Matter of Otto
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August 24, 2018
Surrogate's Court, New York County
Docket Number: 1999-3358
Judge: Nora S. Anderson
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SURROGATE'S COURT : NEW YORK COUNTY

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In the Matter of the Judicial Settlement of the Account of the Proceedings of Regan Otto Schroeder and Jed Isaacs as the Executors of the Estate of

RICHARD A. OTTO,

Deceased.

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New York County Surrogate's Court
Date: AUGUST 24, 2018

File No. 1999-3358

A N D E R S O N, S.

In this contested accounting by the executors of the estate of Richard Otto, resolution of the remaining objections by decedent's wife, Maria Otto, requires the court to determine two issues: 1) whether the executors failed to investigate the propriety of a September 15, 1998 agreement (the "Original Agreement"), as revised on January 5, 1999, between decedent and his son Jonathan Otto ("the Revised Agreement"), and 2) the reasonableness of professional fees incurred by petitioners. The court held a two-day bench trial to determine the first issue. The parties waived their right to a hearing on the second issue and relied on papers submitted.

Background

Richard Otto died on August 18, 1999, at the age of 66, leaving an estate of approximately $25 million. He was survived by Maria, his third wife of 15 years, and six children from his prior marriages. Decedent's substantial wealth was derived from the sale of his majority ownership in Rock Bottom Stores, Inc., a chain of drug stores that was sold a year before his death to Duane Reade, Inc., as well as his interest in fifteen real estate partnerships

and limited liability companies (the "Real Estate Entities").

Under his will, decedent bequeathed to Maria his tangible property and 50% of his residuary estate either outright or in trust, with the remaining 50% to be held in trust or distributed outright to Maria's daughter and three of his six children, depending on their ages. Letters testamentary issued to decedent's daughter Regan Otto Schroeder ("Schroeder") and his long-time accountant, Jed Isaacs ("Isaacs"). Letters of trusteeship issued to Schroeder and decedent's long-time lawyer, Richard Marlin ("Marlin").

The long and contentious history of this estate is set forth in prior decisions and will not be repeated here (*see e.g. Matter of Otto*, 32 Misc 3d 1244[A] [Sur Ct, NY County 2011], *affd* 96 AD3d 433 [1st Dept 2012]; *Matter of Otto*, NYLJ, Mar. 25, 2015, at 22, col 4 [Sur Ct, NY County 2015]). For present purposes, the following facts are relevant. In October 2006, the executors commenced the instant proceeding to settle their final account for the period beginning from the date of decedent's death through April 30, 2006, to which Maria filed objections (the "Original Account"). Thereafter, the executors amended the Original Account through April 30, 2007 (the "Amended Account") and then supplemented the Amended Account to cover the period through April 30, 2009 (the "Supplemental Account"). Maria did not file objections to either the Amended Account or the Supplemental Account. However, the court later deemed her pleading to be

objections to the Amended Account to the extent of matters raised in the Original Account (*see Matter of Otto*, 32 Misc 3d 1244(A), *supra*).

After years of discovery and motion practice, Isaacs filed a note of issue. A dispute then arose over the parties' respective statements of issues for trial (Uniform Rules for Sur Ct [22 NYCRR] § 207.30). The court determined that the only issues raised by Maria's objections were whether professional fees were reasonable and whether the executors had failed to investigate the propriety of the Revised Agreement (*see Matter of Otto*, NYLJ, Mar. 25, 2015, at 22, col 4, *supra*).

The Bench Trial

After the parties waived a hearing on the issue of professional fees, the only issue for trial was as follows:

> "Whether Petitioners failed to investigate properly the propriety of the alleged September 15, 1998 Agreement, as revised on January 5, 1999, between Jonathan Otto and Richard Otto, including but not limited to whether such agreement was a forgery, in which Richard Otto purportedly transferred control of the general partner entities of each of the real estate entities to Jonathan Otto in exchange for $10,000, which amount was deposited in Richard Otto's bank account on August 17, 1999 - the day before his death."

The trial began with the testimony of petitioners, who established prima facie the accuracy and completeness of their Amended Account (*see Matter of Schnare*, 191 AD2d 859 [3d Dept 1993]). It was then incumbent upon Maria ("objectant") to come forward with evidence establishing that the Amended Account is, in fact, inaccurate or

incomplete (*id.*). Only then would petitioners have to "prove, by a fair preponderence of the evidence, that [their] account is accurate and complete" (*id.* at 860).

