

Matter of Buckman
2016 NY Slip Op 32019(U)
June 28, 2016
Surrogate's Court, Nassau County
Docket Number: 321411F
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 Account of Proceedings
of Thomas Buckman, as Successor Executor
of the Estate of**

**DECISION
File No. 321411F
Dec. No. 31687**

WILLIAM F. BUCKMAN,

Deceased.

-----X
**In the Matter of the Account of Proceedings
of Donald Buckman, as Executor
of the Estate of**

**File No. 321411C
Dec. No. 31890**

WILLIAM F. BUCKMAN,

Deceased.

-----X
PRESENT: HON. MARGARET C. REILLY

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

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I. PROCEDURAL HISTORY

Before the court is the first and final account of Thomas Buckman as successor executor for the estate of William F. Buckman.¹

II. BACKGROUND

William F. Buckman (the decedent) died a resident of Farmingdale, on October 5, 2001. He was survived by his wife, Velma Buckman, and by his three sons: James Buckman; Thomas Buckman; and Donald Buckman. Decedent left a will dated April 1, 1982, in which he bequeathed his estate to his wife.² Letters testamentary in the decedent's estate issued to Donald Buckman on January 11, 2002.

In 2006, Thomas Buckman filed a petition to compel Donald Buckman to account. In response, Donald Buckman filed an account dated April 28, 2008. Thomas Buckman filed objections to the account and asked the court to revoke the letters issued to Donald Buckman. The court suspended Donald Buckman's letters on October 6, 2009 and revoked Donald Buckman's letters on August 5, 2010, in Dec. No. 26554. The court noted Donald Buckman's default and the assertions made by Thomas Buckman that Donald Buckman was improvident and dilatory in his fiduciary duties and that he failed to act in the best interests

¹The account was initially filed on February 15, 2012, pursuant to the direction of this court in Dec. Nos. 27274 and 27265, issued on June 29, 2011. At the request of the court, the account was updated on October 5, 2015, and supplemental supporting documents were filed.

²Velma Buckman post-deceased her husband on February 28, 2008, leaving a will in which she bequeathed her estate to her three sons. Thomas Buckman was appointed executor of Velma Buckman's estate in Illinois on April 3, 2008, and this court issued ancillary letters to Thomas Buckman in his mother's estate on March 5, 2009.

of the decedent's estate. At the same time, the court denied Thomas Buckman's request for an inquest, noting that Donald Buckman's liability had not been established. Successor letters testamentary issued to Thomas Buckman on December 22, 2010.

III. THE ACCOUNT

Thomas Buckman's account was initially filed on February 15, 2012. Thomas Buckman filed an updated accounting on October 5, 2015, covering the period between December 22, 2010 and June 29, 2015. It shows the receipt of \$206,614.21 in total charges, which was reduced by credits of \$61,193.04, leaving a balance on hand of \$145,421.17.

IV. RELIEF REQUESTED

A. Relief Sought by Petitioner

Petitioner asks the court to:

1. Approve commissions to Thomas Buckman in the amount of \$8,289.92;
2. Approve legal fees of \$50,678.15 to petitioner's counsel, Bondi Iovino and Fusco, and disbursements of \$311.27;
3. Approve reimbursement of petitioner in the amount of \$12,221.00 for legal fees paid out of personal funds;
4. Disallow commissions of \$20,280.35 taken without court permission by Donald Buckman and direct the return of these commissions to the estate;
5. Surcharge Donald Buckman; and
6. Permit the estate to enter a money judgment against Donald Buckman in the event

that he fails to reimburse the estate in full for the amounts surcharged against him and for commissions previously taken by him without court permission, within 30 days of service upon Donald Buckman of an order requiring him to do so, with notice of entry.

