SURROGATE'S COURT: NEW YORK COUNTY

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In the Matter of the Judicial Settlement of the First Account, as Supplemented by the Final Account, of Andrew J. Duell, as co-Executor of the Will of

MANNY E. DUELL,

Deceased.

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File No. 1977-4835 A

GLEN, S.

This is a contested proceeding for the settlement of the first intermediate account of Andrew J. Duell (Andrew), as co-executor of the will of his father, Manny E. Duell, for the period from September 17, 1977 to August 31, 1992, as supplemented by his final account, covering the period from September 1, 1992 to August 31, 1998. Numerous objections were filed to the supplemented portion of the account by decedent's wife, Irene Duell (Irene), and his and Irene's other two children, Thea Duell (Thea) and Benjamin Duell (Benjamin) (collectively, Objectants). Many of the objections were subsequently resolved by stipulation or on motions for partial summary judgment.

In September 2011, the parties entered a further stipulation settling other objections, fixing a schedule for additional submissions, and agreeing to waive an evidentiary hearing on the remaining issues. Those issues, resolved here, are: (1) the amount of commissions, if any, to which Andrew is entitled, including whether he is entitled to rental commissions under SCPA 2307 (6); (2) whether, to what extent, and from what source Objectants are entitled to reimbursement for their attorneys' fees; and (3) whether and to what extent Andrew should be denied payment of his attorneys' fees from the general estate.

Background

The decedent died in 1977 leaving a substantial estate comprised largely of income producing real property. His will distributes the residuary estate in equal shares to two trusts, Funds A and B. Irene was the sole beneficiary of Fund A, with the power to withdraw the entire principal. Fund B as originally constituted provided Irene and the three children with specified fixed income interests. A portion of the principal was distributable to Andrew at age 35 and to Thea at age 35, with a final distribution of their respective principal interests due upon the death of Irene. Benjamin was entitled to partial distributions of principal in three stages, with the balance continuing in trust for his life. Andrew and Irene were appointed as co-executors and co-trustees as provided in the will.

In 1992 the parties began engaging in what would become protracted litigation. The dispute arose from Andrew's continuing failure to distribute the trust property to which Thea had become entitled when she turned 35 in 1985, allegedly because of the parties' fundamental disagreement over the allocation of the assets. After lengthy attempts to settle the differences were unsuccessful — including the appointment of successive "tie-breaking" fiduciaries—the court issued a distribution order in 1996 directing the allocation of the estate's properties among Irene (who had exercised her power to withdraw the Fund A assets), Andrew (to the extent of his right at that time to an outright distribution), Thea (to the extent of her right to an outright distribution), and Fund B. In 1997, Andrew was removed as co-trustee of Fund B, after a hearing.

Fund B was divided into three further shares by order dated May 15, 1998, one in respect of each of the children. Andrew was appointed co-trustee, with Irene, of the share of which he is

the remainder beneficiary.

Andrew later commenced litigation over the allocation of the property among the three Fund B shares, which was determined by the decision of this court and affirmed on appeal.

Various other actions and proceedings were commenced by Andrew, by Thea, and by Irene, and either determined or abandoned. These are discussed below to the extent relevant to the outstanding issues on this accounting.

Commissions

Objectants rely on the findings at the hearing for Andrew's removal as co-trustee to support their position that Andrew is not entitled to commissions as executor. Those findings establish, among other things: Andrew tried to prevent Thea from receiving her trust distribution; Andrew refused to communicate with Thea at all and exhibited extreme hostility to her and to the other beneficiaries, Irene and Benjamin, which "prevented even a reasonably functioning relationship" between the trustees and beneficiaries; Andrew engaged in "deceitful and malicious" conduct toward his mother and sister, requiring Irene to waste estate time to correct the problems he created; and Andrew conducted wasteful litigation, including attempts to relitigate the trust distribution after it was settled by court order. Objectants argue that Andrew's conduct, found by this court to be "arbitrary and antagonistic" as well as "rude, disrespectful, and discourteous" to the beneficiaries, amounts to bad faith that requires a denial of executor's commissions.

