

**Matter of Hartman**

2018 NY Slip Op 30644(U)

March 30, 2018

Surrogate's Court, Nassau County

Docket Number: 2016-389739/B

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 Account of Proceedings of  
John T. Hartman, as Executor of the Estate of**

**DECISION**

**File No. 2016-389739/B  
Dec. No. 33936**

**THOMAS JOHN HARTMAN,  
a/k/a THOMAS J. HARTMAN,  
a/k/a THOMAS HARTMAN,**

**Deceased.**

**PRESENT: HON. MARGARET C. REILLY**

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

Petition for Judicial Settlement of Account. ....	1
Amended Petition for Judicial Settlement of Account. ....	2
Accounting. ....	3
Affidavit to Amend Petition and Accounting. ....	4
Proof of Claim for Internal Revenue Taxes. ....	5
Notice of Appearance and Consent (NYS Department of Taxation and Finance). ....	6
Consolidated Statement of Tax Liabilities (NYS Department of Taxation and Finance). ....	7
Waiver of Citation and Consent in Accounting (2). ....	8
Affirmation of Legal Services. ....	9
Second Affirmation of Legal Services. ....	10
Affidavit of Services of Accountant. ....	11

In connection with the first and final account of John T. Hartman, as the executor for the estate of Thomas John Hartman, the petitioner prays that this court issue a decree: (1) stating that the account of proceedings be judicially settled; (2) awarding the sum of \$21,644.01 to be paid to Forchelli, Curto, Deegan, Schwartz, Mineo & Terrana, LLP, from estate funds, representing the amount of unpaid legal fees and disbursements through April 30, 2017; (3) awarding the sum of \$17,000.00 to be paid to Forchelli, Curto, Deegan, Schwartz, Mineo & Terrana, LLP, from estate funds, representing the amount of legal fees

and disbursements from May 1, 2017 through the finalization of this accounting proceeding and the administration of the estate; (4) awarding the sum of \$4,041.09 to be paid to Eckhardt & Company, P.C., from estate funds, representing fees for accounting services from March 1, 2016 through August 23, 2016; (5) awarding the sum of \$750.00 to be paid to Eckhardt & Company, P.C., from estate funds representing the accounting fees to prepare the fiduciary income tax returns for the estate for fiscal year ending January 31, 2017; (6) approving the claim of JoAnne Peluso in the amount of \$293.47 for payment of funeral expenses and directing that same be paid from estate funds; (7) approving the claim of JoAnne Peluso in the amount of \$575.00 for payment of grave monument engraving and directing that same be paid from estate funds; (8) approving the claim of John T. Hartman in the amount of \$140.87 for funeral and executor expenses and directing that same be paid from estate funds; (9) approving the claim of Specialty, RX in the amount of \$50.00 for a medical expense and directing that same be paid from estate funds; (10) approving the executor's commissions due John T. Hartman in the amount of \$9,731.06 and directing that same be paid from estate funds; (11) directing that the balance remaining in the estate after all of the above are paid from the estate funds in the amount of \$160,287.77 be paid to the "United States Treasury" to pay the federal tax lien filed against the decedent; (12) directing that all bequests and legacies under the Will (including, but not limited to, the legacies of Mary Cassidy, Colleen Hart and Brian Cassidy) shall abate and not be paid due to the insolvency of the estate; (13) directing that all other claims listed in the accounting including, but not limited to, the balance of the federal tax lien filed against the decedent and the claim by the New York State

Department of Taxation and Finance, remain unpaid due to the insolvency of the estate and that the executor be discharged in regard to all unpaid debts; (14) directing that process be issued to all necessary parties who have not appeared to show cause why the relief requested should not be granted; and (15) directing the service of process pursuant to the provisions of SCPA Article 3 upon such persons named in paragraph [6] whose names or whereabouts are unknown and cannot be ascertained or who may be persons on whom service by personal delivery cannot be made.

