

# Book Reviews

## Will Contests

*Undue Influence: The Epic Battle for the Johnson & Johnson Fortune.* By David Margolick.\* *New York: William Morrow & Co.*, 1993. Pp. 624. \$23.00.

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Basia Piasecka, a thirty-year-old Polish emigre, landed in New York in 1968 seeking work. Through Polish connections, she found her way to kitchen employment in the New Jersey home of Seward Johnson and his second wife, Essie. Within months, Basia became Seward's mistress. Seward, then seventy-three, was an heir to the Johnson & Johnson pharmaceuticals fortune. Although Johnson & Johnson treated Seward as a nominal officer, he played no role in the company. (29-31, 42) He spent his decades philandering and dabbling in oceanography through a foundation that he established. In 1971 Seward divorced Essie, settling \$20 million on her to dissolve their thirty-two-year marriage. Weeks later Seward married Basia, who was more than forty years his junior. (53) Their marriage endured a dozen years, until Seward died from cancer in May 1983.

Seward's estate was valued at his death in excess of \$400 million. (171) Seward was survived by his six adult children, four of whom were older than Basia. Seward had shown little interest in the children when they were young (33), and his relationship with them as adults was largely perfunctory, although

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Basia cultivated amicable relations with the children throughout her marriage to Seward. As adults, the children were embarrassing wastrels, constantly in debt to their trust funds. They fared as badly in their marriages and family lives as in their careers and business affairs. (34-42, 94-98) The extravagant marital and extramarital adventures of one of Seward's daughters, Mary Lea (99-117), would strain credulity in a work of cheap fiction. Beginning in the 1940's, Seward had used inter vivos trusts to settle Johnson & Johnson stock worth tens of millions on each child. (33) In the many wills that he executed across the next four decades, he excluded his children from benefitting further in his estate. After marrying Basia, Seward revised his estate plan several times, making ever larger provision for her. His last will, executed in April 1983 when his struggle with cancer was near the end, devised a little of his estate to his foundation and the rest to Basia. The will excluded the children, as well as their spouses and descendants.

At about the time that he married Basia, Seward hired the prominent New York law firm of Shearman & Sterling to take charge of his estate planning. The firm placed Seward's affairs in the hands of a young associate, Nina Zagat. Nina and Basia became confidants, and, over the dozen years of the marriage, Nina assisted the couple with a variety of transactions. Seward's estate plan, drafted by Nina with the firm's oversight and approval (123-27), named herself as one of three co-executors, together with Basia and Seward's oldest child, Junior. Under New York's peculiar scheme of statutory executor fees,<sup>1</sup> each of the three co-executors would receive the full statutory commission, calculated as a percent of the estate. Using three executors multiplied the fee by three. Based on the estate's value at Seward's death, Nina stood to reap a \$6.2 million executor's fee, plus trustee's fees that would amount to nearly a million dollars each year thereafter (418-19) for as long as Basia lived.<sup>2</sup>

When the contents of Seward's will became known, the children instituted the will contest that David Margolick chronicles in his book. The children alleged that Basia, in cahoots with Nina, procured the April 1983 will by exerting undue influence on the cancer-ravaged Seward. The children's lawsuit was weak. Under the doctrine of undue influence, persons contesting a will must prove that the testator was vulnerable to undue influence (the "susceptibility" test), and that the defendant's wrongful conduct caused the testator to disinherit the contestants.<sup>3</sup> The Johnson children's case satisfied

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1. 1981 N.Y. Laws 803, codified at N.Y. Surr. Ct. Proc. Act § 2307 (McKinney 1986) (amended by 1993 N.Y. Laws 514, codified at N.Y. Surr. Ct. Proc. Act § 2307 (McKinney Supp. 1994)).

