| **Matter of Goodman** |
| --- |
| 2015 NY Slip Op 30864(U) |
| May 21, 2015 |
| Sur Ct, New York County |
| Docket Number: 2010-1889/A |
| Judge: Nora S. Anderson |
| Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office. |
| This opinion is uncorrected and not selected for official publication. |

[* 1]

New York County Surrogate's Court
MISCELLANEOUS DEPT.
MAY 21 2015
FILED
Clerk

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

-------------------------------------------X

In the Matter of the Account of Proceedings of Joshua Brinen as Executor of the Estate of

REBECCA GOODMAN,

Deceased.

-------------------------------------------X

File No. 2010-1889/A

A N D E R S O N , S.

In this contested accounting proceeding in the estate of Rebecca Goodman, the parties have consented in writing to have the objections decided on submitted papers, without further discovery or motion practice.

Rebecca Goodman died on April 22, 2010. In her will, dated September 18, 2009, decedent left her tangible property to a friend; $25,000 each to her mother, uncle, and three friends; and her residuary estate in equal shares to five charities. She named the attorney-drafter, Joshua Brinen, as her executor. The will was admitted to probate without objection on July 8, 2010, and letters testamentary issued to Brinen.

This proceeding commenced on May 22, 2012, with the filing of an accounting by Brinen. The accounting covered the period from decedent's date of death until May 18, 2012, and was later amended to August 1, 2012. The amended accounting shows gross receipts (principal, increases to principal and income) of $807,149.75. Objections to the attorney-executor's commissions, legal fees and disbursements were filed by the Attorney General

of the State of New York, on behalf of charitable beneficiaries, and by two of the charitable remainder beneficiaries, the American Civil Liberties Union Foundation and The Hope Program ("the charities") (collectively, "respondents").

Objections to commissions. Respondents oppose the attorney-executor's claim to a full commission of $26,419.79 (as calculated on amended Schedule I). The basis of their opposition is the attorney's failure to comply with the disclosure requirements of SCPA § 2307-a. The court must decide a preliminary question as to whether the Attorney General and the charities are procedurally barred from objecting to the executor's commission in this accounting proceeding.

SCPA § 2307-a requires an attorney-drafter to make certain written disclosures to a client who designates the attorney, or an affiliated attorney, to serve as executor. The statute, enacted in 1995, and amended in 2004 and 2007, was intended to curb overreaching by any attorney who seeks to have him or herself or an associate named as executor for financial advantage (*see*, 1995 NYS Assembly Memorandum in Support of Legislation [S.3195; A.5491]). The current statute, in effect at the time decedent executed her will, requires an attorney who prepares a will in which he or she is nominated as executor to disclose the following to the testator: subject to limited statutory exceptions, any person, including a spouse, child, friend or

associate, or an attorney can serve as executor; absent agreement to the contrary, any person who so serves is entitled to receive a statutory commission; if the attorney-executor or an affiliated attorney renders legal services in connection with the executor's official duties, the attorney is also entitled to just and reasonable legal fees; and if the testator does not acknowledge the disclosure form, the executor is limited to one-half of a statutory commission.

The language of the disclosure must "substantially conform" to the model language contained in SCPA § 2307-a [3][a] and [b] (SCPA 2307-a [4][a]). If no disclosure or *inadequate disclosure* is made, the attorney-executor is entitled to only one-half of a full statutory commission (SCPA § 2307-a [5]).

SCPA § 2307-a is strikingly short on procedural guidance. It states that "a determination of compliance...shall be made in a proceeding for the issuance of letters testamentary to an executor-designee [*i.e.,* a probate proceeding]..." (SCPA § 2307-a [7]). However, unlike many other provisions of the SCPA, which was enacted, after all, to establish "the procedure in the surrogate's courts" (Preamble, SCPA, Laws 1966, Chapter 953), SCPA 2307-a does not identify the manner in which a determination of compliance be made or the persons entitled to notice and an opportunity to be heard. Neither the legislative history nor subsequent statutory amendments provide any insight into the

necessary procedural steps for a § 2307-a determination.

This lack of guidance is particularly problematic because the determination required by SCPA § 2307-a [7] is grafted onto a probate proceeding which otherwise deals only with questions relating to the admissibility of the will to probate and issuance of letters to a fiduciary. The detailed procedural requirements for probate proceedings set out in Chapter 14 of the SCPA are designed to protect only those persons who have an interest in contesting the validity of a will. In contrast, an executor's accounting is a proceeding designed to protect persons who have a financial stake in the estate, including those who are affected by the magnitude of fiduciary commissions. This case illustrates the complication that arises when such persons were not joined in the probate proceeding.

