

Matter of Sammis
2016 NY Slip Op 32012(U)
July 1, 2016
Surrogate's Court, Nassau County
Docket Number: 155513B
Judge: Margaret C. Reilly
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**SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

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**In the Matter of the Trust for Carol Applegate Tomaswick
under Clause Twelfth of the Will of**

DECISION

KATHERINE VIRGINIA SAMMIS,

File No. 155513B

Dec. No. 31559

Deceased.

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PRESENT: HON. MARGARET C. REILLY

In connection with this miscellaneous proceeding, the following papers were considered in the preparation of this decision:

Petition for Appointment of Successor Trustee.....	1
Affirmation of Attorney for Petitioner.....	2
Oath and Designation of Trustee.....	3
Renunciation of Nominated Successor Trustee.....	4
Waiver and Consent of Carol Applegate Tomaswick.....	5
Waiver and Consent of James Tomaswick, Jr.....	6
Attorney Affirmation of Legal Services.....	7

I. PROCEDURAL HISTORY

Before the court is the unopposed petition of Norma S. Wickersham, the executor of the estate of Theodore S. Wickersham, who prior to his death had been the successor trustee of the trust under Clause Twelfth of the Will of Katherine Virginia Sammis. Petitioner seeks: (1) the cancellation of letters of trusteeship issued to Theodore S. Wickersham; (2) the issuance of letters of trusteeship to James Tomaswick, to serve without bond; and (3) approval of payment from the trust of legal fees and expenses and disbursements: (a) in the amount of \$7,609.90, incurred in connection with the

administration of the trust from May 30, 2013 through August 31, 2015; and (b) as may be accrued after August 31, 2015 in connection with this proceeding.

II. BACKGROUND

Katherine Virginia Sammis (the decedent) died on January 31, 1972, leaving a Last Will and Testament dated July 11, 1966 which was admitted to probate by this court on March 8, 1972. Under Clause Twelfth of the will, the decedent created a trust (the trust) to pay all trust income to her granddaughter, Carol Applegate Tomaswick (Carol), and as much of the principal as the trustee deems appropriate in the event that Carol suffers a serious illness or emergency. Upon Carol's death, the principal is payable to Carol's issue then living. The value of the trust as of September 30, 2015 is \$859,506.78.

Letters issued to Huyler C. Held as trustee of the trust and he served as trustee until his death on April 16, 2012. Pursuant to the terms of the trust, Huyler C. Held designated Theodore S. Wickersham (Theodore) to serve as the successor trustee, in a written instrument dated December 11, 1984. Theodore accepted this appointment and was issued successor letters of trusteeship on January 17, 2013. He served until his death on September 8, 2014. No trustee has received letters since the death of Theodore.

The trust language provides, in Clause Seventeenth, that "in the event of a complete failure of Trustee," U.S. Trust is to serve as successor trustee. The successor to U.S. Trust is Bank of America, N.A., which has declined to serve. The trust has no further provisions for the appointment of an alternate successor. Carol, who is the current

income beneficiary, is of full age and not under any disability. In the present petition, Norma S. Wickersham (Norma, or the petitioner) has advised the court that Carol consents to the appointment of Carol's husband, James Tomaswick (James), as the successor trustee of the trust, to serve without bond, in place of the renouncing successor trustee, Bank of America, N.A. The sole presumptive remainder beneficiary is Carol's son, James Tomaswick, Jr. (James Jr.), who virtually represents his own children, the contingent remainder beneficiaries. James Jr. has also consented to the appointment of James as successor trustee, to serve without bond. There is no opposition to the appointment. James has filed an oath and designation and has agreed to serve without commissions.

III. ANALYSIS

A. Cancellation of Letters of Trusteeship Issued to Theodore S. Wickersham

The present petition seeks the cancellation of letters issued to a successor trustee who died on September 8, 2014. The letters of trusteeship issued to Theodore are hereby revoked.