To meet her evidentiary burden, objectant sought to establish that petitioners had failed to investigate her theory, as supported by a purported handwriting expert's report, that the Revised Agreement was a forgery. According to objectant, the Revised Agreement caused a $5 million injury to the estate "through the loss of control of the general partner entities for woefully inadequate consideration."[1]

The evidence showed, however, that prior to executing the Revised Agreement, decedent had entered into the Original Agreement, which transferred control of the Real Estate Entities to Jonathan in exchange for $10,000. Objectant does not challenge the validity of the Original Agreement. In the Revised Agreement, the parties simply corrected an inconsistency between the Original Agreement and an annexed exhibit concerning the formula for the minimum sales price that Jonathan would have to obtain in order to sell unilaterally the underlying real property owned by the Real Estate Entities. The terms set forth in the Original Agreement otherwise remained the same, with the Revised Agreement thus

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[1] These were the only losses objectant claimed in her post-trial brief. She testified at trial that she was injured to the extent of "a lot of money, millions" and that Jonathan sold the properties for "a very little price." However, no evidence was offered to substantiate these claims.

"supersed[ing] and amend[ing]" the Original Agreement in a very discrete way.

As a result, even if the Revised Agreement were a forgery as objectant contends, the Original Agreement would stand and Jonathan would still have gained control of the Real Estate Entities for $10,000. In other words, petitioners' alleged conduct in connection with the Revised Agreement could not have caused any loss to the estate. Objectant cannot therefore prevail since the basis for surcharging a fiduciary is conduct that actually causes injury to the estate (*see e.g. Matter of Jewett* 145 AD3d 1114, 1123 [3d Dept 2016][citations omitted]).

Moreover, even if decedent had not contracted to give Jonathan control of the Real Estate Entities before executing the Revised Agreement, objectant still failed to establish that petitioners' conduct related to the Revised Agreement was a breach of fiduciary duty warranting a surcharge. Objectant testified that, when she first learned of the existence of the Revised Agreement in 2003, she claimed it was a forgery and gave petitioners a report from a handwriting expert.[2] Objectant's claim that petitioners did "nothing" thereafter is belied by the record. Isaacs testified that he reviewed the report and discussed objectant's allegation with Marlin, decedent's then attorney, and

[2] Since the author of the report was deceased at the time of trial, it was admitted into evidence for the limited purpose of showing that the report had been given to Isaacs.

with decedent's estate planning counsel, Michael Weinberger. Schroeder was also notified of the report. She testified that she was familiar with her father's signature and examined the questioned signature. Ultimately, after consulting with counsel, petitioners determined that there was no substance to the allegation and that it should not be pursued.

In challenging petitioners' conduct, objectant ignores the fact that decedent relied on a team of advisors who were intimately familiar with both agreements. Isaacs was one of those advisors as was Marlin, who had negotiated the agreements directly with Jonathan's counsel. The court credits the compelling testimony of both that they had discussed with decedent and each other the negotiated terms of the Revised Agreement, which were all part of decedent's estate plan to transfer control of the Real Estate Entities to Jonathan. They testified that, although they did not witness or recall witnessing decedent's execution of the document, they had no doubt that decedent had signed it pursuant to their prior discussions. Isaacs testified that decedent had specifically told him that he had executed the Revised Agreement.

Objectant offers no evidence that, after agreeing to the terms of the Revised Agreement in January 1999, decedent ever indicated that he did not wish to follow through and execute it. Instead, the credible evidence leaves no doubt that decedent always recognized the Revised Agreement. For example, in a March 23, 1999 letter to Jonathan, decedent confirmed his agreement to

transfer control of the Real Estate Entities. Then, on August 4, 1999, decedent went to Marlin's office to execute the documents necessary to effectuate the transfer.

That Jonathan did not furnish a check for $10,000 until August 1999 in no way constitutes "evidence of the forgery" as objectant contends. The Revised Agreement (like the Original Agreement) provided that control to Jonathan would be transferred as of September 15, 1999, almost a year after the Original Agreement was executed. In view of that date, the parties' efforts to complete the necessary paperwork and finalize the transaction in early August 1999 were not out of the ordinary and certainly do not suggest that the Revised Agreement was forged.

Moreover, contrary to objectant's contention, the circumstances surrounding the deposit of Jonathan's $10,000 check are not suspicious and do not support her forgery claim. Unfortunately, by the time the Revised Agreement and all necessary transfer documents had been executed and Jonathan had made the $10,000 payment, decedent was gravely ill and had been hospitalized. Isaacs testified that his office's bookkeeping department took care of depositing the check for decedent on August 17, 1999, a day before he died.

Also without merit is objectant's contention that a "falling out" between decedent and Jonathan should have prompted petitioners to further investigate the validity of the Revised Agreement. There is no dispute that Jonathan had a rocky

relationship with decedent. Evidence of that is decedent's removal of Jonathan as the president of Rock Bottom. However, the court credits Isaacs's testimony that decedent's displeasure with Jonathan had to do with his "performance in the retail side of the business." On the real estate side, decedent took Isaacs's advice that Jonathan, who had a substantial ownership interest in the Real Estate Entities and was handling their day-to-day management, was the "smartest guy to run the real estate." Indeed, the Revised Agreement, like the Original Agreement, reflected decedent's choice notwithstanding whatever other issues existed between Jonathan and decedent. That decedent made no testamentary provision for Jonathan in these circumstances does not prove otherwise.