Brinen commenced the probate proceeding as the prospective attorney-fiduciary. His petition did not raise the issue of commissions under SCPA § 2307-a. Accordingly the only persons joined in the proceeding were decedent's sole distributees (her parents), who waived service of process. The probate application proceeded in the ordinary course of an uncontested matter. The named beneficiaries, including the charities, and the Attorney General on behalf of ultimate charitable beneficiaries, were entitled only to a notice of probate (SCPA § 1409), which does not constitute process, as defined in SCPA § 103 [43], since "it

[* 5]

does not call upon the person to whom it is given to 'show cause' or take any other affirmative action whatsoever" (*Matter of Smith*, 175 Misc 688, 692 [Sur Ct, Kings County 1940]). Because the notice of probate does not constitute process, its recipients are not joined as parties and jurisdiction is not obtained over them (Margaret Turano, Practice Commentary, McKinney's Cons Laws of NY, Book 58A, SCPA 1409; *Matter of Smith, supra*, 175 Misc at 692-94). Moreover, the notice is merely, as its title indicates, an instrument that puts persons on notice that a will, which has conferred upon them an interest in the estate, has been offered for probate. It contains nothing to advise such persons that an issue under § 2307-a may arise if probate were granted.

In the instant accounting proceeding, in contrast, the executor was required to serve with a citation all the beneficiaries and the Attorney General for all charitable beneficiaries (SCPA § 2210). The charities and the Attorney General appeared and filed their objections to the executor's proposal to pay himself a full commission.

The executor argues that respondents are barred from making these objections by the plain language of SCPA § 2307-a(7), which states that a determination of compliance "shall be made in" the probate proceeding. He argues that no determination of non-compliance was made in the probate proceeding, and that the matter is now foreclosed. In considering this argument, the

court is mindful of the basic rule of statutory interpretation which is that, wherever possible, statutes must be interpreted in accordance with constitutional principles (*American Power & Light Co. v SEC*, 329 U.S. 90, 108 [1946]). If it is possible to read a statute in a manner which avoids the necessity of finding it unconstitutional, the court must do so (*United States v Harriss*, 347 US 612, 618 [1954]).

If the court were to accept the executor's interpretation of SCPA § 2307-a, it would be constrained to find the statute in violation of the due process clause of the Fourteenth Amendment to the United States Constitution and section 6 of article 1 of the Constitution of the State of New York, as it would deprive persons with a property interest of the most basic elements of due process; *i.e.*, notice and some opportunity to be heard on an issue in which they have a legally cognizable stake. Here, because the statute does not affirmatively impose a requirement that the court make a final determination on the executor's commission at the probate stage, the court finds that it is not, on its face, constitutionally infirm.

In the absence of statutory guidance as to the appropriate procedure to insure constitutional application of SCPA § 2307-a, various surrogate's courts have designed procedures to insure a fair and meaningful determination regarding the commissions for an attorney-executor. Where a proponent has explicitly sought

such a determination in the probate proceeding, the court has directed that all interested parties be served and the matter is calendared on notice (*Matter of Tores*, NYLJ, June 19, 2002, at 20, col. 1 [Sur Ct, Bronx County]). Alternatively, the courts have reached the adequacy of compliance with SCPA 2307-a disclosure requirements in an accounting proceeding, where all affected parties are before the court (*see, e.g., Matter of Fleshler,* 176 Misc 2d 583 [Sur Ct, Bronx County 1998]; *Matter of Parker*, NYLJ, Aug. 4, 1999, at 26, col. 5 [Sur Ct, Suffolk County]; Matter of Johnson, NYLJ, July 31, 2000, at 32, col. 1 [Sur Ct, Bronx County] [request for determination of commissions to be held in abeyance to the accounting proceeding unless a formal application is made in the probate proceeding]; *Matter of Weygand,* 4 Misc 3d 190 (Sur Ct, Greene County 2004]; *Matter of Schuck,* NYLJ, March 31, 2005, at 5, col. 1 [Sur Ct, Westchester County]). Because the charities and the Attorney General were not given notice and an opportunity to be heard on the issue of commissions in the probate proceeding, they properly raised it in their objections to this accounting. Accordingly, we now turn to the merits of that objection.