B. Issuance of Successor Letters of Trusteeship to James Tomaswick

Petitioner seeks the appointment of James as successor trustee. The request for relief is supported by consents and waivers filed by the interested parties and by extensive information contained in the petition concerning the qualifications of the nominated successor to serve as trustee. The requested relief is granted. Letters shall issue to James,

who has filed an oath and designation with the court. The trust assets shall be turned over to James as successor trustee following the court's issuance of successor letters of trusteeship to him.

C. Approval of Legal Fees, Expenses and Disbursements

Petitioner has also asked the court to approve the payment of legal fees, expenses and disbursements in the total amount of \$7,609.90 from the trust, for legal services rendered between May 30, 2013 through August 31, 2015. In addition, petitioner seeks approval of anticipated fees and expenses that will be charged after August 31, 2015 in connection with the present proceeding.

Regarding the fee of the attorney for an estate or trust, the court bears the ultimate responsibility for approving legal fees that are charged and has the discretion to determine what constitutes reasonable compensation for legal services rendered (*see Matter of Stortecky v Mazzone*, 85 NY2d 518 [1995]; *Matter of Vitole*, 215 AD2d 765 [2d Dept 1995]). While there is no hard and fast rule to calculate reasonable compensation to an attorney in every case, the Surrogate is required to exercise his or her authority "with reason, proper discretion and not arbitrarily" (*see Matter of Brehm*, 37 AD2d 95, 97 [4th Dept 1971]; *Matter of Wilhelm*, 88 AD2d 6, 11-12 [4th Dept 1982]). The burden with respect to establishing the reasonable value of legal services performed rests on the attorney performing those services (*see Matter of Potts*, 123 Misc 346 [Sur Ct, Columbia County 1924], *affd* 213 App Div 59 [4th Dept 1925], *affd* 241 NY 593 [1925]; *see e.g. Matter of Spatt*, 32 NY2d 778 [1973]).

(1) Fees Incurred

Counsel submitted an affirmation of services on February 23, 2016 which advises the court that Theodore S. Wickersham was a partner of the law firm which provided the trust with legal services. After the petitioner was appointed as the executor of the estate of Theodore S. Wickersham, the firm continued to provide legal services necessary in connection with the administration of the trust. As the fiduciary of the estate of Theodore S. Wickersham, the petitioner paid the firm's invoices for services rendered.

As noted above, the interested parties have consented to the payment of \$7,609.90. In reviewing the time records annexed to the affirmation of services, the court notes that the charges include \$72.65 for photocopies and \$72.00 for postage. With respect to disbursements, the tradition in Surrogate's Court practice is that the attorney may not be reimbursed for expenses that the court normally considers to be part of overhead, such as photocopying, postage, telephone calls, and similar items (*see Matter of Graham*, 238 AD2d 682 [3d Dept 1997]; *Matter of Diamond*, 219 AD2d 717 [2d Dept 1995]). In *Matter of Corwith* (NYLJ, May 3, 1995, at 35, col 2 [Sur Ct, Nassau County]), this court discussed the allowance of charges for photocopies, telephone calls, postage, messengers and couriers, express deliveries and computer-assisted legal research. The court concluded that it would permit reimbursement for such disbursements only if they involved payment to an outside supplier of goods and services, adopting the standards set forth in *Matter of Herlinger* (NYLJ, Apr. 28, 1994, at 28, col 6 [Sur Ct, New York

County])). The court prohibited reimbursement for ordinary postage and telephone charges other than long distance.

The court disallows the charges for photocopying and postage in the total amount of \$144.65 and approves the payment of legal fees from the trust in the reduced amount of \$7,465.25.

(2) Future Fees

In addition to payment of the fees incurred, petitioner has requested, and the parties have consented to, the payment of “such additional legal fees and expenses accruing after August 31, 2015 in connection with this proceeding.” Although the affirmation of legal services is dated February 16, 2016, the annexed time sheets end in October of 2015.

