

Matter of Hill
2017 NY Slip Op 31642(U)
June 29, 2017
Surrogate's Court, Nassau County
Docket Number: 342314/G
Judge: Margaret C. Reilly
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**SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

**Accounting by Sally Hill, as the Successor Trustee
of the Trust Established under the Last Will
and Testament of**

**DECISION & ORDER
File No. 342314/G
Dec. No. 32866**

HOWARD HILL,

Deceased.

PRESENT: HON. MARGARET C. REILLY

The following papers have been considered in the preparation of this decision:

Amended Account and exhibits.	1
Account for 4/1/2013 through 8/31/2016	2
Guardian ad Litem Reports.	3
Affirmations of Legal Service	4
Affidavits from Accountant	5

I. INTRODUCTION

The petitioner, Sally Hill¹, successor trustee, seeks judicial settlement of her account as trustee of a trust for the benefit of David Elliot Hill under the will of Howard Hill. Specifically, the petitioner seeks the following relief: she prays that the account of proceedings be judicially settled, which includes fixing and approving attorney’s fees, approving commissions, and approving the fee of the accountant; that she be allowed to resign as successor trustee; that John DiMarco be appointed successor trustee; and that process issue to all necessary parties. The court must also fix the fees of the guardian ad litem. By prior decision of the court dated January 10, 2017, the court directed the petitioner

¹Subsequent to filing the petition and account, Sally Hill died in December of 2016.

to provide an explanation as to why none of her accounts balanced with the prior decrees and to explain her methodology with regard to gains/losses which resulted in the accounts never balancing. The court also advised that, as the guardian ad litem raised questions with regard to the investments of the assets, a hearing must be scheduled. The guardian ad litem subsequently filed a report in which he asked the court to waive the right to a hearing but deny commissions to the trustee.

II. BACKGROUND

The decedent, Howard Hill, died on May 26, 2006. He was survived by his son, David Elliot Hill. The decedent's will dated February 2, 2001 was admitted to probate and provided that the entire estate be held in trust for the benefit of his son. The decedent nominated his brother, Irwin Hill, to act as trustee and Sally Hill, the petitioner, to act as successor trustee. Irwin Hill died in 2010 and Sally Hill was appointed successor trustee. After the death of the decedent, David Elliot Hill lived with relatives who were unable to continue caring for him. He was subsequently adopted and his adoptive father appeared in this proceeding. After multiple conferences, it was noted that the only expenditures from this trust were administrative, which included trustee commissions, attorneys' fees and management fees and not one disbursement for the infant. The petitioner, Sally Hill, died in December 2016. The successor trustee set forth in the petition is John DiMarco, David's adopted father.

III. THE ACCOUNT

The account as amended covers the period from April 1, 2013 to August 31, 2016. It shows the receipt of \$432,982.41 in trust principal and income, \$123,570.23 in realized decreases in principal and administration expenses, and the balance on hand is \$309,412.18.

IV. FEES

The Surrogate's Court bears the ultimate responsibility for deciding what constitutes a reasonable attorney's fee, and the evaluation of what constitutes a reasonable attorney's fee is a matter within the sound discretion of the court. In evaluating what constitutes a reasonable attorney's fee, factors to be considered include the time and labor expended, the difficulty of the questions involved and the required skill to handle the problems presented, the attorney's experience, ability, and reputation, the amount involved, the customary fee charged for such services, and the results obtained" (*Matter of Goliger*, 58 AD3d 732, 732 [2d Dept 2008][internal quotation marks and citations omitted]; *accord*, *Matter of Freeman*, 34 NY2d 1, 9, [1974]; *Matter of Potts*, 123 Misc 346 [Sur Ct, Columbia County 1924], *affd* 213 App Div 59 [4th Dept 1925], *affd* 241 NY 593 [1925]). 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]).