2. The will named Nina personally rather than Shearman & Sterling. At Seward's death, Nina was not a partner of Shearman & Sterling (she had been passed over some years earlier). The firm appears to have assumed that because the will did not name Nina as a representative of the firm, she would not be obliged to share the fee with the firm. (165-66)

3. See, e.g., *In re Estate of Kamesar*, 259 N.W.2d 733 (Wis. 1977).

neither branch of the doctrine. Seward had made ever more generous provision for Basia in successive wills during the years of their marriage, long before his terminal bout with cancer might have left him vulnerable to Basia's asserted imposition. Further, he had already disinherited the children in the string of wills from the decades preceding his marriage to Basia. He thought their trust funds were enough. (122-23)

Shearman & Sterling probated Seward's will in the Surrogate's Court, New York's court of probate jurisdiction. The children's undue influence contest was tried there. The highly publicized jury trial lasted many weeks and went badly for Basia. On the eve of the verdict, she agreed to a settlement that diverted roughly \$40 million of estate proceeds from her to the children. (586) The estate also paid the legal fees of both sides, which amounted to \$25 million. (587)

How did so weak a case turn into a \$40-million dollar asset? Margolick's answer, in a nutshell, is that the children's lawyers—aggressive litigators from the firm of Milbank, Tweed, Hadley & McCloy—bested the estate's counsel, Sullivan & Cromwell, whom Shearman & Sterling had engaged to defend Basia and Nina. The story line of the book is that clever Milbank lawyers, aided by the astonishing partiality of the judge, Surrogate Marie Lambert, “concocted” (397) a case that they had no business winning.

Readers familiar with Margolick's “At the Bar” column on law and lawyers, which appears weekly in the *New York Times*, will not be surprised to find that his six-hundred page book is long on gossip, relentlessly scornful of establishment persons, and sadly short on legal analysis. Margolick recounts “the epic battle for the Johnson & Johnson fortune”<sup>4</sup> as the voyage of a ship of fools. His subject is not so much the lawsuit, or the legal system that permitted it, but rather the human foibles of the characters caught up in it. The book's early chapters center on the Johnson family—Seward courting Basia; Seward and Basia building a zanily ostentatious country estate near Princeton, New Jersey; Basia's exploits in buying art, hosting galas, and throwing temper tantrums; the pathetic lives of the Johnson children; and Seward's lengthy illness and death. Toward the middle of the book, the litigation teams take the stage. Margolick supplies admirable reportage on the pretrial investigative work and trial maneuvering of the adversaries, but he laces the narrative with an almost prurient interest in the careers and personal lives of the lawyers.

The Seward Johnson will contest was a meritless claim that a well functioning legal system should have suppressed in short order. The interesting questions, which go unaddressed in this book, are why the legal system allowed this preposterous lawsuit to advance so far; and why Seward Johnson's lawyers failed to take advantage of the devices available at the estate planning stage to deter or defeat such frivolous lawsuits.

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4. The book's puffy subtitle.

## I. CAPACITY LITIGATION IN THE UNITED STATES

The United States is the home of capacity litigation. Claims of undue influence<sup>5</sup> or unsound mind, which occupy so prominent a place in American probate law, are virtually unknown both on the Continent and in English and Commonwealth legal systems.<sup>6</sup> It is instructive to consider some of the reasons for this striking divergence.

A. *No Forced Share for Children*

As in the Seward Johnson estate, disinherited children are the prototypical plaintiffs in capacity litigation. American law is unique in how little it cares to protect children against disinheritance—or, put differently, in how strongly it values the parent's right to disinherit the child. Continental legal systems commonly provide children with a minimum fraction of a parent's estate (*legitime, Pflichtteil*).<sup>7</sup> In the English and Commonwealth systems, the so-called "family provision" statutes empower the court of equity to make discretionary provision for children (and others) if the court determines that the testator disinherited them unfairly.<sup>8</sup>

Whether foreign legal systems are wise to protect these shares for children is a difficult question of policy. I prefer the American position of liberal testamentary freedom to disinherit children who turn out to be as disappointing and unsavory as Seward Johnson's offspring, but counterarguments for protecting the expectations of children can certainly be made. What is important for present purposes is that the American rule, by allowing liberal disinheritance of children, creates the type of plaintiff who is most prone to bring these actions.