Denial of commissions is an extreme remedy for which, as Objectants recognize, there is no clearly articulated standard. *Matter of Taft* (145 Misc 435 [Sur Ct, Kings County 1932]) provides a survey of older cases on this point. It notes that courts have refused to deny

commissions, even if surcharge were imposed for loss to the estate, where "there has been an absence of extreme carelessness or dereliction of duty." In those cases where courts have denied commissions in addition to imposing a surcharge to repair financial losses, the *Taft* court noted that "either positive *mala fides* had been demonstrated or there had been a long-continued and striking disregard of fiduciary duties." Subsequent cases have not deviated from these principles. Thus, the court stated in *Matter of Cushman* (NYLJ, July 23, 2010, at 34, col 4 [Sur Ct, Bronx County]):

> "[T]he allowance of commissions is within the discretion of the court, and the harsh determination that a personal representative should not receive any compensation for administering the estate is limited to those cases involving bad faith, neglect of duty or wanton disregard of the rights of the beneficiaries of the estate [citations omitted]."

Applying these standards, the court determine that a portion, but not all, of Andrew's commissions shall be disallowed, as directed below.

Andrew's "Deceitful and Malicious Conduct"; Refusal to Communicate

There is no question that Andrew harbored animosity and hostility toward his mother and the other beneficiaries. Andrew's estrangement from his sister was allegedly rooted in his disapproval of her marriage outside the family's faith, a personal issue which Andrew characterizes as a matter of principle that preceded their father's death. As mentioned above, much of the family friction arose from disagreement over the allocation of properties. Whatever the source of the antagonism, Andrew engaged in conduct that was, at best, rude and spiteful. He was found, for example, to have torn up and discarded rent checks payable to the company that managed the estate's real estate holdings, and to have left confidential estate records in the

estate's office building lobby instead of delivering it to the appropriate office (his mother's). He refused to speak to Thea and severely limited his availability for meetings with Irene, his co-executor, about the management of the estate. The issue for the court is whether this conduct, however deplorable, constitutes grounds for denying commissions, as urged by Objectants.

The court has previously found that the estate was administered without incident for many years: it was not until sometime in 1985 when Thea turned age 35 that the problems began. Further, Objectants do not allege harm to the estate as a result of Andrew's conduct. Over the 21-year period of the account, the estate grew in value exponentially, whether or not as a result of Andrew's efforts: the gross estate was initially valued at approximately $14 million, while distributions of principal and income to beneficiaries total over $118 million. In addition, Andrew has established that he was personally active in the administration of the estate for 20 years, fulfilling his duties as executor by preparing the federal estate tax return, overseeing the IRS audit, conducting certain appraisals, preparing annual estate income tax returns, overseeing the financial and legal affairs of the estate's real estate business, and making timely distributions of all the estate income,[1] amounting to $54 million. None of the objectants has claimed that Andrew utterly failed to administer the estate or administered it negligently. Nor do Objectants contend that Andrew's offensive behavior involved self-dealing or dishonesty. Significantly, when Andrew turned age 35 and became entitled to a distribution, three years before Thea, he did not take it. And Objectants do not allege any practical harm as a result of Andrew's refusal to speak to Thea, who testified that she communicated daily with her mother, the co-executor.

[1] The one exception involved income owed to Irene when the estate had an offsetting claim against an entity she owned, a claim that was later settled.

The court observes further that many of the particular acts complained of occurred *after* distribution of the properties from the estate, either outright or to Fund B, and therefore do not implicate Andrew's behavior as executor. In all the circumstances, the court finds that the acts characterized as "deceitful and malicious" do not warrant a forfeiture of statutory commissions.