Based on the forgoing evidence, petitioners cannot be faulted for rejecting objectant's forgery claim without retaining a handwriting expert. Fiduciaries are "required to employ such diligence and prudence to the care and management of the estate assets and affairs as would prudent persons of discretion and intelligence in their own like affairs" (*Matter of Billmyer*, 142 AD3d 1000, 1001 [2d Dept 2016][citations omitted]; see *Matter of Carbone*, 101 AD3d 866 [2d Dept 2012]). At the time objectant raised her forgery theory, petitioners had every reason to believe that decedent intended to execute the Revised Agreement and, in fact, had executed it.

In retrospect, petitioners were correct in their assessment

of objectant's forgery theory, since she also failed to meet her burden to prove by a preponderance of the evidence that the Revised Agreement was, in fact, a forgery (*see e.g. Blue Danube Prop. LLC v Mad52 LLC*, 107 AD3d 561 [1st Dept 2013]). Contrary to objectant's contention, the testimony of Marlin and Isaacs supported the conclusion that decedent's signature on the Revised Agreement is genuine. Objectant offered no theory for how or why decedent's signature had been forged, particularly given the unchallenged evidence that decedent never wavered in his desire and intent to abide by his agreement to transfer control of the Real Estate Entities to Jonathan.

This is not to overlook the testimony of objectant's expert witness who opined that it was "Highly Probable" that decedent had not signed the Revised Agreement, as well as that expert's Letter of Opinion dated March 9, 2015, in which he first set forth the basis for his conclusion.[3] However, the court is not obligated to adopt the expert's opinion (*see e.g. State Ex Rel. H.K. v M.S.*, 187 AD2d 50, 53 [1ST Dept 1993] [even in the case of a court-appointed or designated expert, the court is "not ... require[d] to accept the opinion of that expert"]). The expert's testimony here was undermined in several important respects.

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[3] Petitioners objected to the admission of the expert's report on the ground that it was self-serving and that its exhibits were "hearsay." The court reserved decision. Upon further consideration, the court admits the report into evidence as additional support for the expert's testimony.

First, the expert based his opinion on a flawed comparison of the signature on the Revised Agreement with 42 checks purportedly signed by decedent, about which the court heard testimony subject to a post-trial determination as to their admissibility. Under CPLR 4536, a writing may be compared with a disputed writing but only if the former is proved "to the satisfaction of the court" to be that of the person claimed. Since objectant was barred under CPLR § 4519 (the Dead Man's Statute) from testifying that the checks bore decedent's signature, she attempted to authenticate the checks through her own testimony that did not implicate CPLR § 4519. Thus, she testified that she had found the checks in "the box of my husband" in "one of the bedrooms" and that she herself had not signed any of the checks. However, to the extent that objectant's testimony did not run afoul of CPLR § 4519, she failed to establish that no-one else could possibly have signed the checks at decedent's request. For this reason, the checks cannot be accepted as exemplars of decedent's signature, and such expert testimony is of no value.

Moreover, even if the court were to consider the checks as a basis for comparison, the expert's own report undermines his credibility. For example, the expert concluded that, in addition to decedent's signature on the Revised Agreement, other "questioned documents" were also likely forgeries. However, Marlin gave credible testimony that decedent had signed, in his presence on August 4, 1999, two of those "questioned documents," namely

stock certificates for Elmont Realty, Inc., and Ridgebay, Inc. Thus, the expert opined that it was "highly probable" that two exemplars, which had been authenticated by Marlin and admitted into evidence without objection, were forgeries. Under these circumstances, even if the court were to consider the checks as a basis for comparison, it would accord little weight to the testimony of objectant's expert and instead rely upon the overwhelming evidence that decedent signed the Revised Agreement, including the credible testimony of the witnesses who were involved in the transaction and the documentary evidence which supports their testimony.

Based upon the foregoing, petitioners acted appropriately upon learning of objectant's forgery theory. Indeed, given what petitioners knew to be true, had they then incurred the cost of hiring their own handwriting expert and pursued the possibility that the Revised Agreement was a forgery, they would have potentially exposed themselves to an objection by the estate's other beneficiaries that such cost had been unnecessary. The objection is therefore dismissed.

Professional Fees

Objectant challenges a total of $603,276.77 in legal fees paid to five law firms and $1,288,416.64 in accounting fees paid to four accounting firms. Petitioners paid all of the professional fees at issue as set forth on Schedule C of the Original Account,

which covers the period from August 18, 1999 to April 30, 2006.[4]

Before assessing the fees at issue here, it is necessary to acknowledge that the estate's administration during this period was complicated and contentious, requiring the services of various attorneys and accountants. Initially, there were disputes related to RB Holdings Corp. ("RB Holdings"), decedent's wholly owned corporation. RB Holdings was the successor to Rock Bottom, of which decedent, his sister, Linda Otto Landsburg, and Jonathan were shareholders. Decedent had become the sole owner of RB Holdings after Rock Bottom sold its assets to Duane Reade. After the sale closed, however, Duane Reade challenged the transaction and litigation ensued. In September 2001, RB Holdings, the estate and Duane Reade reached a settlement, pursuant to which RB Holdings agreed to pay Duane Reade approximately $7,000,000 in settlement of all its claims (the "Duane Reade Settlement").