B. Additional Relief

1. In accordance with Dec. No. 27265, issued by this court on June 29, 2011, the court must fix the legal fees reflected in the account filed by Donald Buckman on May 12, 2008 (File No. 321411[C]). Thomas Buckman originally asked the court to approve legal fees and disbursements to the firm currently known as Vishnick McGovern Milizio LLP as former counsel for Donald Buckman, in an amount to be determined by the court. Subsequently, by affidavit of Bernard Vishnick, Esq., dated March 30, 2016, and a copy of a letter dated April 5, 2016, the court was advised that the firm's fees were previously settled with the knowledge of the court. Schedule D-1 reflects that on January 9, 2013, a fee of \$15,000.00 was paid to Vishnick McGovern Milizio LLP. However, the court must still review the fees paid by Donald Buckman to Ruskin Moscou Faltischek, P.C., and the Taylor Law Offices.

2. The court must determine the fee of the guardian ad litem.

V. REPORT OF THE GUARDIAN AD LITEM

On June 10, 2014, the court appointed Thomas De Maria as guardian ad litem to represent the interests of Donald Buckman, a missing person who has not appeared in this proceeding. The guardian ad litem filed his report on December 1, 2014, in which he

confirms that the petitioner made a thorough and exhaustive search for Donald Buckman.³

According to the report of the guardian ad litem, Donald Buckman filed objections dated December 10, 2013 to the account of Thomas Buckman. The guardian ad litem received a copy of the purported objections from Thomas Buckman's attorney, who received them from Donald Buckman.⁴ However, the court record reflects that Donald Buckman never filed these objections with the court or paid the requisite fee. The objections will therefore not be considered by the court. Even if Donald Buckman had properly filed the purported objections with the requisite filing fee, he has absented himself in the two and one-half years since, and the court can properly dismiss the objections for failure to prosecute (*Matter of Owens*, NYLJ, Sept. 9, 2010, at 33, col 3 [Sur Ct, Suffolk County]).

In concluding his report, the guardian ad litem recommends that the account of Thomas Buckman be judicially settled, and defers to the court in determining the merits of Donald Buckman's objections. As indicated, Donald Buckman did not file objections with the court and there are, therefore, no objections to be considered.

VI. FEES

Regarding the fees of the attorney for the estate and the guardian ad litem, the court

³The guardian ad litem advises the court that great effort was expended in an effort to locate Donald Buckman, culminating in a report by Mid-West Protective Services, dated September 19, 2013. The report indicates that the extensive search for Donald Buckman was unsuccessful.

⁴In a letter to the court dated June 16, 2016, counsel for Thomas Buckman explained that she provided the guardian ad litem with a copy of the purported objections that her firm had received from Donald Buckman.

bears the ultimate responsibility for approving legal fees that are charged to an estate and has the discretion to determine what constitutes reasonable compensation for legal services rendered in the course of an estate (*see Matter of Stortecky v Mazzone*, 85 NY2d 518 [1995]; *Matter of Vitole*, 215 AD2d 765 [2d Dept 1995]; *Matter of Phelan*, 173 AD2d 621, 622 [2d Dept 1991]). 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" (*Matter of Brehm*, 37 AD2d 95, 97 [4th Dept 1971]; *see Matter of Wilhelm*, 88 AD2d 6, 11-12 [4th Dept 1982]).

In evaluating the cost of legal services, the court may consider a number of factors. These include: the time spent (*see Matter of Kelly*, 187 AD2d 718 [2d Dept 1992]); the complexity of the questions involved (*see Matter of Coughlin*, 221 AD2d 676 [3d Dept 1995]); the nature of the services provided (*see Matter of Von Hofe*, 145 AD2d 424 [2d Dept 1988]); the amount of litigation required (*see Matter of Sabatino*, 66 AD2d 937 [3d Dept 1978]); the amounts involved and the benefit resulting from the execution of such services (*see Matter of Shalman*, 68 AD2d 940 [3d Dept 1979]); the lawyer's experience and reputation (*see Matter of Brehm*, 37 AD2d 95 [4th Dept 1971]); and the customary fee charged by the Bar for similar 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]; *Matter of Freeman*, 34 NY2d 1 [1974]). In discharging this duty to review fees, the court cannot apply a selected few factors which might be more favorable to one position or another but must