### **BACKGROUND**

Thomas John Hartman (the decedent) died on February 16, 2016, survived by his mother, Sheila Hartman, as his only distributee. He left a last will and testament dated February 12, 2003, in which he nominated his brother, John T. Hartman (the petitioner) to serve as the executor. Under the terms of his will, the decedent bequeathed: fixed dollar amounts to Brian Cassidy and Colleen Hart; a specific bequest to Mary Cassidy; and specific bequests and residuary shares to JoAnne Poluso, Eileen Zraick, Sheila Mohrman and the petitioner. The decedent's will was admitted to probate and letters testamentary issued to the petitioner on June 22, 2016. On June 23, 2017, the petitioner filed his petition and account. An amended petition, dated July 25, 2017, was filed, and on October 5, 2017, the petitioner filed an affidavit to amend the petition and accounting.

### **THE ACCOUNT**

The petitioner's account covers the period from February 16, 2016 through April 30, 2017. It shows the receipt of \$214,363.79 of estate principal, which was supplemented by

realized increases of \$5,772.33 and income collected totaling \$1,332.25. This resulted in total charges of \$221,468.37. This amount was reduced by realized decreases of \$6,383.82 and administrative expenses in the amount of \$571.28, leaving a balance of \$214,513.27 on hand.

The Internal Revenue Service filed a claim dated April 19, 2017 against the estate in connection with the individual income tax returns filed by the decedent in the following amounts: 2009 - \$1.62; 2010 - \$1,406.51; and 2011 - \$337,586.66; for a total claim of \$338,994.79, inclusive of interest and penalties. This claim is shown on Schedule D-2. In addition, Schedule D-2 includes a claim by the New York State Department of Taxation and Finance in the amount of \$97,714.36, for the year 2011, plus accrued interest and penalties. These claims render the estate insolvent.

#### **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” (*Matter of Goliger*, 58 AD3d 732, 732 [2d Dept 2008] [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]). In determining what constitutes a reasonable attorney's fee, the court may consider factors such as “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 Szkambara*, 53 AD3d 502, 502-503 [2d Dept 2008] [citations omitted]; *see Matter of Freeman*, 34 NY2d 1 [1974]). 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]).

### **Legal Fees**

The petitioner seeks approval of the amount of \$21,644.01 for unpaid legal fees and disbursements through April 30, 2017, plus \$17,000.00 for legal fees and disbursements from May 1, 2017 through the finalization of this accounting proceeding and the estate administration.

Counsel filed an affirmation of services which reflects that the actual time billed through April 30, 2017 amounts to 60.4 hours, which results in billable time of \$21,644.01 at rates ranging from \$345.00 to \$475.00. This request is supported by a detailed summary of the services provided as well as contemporaneous time records. In addition, counsel filed a second affirmation seeking payment of \$17,000.00 for legal fees and disbursements for 30.3 hours of services provided from May 1, 2017 through the finalization of the accounting proceeding and the estate administration. This second request is supported by a summary of services and contemporaneous time records through October 31, 2017, which reflect billing in the amount of \$11,480.73 at rates ranging from \$250.00 to \$475.00. The balance of the fee sought, \$5,519.27, is requested for anticipated services to finalize the accounting and conclude the administration of the estate.

The court has carefully reviewed the two affirmations of services and the time records submitted to the court. 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 (*Matter of Von Hofe*, 145 AD2d 424 [2d Dept 1988]; *Matter of Phelan*, 173 AD2d 621 [2d Dept 1991]).

The legal fees requested by counsel, \$38,644.01, are equivalent to more than 17% of the estate. The billed fees, which total \$33,124.74, are equivalent to nearly 15% of gross assets. Schedule A reflects that the probate assets consist of two relatively small investment accounts, two bank accounts and three small checks. The only issue in this administration is its insolvency, which is the result of federal and New York State tax debts related to the year ending December 31, 2011, for which no further information has been provided to the court.

The size of the estate can operate as a limitation on the fees payable (*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 view of the amount of probate assets and all of the factors discussed above, the fee for billed and anticipated services is fixed in the total amount of \$22,000.00, none of which has been paid.

#### **Accountant's Fee**

The court has also been asked to review the accountant's fees. Typically, an accountant's services are not compensable from estate assets unless there exist unusual

circumstances that require the expertise of an accountant (*Matter of Meranus*, NYLJ, Mar. 31, 1994, at 28, col 2 [Sur Ct, Suffolk County]). The fee for such services is generally held to be included in the fee of the attorney for the fiduciary (*Matter of Musil*, 254 App Div 765 [2d Dept 1938]). The purpose of this rule is to avoid duplication (*Matter of Schoonheim*, 158 AD2d 183 [1st Dept 1990]). “Where the legal fees do 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, July 19, 1995, at 26, col 2 [Sur Ct, New York County] [internal citation omitted]).