"Wasteful Litigation"

Objectants argue that Andrew engaged in wasteful litigation, an additional ground for denying his commissions, citing *Matter of Bloomingdale* (172 Misc 218 [Sur Ct, New York County 1939]). The *Bloomingdale* case disallowed commissions to an executor for various acts of misconduct, including "the fomenting of vexatious and unnecessary litigation." Much of the litigation that concerned the court in *Bloomingdale,* however, was either brought by the executor against her co-fiduciary on charges that "proved to be groundless and without foundation in law or in fact," or was discontinued by her on the date set for trial (*id.* at 224-25). The litigation in this case, while voluminous, is not so easily characterized as "unnecessary." Although Andrew failed to take adequate steps to resolve the conflict, there is no reason to believe that his disagreement with his co-executor and the other beneficiaries was not reasonable and genuine. The court also recognizes that the large volume of income producing real property in this estate necessarily complicated the estate administration and was itself a catalyst for disputes. Most of the litigation here involved allocation of illiquid assets, not susceptible to incontrovertible valuations or unquestionable judgment in the exercise of fiduciary discretion.

Some of the litigation involved Andrew's attempt to revise the distribution values used in the intermediate account. He identified certain undisputed errors in the property descriptions on which the relevant appraisals had been based, and argued that the proposed allocation did not

provide for sufficient diversification among the shares, considering tax bases and potential for growth, among other factors. The court denied Andrew's request for a hearing and granted objectants' motion to dismiss Andrew's proposed revisions on summary judgment. The decision was not based upon a finding that the errors did not exist, but because the court found that the earlier appraisals had already been accepted and were law of the case.

Despite the resulting delay in distribution, the court cannot determine on this record that the litigation which Andrew brought or defended was conducted in bad faith. Nor can it be denied that he had a right to appeal adverse decisions. The court therefore determines that the litigation in which Andrew engaged does not in itself warrant denial of the commissions to which he is presumptively entitled.

Attempting to Prevent Distribution to Thea

The court's finding in the removal hearing that Andrew did "everything in his power to prevent Thea from getting what was hers by right" poses a more serious question about Andrew's entitlement to commissions because it is potentially indicative of a deliberate failure to distribute the assets in accordance with the terms of the will. Willful disregard of an executor's duties has been held grounds for disallowance of commissions (*e.g. Matter of Geffen*, 129 NYS2d 311 [Sur Ct Kings County 1954]).

Andrew maintains that his failure to distribute was solely attributable to a genuine disagreement over the particular assets to be distributed. Out of a desire to continue the successful management of the properties as a single unit, Andrew wanted a fractional distribution of the estate assets among the beneficiaries. The others opposed this proposal in favor of allocating discrete properties. The court appointed a neutral third party to break the deadlock,

but the individual died before the plan he recommended could be implemented. A successor was appointed, who concurred with that plan (or one similar), which called for distribution of discrete properties solely on the basis of the hostility among the parties. Irene also agreed. The court issued its distribution order in May 1996, and Irene and the neutral fiduciary executed deeds to effect the conveyances as ordered. Andrew appealed the order, however, and obtained a stay of its enforcement pending the appeal.

In October 1996, the Appellate Division unanimously affirmed the distribution order, noting that Andrew failed to raise any material issues of fact to contest the appraisals upon which the distribution was based, and "failed to avail himself of the opportunity to substantiate his position when he declined to submit an appraisal in opposition to the appraisal submitted to the Surrogate." By order dated April 1, 1997, the Court of Appeals dismissed his motion for leave to appeal, not on the merits, but because the order below "does not finally determine the proceeding within the meaning of the Constitution" (*Duell v Duell*, Ct App, 1-10, Motion No. 23).