“In any proceeding in which the relief requested includes determination of compensation of an attorney or the allowance of expenses of counsel, there shall be filed with the petition an affidavit of services which shall state . . . the period during which services were rendered; the services rendered, in detail; the time spent; and the method or basis by which the requested compensation was determined” (22 NYCRR § 207.45 [a]).

The court cannot approve fees incurred after the last date on the submitted time records, October 26, 2015, as the affidavit of services and time records do not include the information necessary under the Rules of the Surrogate’s Court for the approval of fees. Fees for services provided after this date must be addressed in a supplemental affirmation of legal fees in order for the court to approve payment, or may be paid by James as

successor trustee without court approval and subsequently addressed in his account.

D. Accounting as a Fiduciary of a Deceased Fiduciary and as a De Facto Trustee

Norma initially became responsible for the trust in her capacity as the fiduciary of a deceased fiduciary. Although she had no authority to continue Theodore's duties as trustee, she was responsible for the protection of trust assets and for accounting on behalf of the deceased fiduciary (*see Matter of Hogeboom*, 219 App Div 131 [3d Dept 1927]). The court has jurisdiction to require the fiduciary of a deceased fiduciary to file an account (SCPA § 2207 [1]) "for all the acts and doings of the deceased fiduciary . . ." (SCPA § 2207 [2]).

Further, according to the affirmation of counsel submitted with the petition, beginning on July 16, 2015, the date of Norma's appointment as the executor of Theodore's estate, counsel assisted Norma in her new capacity, described by counsel as "interim fiduciary of the Trust." Although Norma was not granted the powers of the deceased trustee under SCPA § 2207 (7), it appears that she forwarded funds from Theodore's estate to pay the trust's legal fees. In addition, a trust tax return was filed, tax payments were made, conferences were conducted, and the present petition and the supporting documents were prepared. It is unclear whether any other actions were undertaken by Norma, with the assistance of counsel, during this time period.

New York recognizes "the concept of a de facto trustee" (*Matter of Monfort*, NYLJ, Dec. 13, 1995 [Sur Ct, Nassau County] [citing *Matter of Sakow*, 160 Misc 2d 703

(Sur Ct, Bronx County 1994])). “A de facto trustee is one who assumes a position under color of title and actually exercises the duties of office and can reasonably expect to be held accountable for trust related activities” (*Matter of Prins*, NYLJ, July 23, 2008, at 30, col 3 [Sur Ct, New York County [citations omitted]]).

Following her appointment as the executor of Theodore’s estate, Norma acted as a de facto trustee. Accordingly, she is accountable for her actions as a de facto trustee (*see Matter of Baugher*, NYLJ, Nov. 1, 2013, at 37 [Sur Ct, Nassau County]; *Matter of Lederer*, NYLJ, March 25, 2009, at 34, col 6 [Sur Ct, New York County] [citing *Matter of Prins*, NYLJ, July 23, 2008, at 30, col 3 (Sur Ct, New York County)]).

The court directs Norma to account: (1) as the fiduciary of a deceased fiduciary, for the period of time in which Theodore served as trustee; and (2) as a de facto fiduciary, for acts undertaken after the death of Theodore. The accounts may be informal, provided that the waivers and consents of the interested parties are filed with the court within 60 days of the issuance of this decision. In the event that waivers and consents have not been filed, Norma is directed to file her judicial accounts for settlement within the same 60-day period.

V. CONCLUSION

The letters of trusteeship issued to Theodore are revoked.

The court grants the request for the issuance of successor letters of trusteeship, without a bond, to James.

The court directs Norma to account as the fiduciary of a deceased fiduciary and as a de facto trustee, informally upon consent filed with the court within 60 days, or judicially.

Legal fees are approved in the amounts of \$7,465.25.

Submit decree.

Dated: July 1, 2016
Mineola, New York

E N T E R:

HON. MARGARET C. REILLY
Judge of the Surrogate's Court

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