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5. See the vast collection of authority in 1 WILLIAM J. BOWE & DOUGLAS H. PARKER, PAGE ON WILLS §§ 15.1-15.13, at 711-43 (Bowe-Parker rev. ed. 1960 & Supp. 1994) [hereinafter BOWE-PARKER: PAGE ON WILLS]. Even in the United States, empirical study suggests that "[w]ill contests rarely occur, perhaps on the order of one in one hundred or so cases." Jeffrey A. Schoenblum, *Will Contests: An Empirical Study*, 22 REAL PROP., PROB. & TR. J. 607, 614 (1987). Because, however, there are millions of probates per year, one-in-a-hundred litigation patterns are very serious. Schoenblum also found "that the predominant weapon for attempting to undo a will is an allegation of undue influence or lack of testamentary capacity." *Id.* at 647-49 (footnotes omitted).

6. The leading German treatise devotes a short paragraph to the requirements of testamentary capacity. THEODOR KIPP & HELMUT COING, ERBRECHT § 17.I.1., at 117-18 (14th ed. 1990) [hereinafter KIPP-COING]. Undue influence merits a single paragraph in the leading English treatise, which cites a case dated 1906 as its most recent authority. J.B. CLARK & J.G. ROSS MARTYN, THEOBALD ON WILLS 41 (15th ed. 1993).

7. E.g., KIPP-COING, *supra* note 6, §§ 8-15, at 51-106.

8. For treatise literature, see DOROTHY KOVACS, FAMILY PROPERTY PROCEEDINGS IN AUSTRALIA (1992); JOHN G. ROSS MARTYN, FAMILY PROVISION: LAW AND PRACTICE (2d ed. 1985); R. OUGHTON & E. TYLER, TYLER'S FAMILY PROVISION (2d ed. 1984); R. DAVERN WRIGHT, TESTATOR'S FAMILY MAINTENANCE IN AUSTRALIA AND NEW ZEALAND (3d ed. 1974).

## B. *Jury Trial*

The Johnson children's meritless will contest was tried to a six-person jury. American law is unique in undertaking to resolve will contests by means of civil jury trial.<sup>9</sup> Europeans have never employed the civil jury, and the English have effectively abolished it. Where the civil jury survives in the Commonwealth, it has never been applied to probate matters, which comprise a traditional field of equity jurisdiction.

Trying a will contest to a panel of lay persons invites litigation such as the Seward Johnson case, in which the strategy is to evoke the jurors' sympathy for disinherited offspring and to excite their likely hostility towards a devisee such as Basia, who can so easily be painted as a homewrecking adventurer. Our fundamental value in the law of wills is freedom of testation, but the inner tendencies of civil jury trial put our procedural system in conflict with our substantive law. Jury trial necessarily places testamentary freedom at risk, because jurors who decide without giving reasons have such latitude to substitute their wishes for the testator's.<sup>10</sup>

## C. *Allocating Litigation Costs*

From the standpoint of comparative law, the most striking peculiarity of American civil procedure is that we lack the "loser pays" principle for allocating the costs of litigation. Some scheme for charging the loser with the winner's costs is universally followed outside the United States.<sup>11</sup> The American rule of leaving the parties to bear their own costs encourages contestants who, like the Johnson children, are pursuing a farfetched claim. As Margolick observes, the Johnson children's undue influence suit was a strike suit.<sup>12</sup> Their lawyers "must have known from the outset that the children could never actually *win* their case; the object had to be settlement." (198) Making contestants pay an estate's costs of defending an unsuccessful challenge would help to deter contestants from bringing such lawsuits.

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9. Not all American jurisdictions permit will contests to be tried to juries. On the extent of the right to jury trial in probate matters, see 3 BOWE-PARKER: PAGE ON WILLS, *supra* note 5, §§ 26.85-26.86, at 180-84; see also Annotation, *Right to Jury in a Will Contest*, 62 A.L.R. 82 (1929) and later supplements.

10. See, e.g., Leon Jaworski, *The Will Contest*, 10 BAYLOR L. REV. 87, 88 (1958) (remarking on the "fundamental truth . . . that the average jury . . . is visited with a strong temptation to rewrite [the will] in accordance with the jury's idea of what is fair and right").