The accountant has submitted an affidavit of services requesting a total fee of \$4,791.09. The affidavit indicates that the accountant prepared fiduciary income tax returns for the year ending January 31, 2017 (\$750.00). The accountant also prepared the 2015 individual income tax returns and compiled the information for the 2016 individual returns (\$4,041.09). The affidavit indicates that the firm devoted 20.2 hours to this matter, at billing rates ranging from \$175.00 to \$300.00 per hour. According to the affidavit, the financial documents reviewed for the preparation of the returns included the following tax forms: 1099-DIV; 1099-R; SSA-1099; 1099-G; 1099-B; 1099-MISC; 1095-C. The firm also reviewed banking notices and invoices and Internal Revenue Service notices, liens and correspondence.

The work performed by the accountant was not duplicative of the services rendered by the estate attorney. In setting this fee, the court is again mindful of the size of the estate. The court approves the fee in the total amount of \$2,250.00, none of which has been paid.



## ANALYSIS AND CONCLUSION

The account, as filed, is approved. Within forty-five (45) days of the date of the issuance of this decision, the petitioner shall file and serve an affidavit bringing the account down to date from the closing date of the account.

As previously acknowledged by this court, when an estate is insolvent, administration expenses are entitled to priority over claims based upon debts of the decedent (*Matter of Henke*, 39 Misc 2d 705 (Sur Ct, Nassau County 1963)). Accordingly:

The commission of the executor is approved subject to audit.

The legal fee of Forchelli, Curto, Deegan, Schwartz, Mineo & Terrana, LLP, is fixed in the total amount of \$22,000.00, none of which has been paid.

The accounting fee of Eckhardt & Company, P.C., in the total amount of \$2,250.00, none of which has been paid.

The claims of JoAnne Peluso in the amounts of \$293.47 and \$750.00 for payment of funeral expenses and grave monument engraving, as shown on Schedule D-2, are approved.

The claim of John T. Hartman in the amount of \$140.87 for funeral and executor expenses, as shown on Schedule D-2, is approved.

The executor's commissions are approved subject to audit.

The claim of Specialty, RX in the amount of \$50.00 for a prescription bill, as shown on Schedule D-2, is **DENIED**, based upon the priority of the debt owed by the decedent to the Internal Revenue Service, pursuant to 31 U.S.C. § 3713 (a) (1) (B).

All bequests and legacies under the Will shall abate and not be paid due to the

insolvency of the estate.

The decree shall authorize the petitioner to distribute the balance of the net estate, after payment of outstanding legal and accounting fees noted above, to the “United States Treasury” to pay the federal tax lien filed against the decedent. All other claims listed in the accounting including, but not limited to, the balance of the federal tax lien filed against the decedent and the claim by the New York State Department of Taxation and Finance, remain unpaid due to the insolvency of the estate and the petitioner is discharged in regard to all unpaid debts, except to the extent that any additional assets come into the hands of the executor.

Settle decree.

Dated: March 30, 2018  
Mineola, New York

**E N T E R:**

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**HON. MARGARET C. REILLY**  
**Judge of the Surrogate’s Court**

cc: Stephanie M. Alberts, Esq.  
Forchelli, Curto, Deegan, Schwartz, Mineo & Terrana, LLP  
The Omni  
333 Earle Ovington Blvd., Suite 1010  
Uniondale, NY 11553

Laura Policano, CPA  
Eckhardt & Company, P.C.  
One Huntington Quadrangle, Suite 4 South 14  
Melville, NY 11747

James J. Doane, Sr.  
Revenue Officer Advisor  
Department of the Treasury/Internal Revenue Service  
300 South State Street, Room 406  
Syracuse, NY 13202

NYS Department of Taxation and Finance  
Att.: Diana Eckler  
TDAB - Estate Tax Audit  
Waiver of Citation Unit  
W.A. Harriamn Campus  
Albany, NY 12227