As result of this substantial payment and other expenses, the liabilities of RB Holdings far exceeded its assets. A dispute then arose over the obligations of the former Rock Bottom shareholders to contribute to the shortfall pursuant to a prior

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[4] Neither objectant nor any other party has challenged the $1,188,257.77 in legal fees and $432,636 in accounting fees incurred between May 1, 2006 and April 30, 2009 (*see Matter of Otto,* 32 Misc 3d 1244(A), *supra*). Although the court has the authority "to initiate an examination of the items on an account before approving them," such authority should be exercised with "caution" (*see Matter of Stortecky,* 85 NY2d 518, 525-26 [1995]). Under the circumstances here and particularly given the complexity of the estate's administration and the highly contested nature of this proceeding during this three-year period, the court, in its discretion, declines to scrutinize the additional professional fees sua sponte.

agreement. This dispute was eventually settled in December 2001 so that RB Holdings could, before its dissolution, satisfy its outstanding liabilities, including the substantial legal and professional fees incurred in connection with the Duane Reade Settlement (the "2001 Settlement Agreement").[5] All persons interested in the estate except for objectant and her daughter consented to the 2001 Settlement. It was not until almost 18 months later that they followed suit and even then only in exchange for the executors' acceptance of certain conditions set forth in a heavily negotiated side agreement, dated May 8, 2003.[6]

Also complicating the administration of the estate was decedent's ownership interest in the Real Estate Entities. Jonathan took control of them under the Revised Agreement on September 15, 1999. Over time, Jonathan's management of the entities became a concern to petitioners and objectant. In May 2004, Schroeder's counsel sent a letter to Jonathan concerning the management fees he was charging the Real Estate Entities pursuant to the Revised Agreement and requested access to the entities'

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[5] An additional $6.6 million in professional fees was incurred by RB Holdings in connection with the extensive litigation with Duane Reade, the Duane Reade Settlement and the 2001 Settlement. Objectant did not argue that any portion of the professional fees accounted for as an estate expense had been incurred by or paid by RB Holdings.

[6] Objectant would ultimately challenge the scope of the 2001 Settlement Agreement in this proceeding in an effort to surcharge petitioners for conduct relating to RB Holdings. However, the court determined that her objections were either foreclosed by the 2001 Settlement Agreement or failed to state a claim (*see Matter of Otto*, 32 Misc 3d 1244(A), *supra*).

books and records. Three months later, another letter reiterated the request for access and notified Jonathan that petitioners and the estate beneficiaries did not want Jonathan to sell the Real Estate Entities. However, notwithstanding the estate's position, Jonathan sold all of the remaining real estate owned by the entities in October 2004.

In November 2004, objectant's counsel, with the consent of petitioners, wrote to Jonathan requesting that he hold the proceeds of the sales until the estate fiduciaries completed their investigation into his management of the Real Estate Entities and the propriety of the sales. However, Jonathan retained only the estate's pro rata share of the sales proceeds and distributed the rest to all the other partners and members of the Real Estate Entities. Petitioners then hired a forensic accounting firm, Gettry Marcus Stern & Lehrer, CPA ("Gettry Marcus"), at the recommendation of objectant, to investigate. Gettry Marcus issued its final report on October 21, 2005 (which it later supplemented by letter in December 2005), concluding that Jonathan had overcharged the Real Estate Entities for his management services and that he had improperly distributed the proceeds of the real estate sales.

Thereafter, petitioners prepared to file derivative actions on behalf of the Real Estate Entities. As a prerequisite, they first demanded that Jonathan correct the overcharges and improper distributions with respect to each of the thirteen remaining Real

Estate Entities.[7] Settlement negotiations ensued and on August 20, 2006, several months after the end of the accounting period at issue, the parties settled. Jonathan paid to the Real Estate Entities in which the estate had an interest a total of approximately $520,000. In addition, the parties agreed that approximately one-half of the cost of the report, or $111,983, would be credited to the estate's share of the Real Estate Entities.

Petitioners also had to contend with the kind of tax and accounting issues that inevitably arise during the administration of a complex estate. These issues were primarily handled by Edward Isaacs & Co. LLP ("EICO"), the accounting firm of which Isaacs was a member, and then RSM McGladry, Inc. ("RSM"), which acquired EICO in October 2000. Issacs had been decedent's accountant since 1968 and had agreed to serve as co-executor and to accept one-half commissions on the condition that, in addition to his executorial services, he would provide "accounting, audit, tax, litigation support and management services" to the estate. Such agreement is reflected in Article THIRTEENTH(C) of decedent's will, which provides that any attorney or accountant who serves as an executor (or the firm of such person) is entitled to "just and reasonable compensation for legal or accounting services to my estate in connection with the official duties of my executors...."

