

Matter of Greenhaus
2013 NY Slip Op 30714(U)
March 13, 2013
Surrogate's Court, Nassau County
Docket Number: 195088
Judge: III., Edward W. McCarty
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SURROGATE'S COURT OF THE STATE OF NEW YORK
 COUNTY OF NASSAU

-----X
 In the Matter of the Account of JP Morgan Chase Bank, N.A.,
 Successor to the Chase Manhattan Bank, as Successor Trustee
 of the Paragraph Third Trust under the Last Will and Testament of

File No. 195088

Dec. No. 28459

SAUL GREENHAUS,

Deceased,

-----X

Before the court is the first and final account of JP Morgan Chase Bank, N.A., successor to the Chase Manhattan Bank, as successor trustee of the Paragraph Third Trust under the last will and testament of Saul Greenhaus. Petitioner seeks the court's approval of its proceedings as successor trustee for the period from May 1, 1992 through September 21, 2003. Letters issued to petitioner on August 21, 1978. The petition requests no further relief.

The original petition before the court was verified March 10, 2005. It was amended by a petition verified June 26, 2006, and further amended by affidavit verified January 29, 2007 and by a second affidavit verified May 24, 2011. Under the terms of decedent's will, the Paragraph Third Trust became payable to the Paragraph Fifth Trust upon the death of its lifetime income beneficiary, Shirley Greenhaus. By order dated May 22, 2007, the court appointed a guardian ad litem to represent the interests of Alan Furst, a person under a disability who was named as a contingent residuary beneficiary of the Paragraph Fifth Trust. The account shows combined accounts of \$470,078.87 on hand as of September 21, 2003.

The guardian ad litem filed three reports, the first two of which were dated April 29, 2010 and June 12, 2012. In her reports, the guardian ad litem raised various questions about the account, requested additional documentation from the trustee and ultimately objected to

petitioner's account. In response to requests made by the guardian ad litem, petitioner produced documentation in support of the account, and multiple court conferences followed. The guardian ad litem filed a third and final report, dated October 3, 2012, in which she withdrew her objections and recommended that the relief requested be granted.

On January 18, 2013, the guardian ad litem filed her affirmation of services, to which no objections have been filed. Her time records reflect that she spent 32.7 billable hours on this matter between July 2, 2007 and October 3, 2012. At her usual billing rate of \$350.00 an hour, this would typically result in a bill of \$9,695.00.

In evaluating the cost of legal services provided by an attorney to the estate or a guardian ad litem, the court may consider a number of factors. These include: the time spent (*Matter of Kelly*, 187 AD2d 718 [2d Dept 1992]); the complexity of the questions involved (*Matter of Coughlin*, 221 AD2d 676 [3d Dept 1995]); the nature of the services provided (*Matter of Von Hofe*, 145 AD2d 424 [2d Dept 1988]); the amount of litigation required (*Matter of Sabatino*, 66 AD2d 937 [3d Dept 1978]); the amounts involved and the benefit resulting from the execution of such services (*Matter of Shalman*, 68 AD2d 940 [3d Dept 1979]); the lawyer's experience and reputation (*Matter of Brehm*, 37 AD2d 95 [4th Dept 1971]); and the customary fee charged by the Bar for similar services (*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 (*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 (*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]). The burden with respect to establishing the reasonable value of legal services performed rests on the attorney performing those services (*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]).

With respect to the fee of the guardian ad litem, the court notes that the contingent interest held by the ward of the guardian ad litem under the Paragraph Fifth Trust is limited to 10%. Using the numbers shown in the account as amended, the value of a 10% interest is \$47,007.48. Further, receipt of any amount by the ward is contingent upon his surviving Gary Greenhaus, the current income beneficiary. Even without having access to the respective ages of Gary Greenhaus and Alan Furst, it is apparent that the value of Alan Furst's interest in the trust is rather small and may ultimately be zero if he is survived by the lifetime income beneficiary. It is well established that the size of the estate or trust corpus 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. In this case, the guardian ad litem provided exceptionally punctilious

and proficient services on behalf of her ward, but the court is constrained by the size of her ward's interest in the trust. Computing the fee of the guardian ad litem by application of her usual billable rate would result in a fee which would be more than 20% of the ward's interest, even without discounting his interest to reflect the contingency factor. Accordingly, the court fixes the fee of the guardian ad litem in the amount of \$4,500.00.

In connection with the fees of counsel for petitioner, the court notes that a decree has been settled which includes the approval of legal fees. Fees are shown in the amount of \$8,500.00, as shown on Schedule C-1, and in the amount of \$3,750.00 for additional legal fees, for services rendered after the June 12, 2005 commencement of this proceeding and continuing through June 12, 2012. At the request of the court, on February 14, 2013, counsel for petitioner submitted an affirmation of legal fees for the court's review so that counsel's fees may be fixed.

The affirmation reflects that counsel did not keep contemporaneous time records, based upon his belief that his firm would not be fully compensated by the trustee for all of the time expended. Time records for the paralegal staff during this period, which records are attached to counsel's affirmation, reflect \$16,735.00 in billable time. The court's records reflect that in addition to producing demanded documents, counsel personally participated in multiple court conferences. Counsel estimates that he personally rendered 20 hours of services during this same time period. The guardian ad litem has not objected to this fee, and the Office of the Attorney General of the State of New York has filed a notice of no objection, in which the Attorney General consents to an additional fee of \$3,500.00.

Counsel's fee is fixed in the amount of \$12,000.00, none of which has been paid.

The decree which has been settled will be signed, as modified in accordance with this decision and order.

The trustee's commissions are approved subject to audit.

This constitutes the decision and order of the court.

Dated: March 13, 2013

EDWARD W. McCARTY
Judge of the
Surrogate's Court