The written disclosure the attorney-executor provided to decedent contained only three of the four mandated statements. It did not contain language required by the 2007 amendments. Thus the disclosure did not "substantially conform" to the

statutory requirements (*see, e.g., Matter of Mayer,* 32 Misc 3d 1229(A) [Sur Ct, Bronx County 2011]). The statute does not allow for the waiver of the disclosure requirements except for wills executed before 1996 in certain circumstances. Accordingly, the attorney-executor is limited to one-half of the statutory commission.

The commission shall further be recalculated to rectify an error caused by the executor having admittedly added certain receipts into the commission base twice, causing a small over-calculation.

Objections to legal fees and disbursements. The court has the ultimate responsibility to determine whether the legal fees charged are necessary and reasonable (*Stortecky v Mazzone,* 85 NY2d 518 [1995]; *Matter of Phelan,* 173 AD2d 621 [2d Dept 1991]). Here, the accounting shows legal fees and disbursements totaling $94,075.55 (over 11.5 percent of the gross value of the estate), all of which have been paid. The respondents' objections to the legal fees and disbursements fall into the following categories: legal fees charged for executorial services; excessive and unreasonable fees for the preparation of the accounting; the imposition of a 3% administrative charge on all legal bills; advance payment of attorneys fees without court order; an advance retainer taken for post-accounting legal services; legal services expended to collect a non-probate asset; time keeping practices

which increased hourly billings; and specific hourly billings and disbursements. Each of these objections is discussed in turn below.

(1) Respondents allege that the attorney-executor and his staff charged their ordinary hourly professional rates for performing executorial tasks. The Attorney General asserts that $14,105 in time charges on specified dates were executorial; the charities assert that approximately $30,000 in executorial services were billed, but without identifying specific dates or services. Although the attorney-executor bears the burden of showing that his legal fee request is supportable, *Matter of Fiore*, NYLJ June 12, 2000, at 34, col. 5 [Sur Ct, Westchester County]), the billing records submitted here by the attorney-executor do not distinguish between executorial and legal work, and the lawyer merely affirms that all legal services were properly charged and recorded.

It is well established that executorial services are compensated by the executor's commission, and not on a hourly fee for services rendered or on a quantum meruit basis (*Matter of Passuello,* 184 AD2d 108, 111 [3d Dept 1992]). Executorial services are those that can be performed by a layperson without special expertise (*Matter of Passuello, supra,* at 111; *Matter of Verplanck,* 151 AD2d 767 [2d Dept 1989]), and include a fiduciary's activities related to the identification, marshaling

and maintenance of assets (*see, e.g., Matter of Levy,* 402 NYS2d 10 [1st Dept 1978]; *Matter of Passuello, supra).* The attorney-executor's billing statements reveal hourly billing for such executorial functions as determining decedent's prior address; identifying the location of and collecting her papers and assets; locating and reviewing her mail; paying outstanding bills; collecting, itemizing, storing and distributing her personal property in accord with her wishes; closing her personal and business bank, e-mail and other accounts and collecting refunds; cancelling insurance policies and collecting insurance proceeds or refunds; cancelling her driving license and voting status; transferring assets and setting up and maintaining estate accounts. Based on the court's own review, hourly billings for such clearly executorial services total $19,115, and must be returned to the estate.

(2) Respondents object to fees charged by the attorney-executor's law firm for the preparation of the account. The work in question was performed by both a senior associate and the attorney-executor at hourly rates ranging between $250 and $450 per hour, and totalled nearly 150 hours and over $44,000 in hourly billings.

In considering whether the legal fee charged for preparation of the account is reasonable, the court is guided by *Matter of Freeman,* 34 NY2d 1 (1974), and *Matter of Potts,* 213 AD 59 (4th

Dept., *aff'd* 241 NY 593 (1925). These cases counsel that, while time expended has some relevance to the size of the fee, it is often the least important factor. More important factors include the value of the assets; the difficulties posed by the problems presented; the skill required; the attorney's experience, ability and reputation; and the benefit resulting to the estate from the services rendered.