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[7] Decedent had sold the real property owned by the other two real estate entities in 1999.

In recognition of decedent's wishes, EICO and then RSM (for whom Issacs had become a consultant) handled the estate's complex and extensive bookkeeping needs and the preparation of the voluminous Original Account. The firms also prepared decedent's final income tax returns, the estate tax returns (which resulted in a 30-month audit and a refund in excess of $3 million) and the annual fiduciary income tax returns. To this end, EICO and then RSM inventoried the estate's substantial assets and liabilities, which required valuations for each of the 15 Real Estate Entities, and assessed the several lawsuits in which the estate was a defendant. The firms also addressed the numerous income and estate tax issues arising from the sale of Rock Bottom to Duane Reade and the litigation that ensued, and Jonathan's sale of the real estate entities in 2004. The retention of EICO and then RSM - firms deeply familiar with decedent's finances, RB Holdings and the Real Estate Entities - to handle the estate's accounting and tax needs achieved substantial cost-saving through continuity and lower billing rates.

Finally, it is observed that during the more than six-year period of the Original Account, objectant raised a number of issues that required petitioners to turn to their lawyers and accountants, including matters relating to RB Holdings, the 2001 Settlement Agreement, the validity of the Revised Agreement, and Jonathan's management of the Real Estate Entities. During this period as well, objectant retained a succession of five attorneys.

Since April 2006, she has parted ways with an additional three attorneys, the last after the trial. When called upon to resolve issues between petitioners and objectant, this court has noted not only petitioners' responsiveness to objectant, providing her with information and discovery beyond their "technical duty" (*see Matter of Otto*, 32 Misc 3d 1244(A), *supra*), but also, the difficulty petitioners have faced in trying to address her concerns, which have "shifted dramatically" with her changes in representation (*see Matter of Otto*, NYLJ, Mar. 25, 2015, at 22, col 4, *supra*). From the court's vantage point, objectant's conduct significantly prolonged the administration of the estate and caused a substantial increase in professional expenses.

Attorney Fees

The Surrogate has the ultimate responsibility to determine reasonable attorney fees in estate matters (*see* SCPA § 2110; *Matter of Stortecky*, 85 NY2d 518, *supra*; *Matter of Marsh*, 265 AD2d 253 [1st Dept 1999]). However, in the accounting process, it is the fiduciaries who have the burden to establish the reasonableness and the value of the services rendered (*see e.g. Matter of Wolf*, 67 AD2d 930 [2d Dept 1979]; *Matter of Jurgielewicz*, NYLJ, June 25, 1997, at 30, col 5 [Sur Ct, Suffolk County 1997]; 5 Cox-Arenson-Medina, New York Civil Practice SCPA ¶ 2211.06[b][1] [Matthew Bender]). In making fee determinations, the court must recognize that time expended has some relevance, but that factor is hardly conclusive. Indeed, hours spent may be less

important than other relevant factors. These factors include 1) the value of the assets involved, 2) the difficulty of the questions presented, 3) the skill required to handle the matter, 4) the attorney's experience, ability and reputation, 5) the benefit resulting to the estate from the services rendered, and 6) the certainty of compensation (*see Matter of Freeman*, 34 NY2d 1 [1974]; *Matter of Potts*, 213 App Div 59 [4th Dept 1925], *affd* 241 NY 593 [1925]; Uniform Rules for Surrogate's Court [22 NYCRR] § 207.45).

Objectant challenges a total of $603,276.77 in legal fees paid to five law firms: Willkie Farr & Gallagher LLP ("Willkie Farr"), Davidoff Hutcher & Citron, LLP ("Davidoff Hutcher"), RubinBaum LLP ("RubinBaum"), Sonnenschein Nath & Rosenthal, LLP, which acquired RubinBaum in 2002 ("Sonnenschein"), and Kramer Levin Naftalis & Frankel LLP ("Kramer Levin").

Willkie Farr

Petitioners paid Willkie Farr a total of $281,444.25 (including disbursements of $4,172.59) for services rendered between July 25, 2003 and April 30, 2006. The fees are supported by a detailed affidavit of services and contemporaneous time records. Objectant argues that Willkie Farr's services were duplicative because Sonnenschein also represented the executors during the same time period. However, Willkie Farr primarily represented Schroeder. Given that Isaacs, in addition to his role as co-executor, was also providing accounting services to the

estate and acting as the sole director of RB Holdings, Schroeder appropriately retained separate counsel to ensure that the estate's administration was untainted by conflicts of interest. Under these circumstances, Schroeder's retention of separate counsel was appropriate and not the unwarranted election that objectant contends.

