

**Matter of Syms**

2015 NY Slip Op 30086(U)

January 26, 2015

Sur Ct, New York County

Docket Number: 2009-4494

Judge: Nora S. Anderson

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NEW YORK COUNTY SURROGATE'S COURT  
DATA ENTRY DEPT.  
JAN 26 2015

SURROGATE'S COURT : NEW YORK COUNTY  
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Probate Proceeding, Will of

SY SYMS,

File No. 2009-4494

Deceased.  
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A N D E R S O N, .

In this contested probate proceeding in the estate of Sy Syms, special referee Anne C. Bederka renews her fee application for the services she performed supervising pre-objection discovery.

In December 2010, respondents, Richard Syms (one of testator's sons), Jillian, Daniel and Olivia Merns (the children of testator's pre-deceased son Stephen Merns), and the guardian ad litem for Chloe Merceron (the infant child of testator's predeceased daughter Adrienne Merns), entered into a stipulation with the preliminary executor, Marcy Syms (one of testator's daughters), in which they all agreed to the appointment of a special referee (CPLR 4321). The stipulation provided as follows:

"[T]he Court shall appoint a referee ... to resolve discovery disputes [among] the parties. After the referee has concluded his or her duties, the Court shall determine the basis and method of computing the referee's fees (including the total amount of the referee's fees), the referee's reasonable expenses, and the allocation of those fees and expenses [among] the parties."

On January 25, 2011, the court appointed movant as special referee "to supervise pre-objection disclosure." Such order

provided that the court would "determine the basis and method for computing the referee's fees and the allocation of such fees among them, upon the conclusion of the reference (see CPLR § 4321[1] and SCPA § 506[5])" (*Matter of Syms*, NYLJ, Feb. 4, 2011, at 26, col 3 [Sur Ct, NY County 2011]). A month later, the parties entered into another stipulation, which provided that the special referee "shall have all the powers indicated in CPLR § 3104(c) and the review of any order issued by her shall be governed by CPLR § 3104(d)."

Pre-objection discovery ensued. Almost two years later, before objections to probate had been filed, movant asked the court to fix her compensation, which, based upon her firm's usual hourly rates, would have been \$135,771.90 (plus \$2,319.49 in disbursements). Although the court found the special referee's performance "of the highest quality" and noted that were it "to determine the motion now, the court would find the [special referee's] fee fair, reasonable and well deserved," the court denied the motion with leave to renew because pre-objection discovery had not been concluded, a requirement under the parties' agreement (*Matter of Syms*, NYLJ, Jan. 7, 2013, at 21, col 5 [Sur Ct, NY County 2013]).

After respondents filed objections in April 2013, the special referee made the instant motion. With the additional services performed in the intervening six months, the value of

the referee's services (again, based upon her firm's usual hourly rates) had increased to \$175,569.40, plus disbursements of \$2,854.03. The referee's affidavit of legal services, which is accompanied by contemporaneous time records, indicates that she spent a total of 246.20 hours on this matter and that others at her law firm acting at her direction spent an additional 75.50 hours, for a total of 321.70 hours.

The preliminary executor does not challenge the amount of time the referee spent or her total fee, including disbursements. However, she asserts that the fees should be allocated 20% to her, with 40% allocated to Richard individually and 40% allocated in the aggregate to Jillian, Daniel and Olivia (the "Merns Grandchildren") because the conduct of their counsel caused needless delays and increased the amount of time and resources the referee was required to devote to the matter. Richard and the Merns Grandchildren are in accord that the referee's fees are excessive, but disagree with the preliminary executor and with each other as to how her compensation should be allocated.

Richard, for his part, asserts that the fee should be allocated 62.5% to the preliminary executor (to be paid with estate funds) with the remaining 37.5% to be allocated equally among respondents as follows: 12.5% to Richard, 12.5% to the Merns Grandchildren and 12.5% to Chloe, the latter's share to be paid out of estate funds. The Merns Grandchildren, however, argue

that the preliminary executor should be required to pay 50% (from estate funds) and the remaining half should be allocated equally to the "three sets of Respondents", namely Richard, the Merns Grandchildren and Chloe (with the latter's share from estate funds), *i.e.*, 16.67% each. The guardian ad litem has not taken a position with respect to the referee's fee or its allocation.

We turn first to the reasonableness of the referee's fees, which the parties stipulated would be fixed by the court (see CPLR § 8003[a]; CPLR 4321[1]). To describe the pre-objection discovery in this matter as very contentious would be an understatement. During the more than two years of the reference, the parties could agree on very little, even reaching an impasse over who would "control selection of the vendor to be charged with making copies of documents produced to Respondents' counsel by non-parties." This dispute over a seemingly non-controversial issue necessarily became the subject of a written decision by the referee, one of 11 she was called upon to make during her reference.

The referee's other ten decisions addressed a variety of other discovery disputes, some raised by formal motion and some, like the disagreement over copying vendors, raised informally, but nonetheless requiring a decision in order for discovery to proceed. Many of the issues resolved by the referee involved complicated legal and factual issues requiring significant

discussion. Indeed, the referee's decisions collectively totaled more than 85 pages.