The Appellate Division faulted Andrew's failure to support his own position for a fractional distribution of the properties. This was at a point eleven years after Thea was due—and requested— her distribution, more than enough time by any standard for Andrew to make his best case for the allocation that he advocated, and beyond any reasonable period for him to continue to thwart the clear wishes of the majority. In light of Andrew's own testimony acknowledging his animosity toward Thea, Irene's testimony that Andrew admitted he was loath to see Thea receive any property from the estate, and the court's finding, after a hearing, that Andrew improperly interfered with Thea's receiving her rightful distribution, it is reasonable to infer the extreme delay in distribution represented a willful failure on Andrew's part to perform

his duties as executor. On the other hand, Andrew's stated desire to make fractional distributions of the properties was reasonable in view of the substantial gains the estate experienced while the properties were managed as a unit. Also, as noted above, the beneficiaries have not established that they suffered harm by the delay in distribution. Balancing these considerations, the court in the exercise its discretion to disallow commissions (*e.g. Matter of Taft* [145 Misc 435]; *Matter of Cushman* [NYLJ, July 23, 2010, at 34, col 4]) determines that Andrew's statutory commissions shall be reduced by the amount attributable to paying out the assets that Thea received outright pursuant to the distribution order, calculated under SCPA 2307(1) at the applicable marginal rate.

Entitlement to Additional Commissions for Collecting Rent

Irene, Thea, and Benjamin object to Andrew's claim for rental commissions pursuant to SCPA 2307(6), which allows an executor five percent of gross rents, in addition to the commissions under SCPA 2307(1), if the executor is required to collect rents and manage real property.[2]

Objectants are correct that Andrew is not entitled to this additional compensation. According to his own testimony, he and Irene paid five percent of the rental income to Morgan Holding Corporation (Morgan),[3] which collected the rents and assisted in the management of the

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[2] The statute allows only one such commission, to be apportioned among multiple fiduciaries according to their respective services. Andrew has sought 75% of the amount computed under the statute " to account for the fact that he had a co-executor."

[3] Morgan Holding Company was owned equally by Andrew and Irene. Andrew complains that the company earned only meager profits, and that these have been deducted from the additional commissions he has requested. At the same time, he testified that the profits were distributed to him and Irene to avoid taxation at the higher corporate rate. The profitability of the management company and its bookkeeping practices are not relevant to the issue of Andrew's entitlement to additional commissions.

property. The caselaw is clear that the cost of employing an agent to manage real estate is deducted from the five percent that would otherwise be payable to the executor for performing this function (*e.g. Matter of Wendel*, 159 Misc 900, 902 [Sur Ct, New York County 1935], *affd* 248 App Div [1st Dept 1936], *affd sub nom. Matter of Shirk*, 273 NY 532 [1937] [decided under former SCA §285]).

The court rejects Andrew's argument that he is entitled to the additional commission, despite the five percent payments to Morgan, because of management functions he allegedly performed above and beyond those undertaken by Morgan and which he claims resulted in substantial benefits to the estate. The statute allowing extra commissions on gross rents in circumstances like these "recognizes the extra services required of the fiduciary in such cases" (Margaret Turano, Practice Commentaries, McKinney's Cons Laws of NY, Book 58A, SCPA 2307). There is no authority in the caselaw or statutes for supplementing commissions beyond what the statute already provides. The case upon which Andrew relies, *Matter of Ducas* (109 NYS2d 17 [Sur Ct, New York County 1950]), is inapposite because it does not involve the management of real estate, much less an interpretation of the rental commissions statute. Andrew will be compensated for the growth in value of the estate —whether or not attributable to his efforts— by the paying out commissions calculated on the increased value as determined under SCPA 2307(1).

Legal Fees

The court has a great deal of discretion in fixing the amount and source of legal fees in accounting proceedings, but certain general principles pertain. As relevant here these may be summarized as follows:

- A fiduciary is entitled to pay from the estate the reasonable and proper expenses of administering the estate, including reasonable and necessary attorneys fees (EPTL 11-1.1).

- Each party to a contested proceeding bears her own legal expenses whether or not successful, absent an agreement, statute, or court rule (*A.G. Ship Maintenance Corp.v Lezak*, 69 NY2d 1 [1986]). This is known as the "American rule."