Objectant's general and unsubstantiated claim that Willkie Farr and Sonnenschein needlessly billed for the same services is without merit. The record shows that the firms coordinated their efforts, leveraging each firm's expertise. Sonnenschein handled day-to-day administration issues, while Willkie Farr focused on estate investments and estate disputes, including those relating to decedent's real estate investments and their management by Jonathan. Such coordination necessarily avoided duplication of services and promoted each firm's effective representation of its client.

In accordance with the above factors to be considered in fixing compensation, the court fixes Willkie Farr's fees and disbursements for services rendered from July 25, 2003 through April 30, 2006 in the amount $279,820.84. This reflects a reduction of $1,623.41 for disbursements that are disallowed because they reflect charges for local travel, meals and other items that are treated as part of ordinary office overhead and therefore not compensable (*see Matter of Aitken*, 160 Misc 2d 587 [Sur Ct, NY County 1994]).

RubinBaum and Sonnenschein

Petitioners paid RubinBaum and then Sonnenschein (after the firm acquired RubinBaum) a total of $288,535.94 (including $5,495.44 in disbursements) for services provided to petitioners between August 18, 1999 and April 30, 2006. These fees are also supported by detailed affidavits of services and contemporaneous time records. As discussed above, when Willkie Farr began representing Schroeder, Sonnenschein successfully worked with that firm to avoid duplication of services. The court finds that the expenditure of 580 hours over more than six years to handle the day-to-day management of the estate is reasonable.

Accordingly, based upon the usual factors in fixing compensation, the fees and disbursements for services rendered from August 18, 1999, through April 30, 2006 are fixed in the amount of $283,040.50. Disbursements in the amount of $5,495.44 are denied in their entirety. Although some disbursements, like court fees, are generally allowed (*see Matter of Aitken*, 160 Misc 2d 587, *supra*), the disbursements in the firm's bills were not sufficiently itemized by amount. Petitioner's have therefore failed to meet their burden to justify payment of these disbursements, and the court is constrained to disallow them (*see id.*).

Davidoff Hutcher

Petitioners paid Davidoff Hutcher $15,678.56 (including 242.74 in disbursements) for services rendered between August 15,

2001 and February 12, 2003. The fees are supported by a detailed affidavit of services, as well as contemporaneous time records. Objectant argues that the firm's services were duplicative of RubinBaum's and Kramer Levin's, firms which she claims were also representing petitioners during this time. However, the record shows that Davidoff primarily represented Schroeder before Willkie Farr began representing her in July 2003. Moreover, as discussed below, Kramer Levin did not represent petitioners during this time and any overlap in services with RubinBaum's is offset by Davidoff Hutcher's decision to write off more than 20% of its fees.

Based upon consideration of all relative factors, the fees for services rendered are fixed in the amount of $15,435.82. This reflects a reduction of $242.74 for disbursements which are identified only as "expenses." Under these circumstances, the court cannot determine whether any of these disbursements are compensable, and, since petitioners have the burden to justify their paid expenses, the court is constrained to disallow all of them (*see Matter of Aitken,* 160 Misc 2d 587, *supra)*.

Kramer Levin

Contrary to the allegation in petitioners' papers, they did not pay Kramer Levin $17,618.02 for services rendered during the period of the Original Account. They actually paid $12,040.42. The reason for the discrepancy is that when petitioners amended the Original Account, they reduced the fees on Schedule C to $12,040.02 to reflect the treatment of $5,578 as an allowed (paid)

claim for services rendered during decedent's lifetime (Schedule D).

Objectant argues only that the fees were for the same services that other firms performed. However, objectant misrepresents the nature and timing of the services performed. For example, Davidoff Hutcher represented Schroeder as co-executor from August 15, 2001 through February 12, 2003, but Kramer Levin represented Isaacs as co-executor and as the sole director of RB Holdings (which was owned by the estate) during a different period. Moreover, to the extent Kramer Levin provided services to Isaacs related to the litigation with Duane Reade, Rubin Baum's representation of the executors at that time was not duplicative, but complementary.

There is, however, an additional discrepancy in the record as to the amount of Kramer Levin's fees and disbursements that must be addressed. Schedule C of the Amended Account indicates that petitioners paid the firm $12,040.02 during the relevant period. However, the firm's affidavit of services states that its fees total $11,481.17, including $460 in disbursements. In addition, the firm's bills, which are based upon contemporaneous time records, state yet another total - $11,780.59, including $330.09 in disbursements.

Although the dollar value of the discrepancy is not substantial, petitioners have the burden to establish the reasonableness of administration expenses and were therefore

required to make the record clear. Under the circumstances, the court has relied on the firm's contemporaneous time record. Upon consideration of the usual factors in fixing compensation, the fees of Kramer Levin are fixed in the amount of $10,702.50. That figure reflects a reduction of $748 for services clearly rendered prior to decedent's death and a reduction of $330.09 for disbursements which are not compensable either because they are for expenses considered part of office overhead, *i.e.*, postage, or were not specifically identified (*see Matter of Aitken*, 160 Misc 2d 587, *supra*).