The record demonstrates that, although the accounting was lengthy, it was not complicated. Rather, its length was attributable to the fact that the attorney-executor held the bulk of decedent's assets in an actively traded account and each transaction was individually reported on the account schedules. Respondents argue for a fee reduction because it was not appropriate for the attorney-executor to maintain the bulk of decedent's assets in such an account; especially as his doing so increased the length of the account and the legal fees charged for its preparation. However, the executor points out that notwithstanding some losses and management fees, the investment still made a modest return for the estate and was not imprudent. In light of these undisputed facts, the court declines to conclude that the investment was per se improper.

The cost of preparation of the account must be viewed through the lens of the *Potts* and *Freeman* standard. The estate's major account was managed by a third-party investment firm which

handled the various trades and reported them to the estate. It is difficult to conceive that preparation of the account required the many hours of legal work claimed on Schedule C, since the account appears to have demanded mainly clerical attention and re-compilation of already available data. Further, it appears that a significant portion of the account was prepared by the attorney-executor together with his senior associate, which resulted in significantly increased hours billed. Since the attorney-executor was using the services of his senior associate to prepare the account, and billing for every hour of her work, his own participation in the same work must be viewed primarily as executorial oversight and not as necessary legal work.

For these reasons, the legal fee for preparation of the account was excessively billed and is reduced by $24,000 which shall be refunded to the estate.

3) Respondents object to the attorney-executor's imposition of an administrative fee of three percent of legal services billed. The attorney-executor's sole explanation for the additional charge is that decedent approved such a fee in her retainer agreement. The decedent's retainer agreement, however, applied to estate planning services rendered before her death. The attorney-executor himself was the client of his law firm after the decedent's death, and his imposition of a three percent additional charge constitutes a self-serving enrichment without

justification. This additional charge, totalling $2,504.15, shall be refunded to the estate.

4) Respondents object to the attorney-executor's having paid his law firm for legal services in advance of the settlement of his account without seeking the court's permission pursuant to SCPA § 2111. Although the attorney-executor is correct that such an error does not preclude the payment of fees on a quantum meruit basis, he must pay the estate interest, as discussed below, on all fees taken in advance of the settlement of his account (*Matter of Amsellem,* 2005 NY Misc Lexis 7771 at 14 [Sur Ct, NY County 2005]).

5) Respondents object to the attorney-executor's payment of $4,174.60 to his firm for anticipated services after the close of the accounting period. This sum must be returned to the estate both for the reasons stated above with respect to advance fees and because the attorney did not request such fees in a supplemental accounting.

6) Objection is made to the billing of $1,025 in legal fees for services related to the collection and distribution of a life insurance policy which is not a probate asset. The court agrees with respondents that the work involved did not benefit the estate. However, these fees have already been disallowed as executorial.

7) Objection is made to certain of the executor's time-

keeping practices which may have wrongly inflated the time spent. Specifically, the Attorney General points to the law firm's practice of billing separately for each task performed (*i.e.*, separate entries for reviewing an e-mail message and responding to the message, or for reviewing a voice mail message and making a return call) and billing each such entry at the firm's minimum six-minute increment. The court notes that most such entries occurred in the context of executorial work and legal fees claimed for such work have been disallowed. Similarly, the firm's practice of billing full hourly rates for every attorney who attended a meeting or conferred with a colleague (which may constitute double-billing) has been rectified here by the disallowance of all billings for executorial services and the reduction of billings for preparation of the account. Thus, no further adjustment is required.

8) Respondents' objection to the billing of time to prepare an affidavit is denied. The affidavit was requested by the clerk of the Probate Department in the ordinary course of processing the probate proceeding, and the time spent on it is thus compensable.

9) As for objections to certain disbursements: respondents' objection to a disbursement for postage is denied, as the separate billing for such disbursements is supported by the executor's affidavit (*Matter of Aitken*, 160 Misc 2d 587 [Sur Ct,

NY County 1994]). Respondents' objection to travel expenses with respect to the executorial function of going to and from the storage locker where decedent's personal property was stored, in the combined amount of $631.04, is granted. (The hourly billings relating to the trips to the storage locker have already been disallowed as executorial.) The charities' objection to investment management fees is denied because, as discussed above, investment in a fee-charging account was not *per se* imprudent and the estate suffered no losses from the investment.

Respondents ask the court to impose interest of nine percent on the various amounts surcharged above. The rate of interest to be imposed is at the court's discretion (CPLR § 5001[a]). The court finds that the attorney's behavior, although flawed, warrants imposition of interest at the rate of two percent.

Settle decree.

Dated: May 21, 2015

SURROGATE