liability claim.

On May 14, 2011, Higgason and Hall filed an Application for Allowance of Attorney Compensation ("Application") [DOC 34] asking that the two attorneys equally split a 1/3 contingency fee of the \$42,500.00. The Application revealed that Higgason spent 32.5 hours on the case, and Hall spent 48.8 hours on the case.

On May 19, 2011, the U.S. Trustee filed an Objection to the Application [DOC 35] of Higgason because some of the duties he performed were as a trustee instead of an attorney. The U.S. Trustee did not object to the fee request of Hall.

On July 7, 2011, Higgason withdrew his Application [DOC 38]; and on July 13, 2011, the Application of Hall was granted [DOC 41].

On August 30, 2011, Higgason filed an Amended Application for Allowance of Attorney Compensation ("Amended Application") [DOC 50]. The Amended Application seeks payment of a one-sixth (1/6) contingency fee of the \$42,500.00. The Amended Application reveals that Higgason spent 22 hours on the case performing attorney duties, and based on a Lodestar analysis, that his payment due would be \$4,950.00.

On October 3, 2011, the U.S. Trustee filed an Objection to the Amended Application [DOC 53] reiterating his arguments in DOC 35. The U.S. Trustee did not identify what duties he thought that Higgason performed that were trustee duties instead of attorney duties.

On November 15, 2011, Higgason filed an Affidavit [DOC 54] stating that all the duties he performed were as an attorney instead of a trustee. At a hearing held on November 16, 2011, the U.S. Trustee maintained his objection, but provided no specific objections to tasks performed by Higgason that were not performed as an attorney.

CONCLUSIONS OF LAW

Section 330 of the Bankruptcy Code allows reasonable compensation to an attorney employed by a trustee. 11 U.S.C. § 330. Section 328(b) of the Bankruptcy Code does not allow compensation to an attorney employed by the trustee for duties that are generally performed by a trustee without the assistance of an attorney. 11 U.S.C. § 328(b). Here, the evidence is that all of the duties performed by Higgason disclosed in the Amended Application are duties not generally performed by a trustee without the assistance of an attorney.

When an Attorney is willing to undertake a matter on a contingent basis, with no assurance of any compensation, some enhancement above normal hourly rates is warranted. In re Chandler, Bankr. E.D.Ky. Case No. 07-52519, DOC 68 (J.Scott). The Court finds that Higgason's allowed fee should be enhanced to more than his normal hourly rate.

The Kentucky Rules of the Supreme Court state "A division of a fee between lawyers who are not in the same firm may be made only if: (1) the division is in proportion to the services performed by each lawyer, or, each lawyer assumes joint responsibility for the representation; ..." Ky. Sup. Ct. R. 3.130(1.5(e)(1)). Here, Higgason and Hall are not members of the same firm, and there is no evidence in the record that each assumed joint responsibility for the representation.

Hall performed 48.8 hours of services, while Higgason performed 22 hours (or 31%) of services per the Amended Application. However, 31% of the 1/3 contingency would be less than Higgason's normal hourly rate. Per the original Application, Higgason performed 32.5 hours on the case, and while a portion of that time may have included performing trustee duties, a review of Higgason's time entries shows them all to be related to the personal injury liability claim. Thus, to ensure an adequate enhancement above Higgason's normal hourly rate, the Court finds that Higgason performed approximately 40% of the services related to the personal

injury claim, so he should receive 40% of the 1/3 contingency which is \$5,666.67.

IT IS HEREBY ORDERED that Maxie E. Higgason be allowed the sum of \$5,666.67 for compensation plus reimbursement of \$27.29 for reasonable expenses.

Copy to:

Debtor
Roger Toyray Adams, Esq.
Maxie E. Higgason, Esq.
Shane Hall, Esq.
U.S. Trustee

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***The affixing of this Court's electronic seal below is proof this document has been signed by the Judge and electronically entered by the Clerk in the official record of this case.***



**Signed By:**  
**Tracey N. Wise**  
**Bankruptcy Judge**  
**Dated: Monday, November 21, 2011**  
**(tnw)**