

Matter of Smulyan (IB)
2018 NY Slip Op 30077(U)
January 17, 2018
Surrogate's Court, New York County
Docket Number: 2014-2144/C
Judge: Rita M. Mella
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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

New York County Surrogate's Court

JANUARY 17, 2018

-----x
Accounting by IB as Executor of the Estate of

MARIA T. SMULYAN,

DECISION

File No.: 2014-2144/C

Deceased.
-----x

M E L L A , S.:

This is a contested proceeding for the settlement of the final account of IB as executor of the will of Maria T. Smulyan for the period from the date of her death, June 1, 2014, to December 31, 2016. The second amended account shows gross receipts (i.e., principal and realized increases) of \$3,938,029.72. IB, an attorney, has served as counsel for himself as fiduciary for the estate.

Verified objections to Schedules C and C-1 were filed by the court-appointed guardian ad litem ("GAL") for Bernd Schmitter ("Bernd"), decedent's son and beneficiary under the will. The objections relate solely to: 1) IB's request for an award of legal fees to his firm to the extent that those fees are not a reasonable and necessary estate expense and were charged for rendering executorial services; and 2) his request for approval of payments to an accounting firm for tax and accounting services to the extent that those fees are not established as reasonable and necessary estate expenses.¹

The parties have consented, in writing, to have the objections decided based on the pleadings and supplemental papers, without discovery or motion practice, and have waived their

¹ The objections filed by the GAL originally took issue with the calculation of the commissions to which IB claimed he was entitled, but this objection was not included in the GAL's amended pleading, IB having corrected the mathematical error in the calculation of his commissions in his second amended account. Statutory commissions are approved in the amount of \$104,026.75 as requested in that account.

right to a hearing.

Background

Decedent died on June 1, 2014, at the age of 96. In her will, which was admitted to probate by this court, decedent left her personal and household effects to Bernd and to Ayellet Packin and Rachel Packin (“the Packins”), the granddaughters of her husband’s cousin.

Decedent left the residuary estate in a trust for the benefit of Bernd and the Packins. Letters Testamentary and Letters of Trusteeship were issued to IB, the nominated executor and trustee under the will. The Packins have executed waivers and consents to the relief requested in the instant petition.

Legal Fees

On Schedule C-1 of the account, IB lists his fee of \$182,431.20 as an unpaid administration expense. IB expresses the opinion “that under the circumstances of this estate, it is appropriate to seek an attorney fee equal to 5% of the \$3,648,624.05 gross estate as shown in Schedule A.” The GAL disagrees and maintains that IB, who did not enter into a retainer agreement with himself as executor, should be compensated for legal services rendered to the estate on a *quantum meruit* basis, not on the basis of a percentage of the value of the estate. The GAL also notes that because IB’s time records do not differentiate between executorial and legal services, it makes a *quantum meruit* analysis more difficult than it would be otherwise. IB concedes that he has “not meticulously segregated the legal work from the administrative work.”

The GAL, for his part, has endeavored to determine which part of IB’s work, in his view, was legal in nature as opposed to executorial. Based on his review, the GAL has concluded that “a substantial portion, if not the majority, of the services for which IB seeks legal fees were

services that were executorial in nature.” More specifically, the GAL contends that, out of the 484.60 hours for which IB seeks compensation, 308.3 hours were spent on services that were executorial in nature and 5.2 hours were spent prosecuting the SCPA 1805 (2) application that IB filed for permission to pay himself for services rendered to decedent as her attorney-in-fact (*Matter of Smulyan*, NYLJ, Jul. 16, 2015, at 23, col 5 [Sur Ct, NY County]). The GAL recommends that the court fix the legal fees of IB in the total amount of \$67,080.

IB agrees with the GAL’s assessment of his time allocation except for two time entries, which IB claims relate to legal work: (1) 9.4 hours that IB devoted to communications with a German attorney whom IB retained to advise him of the impact, if any, that German law might have on this estate,² and (2) 6.7 hours that IB spent preparing a family tree, “hammering out a listing agreement with the broker for selling the coop,” communicating with “prior guardian ad litem,” reviewing tax returns, requesting filing extensions for estate tax returns, and reviewing amended returns.

In response to the GAL’s objections, IB avers that the time entries in his submissions “alone do not show all the work that was done for this estate” because they do not include his office staff time or the time that he spent working in the evenings and on weekends.

An attorney, including one who acts as fiduciary, is allowed “such compensation for his legal services as appear to the court to be just and reasonable (SCPA 2307[1]; *see also* EPTL 11-1.1[b][22]). Furthermore, as is the case here, when legal services are performed without a retainer agreement, the value of the attorney’s work must be determined based on *quantum*

² According to IB, decedent was a citizen of Germany and a legal resident of the United States. Bernd, one of the primary beneficiaries under the Will, lives in Germany.

meruit (*Matter of Pritchard*, 138 Misc 2d 945, 948 [Sur Ct, Suffolk County 1988]).

