

Matter of Goldstein
2016 NY Slip Op 32014(U)
July 5, 2016
Surrogate's Court, Nassau County
Docket Number: 284020/J
Judge: Margaret C. Reilly
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**SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

**In the Matter of the Accounting by Allan D. Goldstein, as
Successor Trustee of the Trust Created Under Article
SIXTH of the Will of**

DECISION

**File No. 284020/J
Dec. No. 31507**

GREGORY JEFREMOW,

Deceased,

**And his Application for Permission to Resign as Successor
Trustee, and for the Appointment of Successor Co-Trustees.**

PRESENT: HON. MARGARET C. REILLY

The following papers were considered in the preparation of this decision:

The Account, Citation and Petition on Accounting.....	1
Report of Guardian ad Litem.	2
Application for Guardian Ad Litem Fee.....	3
Affidavit of Accountant Services.	4
Affirmation of Legal Services of Petitioner’s Attorneys.....	5
Waivers and Consents.....	6
Renunciation of Nominated Successor Trustee.....	7

Submitted for review is an accounting filed by Allan D. Goldstein, the successor trustee of the trust created under Article SIXTH of the will of Gregory Jefremow. The petitioner seeks the following relief: the judicial settlement of his account as successor trustee for the period from October 1, 1995 to January 31, 2015; the approval of legal fees and disbursements in the amount of \$42,369.00¹, of which \$19,637.50 has been paid;

¹ The waivers and citation ask for approval of \$34,637.50 in total legal fees. By amended affirmation, the attorneys have requested additional fees bringing the total of fees and disbursements to \$42,369.00. Because of the additional fee request, the attorneys are directed to settle a decree.

revocation of his Letters of Trusteeship; and the issuance of successor Letters of Trusteeship to Esther Jefremow, Laura Carroll and Gregory Jefremow, to serve without bond. The Court must also fix the fee of the guardian ad litem appointed to represent the interests of two minor contingent beneficiaries. The guardian ad litem filed his report and has no objections.

The decedent, Gregory Jefremow, died a resident of Nassau County on January 7, 1994. He was survived by his wife, Esther Jefremow, and two children Gregory Jefremow, Jr. and Laura Carroll. His will was admitted to probate by this court on January 31, 1994 and Letters Testamentary and Letters of Trusteeship issued to Irving A. Cohn. Pursuant to Article SIXTH of the decedent's will, a trust for the benefit of Esther Jefremow was established. The trustees were authorized to distribute principal and income to Esther Jefremow and her descendants. Upon the death of Esther Jefremow, the principal of the residuary trust is to be divided into equal parts for the decedent's two children. If either child predeceased, his or her share is to be distributed to his or her then living descendants.

The decedent nominated his attorney, Irving A. Cohn, as his trustee. If Irving Cohn was unable to serve, he nominated Allan D. Goldstein (petitioner) and his accountant, Stephen J. Macaluso, "serving singly in the order named as his substitute and successor Co-Executor and Co-Trustees." The will further provides that in the event of a vacancy, the remaining co-trustee shall designate a successor and if no such designation has been made, then the trustee or any beneficiary of the trust or estate shall be entitled to apply to the court for the appointment of a trustee to fill such vacancy. Paragraph THIRTEENTH (b) provides "[a]t all times my estate and any trustee herein created shall

be administered by three Co-Executors and three Co-Trustees.” Irving Cohn, the original trustee, died on February 20, 2008. The petitioner is now accounting for the entire period of the trust.

I. ACCOUNT

The summary statement shows charges to the accounting party of \$1,407,896.31 and credits in the total amount of \$523,850.58 leaving a balance of \$884,045.73. The guardian ad litem filed his report, and had no objection to the accounting.

The account is approved, as filed.

II. FEES

The Court bears the ultimate responsibility for approving legal fees that are charged to an estate and has the discretion to determine what constitutes reasonable compensation for legal fees rendered in the course of an estate (*see Matter of Stortecky v Mazzone*, 85 NY2d 518 [1995]; *Matter of Vitole*, 215 AD2d 765 [2d Dept 1995]; *Matter of Phelan*, 173 AD2d 621, 622 [2d Dept 1991]). While there is no hard and fast rule to calculate reasonable compensation to an attorney in every case, the Surrogate is required to exercise his or her authority "with reason, proper discretion and not arbitrarily" (*Matter of Brehm*, 37 AD2d 95, 97 [4th Dept 1971]; *see Matter of Wilhelm*, 88 AD2d 6, 11-12 [4th Dept 1982]).

In evaluating the cost of legal services, the Court may consider a number of factors. These include: the time spent (*see Matter of Kelly*, 187 AD2d 718 [2d Dept 1992]); the complexity of the questions involved (*see Matter of Coughlin*, 221 AD2d 676 [3d Dept 1995]); the nature of the services provided (*see Matter of Von Hofe*, 145 AD2d