11. On the contrast between practice under the American rule and in the English and Commonwealth legal systems, see J. Robert S. Prichard, *A Systemic Approach to Comparative Law: The Effect of Cost, Fee, and Financing Rules on the Development of the Substantive Law*, 17 J. LEG. STUDIES 451, 455-61 (1988), concluding that the English rule makes "relatively low probability cases less attractive in England than in the United States." *Id.* at 461.

12. It was understood at the New York probate bar that the Seward Johnson will contest was a "strike suit"—that is, a holdup staged by disgruntled heirs to induce a settlement . . ." (268)

#### D. *No Anticipatory Relief*

Continental legal systems provide a valuable defensive device for the testator who fears a capacity contest: the authenticated will. The testator can execute his or her will before a quasi-judicial officer, who has a duty to be satisfied of the testator's capacity. The resulting presumption of capacity makes the authenticated will practically immune to a post-mortem challenge on grounds of incapacity or undue influence.<sup>13</sup> Only three American jurisdictions (Arkansas, Ohio, North Dakota)<sup>14</sup> have any counterpart—a declaratory judgment procedure that allows the testator to obtain a determination of capacity while still alive. Elsewhere, our probate procedure follows a “worst evidence” rule. We insist that the testator be dead before we investigate the question whether he had capacity when he was alive.

#### E. *The Probate Bench*

There have long been difficulties in staffing the American probate bench, and some of the people who serve there—such as Surrogate Marie Lambert, whose partisanship disfigured the trial of the Seward Johnson estate—are menacing. Margolick supplies a chilling collection of instances of Lambert's incessant one-sidedness and impropriety. (E.g., 313, 407, 424, 479, 486, 494, 523-24, 546-47, 564, 568, 576, 585) He leaves open the question of whether she was looking to be bribed (459, 550) or whether her prejudgment was merely gratuitous.

I would not wish to imply that Marie Lambert typifies the American probate bench, or that competent and devoted judges are not to be found in American probate courts. Occasionally, splendid figures such as James Wade in Denver or Floyd Probst in Atlanta grace the probate bench. My point is simply that the integrity and ability of the American probate bench has so often been found wanting that confidence in the predictability and correctness of adjudication in these courts has been impaired.<sup>15</sup> Americans can only look with envy to the esteemed and meritocratic chancery bench that conducts probate adjudication in English and Commonwealth jurisdictions.

The risk of error or worse in American probate adjudication is not adequately offset by the prospect of appellate review. Because the presumption of correctness that attaches to the trial court's findings of fact is so difficult to overcome on appeal, Marie Lambert had little to fear. She was virtually a potentate. On the Continent, by contrast, the disappointed civil litigant is

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13. MAX RHEINSTEIN & MARY ANN GLENDON, *THE LAW OF DECEDENTS' ESTATES* 198-99 (1971 ed.).

14. ARK. CODE ANN. § 28-40-202 (1987); N.D. CENT. CODE § 30.1-08.1-01 (Supp. 1993); OHIO REV. CODE ANN. § 2107.081 (1990).

15. A theme of the influential bestseller, NORMAN F. DACEY, *HOW TO AVOID PROBATE* 1-7 (5th ed. 1993).

entitled to review de novo, with no presumption of correctness below.<sup>16</sup> Because review in these systems is retrial, the damage that an arbitrary, ignorant, or corrupt trial judge can cause is significantly reduced. Indeed, Margolick asserts that in New York, Marie Lambert was thought to be especially immune from oversight on account of the perverse financial incentives of the appellate judges. In previous scrapes, "the judges of the Appellate Division, her ostensible superiors, went easy on her; once they left the bench, they wanted appointments" (314) to guardianships or other lucrative posts that, especially in New York, are treated as patronage plums within the gift of the surrogate.<sup>17</sup>

#### F. *Inviting Will Contests*

The Seward Johnson will contest needs to be understood in the setting of these deeply deficient institutions and procedures that invite disappointed heirs to wage capacity contests. Anywhere else in the Western world, the Johnson children's lawsuit would have been suppressed in short order. In the United States, it became a license to exploit the shortcomings of the procedural system. Skilled plaintiffs' lawyers extorted a multi-million dollar payoff for themselves and their unworthy clients.