Some corollaries and exceptions to these general rules are:

- A fiduciary may not charge the estate for fees incurred in defending his misconduct (*Birnbaum v Birnbaum*, 157 AD 2d 177 [4th Dept 1990]).

- A beneficiary's attorney may be compensated from estate assets if the attorney's services benefited the estate as a whole, resulting in the enlargement of the beneficiaries' shares (*Matter of Wallace*, 68 AD3d 679 [1st Dept 2009]). Such services must be substantial; achieving reduction in charges claimed by the fiduciary in an accounting proceeding may not qualify as a benefit warranting payment of a beneficiary's fees from the estate (*see Matter of Heilbronner*, 39 Misc 2d 912 [Sur Ct, New York County 1963]; *Matter of Sielcken*, 176 Misc 235 [Sur Ct New York County 1941], *affd* 263 App Div 866 [1015]); *but see Matter of Poletto* (31 Misc 3d 1206(A) [Sur Ct, Monroe County 2011]).

- The fees of a beneficiary's attorney may be compensable from the estate if the attorney facilitated the proper administration of the estate. As with all fees, approval requires that they be reasonable and *necessary* and will be awarded only where the fiduciary has been found to have neglected the administration (*see Matter of Geller,* 167 Misc 578, 582 [Sur Ct, Kings County 1938]).

In determining the allowance or shifting of fees in this matter, the court has given consideration to the often cited factors enumerated in *Matter of Freeman* (34 NY2d 1 [1974]) ("the time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented; the lawyer's experience, ability and reputation; the amount involved and benefit resulting to the client from the services; the customary fee charged by the Bar for similar services; the contingency or certainty of compensation; the results obtained; and the responsibility involved" [*id.* at 9]), and in *Matter of Potts* (213 App Div 59 [4th Dept 1925], *affd* 241 NY 593 [1925]).

All the legal fees at issue have been supported by affidavits of legal services and contemporary time records. The parties do not question the skill required, reputation of opposing counsel, the amount of time spent—to the extent it can be ascertained from the papers submitted, an issue which will be discussed below—or that the fees charged are customary for similar services. The objections are not to the amount of the fees per se, but rather to the propriety of allocating fees against the estate for those services that Objectants claim did not benefit the estate. Similarly, where Objectants seek to shift their own fees to Andrew, he does not question the value, but, instead, defends against their allocation to him. The court accepts the charges as reasonable for the services rendered, and further review here is limited to the necessity and proper allocation of the time-based charges.

Legal fees charged to the estate

Irene, Thea, and Benjamin object broadly to all attorneys' fees that Andrew charged to the estate other than "any reasonable payments directly related to Estate administration and the proper preparation of the accounting papers." They state that they are unable to determine from his attorneys' affidavits of services which fees were incurred for which services, but object to fees Andrew incurred in (1) the removal proceeding, (2) litigation against Cushman & Wakefield, and, more generally, (3) duplicative, unnecessary, and wasteful litigation, failing to comply with the terms of the will, and failing to cooperate.

The Removal Proceeding

Fees expended in defending a fiduciary's misconduct may not be charged to the estate (*e.g. Matter of Campbell*, 138 AD2d 827, 829 [3d Dept 1988]). Andrew's counsel reports that only half the time they allocated to the removal proceeding has been charged to the estate,

reflecting the fact that Andrew was removed only as trustee and not as executor. Objectants point out, however, that they did not press for his removal as executor because the estate had been almost entirely distributed by the time of the removal hearing.[4] The removal decision did not exonerate Andrew for his conduct as executor; it simply did not determine the issue. Further, there is no evidence that any of counsel's time related to the proceeding was expended solely in defending Andrew's removal as executor. The circumstances here are distinguishable from those in *Matter of Lasdon* (NYLJ 1202474997186, *1 [2010]), decided by this court and cited by Andrew, where the fiduciary was not found to have engaged in deliberate misconduct. Accordingly, the fees claimed attributable to defending Andrew's removal as executor, including appeals, are disallowed.