424 [2d Dept 1988]); the amount of litigation required (*see Matter of Sabatino*, 66 AD2d 937 [3d Dept 1978]); the amounts involved and the benefit resulting from the execution of such services (*see Matter of Shalman*, 68 AD2d 940 [3d Dept 1979]); the lawyer's experience and reputation (*see Matter of Brehm*, 37 AD2d 95 [4th Dept 1971]); and the customary fee charged by the Bar for similar services (*see Matter of Potts*, 123 Misc 346 [Sur Ct, Columbia County 1924], *affd* 213 App Div 59 [4th Dept 1925], *affd* 241 NY 593 [1925]; *Matter of Freeman*, 34 NY2d 1 [1974]). In discharging this duty to review fees, the Court cannot apply a selected few factors which might be more favorable to one position or another but must strike a balance by considering all of the elements set forth in *Matter of Potts* (123 Misc 346 [Sur Ct, Columbia County 1924], *affd* 213 App Div 59 [4th Dept 1925], *affd* 241 NY 593 [1925]), and as re-enunciated in *Matter of Freeman* (34 NY2d 1 [1974]) (*see Matter of Berkman*, 93 Misc 2d 423 [Sur Ct, Bronx County 1978]). Also, the legal fee must bear a reasonable relationship to the size of the estate (*see Matter of Kaufmann*, 26 AD2d 818 [1st Dept 1966], *affd* 23 NY2d 700 [1968]; *Martin v Phipps*, 21 AD2d 646 [1st Dept 1964], *affd* 16 NY2d 594 [1965]). A sizeable estate permits adequate compensation, but nothing beyond that (*see Martin v Phipps*, 21 AD2d 646 [1st Dept 1964], *affd* 16 NY2d 594 [1965]; *Matter of Reede*, NYLJ, Oct. 28, 1991, at 37, col 2 [Sur Ct, Nassau County]; *Matter of Yancey*, NYLJ, Feb. 18, 1993, at 28, col 1 [Sur Ct, Westchester County]). Moreover, the size of the estate can operate as a limitation on the fees payable (*see Matter of McCranor*, 176 AD2d 1026 [3d Dept 1991]; *Matter of Kaufmann*, 26 AD2d 818 [1st Dept 1966], *affd* 23 NY2d 700 [1968]), without constituting an adverse reflection on the services provided.

The burden with respect to establishing the reasonable value of legal services performed rests on the attorney performing those services (*see Matter of Potts*, 123 Misc 346 [Sur Ct, Columbia County 1924], *affd* 213 App Div 59 [4th Dept 1925], *affd* 241 NY 593 [1925]; *see e.g. Matter of Spatt*, 32 NY2d 778 [1973]). Contemporaneous records of legal time spent on estate matters are important to the Court in determining whether the amount of time spent was reasonable for the various tasks performed (*see Matter of Von Hofe*, 145 AD2d 424 [2d Dept 1988]; *Matter of Phelan*, 173 AD2d 621 [2d Dept 1991]).

a. Attorney for Petitioner

In this case, the attorney employed by the petitioner filed an affirmation of legal services and annexed a copy of his time records to the affirmation. The attorney for the petitioner affirmed that his firm rendered 186.50 hours of legal services to date, at various hourly rates. The attorney further affirms that they expended \$1,402.75 in disbursements. The attorney for the petitioner affirmed that he and members of his firm prepared the accounting for the time period in question which necessitated gathering the necessary financial records for the period and posting the transactions in proper accounting schedules. According to the attorney, the accounting was particularly complicated as it covered a period of approximately twenty years and a substantial number of financial transactions had to be reviewed. Further, the attorney states that the initial trustee's records had been lost over time, including a number of records concerning the brokerage and checking accounts from the period of 1995 to 2005. The attorneys and their client had to recreate many of the records which required additional time and fees. The attorney also stated that his firm prepared the petition, the renunciation, the waivers and consents, and the citation. They filed the papers with the court and appeared in court on the return date. They further conferred with the guardian ad litem. In light of the

foregoing factors, the Court sets the fee for the attorney for the petitioner in the amount of \$40,966.25 for all services rendered and disbursements in the amount of \$1,402.75.

b. Guardian Ad Litem

The guardian ad litem has submitted his report and prepared an application for a fee. The guardian ad litem reports he and an associate spent a total of 19.50 hours on this matter. They performed the following services: reviewed and analyzed all schedules of the accounting; reviewed the sale of the commercial building; reviewed and compared tax returns with the schedules; analyzed the investment portfolio; held telephone conversations with the attorneys for the petitioner and prepared his report. Upon a review of all of the factors, the fee of the guardian ad litem is fixed in the amount of \$7,300.00.

c. Accountant

The account and citation show accounting fees in the amount of \$8,650.00, all of which has been paid. The accountant avers that he prepared the Federal and New York State fiduciary income tax returns for the trust from 1995 to 2002 (16 tax returns), that he requested and obtained information concerning the income and expenses of the trusts from the former trustee, that he reviewed the monthly statements for the trust checking and brokerage accounts and prepared separate income and expense spreadsheets for each tax year. The accountant further avers that his firm analyzed the rental income from the commercial real estate in order to pay estimated taxes. Finally, the accountant states that his firm consulted with the trustee on a number of accounting and tax matters. The use of an accountant in this case appears to be reasonable. Therefore, the fee of the accountant in the amount of \$8,650.00 is approved.

III. RESIGNATION AND SUCCESSOR TRUSTEES

The application to allow the resignation of Allan D. Goldstein is **GRANTED**. His Letters of Trusteeship are revoked. The application to appoint Esther Jefremow, Laura Carroll and Gregory Jefremow, Jr., and to allow them to serve without bond, is **GRANTED**.

Allan D. Goldstein is discharged and released from his duties as successor trustee. Settle decree within thirty (30) days of the date of this decision. Failure to settle a decree, as directed, shall result in a conference of this proceeding, on August 18, 2016, at 10:00 a.m. at the Nassau County Surrogate's Court, 262 Old Country Road, Mineola. All parties and attorneys shall appear at said conference.

Dated: July 5, 2016
Mineola, New York

E N T E R:

HON. MARGARET C. REILLY
Judge of the Surrogate's Court

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