The referee was also called upon to preside over multiple telephone conferences and to review and respond to dozens of e-mails and letter submissions regarding a variety of issues. In addition, the referee also reviewed documents *in camera* to address disputed privilege claims. In the end, as a result of the parties' numerous discovery disputes and the protracted discovery process that followed, the referee had to amend her original discovery order three times in order to set a timetable to ensure that appropriate pre-objection discovery could be completed.

Richard contends that the referee's fee should be reduced, not because of the quality of the services performed, but because the alleged probate estate of \$2 million dollars does not warrant the referee's customary hourly rate.<sup>1</sup> However, Richard himself does not believe that the probate estate is \$2 million. Rather, he asserts that it is worth at least \$60 million due to allegedly invalid transfers by testator. There can be no doubt that this view (shared by the other respondents) informed the broad scope of the pre-objection discovery that, in turn, led to many of the

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<sup>1</sup> Richard also contends that the amount of time spent by the referee was "excessive" as a result of "Petitioner's counsel's recalcitrant posture and reluctance to cooperate with the Special Referee and opposing counsel." This argument, however, is more appropriately viewed as one supporting a disproportionate allocation of the referee's fees to the preliminary executor.

discovery issues the referee was required to resolve. Under these circumstances, Richard cannot be heard to complain that the size of the alleged probate estate warrants a reduction in the referee's hourly rate, a rate which he does not otherwise challenge.

The Merns Grandchildren also argue that the referee's fees should be reduced, but for different reasons. First, they challenge the correctness of several of the referee's decisions as a basis for reducing her compensation. However, it is noteworthy that the Merns Grandchildren specifically stipulated that the referee would have the powers of the court under CPLR § 3101(c) and they, in turn, would have the right to apply for review of any order pursuant to CPLR § 3101(d). Yet, the first time that they elected to challenge the propriety of any of the referee's decisions is in opposition to her fee application. Since the Merns Grandchildren failed to avail themselves of the stipulated remedy for challenging the referee's decisions, the court finds suspect their efforts to challenge the decisions now. In any event, the court has reviewed the record and finds the Merns Grandchildren's attacks on the decisions without merit and therefore insufficient to warrant a reduction in the referee's fee.

Also without merit is the Merns Grandchildren's claim that the time spent by the referee on discovery issues was excessive.

A review of their counsel's 45-page opposition affidavit demonstrates the difficulties facing the referee. The parties' discovery disputes as set forth in the record unquestionably support the time the referee devoted to this matter.

Equally unavailing is the Merns Grandchildren's assertion that the referee's fee should be reduced because she engaged in "secret communications" with the preliminary executor's counsel which "poison[ed] the whole adjudicative process." The three communications at issue involved either email or written submissions to the referee by the preliminary executor's counsel without notice to respondents' counsel. A review of the record establishes that nothing about these communications, of which the referee was merely a passive recipient, undermined the fairness of the judicial process. With regard to the written submissions, respondents subsequently received notice of each at the direction of the referee upon her recognition of their *ex parte* nature. No prejudice to respondents resulted. The one email involved a factual matter. The referee promptly disclosed the communication in her next decision. This fact supports the referee's claim that, far from trying to hide the communication, she simply had not noticed that the preliminary executor's counsel had failed to include others in the email chain. Again, no prejudice resulted to respondents from this communication.

Given the complexity and scope of the issues involved, the



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significant amount of time required to address the parties' discovery disputes, and the thoughtful and comprehensive manner in which the referee did so, the court finds that the time spent and the value of those services at prevailing hourly rates are reasonable. Accordingly, the referee is awarded a fee of \$175,569.40 for her services. However, disbursements of \$2,854.03 are disallowed absent a demonstration that they do not constitute normal law office overhead (see *Matter of Aitken*, 160 Misc 2d 587 [Sur Ct, NY County 1994]).

We now turn to the allocation of the referee's fees. None of the parties is asserting that the cost of the reference should be borne solely by their adversary on the ground that the adversary failed to prevail on the merits (see *SCPA § 2301; Matter of Grossman*, 292 AD2d 195 [1<sup>st</sup> Dept 2002]). Instead, the preliminary executor, Richard and the Merns' Grandchildren seek a favorable allocation which foists a substantial amount of the cost of the reference on parties other than themselves.

Upon review of the record, it is clear that all parties, including Chloe, who, by her guardian ad litem, joined in multiple motions made by the other respondents, either directly availed themselves of the referee's services or benefited from the issues raised by others. No one party can be said to have prevailed more than any other with respect to the issues determined by the referee. Certainly, as found by the referee

whose decisions were not challenged, at various points all parties engaged in conduct that resulted in the generation of additional fees and needless delay. Under the circumstances, the court finds that the fees should be allocated among all the parties, including Chloe, in the following manner: 1/3rd to the preliminary executor, 1/3rd to Richard and 1/3rd to be divided equally among each of the Merns Grandchildren and Chloe, the latter's share to be borne by the estate.<sup>2</sup>

This decision constitutes the order of the court.

Dated: January 26, 2015

  
 S U R R O G A T E

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<sup>2</sup> In this case, the estate will bear the cost of the infant's share since none of the parties have objected, including the preliminary executor, who remained silent on the issue.