Accounting Fees

Normally, fees for services of an accountant are not to be paid from estate assets. Rather they are deducted from the fee of the attorney for the fiduciary (*see e.g. Matter of Schoonheim*, 158 AD2d 183 [1st Dept 1990]). The rule is meant to "avoid duplication" of services and concomitant fees (*id.* at 188 [citations omitted]). However, where unusual or complex circumstances require expertise beyond the generally recognized skills of an attorney, there is no duplication and the legal fee is not automatically reduced by the accounting fee (*see Matter of Tortora*, NYLJ, July 19, 1995, at 29, col 4 [Sur Ct, NY County 1995]; 11 Warren's Heaton, Surrogate's Court Practice § 93.08 [7th ed]).

Here, there is no dispute that the accounting fees should be paid with estate assets. Objectant challenges only the reasonableness of the $1,288,416.64 petitioners paid to four

accounting firms: EICO, RSM, Gettry Marcus and H.D. Ehrlich.

EICO

Petitioners paid EICO $105,208 for accounting services rendered during the period August 18, 1999, through September 30, 2000. Such fees reflect a voluntary reduction of $15,458, a 12.8% discount, and are supported by detailed affidavits of services by the EICO partner who was in charge of the account and by Isaacs. Although Isaacs did not provide professional services to the estate for EICO during this period, he was intimately familiar with the services performed. In addition, the firm's contemporaneous invoices set forth the hours spent and a description of services by firm employees.

Objectant cites *Matter of Boskowitz* (NYLJ 1202719814295 [Sur Ct, NY County 2015]) for the proposition that the record here is insufficient to assess the reasonableness of the fees. However, that case is inapposite. The record supporting the fees here is much more substantial than it was in *Boskowitz*. In view of the documented services the firm was called upon to perform, including handling all the significant bookkeeping needs of the estate, preparing decedent's complicated final income tax return, preparing an inventory of assets and liabilities for the federal and state estate tax returns and the initial preparation of those returns, the 580 hours spent over the course of 13 months is not excessive. This is so without regard to the results achieved, which saved the estate money, and the fact that, had lawyers

performed the services themselves at their higher billing rates, the total professional fees incurred by the estate would have been even greater.

Based upon the foregoing, the court fixes the fees of EICO in the amount of $105,208.[8]

RSM

After RSM acquired EICO in October 2000, petitioners paid RSM $962,179.89 for accounting services for the balance of the accounting period. Included in this amount is $292,881 for services that Isaacs performed as a consultant to the firm.[9] According to Isaacs, these services were not executorial in nature, but rather, were "accounting, tax, management, auditing, bookkeeping, and litigation support services." Objectant argues, however, that a significant portion of Isaacs's services were executorial or cannot be categorized due to the lack of billing detail.

With regard to fees for services performed by the firm (not including Isaacs), the RSM team spent in excess of 3,600 hours on estate matters over five-and-one-half years. Those hours are supported by the detailed affidavits of services by the partner in charge of the account and by Isaacs, as well as the firm's

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[8] No disbursements were included in this total.

[9] Objectant asserts that the total amount Isaacs billed for his services is $305,333.50. However, based on the summary of bills and the bills themselves, both of which are attached to RSM's affidavit of services, that number could not be verified.

contemporaneous time records.

Significantly, objectant barely objects to the fees for services by those other than Isaacs. She only contends that EICO and RSM performed duplicative services. However, as successor to EICO, RSM necessarily completed some tasks that EICO began. Thus, for example, EICO began the preparation of the decedent's estate tax returns, but RSM completed the job. It does not follow that because both firms billed for the preparation of the tax returns their services were duplicative.

That the estate required substantial accounting services is not in dispute. Nor is the fact RSM's work resulted in substantial tax savings to the estate. Moreover, the fees reflect a discount of $92,902 (approximately 12%), which more than offsets any inadequate billing descriptions and charges for certain disbursements, like postage, travel and meals, that are not allowable (*see Matter of Aitken*, 160 Misc 2d 587, *supra*). Under all the circumstances as described above, the court, in its discretion, declines to reduce the fees of RSM (excluding Isaacs's time). Accordingly, these fees are fixed in the amount of $669,298.89 ($962,179.89 less $292,881).

With regard to the fees for Isaacs's services ($292,881), however, a reduction is warranted. It was incumbent upon petitioners to establish that Isaacs's services were not only reasonable, but also distinct from his services as co-executor. However, all that petitioners offer in this connection are RSM's

bills and Isaacs's self-serving contention that RSM charged for his services as a consultant, but "not [for] the services [he] rendered as co-executor." Of particular note is Isaacs's unwarranted insistence that he billed for his attendance at Surrogate's court hearings "in order to provide technical support to counsel."