strike a balance by considering all of the elements set forth in *Matter of Potts* (123 Misc 346 [Sur Ct, Columbia County 1924], *affd* 213 App Div 59 [4th Dept 1925], *affd* 241 NY 593 [1925]), and as re-enunciated in *Matter of Freeman* (34 NY2d 1 [1974]) (*see Matter of Berkman*, 93 Misc 2d 423 [Sur Ct, Bronx County 1978]). Also, 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]; *Martin v Phipps*, 21 AD2d 646 [1st Dept 1964], *affd* 16 NY2d 594 [1965]). A sizeable estate permits adequate compensation, but nothing beyond that (*Martin v Phipps*, 21 AD2d 646 [1st Dept 1964], *aff'd* 16 NY2d 594 [1965]; *Matter of Reede*, NYLJ, Oct. 28, 1991, at 37, col 2 [Sur Ct, Nassau County]; *Matter of Yancey*, NYLJ, Feb. 18, 1993, at 28, col 1 [Sur Ct, Westchester County]). 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]).

When multiple attorneys are employed by the fiduciary of a decedent's estate, the aggregate fee should approximate what one attorney would charge (*see Matter of Leopold*, 244 AD2d 411 [2d Dept 1997]; *Matter of Mattis*, 55 Misc 2d 511 [Sur Ct, New York County 1967]). Some overlap in services may necessarily occur (*see Matter of Patchin*, 106 AD2d 730 [3d Dept 1984]), and should be a factor when considering the aggregate fee (*see, e.g. Matter of Mergentime*, 155 Misc 2d 502 [Sur Ct, Westchester County 1992], *affd* 207 AD2d

453 [2d Dept 1994]). In determining the division of one aggregate fee among multiple firms, the court will take into account each firm's proportionate rendering of services to the estate.

A. Legal fees for Services Rendered to Thomas Buckman

Petitioner petitioned the court for approval of the payment of \$50,678.15 to his attorney in connection with services rendered on behalf of the successor executor from November 16, 2006 through January 13, 2012. No request has been made, or information provided, concerning legal services rendered from January 14, 2012 to date. The updated accounting reflects that \$49,712.21 has been paid⁵ and \$965.94 remains unpaid. The petition also seeks reimbursement of disbursements expended by counsel, consisting of subpoena fees and court fees, in the total amount of \$311.27. The guardian ad litem has not objected to these fees. The court has carefully reviewed the affirmation 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 (*see Matter of Von Hofe*, 145 AD2d 424 [2d Dept 1988]; *Matter of Phelan*, 173 AD2d 621 [2d Dept 1991]).

It is well established that size of the estate can operate as a limitation on the fees payable (*see Matter of McCranor*, 176 AD2d 1026 [3d Dept 1991]; *Matter of Kaufmann*, 26 AD2d 818 [1st Dept 1966], *aff'd* 23 NY2d 700 [1968]), without constituting an adverse reflection on the services provided. The fees charged in this matter represent nearly 25% of

⁵\$37,491.21 was paid from estate assets and \$12,221.00 was paid by Thomas Buckman out of his personal funds, for which he seeks reimbursement.

the gross estate. At the same time, the court recognizes that there were services performed over many years in connection with multiple proceedings and issues, including Donald Buckman's SCPA § 2103 proceeding; Donald Buckman's failure to account; discovery of estate records; preparation of an order to show cause to restrain Donald Buckman from making unauthorized withdrawals from the estate accounts; the filing of a motion for summary judgment; actions taken for the removal of Donald Buckman as executor; addressing the motion by Donald Buckman's attorney to be relieved as counsel; preparation of the petition to have Thomas Buckman appointed as successor trustee; liquidation of decedent's prior accounts and the establishment of an estate checking account; preparation of the accounting and the updated accounting; and preparation of an affirmation regarding disallowance of fees for Donald Buckman's counsel.

The fee is approved in the amount requested.⁶ Although counsel's affirmation indicates that this is a request for an interim fee, given the size of the estate, no additional fees will be awarded to counsel for Thomas Buckman.