Although there is no specific rule for determining reasonable value of legal services, the Surrogate may consider any number of factors, including the time spent (*Matter of Kelly*, 187 AD2d 718 [2d Dept 1992]), the complexity of questions involved (*Matter of Coughlin*, 221 AD2d 676 [3d Dept 1995]), the nature of services rendered (*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 professional standing of counsel (*Matter of Brehm*, 37 AD2d 95 [4th Dept 1971]), and the results obtained (*Matter of Shalman*, 68 AD2d 940 [3d Dept 1979]; *see Matter of Freeman*, 34 NY2d 1 [1974]; *Matter of Potts*, 213 App Div 59 [4th Dept 1925], *affd* 241 NY 593 [1925]). The burden to establish the reasonable value of legal services rendered is on the attorney who performed those services (*Matter of Potts*, 213 App Div at 61).

Examination of the time sheets submitted by IB confirms the GAL's assessment that a majority of the services for which IB seeks legal fees were executorial in nature. For example, IB spent a significant amount of time on tasks associated with the marketing and selling of decedent's co-op apartment, banking, and sorting through decedent's tangible personal property for distribution. The court also agrees with the GAL that the compensation sought by IB for preparing a family tree chart, "hammering out a listing agreement" with a real estate broker for the sale of decedent's co-op apartment, communicating with a guardian appointed by a German court for Bernd, and reviewing tax returns and other actions related thereto³ are executorial in nature. These tasks are not properly charged to the estate as legal services (*see Matter of Ellis*, 277 AD2d 102 [1st Dept 2000]; *see also Matter of Verplanck*, 151 AD2d 767 [2d Dept 1989];

³ IB does not claim to have any expertise in tax or accounting matters.

Matter of Blau, 24 Misc 3d 1249[A], 2009 NY Slip Op 51934[U] [Sur Ct, Bronx County 2009]).

IB's commissions will compensate him for this work.

In light of the foregoing, the court fixes IB's legal fees in the total amount of \$85,755.

Accountants' Fees

IB also seeks court approval of his payment of \$6,375 to the accounting firm for tax and accounting services rendered to the estate, as shown in Schedule C.⁴ Normally, "accountants' services are not compensable out of estate assets unless there exist unusual circumstances that require the expertise of an accountant" (*Matter of Meranus*, NYLJ, Mar. 31, 1994, at 28, col 1 [Sur Ct, Suffolk County]). The fee for the routine services of an account is generally held to be included in the fee of the attorney for the fiduciary (*Matter of Heinz*, NYLJ, Dec. 29, 2006, at 4, col 4 [Sur Ct, NY County]). The purpose of this rule is to avoid duplication of charges, but "[w]here the legal fee[] does not include compensation for services rendered by the accountant, there is no duplication and the legal fee is not automatically reduced by the accounting fee" (*Matter of Tortora*, NYLJ, Jul. 19, 1995, at 29, col 4 [Sur Ct, NY County]).

In a supplemental filing, IB submitted an affidavit of Daniel P. McGuire of the accounting firm that provided services to the estate ("McGuire Affidavit"), which sets forth in detail the services rendered, including, among other things, preparation and filing of the estate's income tax returns for the estate tax years 2014-2015 and 2015-2016 as well as the New York State estate tax return and an amendment to it. In February 2015, the accounting firm also prepared a draft of the federal estate tax return (IRS 706) which was needed for the preparation of

⁴ IB explains that this amount includes \$350 paid to the accounting firm for preparing and filing decedent's 2013 income tax returns. The GAL has objected to this payment.

the NYS estate return, and was able to obtain for the estate a closing letter from the NYS Department of Finance.

Decedent's will authorized IB to retain accountants and to pay their fees "without reduction of [his] own compensation." The work performed by the accountants was not duplicative of the services rendered by IB, and the requested amount for these services is reasonable. Thus, the court approves payment to the accounting firm in the sum of \$6,025.

IB submitted his own affidavit in support of his request for approval of accountants' fees to explain that a March 31, 2015 payment in the amount of \$350 to the accounting firm was for the preparation and filing of decedent's 2013 federal and state income tax returns. No invoice for this service was provided, however, and the McGuire Affidavit does not address the issue. Although IB was given the opportunity to supplement his accounting with proof to support such payment, he failed to do so. Therefore, the GAL's objection to this \$350 payment for lack of substantiation is sustained.

CONCLUSION

In accordance with the foregoing, the GAL's objections are sustained to the extent that IB's compensation for the legal services that he rendered to the estate is fixed at \$85,755 and the accountants' fees are set at \$6,025. With these adjustments, IB's account is settled.

Settle Decree with a provision for fixing the compensation of the GAL.

Clerk to notify.

Dated: January 17, 2018



SURROGATE