By dwelling on titillation and human foibles rather than the structural disorder of American probate litigation, Margolick has missed the truly important story of "the epic battle for the Johnson & Johnson fortune."

## II. PREVENTING CONTEST

Margolick's version of the Seward Johnson will contest, I have said, is that the crafty plaintiffs' lawyers bested the gentle defense lawyers. Regardless of the moves in the courtroom, however, there is reason for thinking that the lawyering blunders that put the Johnson estate at risk occurred in the planning process, that is, during the testator's lifetime.

When a legal system is as ill-equipped as ours is to dispose effectively of marginal capacity suits, the system places a considerable premium on taking preventive measures to forestall attack. Seward Johnson's estate cried out for such contest planning. The indicia of potential contest were visibly present when the will was drafted. The will disinherited the children totally, from a

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16. See John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 856-57 (1985).

17. Mayor La Guardia called the New York Surrogate's Court "the most expensive undertaking establishment in the world." See JESSE DUKEMINIER & STANLEY M. JOHANSON, *WILLS, TRUSTS, & ESTATES* 33 n.10 (4th ed. 1990) (quoting Goldstein, *Once More, Surrogate Talk*, N.Y. TIMES, Sept. 4, 1977, at E5). The same source describes how Surrogate Joseph A. Cox appointed the lawyer-son of his fellow Surrogate S. Samuel DiFalco as special guardian for a large and remunerative estate matter, as a "wedding present" for the young lawyer. *Id.*

\$400 million estate. The children were known to have had no particular affection for Seward and Basia, hence no incentive to avoid besmirching the couple's names with the ugly evidence of eccentricity, vulnerability, and overbearing that is the currency of undue influence suits. Basia, who had to defend the will, was an intrinsically unsympathetic figure—half the testator's age, imperious and temperamental, an arriviste flaunting a life of unimaginable luxury near her former haunts as cook and chambermaid.

Had Seward's lawyers responded to these flashing warning lights, three broad strategies were open to them to protect the estate against the threat of contest.

#### A. *Obtaining Evidence of Capacity*

Because the "worst evidence" principle of American probate law requires the testator to be dead before the court decides whether he was capable when he was alive, good planners take steps to generate and preserve favorable evidence of the testator's capacity and independence. Counsel should have arranged for Seward to explain why he chose to exclude the children, and why he chose to favor Basia. Sometimes counsel advises the testator to write this explanation in a letter,<sup>18</sup> or counsel works with the testator to prepare an affidavit. Sometimes it is arranged for the testator to be video taped reading from a script or speaking from notes. Another variant is for the lawyer to interview the testator for a stenographic transcript or video record, asking the testator to explain the will, and giving him the opportunity to show his deliberation and volition.

Seward Johnson remained vigorous despite his long decline until his last few days, yet no steps were taken at the times he executed his series of wills to create and preserve this kind of powerfully persuasive evidence of his testamentary capacity, independence, and freedom from imposition.

#### B. *Involving Potential Witnesses*

Another common precaution is to arrange for persons who are likely to survive the testator to inform themselves about his condition at the time of the making of the will, so that they can testify about the subject in the event of contest. Such persons might include both medical experts new to the testator, and persons who have been long familiar with him and are thus able to form a comparative view of his capacity at the time of the making of the will. These persons interview the testator about his condition, the contents of his will, and his reasons for disinheriting his "natural objects." Under this drill, the witnesses execute fairly contemporaneous affidavits, reciting their contact with

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18. Jaworski, *supra* note 10, at 91-93.



the testator and their reasons for concluding that the testator was of sound mind and acting freely. Occasionally, the planner arranges for these persons to serve as supernumerary attesting witnesses, who attend and attest the execution of the will,<sup>19</sup> other planners prefer to confine the involvement of these potential witnesses outside the will.<sup>20</sup>

Seward Johnson's lawyers made only an isolated and ineffectual use of this technique. On the day Seward executed his last will, Nina Zagat had an attending physician sign a canned certificate reciting that Seward was "of sound mind and memory and aware of his acts." (158)