A. Fee of the Attorney for the Fiduciary

In this case, the attorney employed by the petitioner filed an affirmation of legal

services and annexed a copy of her detailed time records to the affirmation. She seeks a reduced fee in the total amount of \$10,000.00. The attorney's usual fee is \$375.00 per hour for her services. The attorney's time records reflect that she, or members of her staff, spent approximately 79 hours on this matter. After reviewing the affirmation of legal services and time records and in light of the foregoing factors, the court sets the fee of the attorney for the petitioner in the amount of \$10,000.00 for all services rendered or to be rendered.

B. Fee of the Guardian ad Litem

The guardian ad litem submitted a report and several amended reports. He also filed an affirmation and supplemental affirmation of legal services in which he affirmed that he spent approximately 15 hours on this matter. His usual fee is \$275.00 per hour for his services. After reviewing his affirmation of legal services, his detailed reports, his annexed time records and upon a review of all of the factors, the fee of the guardian ad litem is fixed in the amount of \$4,125.00.

C. Fee of the Accountant

The accountant filed an affidavit and supplemental affidavit of tax services. He prepared the 2013, 2014 and 2015 fiduciary income tax returns. He also prepared the estimated tax payment calculations for the years 2014 through 2016. The accountant seeks a fee in the total amount of \$3,602.25. Where the legal fees do not include compensation for services rendered by an accountant, and if there is no duplication of services, the fee of the accountant may be a proper charge against the estate (*see generally Matter of Schoonheim,*

159 AD2d 183 [1st Dept 1990] and *Matter of Tortora*, NYLJ, July 19, 1995 at 26 col 2 [Sur Ct, New York County]).

The work performed by the accountant was not duplicative of the services rendered by the attorney for the estate. The court approves the fee in the amount of \$3,602.25.

V. COMMISSIONS

The petitioner/successor trustee seeks commissions for the accounting period in the amount of \$10,501.75, covering four years of service. The guardian ad litem in his final report and amended reports set forth “[w]hile I do not agree with the manner of the investments due to the volatility of the stock market and the related expenses v mutual funds which are more secure and somewhat less expensive to manage and while prudence may have dictated otherwise that was the choice of the trustee.” At subsequent conferences, this issue was raised and by decision of the court dated January 10, 2017, the court advised that, as the guardian ad litem raised questions with regard to the investments of the assets, a hearing must be scheduled. The guardian ad litem subsequently filed a report in which he made the following recommendation “in light of the recent developments it is my opinion that a hearing would not serve any purpose to resolve the concerns raised in my report or the court’s decision and would cause unnecessary delays in the appointment of the successor trustee and additional legal fees and expenses to my ward’s financial account. Accordingly I would recommend to the court to dispense with a hearing. I further recommend to the court

that if the court was considering the decedent trustee's request for commissions, that the request for commissions should be denied." Although the guardian ad litem has asked that the petitioner/successor trustee's commissions be reduced, a court can generally only deny statutory commissions upon a finding of misconduct, breach of fiduciary duty or similar misfeasance (*Matter of Gregory Stewart Trust*, 109 AD3d 755, 757 [1st Dept 2013]; *Matter of Dorfsman*, 2016 NY Slip Op 32028 [U]). As there has been no finding of misconduct, breach of fiduciary duty or misfeasance, the petitioner/successor trustee is allowed commissions subject to audit.

VI. SUCCESSOR TRUSTEE

With regard to the appointment of David DiMarco as successor trustee, as the appointment will not contravene the express terms of the agreement and the successor trustee is qualified to act (SCPA § 1502 [2]), the application is **GRANTED**. The trustee, however, will be required to file a bond (SCPA § 806; *see Matter of Lubin*, 143 Misc 2d 121 [Sur Ct, Bronx County, 1989]).

VII. CONCLUSION

The application that the account of proceedings be judicially settled, which includes fixing and approving attorney's fees, approving commissions subject to audit, and approving the fee of the accountant is **GRANTED**. The application to allow Sally Hill, the successor trustee, to resign as successor trustee is **GRANTED** and her letters are revoked. The

application to appoint John DiMarco successor trustee is **GRANTED** subject to the posting of a bond.

This constitutes the decision and order of the court.

Settle decree.

Dated: June 29, 2017
Mineola, New York

E N T E R :

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

cc: Michael A. Montesano, Esq.
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