Fees Attributable to Cushman & Wakefield Lawsuit, and Morgan Holding Company

A factor in Andrew's objection to the distribution of properties which was ultimately ordered by the court was his criticism of appraisals conducted by Cushman & Wakefield. As indicated above, he identified numerous errors in the descriptions of the properties which he alleged caused undervaluations in some cases and overvaluations in others, with the net effect that his share allegedly fell short of the value to which he was entitled. In 1999, after this court entered its distribution order using the Cushman & Wakefield values, Andrew, both individually

[4] In 1992, Thea petitioned to compel Andrew to account and also sought his removal as executor in the same proceeding. The removal issue was not then determined. In 1995, she renewed her request for his removal and added a request for his removal as trustee, in a petition that also sought to compel distribution of assets. The court issued a distribution order in May 1996, but did not address the requests for Andrew's removal as executor or trustee. In late 1996, Irene petitioned for the division of Fund B into three separate shares and, in the same application, sought the removal of Andrew as trustee. By this time, the assets had been distributed out of the estate.

and as executor, brought an action against Cushman & Wakefield,[5] claiming that its negligence and breach of fiduciary duty damaged the estate by requiring it to engage in additional litigation and to obtain new appraisals to establish the correct property values. By the time he brought the lawsuit, however, the Cushman & Wakefield valuations had been accepted by this court and found to be "law of the case," and the decision had been affirmed on appeal. The valuations could not, therefore, have been the basis for an action for damages to the estate. The time attributable to that action was, at best, for Andrew's personal benefit. Any charges against the estate for the cost of the action are disallowed.

Similarly, fees sought herein for the defense of the proceeding brought by Irene for the dissolution of Morgan Holding Company are disallowed as a charge against the estate. That litigation occurred after the distribution of the estate property when Morgan no longer served any function for the estate, and the dispute was between the principals in their individual capacities.

Fees incurred for alleged failure to comply with the terms of the will, and for failure to follow orders of the court or to comply with the wishes of the tie-breaking neutral fiduciary, for bringing duplicative, wasteful or unnecessary litigation, and for general failure to cooperate

In this broad category are all the proceedings relating to the parties' disagreement about the allocation of the real estate among the various shares and the resulting failure to distribute. As discussed above, there is no indication that Andrew's litigation position was influenced by a desire to gain more than his rightful proportionate share of the estate, or that he engaged in self-dealing. To the extent Objectants make more specific allegations, they repeat their recitation of Andrew's bad acts without indicating how these acts generated legal fees paid by the estate. They do not explain, for example, how their complaint of "Andrew's filing of an accounting that

[5] The action was commenced in Supreme Court and transferred to this court.

included no plan for distribution" resulted in an improper charge of legal fees to the estate. Accordingly, fees will not be disallowed for this broad category of objections, except as indicated above.

Legal fees incurred by objectants

Objectants seek reimbursement from Andrew, individually, of all fees they incurred beginning in 1992, when Thea filed her petition to compel his account, through the date of the distribution order in 1996. They also ask for all their fees related to Andrew's various appeals relating to that order; for the fees they incurred objecting to Andrew's account; for the proceeding to split the trust; for the removal of Andrew as trustee; for the litigation against Cushman & Wakefield; for fees in connection with Andrew's taking certain computer equipment; and for the 2009 proceedings and appeals concerning the allocation of trust property. Citing this court's March 2011 decision that Andrew individually was responsible for objectants' fees "to the extent that such fees were reasonable and were necessarily incurred, and resulted in the enhancement of the value of the estate or facilitated the proper administration of the estate," they argue that virtually every dollar they expended on legal fees should be borne by Andrew.

Objectants have failed to establish that all of those fees were *necessary* to the *proper* administration of the estate, as required to shift the expense to the estate or to Andrew's share of the estate. To adopt their position would not only eviscerate the American rule, it would also expose every fiduciary to the risk of incurring personal expense for advocating a view contrary to that of any beneficiary.

