

Estate of Korn
2020 NY Slip Op 30068(U)
January 9, 2020
Surrogate's Court, New York County
Docket Number: 2001-4153/A
Judge: Rita M. Mella
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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

New York County Surrogate's Court
DATA ENTRY DEPT
Date: JANUARY 9, 2020

Petition to Fix and Allocate a Portion of Attorney Compensation,
Estate of

DECISION and ORDER

EDITH KORN,
Deceased.

File No. : 2001-4153/A

M E L L A, S. :

The following papers were considered in deciding this motion:

Papers	Numbered
Notice of Motion by Edward Korn dated September 25, 2019, to Dismiss the Petition of Robert Korn to Fix and Allocate a Portion of His Attorney's Compensation	1
Affirmation of Karin Barkhorn, Esq., in Support of Motion to Dismiss, dated September 24, 2019, with Exhibits 1 through 6	2
Memorandum of Law in Support of Motion to Dismiss, Dated September 25, 2019	3
Affirmation of James S. Kaplan, Esq., in Opposition to Motion to Dismiss, dated October 4, 2019	4
Affirmation of Karin Barkhorn, Esq., in Further Support of Motion to Dismiss, dated October 10, 2019	5

The proceeding underlying this motion to dismiss is an application, pursuant to SCPA 2110, to fix and allocate a portion of the legal fees incurred by a beneficiary in a highly contested accounting proceeding. Robert Korn filed 45 objections to the account of his brother, Edward Korn, as executor of the will of their mother, Edith Korn. After an eleven-day trial in

that proceeding, the court (Webber, S.) issued a decision¹ finding, inter alia, that Edward had breached his fiduciary obligation to Robert in connection with the settlement of disputes concerning real estate in New York City known as “Florida Flats.” In the current proceeding, Robert asks the court to fix the portion of his attorney’s fees attributable to his successful litigation of the Florida Flats issue, and to allocate those fees to the estate.

The court has authority to fix attorneys fees for services rendered to a beneficiary (as well as to a fiduciary), at any time during the administration of the estate (SCPA 2110 [1]). Caselaw recognizes the court’s broad discretion in exercising this authority (*see e.g. Matter of Driscoll*, 273 AD2d 381, 382 [2d Dept 2000] [“It is well settled that the Surrogate bears the ultimate responsibility of deciding what constitutes reasonable legal fees”]). The statute also grants the court power to direct payment of those fees “from the estate generally or from the funds in the hands of the fiduciary belonging to any legatee” (SCPA 2110 [2]).

In support of his contention that a portion of his legal fees should be charged to the estate, Robert invokes the principle that the general estate bears attorneys fees for work that benefited the estate as a whole, such as where additional assets are recovered (*e.g. Matter of Bellinger*, 55 AD2d 448 [4th Dept 1977] [counsel for legatees allowed fees from estate for obtaining judgment against fiduciary for self-dealing, resulting in reimbursement of substantial stock losses to the estate]; *Matter of Berg*, 91 Misc 2d 939 [Sur Ct, NY County 1977]). He also cites *Matter of Rose BB* (35 AD3d 1044, 1045 [3d Dept 2006]), where the Appellate Division stated that “Surrogate’s Court may award counsel fees in situations where the misconduct of a fiduciary brings about the expense.”

¹ *Matter of Edith Korn*, May 27, 2011, File No.: 2001-4153.

Edward moves to dismiss the petition on the ground that where the work of the attorneys benefited only the beneficiary, as Edward claims occurred, the fees cannot be charged to the general estate.

A brief review of decedent's estate plan and the controversy surrounding Florida Flats is necessary for the evaluation of Robert's arguments. Decedent's will makes various pre-residuary, specific gifts to family members, including a specific devise to Robert of her 5.833 percent interest in the Florida Flats real estate. The residue of her estate passes to Edward. Critical to this case is a marital trust under the will of decedent's predeceased husband, which also held a 5.833 percent interest in Florida Flats. The trust terminated on decedent's death, with remainder payable one-quarter each to Edward, Robert, and their brother William, and the balance payable in equal shares to William's two children. Edward was both executor of decedent's will and trustee of the marital trust.

