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| Matter of Rodecker |
| 2018 NY Slip Op 32760(U) |
| October 29, 2018 |
| Surrogate's Court, New York County |
| Docket Number: 1970-0009/C |
| Judge: Nora S. Anderson |
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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

New York County Surrogate's Court

Date: October 29, 2018

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In the Matter of the Petition for Cy Pres
of Bank of America, N.A., as Trustee of
the Emil Ross Trust Created under
Article SEVENTH(b) of the Last Will and
Testament Dated September 21, 1962 of

File No. 1970-0009/C

REUBEN RODECKER,

Deceased.

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A N D E R S O N , S .

This is an uncontested miscellaneous petition for an order granting cy pres relief and for fixing and allocating attorney's fees. Petitioner bank is the named trustee of the subject charitable trust (the Trust) created under Article SEVENTH(b) of the will of Reuben Rodecker.

The Trust provides a life estate for a post-deceased beneficiary. The Trust's remainder, currently valued at about one million dollars, is distributable among seven named charitable entities, one of which, the Swedish Hospital in Brooklyn, is given a twenty percent share. The court agrees with petitioner that the current purposes of the Swedish Hospital are fundamentally different from those in effect when testator executed the will. Thus, the testator's charitable intent would not be served unless the benefits designated for the Swedish Hospital are redirected to a charitable entity more nearly devoted to the objectives previously served by the Swedish

Hospital. The court further agrees with petitioner that the entity most closely fitting that description and the intent of the testator is the Brooklyn Hospital Center.

A court order re-directing distribution of charitable benefits from one charitable entity to another represents an exercise of a court's cy pres power and is appropriate under the circumstances described in the petition here (see EPTL § 8-1.1[c][1]); *Matter of Geng*, 50 Misc 3d 475 [Sur Ct, Nassau County 2015]; *Matter of Lally*, 37 Misc 3d 1045 [Sur Ct, Schenectady County 2012], *aff'd* 112 AD3d 1099 [3d Dept 2013]; *Matter of Hummel*, 9 Misc 3d 996 [Sup Ct, Albany County 2005], *aff'd* 30 AD3d 802 [3d Dept 2006], *lv denied*, 7 NY3d 713 [2006]; *Matter of Kraetzer*, 119 Misc 2d 436 [Sur Ct, Kings County 1983]).

Accordingly, the portion of the petition asking the court to exercise its cy pres power by authorizing the trustee to distribute the Swedish Hospital's twenty percent share of the remainder under Article SEVENTH(b) to the Brooklyn Hospital Center is granted.

Petitioner also seeks approval of \$13,296.60 for legal services rendered in connection with this proceeding from June 2, 2011 through October 13, 2017. The record reflects, *inter alia*, that 61.8 hours were expended and that reasonable rates were charged. In view of the factors set forth in *Matter of Freeman* (34 NY2d 1 [1974]) and *Matter of Potts* (213 AD 59 [4th Dept

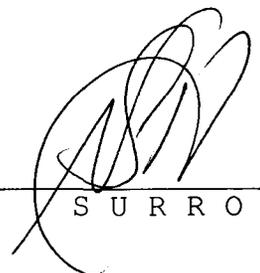
1925], *aff'd* 241 NY 593 [1925]), these legal fees are approved in the amount requested. The request for approval of disbursements in the amount of \$1,250 for court filing fees is also approved (see *Matter of Waly*, NYLJ, Oct. 2, 2017, at 28, col 1 [Sur Ct, NY County]). The request for approval of a reserve of \$3,000 "for anticipated future legal work" is, however, denied (see *Matter of Cook*, 41 AD2d 909 [1st Dept 1973], *aff'd* 33 NY2d 919 [1973]; *Matter of Lynch*, 258 AD 1060 [2d Dept 1940]).

The court may direct payment of attorney's fees "from the estate generally or from the funds in the hands of the fiduciary belonging to any legatee, devisee, distributee or person interested" (SCPA 2110[2]). In exercising its discretion as to allocation, the court must consider the factors set forth in *Matter of Hyde*, 15 NY3d 179 [2010]. In this case, because the services rendered conferred a pecuniary benefit solely on the designated substituted beneficiary of the twenty percent share of the Trust, the court sees no reason to impose the burden of petitioner's fees on the other six remainder beneficiaries of the Trust. Therefore, the Brooklyn Hospital Center, which has expressed no opposition, will bear the cost of such allocation.

Accordingly, the request to allocate counsel fees to the twenty percent share of the Trust is granted (see *Matter of Frey*, NYLJ, Jul. 25, 2013, at 25, col 5 [Sur Ct, NY County]; see also *Matter of Hardy*, 45 Misc 3d 1218[A] [Sur Ct, Yates County 2014]).

Settle decree.

Dated: *Oct 29*, 2018



SURROGATE