However, the legal fees of a beneficiary incurred to establish a fiduciary's wrongdoing may be shifted to the fiduciary (*Matter of Campbell*, 134 Misc 2d 960 [Sur Ct, Columbia County

1987], *mod on other grounds* 138 AD2d 827 [3d Dept 1988]). As applicable here, the fees of Objectants attributable to the proceeding for his removal as executor and trustee, including appeals, shall be charged to Andrew as a surcharge against his commissions. These fees total $133, 689.26 to Irene and $27,416.00 to Thea for the trial on Andrew's removal, with additional amounts to defend the appeal of his removal that cannot be determined on the papers submitted because they are shown combined with fees to oppose his appeal on splitting the trust, which are to be borne by Irene and Thea and not by Andrew.

Similarly, Irene and Thea's fees for litigation to compel Andrew to return computer equipment shall be borne by Andrew. It is undisputed that these fees amount to $12,884.65 to Irene, and $1,785 to Thea.

None of the other categories of fees, however, warrants assumption by Andrew. As previously discussed, Andrew did not stand to benefit from the position he took on the distribution of assets; he was in the same position as Thea regarding the method of asset distribution. Cases that have awarded attorneys' fees to beneficiaries for taking over the duties of a fiduciary involve a complete dereliction of duties by that fiduciary, "because of an adverse interest, disinclination or neglect" (*Application of Elias, Schewel and Schwartz,* 55 AD2d 448, 451-452 [4th Dept 1977]). *Matter of Poletto* (31 Misc 3d 1206(A) [Sur Ct, Monroe County 2011]), cited by Objectants, is distinguishable, because it involved a fiduciary who failed to offer the decedent's latest will for probate, under suspicious circumstances, while propounding an earlier will under which he fared better, suggesting a self-interested dereliction of duty.

Procedural Considerations and the Scope of the Fees Addressed

Schedule C of the initial portion of the account shows $68,208.67 in legal fees paid, and

Schedule C-1 shows $1,726,117.80 in estimated unpaid legal fees. Schedule C of the supplemental portion of the account reflects $154,739.01 in paid legal fees. An additional amount is cryptically shown as unpaid, but "chargeable to petitioner." Petitioner's memorandum of law states that Andrew is seeking total fees and costs in the amount of $2,243,279.01. The court is unable to reconcile these figures.

The discrepancy might be explained by the fact that the affidavits of legal services include services performed by Andrew's counsel subsequent to the period of the account.[6] Objectants address the merits of these fees without raising their timing as an issue, and the court interprets the latest stipulation as including the parties' consent to the court's fixing all fees incurred in connection with the administration of the estate, to the extent disclosed in the affidavits of services, whether or not reflected in the accounting.

As Objectants observe, however, it is not possible to determine from the copious time records submitted or from the summaries in their narrative affidavits precisely how much of those charges is attributable to the services disallowed in this opinion. Petitioner's counsel is directed to file an affidavit attesting to the amounts included in the figure for which they seek approval, but which have been disallowed, and Objectants' counsel is directed to file an affidavit attesting to the portion of fees attributable to defending the appeal of Andrew's removal, both by January 31, 2013. Each side shall have a period of 20 days thereafter to file responsive papers, after which a decree shall be settled.

Disbursements are disallowed for reproduction charges, telephone charges, and telecopier

[6] Indeed, one of the firms was not retained until after the close of the account.

charges, in accordance with *Matter of Herlinger* (NYLJ, Apr. 28, 1994, at 28 col 6). The cost of transcripts, expert witness fees, appraisal fees, courier fees, and FEDEX are allowed except to the extent they are associated with litigation for which the charges have been disallowed. The affidavits to be submitted shall identify those associated disbursements.

Settle decree on accounting, following submission of the additional affidavits and any responsive papers as provided above.

SURROGATE

Dated: December 27, 2012