The Florida Flats property was the subject of litigation in New York County Supreme Court, which raised questions about Edward's authority to distribute the estate's and the trust's respective interests. After additional litigation, including appeals, the matter was settled with Edward selling both interests in his fiduciary capacities and receiving a premium of \$2.3 million over what other owners had negotiated for the sale of their respective rights to the same buyer. Edward allocated the entire premium to the marital trust. In the accounting proceeding, this court noted Edward's conflict of interest and found that crediting the premium solely to the trust constituted a breach of Edward's fiduciary duty of loyalty to Robert. The court directed that one-half of the premium "be allocated to the estate and paid to Robert" and also denied Edward his executor's commissions as a remedy for his breach.

Robert argues that the efforts of his attorneys benefited the general estate by enlarging it in the amount of one-half of the premium, and by saving the expense of the executor's commissions. His argument fails on both points. The amount paid to Robert did not increase the value of the general estate, but increased only Robert's interest. As for commissions, these would have been payable from the residuary, and Edward is the sole beneficiary of the residuary. There is no impact on the estate. The services of Robert's attorneys benefited him alone and are therefore not subject to recovery from the general estate (*see Matter of Frey*, NYLJ, July 25, 2013, at 25, col 5 [Sur Ct, NY County]; *Matter of Driscoll*, 273 AD2d at 382 ["To the extent that the appellant's services benefit[ed] only [his client] and not the estate, the Surrogate may direct [the client] to personally pay a reasonable fee"]).

As noted above, Robert also argues that his legal fees are chargeable to the estate generally because he uncovered the fiduciary's wrongdoing. The *Rose BB* case, on which he principally relies, is of dubious precedential value here because of its complex procedural history—including numerous appeals and related cases—making it unclear precisely how and why fees were awarded as they were. The case is distinguishable in any event because a portion of the fees under consideration in *Rose BB* were for services in a guardianship proceeding, which are determined under a different statute; and a portion were attributable to the disruptive behavior of the opposing party during prior proceedings in the same estate, rather than wrongdoing in his role as fiduciary. Further, *Rose BB* itself relies on cases where, unlike here, the expenditure of counsel fees exposed wrongdoing that affected the general estate (*e.g. Matter of Campbell*, 138 AD2d 827 [3d Dept 1988] [administrators were surcharged for estate's losses attributable to maladministration of the estate]; *Parker v Rogerson*, 49 AD2d 689, 690 [4th Dept 1975] [legal services were performed to recoup loss to the estate caused by a fiduciary]).

In *Matter of Hyde* (15 NY3d 179, 186-187 [2010]), the Court of Appeals identified several factors as relevant to fee allocation issues,² including “whether the objecting beneficiary acted solely in his or her own interest or in the common interest of the estate” and “the possible benefits to individual beneficiaries from the outcome of the underlying proceeding.” Here, Robert was clearly acting solely in his own interest by objecting to the allocation of the premium entirely to the marital trust. He was the only party who stood to benefit. As the Appellate Division observed in the *Driscoll* matter (273 AD2d 381), the Surrogate “is in the best position to determine” which legal services benefited the estate generally and which solely benefited the client (*id.* at 382). In the exercise of its discretion, and weighing the applicable factors set forth in *Hyde*, the court determines that Robert’s fees should be borne by him personally and not by the general estate.

Accordingly, the motion to dismiss the petition is granted. In light of this ruling, it is unnecessary for the court to address Robert’s unsupported allegations concerning the proportion of his fees attributable to work on the Florida Flats objection, or to fix the amount of such fees.

This constitutes the decision and order of the court.

Clerk to notify.

Dated: January 9, 2020



SURROGATE

² Although the *Hyde* case concerned legal fees of a fiduciary, its rationale does not depend on the role of the party seeking allocation of fees (*Matter of Frey, supra*).