### C. *The No-Contest Clause*

A third avenue of defense is to include a no-contest clause in the will.<sup>21</sup> In Seward Johnson's case, he would have needed to alter his testamentary plan somewhat, and provide modest but conditional devises for each child. The condition would have been that all the children's devises would be canceled if any child contested the will. Very shortly before Seward's death, lawyers at Shearman & Sterling gave passing thought to drafting a no-contest clause to include in Seward's will but ultimately did nothing about it. (141-42)

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Why were the common defensive measures not taken in planning the Johnson estate? Margolick does not even pose the question, although he records that in March 1983, in the course of the penultimate round of will drafting two months before Seward's death, Seward inquired of Shearman & Sterling's Nina Zagat whether the children might be able to contest the will. She assured him that there were no grounds for contest. (141)

One is left to wonder whether the enormous executor compensation that Shearman & Sterling wrote into Seward's will played some role in the firm's seemingly wishful failure to attend to proper contest planning. The best defense against the allegation that Basia and Nina conspired to impose Basia's scheme upon Seward's will would have been a videotape or affidavit, in which Seward explained not only why he favored Basia and disinherited his children, but also why he chose to lavish millions on avoidable executor fees for Nina. He would have needed to declare that he knew that one executor might suffice where his will ordained three at a price tag in excess of \$6 million each, and that lawyers normally serve as lawyers without being named as executors. He

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19. *See, e.g.*, W. BARTON LEACH, *CASES AND TEXT ON THE LAW OF WILLS* 47 (2d ed. 1960).

20. Jaworski, *supra* note 10, at 92.

21. Prevailing American law enforces the no-contest clause unless the contestant can prove probable cause for bringing the contest. *See, e.g.*, UNIFORM PROBATE CODE § 3-905 (1969) [hereinafter U.P.C.]; RESTATEMENT (SECOND) OF PROPERTY § 9.1, at 342-80 (1983).

should also have been guided to explain that he knew that the New York statutory fee was a default formula, and that he had declined to negotiate a much lower fee. How much of this Seward actually understood is far from clear.

Avoiding self-dealing or conflict of interest is a paramount value in the fiduciary law that governs trustees and executors.<sup>22</sup> Yet, as the Johnson case illustrates, the enormous windfalls that arise under New York's executor compensation system create severe ethical conflicts. One wonders, for example, whether the prospect of New York executor compensation distorted the thinking that led to probating Seward's will in New York. Seward's lawyers took careful steps to treat Florida as Seward's domicile, in order to minimize the state inheritance tax. Seward was guided to vote in Florida, spend time there, and endure his last illness and death there. The decision to opt into an avoidable New York probate was, therefore, riven with conflict of interest.

In jurisdictions in which the standard for executor compensation is more sensitive to the beneficiaries' interests, fees are based on the worth of the services rendered, not on the fortuity of the asset value of the estate. Margolick makes no mention of the ethical dilemmas that inhere in the New York law, or the contrary standards in other states.<sup>23</sup>

*Undue Influence* is an oddly unsatisfying work. Despite its length, the book is an engaging read, thanks to Margolick's gifted prose. A high point is his account of Seward and Basia staging a funeral for their dead dog on their New Jersey estate, with four groundskeepers "doubling as paw-bearers." (130) There is vast detail about the antics of the parties and the lawyers, but scant attention to the institutional, procedural, and ethical failings that propelled this bizarre lawsuit. *Undue Influence* is a missed opportunity to explore the deep disorder that afflicts the administration of justice in the wealth transfer process in the United States.

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22. See RESTATEMENT (SECOND) OF TRUSTS § 170(1), the so-called duty of loyalty. The New York courts have imposed drastic liabilities upon executors for breach of the duty of loyalty. See, e.g., *In re Estate of Rothko*, 372 N.E.2d 291 (N.Y. 1977).

23. The Uniform Probate Code provides that the "personal representative is entitled to reasonable compensation for his services." U.P.C. § 3-719. See, e.g., the opinion of the Maine Supreme Court, interpreting this language to mean that fees should ordinarily reflect time reasonably devoted to the estate rather than the value of the estate's assets. *Estate of Davis*, 509 A.2d 1175 (Me. 1986).