In addition, the successor executor is authorized to reimburse himself \$12,221.00 of these legal fees paid out of his personal funds.

B. Legal Fees Paid by Donald Buckman

Pursuant to this court's Dec. No. 27265, issued on June 29, 2011, the court granted

⁶In fixing this fee for counsel to Thomas Buckman, the court is mindful that legal fees were also paid by Donald Buckman, prior to the revocation of his letters, and to Donald Buckman's prior counsel, pursuant to settlement. All of the fees for services rendered to Donald Buckman are reviewed below.

a summary judgment motion filed by Thomas Buckman in connection with his objections to the account filed by Donald Buckman on May 12, 2008 (File No. 321411[C]), except for Thomas Buckman' objection to attorneys' fees paid by Donald Buckman. The court stated that it would determine those legal fees in the context of the judicial account filed by Thomas Buckman as the successor executor, and the court directed counsel for Donald Buckman to file an affirmation of legal services.

1. Vishnick McGovern Milizio, LLP

As noted above, the petition filed by Thomas Buckman originally sought approval of fees paid by Donald Buckman to the law firm currently known as Vishnick McGovern Milizio LLP. However, the court was subsequently advised that a fee of \$15,000.00 had been paid to the firm in a settlement, with the knowledge of the court, as reflected on Schedule D-1 of the account filed by Thomas Buckman. Accordingly, this fee will not be reviewed by the court at this time.

2. Ruskin Moscou Faltischek, P.C.

In his capacity as executor, Donald Buckman authorized payment of \$13,885.97 from estate funds to Ruskin Moscou Faltischek, P.C. for legal fees. In the affirmation in support of disallowance of attorneys' fees and commissions submitted by counsel for Thomas Buckman, counsel acknowledges that the firm represented Donald Buckman in his capacity as the executor of the decedent's estate, but argues that "there is no evidence of what work Ruskin Moscou did on behalf of the Buckman estate and what work Ruskin Moscou did on

behalf of Donald Buckman personally.”

On May 3, 2016, the firm filed an affidavit of legal services, along with time records. These reflect 56.30 hours of services provided, billable at \$14,131.50, for which the firm states that it has been paid in full.

The time records show that the firm’s representation of Donald Buckman, in his capacity as executor, began in March 2004 and continued through 2006. The affidavit indicates that Ruskin Moscou Faltischek, P.C. was substituted for previous counsel, the law firm currently known as Vishnick McGovern Milizio LLP. Among other services, the firm assisted Donald Buckman in transferring stocks, marshaling assets and opening an estate account. The firm also conferred with brokerage firms and banks and commenced a discovery proceeding on behalf of their client. In addition, the firm represented Donald Buckman in his disputes with Thomas Buckman, who was the court-appointed guardian of the decedent’s surviving spouse in Illinois, concerning the registration of various stocks, and possession of the decedent’s personal assets, and whether those assets had been held jointly with the decedent’s wife.

In connection with these disputes, counsel advises the court that in addition to the services described above, counsel had lengthy communications with counsel representing his client in the dispute in Illinois as well as multiple conferences with counsel to Thomas Buckman regarding the turnover proceeding in New York.

The court has reviewed the affidavit submitted by Rukin Moscou Faltischek, P.C., and

approves the fee in the amount paid.

3. The Taylor Law Offices

Thomas Buckman asserts that Donald Buckman and James Buckman engaged the Taylor Law Offices to represent them in seeking guardianship of the decedent's surviving spouse, Velma Buckman, in Illinois, and that Donald Buckman reimbursed himself in the amount of \$6,910.45 and reimbursed James Buckman in the amount of \$5,000.00, out of funds belonging to the decedent's estate, for legal fees they allegedly paid to the Taylor Law Offices. However, on Schedule C of the account filed by Donald Buckman, the amount reimbursed to Donald Buckman says that it is "for payment for initial accounting to Taylor Law Offices." There is no explanatory note for the fees allegedly paid by to the Taylor Law Offices by James Buckman.⁷

Counsel for Thomas Buckman has advised the court that she repeatedly asked the Taylor Law Offices to submit an affirmation of legal services⁸ so that the court could determine whether any of the services rendered by the firm inured to the benefit of the decedent's estate, but no affirmation was filed. Based upon the limited information before the court, there is no indication that the services rendered by the Taylor Law Offices benefitted the decedent's estate. At the same time, the court notes that the Taylor Law Offices was not paid with estate funds, but rather, with personal funds allegedly expended

⁷James Buckman is not a party to this proceeding.