The court agrees with objectant's observation that some of Isaacs's bills include descriptions of his services that are insufficient and make it nearly impossible to determine whether his services were truly accounting or executorial in nature. One invoice, dated January 8, 2001, for $25,471 contains no descriptions of Isaacs's services over a more than two-month period. Other time entries simply indicate "time expended" or describe services that could be viewed as executorial. This is not to suggest, however, that all of the descriptions of Isaacs's services in his invoices are inadequate. The problematic descriptions are mostly confined to the period from October 2000 through March 2003, when Isaacs's services had generated fees of less than $60,000.

There can be no doubt that decedent nominated Isaacs to serve as a co-executor with Schroeder (who serves without commissions) because of the experience he would bring to that role as his long-time accountant. However, as decedent made clear in his will, he also intended that Isaacs, independent of his role as executor, would perform accounting services for the estate and would be

compensated appropriately for them. Following that mandate, Isaacs was an integral part of RSM's team, employing his expertise for the benefit of the estate.

Nonetheless, some of the descriptions of Isaacs's services are insufficient even when viewed with the detailed affidavits of accounting services submitted in support of RSM's fee. RSM did not discount its fee for Isaacs's more than 650 hours of services (at hourly rates of between $380 and $500) as it did with the services provided by those other than Isaacs, who billed at lower rates. Yet petitioners paid for all of Isaacs's services, notwithstanding his dual role and the fact that some of the descriptions of his services were lacking.

Under all of the circumstances, the court fixes RSM's fees for the services performed by Isaacs in the amount of $250,000, a reduction of $42,881 or slightly less than 15%. This reduction includes disbursements Isaacs charged to the estate (mostly meals), since they are considered part of office overhead (*see Matter of Aitken,* 160 Misc 2d 587, *supra)*, resulting in a total fee to RSM of $919,298.89 ($669,298.89 + $250,000).

There is a dispute between Schroeder, Isaacs and RSM with regard to RSM's fees. In December 2009, Schroeder filed a cross-petition in this proceeding impleading RSM, and asserting claims against RSM and Isaacs in relation to those fees. Both Isaacs and RSM filed answers, raising various affirmative defenses. In view of the court's reduction of RSM's fees, the issues raised by the

cross-petition and answers can now be determined in due course.

Gettry Marcus

Petitioners paid Gettry Marcus $220,028.75 for forensic accounting services provided to petitioners between December 2004 and April 30, 2006 in relation to Jonathan's management and sale of the Real Estate Entities. However, as part of the estate's settlement with Jonathan that resulted from the firm's work, Jonathan credited the estate's share of the Real Estate Entities with approximately one-half of these fees or $111,983. As a result, petitioners seek approval of their payment of $108,045.75 in respect of the Gettry Marcus fee.

Objectant does not dispute that there was a need for petitioners to retain forensic accountants. Nor does she dispute that she recommended the firm to petitioners. She claims only that petitioners failed to substantiate the fees with invoices and time records. However, the record includes the firm's bills, which include contemporaneous time records and descriptions of the services performed.

After its forensic review of the operations of the 15 Real Estate Entities, Gettry Marcus produced a substantial final report, concluding, among other things, that the Real Estate Entities had overpaid Jonathan $498,041 in management fees and that Jonathan had not properly distributed the proceeds from the sales of the real estate owned by the entities. As a result of the work of Gettry Marcus, Jonathan (or the company he owns) paid the

Real Estate Entities $520,526, and the estate's share of the Real Estate Entities was credited with approximately half of the cost of Gettry Marcus's services ($111,983).

Gettry Marcus's fees of $220,028.75 reflected a $10,000 discount. The estate's remaining share of the fees, or $108,045.75, is supported by the firm's itemized billing statements and the description of the extensive work done as reflected in the report. Based upon the record, the court fixes the fee of Gettry Marcus in the amount of $108,045.75.

H.D. Erlich

Objectant does not dispute that H.D. Erlich reviewed financial records and tax returns of the estate and RB Holdings on her behalf. The fee of $1,000 for such services is modest and was incurred for objectant's benefit. There is no objection from the other estate beneficiaries. The court therefore fixes the fee of H.D. Erlich in the amount of $1,000.

In summary, after a bench trial, the court concludes that objectant failed to meet her burden to establish that petitioners' conduct in relation to the Revised Agreement warrants a surcharge. Her objection is therefore dismissed. In addition, the court fixes legal fees and disbursements as follows: 1) Willkie Farr - $279,820.84, 2) RubinBaum and Sonnenschein - $283,040.50, 3) Davidoff Hutcher - $15,435.82, and 4) Kramer Levin - $10,702.50. As to the issue of accounting fees, the court fixes them as follows: 1) EICO - $105,208, 2) RSM $919,298.89, 3) Gettry Marcus

- $108,045.75, and 4) H.D. Erlich - $1,000. Petitioners are surcharged to the extent that legal fees and disbursements have been reduced. To the extent that accounting fees and disbursements have been reduced, the issue of who is responsible for refunding to the estate any excess payments remains to be determined in due course.

This decision constitutes the order of the court.

Dated: August 24, 2018

S U R R O G A T E