⁸See letter of Desiree Lovell Fusco dated June 16, 2016.

by Donald Buckman and James Buckman, who were then improperly reimbursed by Donald Buckman using estate funds. Donald Buckman is directed to return the reimbursement amounts of \$6,910.45 and \$5,000.00, respectively, to the estate, as these were improper payments from estate funds made by Donald Buckman in his capacity as the executor of the estate.

C. Fee of the Guardian ad Litem

With respect to the fee of the guardian ad litem, the court notes that the guardian ad litem's affirmation reflects eight and one-half hours of services on behalf of Donald Buckman. Considering all the factors set forth above concerning attorneys' fees, and the relatively small size of the estate, the court fixes the fee of the guardian ad litem in the sum of \$2,000.00.

VII. CONCLUSION

A. Relief Sought by Petitioner

1. The commission of the successor executor is approved subject to audit.
2. The court approves total legal fees of \$50,678.15 to petitioner's counsel, Bondi Iovino and Fusco, and disbursements of \$311.27. Of these amounts, \$37,491.42 was paid out of estate assets, \$12,221.00 was paid by Thomas Buckman out of his personal funds, and \$965.94 remains unpaid. In addition, the firm may be reimbursed in the amount of \$311.27. No additional fees will be approved.

3. The court approves reimbursement of Thomas Buckman in the amount of

\$12,221.00 for legal fees paid out of his personal funds.

4. The court disallows commissions of \$20,280.35 taken by Donald Buckman without court permission, as reflected in estate check no. 377206 in that amount, dated March 12, 2006, made payable to Donald Buckman, endorsed by Donald Buckman, and deposited on April 16, 2008, and directs the return of these commissions to the estate.

5. The court denies the petitioner's request that Donald Buckman be surcharged at this time.

6. Thomas Buckman is authorized, as the successor executor of the decedent's estate, to enter a money judgment against Donald Buckman in the event that he fails to reimburse the estate in full for the commissions of \$20,280.35 previously taken by him without court permission, within 30 days of service upon Donald Buckman of an order requiring him to do so, with notice of entry. To avoid further proceedings in the decedent's estate, Thomas Buckman may wish to consider assigning the money judgment to the estate of Velma Buckman.

B. Additional Relief

1. Legal fees paid by Donald Buckman

a. The court approves a fee of \$13,885.97 to the law firm of Ruskin Moscou Faltischek, P.C., all of which has been paid.

b. The court directs Donald Buckman to return to the estate the amounts of \$6,910.45 and \$5,000.00, which are shown on Schedule C of Donald Buckman's account as

reimbursements to Donald Buckman and James Buckman, respectively, for fees paid to the Taylor Law Offices.

Thomas Buckman is authorized, as the successor executor of the decedent's estate, to enter a money judgment against Donald Buckman in the event that he fails to reimburse the estate in full for the improper reimbursements of \$6,910.45 and \$5,000.00 paid by him as executor of the decedent's estate, within 30 days of service upon Donald Buckman of an order requiring him to do so, with notice of entry. To avoid further proceedings in the decedent's estate, Thomas Buckman may wish to consider assigning the money judgment to the estate of Velma Buckman.

2. The court approves a fee of \$2,000.00 to the guardian ad litem, to be paid within 30 days of the date of the decree.

3. The decree shall authorize petitioner to distribute the balance of the net estate to the estate of Velma Buckman.

Settle decree.

Dated: June 28, 2016
Mineola, New York

ENTER:

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

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