

**Matter of BNY Mellon, N.A.**

2016 NY Slip Op 32021(U)

July 1, 2016

Surrogate's Court, Nassau County

Docket Number: 337994D

Judge: Margaret C. Reilly

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**SURROGATE’S COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU**

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**Final Accounting by BNY Mellon, N.A.,  
as Trustee of the Article III, Credit Shelter Trust:  
Trust B under the Will of**

**DECISION  
File No. 337994D  
Dec. No. 31200**

**GEORGE F. ULICH,**

**Deceased.**

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**PRESENT: HON. MARGARET C. REILLY**

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The following papers were considered in the preparation of this decision:

Petition for Judicial Settlement of Account of Trustee.....	1
Accounting of Trustee .....	2
Interim Report of Guardian ad Litem filed February 25, 2015 .....	3
Final Report of Guardian ad Litem filed June 26, 2015 .....	4
Affirmation of Legal Services of Guardian ad Litem filed June 26, 2015 .....	5
Supplemental Report of Guardian ad Litem filed September 18, 2015 .....	6
Affirmation of Attorney Services .....	7
Affidavit Amending Accounting and Petition filed January 26, 2016 .....	8

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**I. PROCEDURAL HISTORY**

Before the court is the account of BNY Mellon, N.A., as Trustee of the Article III, Credit Shelter Trust, Trust B under the will of George F. Ulich. The trustee asks the court to: (1) settle the account; (2) allow Whitman Breed Abbott & Morgan paid legal fees of \$11,750.00 and additional paid fees of \$4,216.50, and allow paid fees of \$2,440.00 to DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, for total fees of \$18,406.50, plus disbursements of \$724.06; (3) allow paid principal commissions of \$75,354.42 and paid income commissions of \$37,327.28; (4) approve the resignation of BNY Mellon, N.A. as trustee; and (5) upon the resignation of BNY Mellon, N.A., direct that the trust assets be transferred to the successor trustee. The court must also set the fee of the guardian ad litem.

## II. BACKGROUND

The account before the court was filed on June 30, 2014 in response to a letter dated November 21, 2013 from Eleanor Ulich, a trust income beneficiary, to BNY Mellon, N.A., asking the trustee to resign. Pursuant to Article V (2) of the will of George F. Ulich, “[i]n the event the beneficiary (ies) then entitled to income shall request that a Trustee resign, the Trustee shall resign.”

The court appointed a guardian ad litem to represent the interests of three infants: (1) Christopher Adam Nichols; (2) Gwendolyn Ulich; and (3) Nathan George Ulich.

## III. THE ACCOUNT

The account shows the receipt of total principal charges as of April 30, 2014 in the amount of \$1,168,105.20, which was reduced by total principal credits of \$279,742.61, leaving a principal balance on hand of \$888,362.59. The account shows income charges of \$98,110.90 and income credits of \$92,022.91, leaving a balance of undistributed income in the amount of \$6,087.99. The combined accounts on hand total \$894,450.58.

## IV. REPORT OF THE GUARDIAN AD LITEM

The guardian ad litem filed an interim report, a final report and a supplemental report. In his interim report, the guardian ad litem raised several issues to be addressed by the trustee: (1) the diminution of the principal from the sum of \$1,013,168.19 to \$888,362.59; (2) the computation of the trustee’s commissions; and (3) the frequent trading of securities on lots as small as one share. In his final report, the guardian ad litem advises the court that he reviewed these issues with counsel for the trustee and reports to the court that: (1) the diminution in principal value resulted from the drastic drop in the residential real estate market, since the trust corpus included two suburban one-family homes that had been owned by the decedent, the values of which were in comportment with current market values but which were reduced from the original inventory values; (2) the commissions were charged in accordance with the trustee’s fee

schedule; and (3) the trust's liquid assets were invested as a "managed account" and were selected and traded in accordance with recommendations made for larger investors, without charges by the trustee for each transaction, resulting in greater diversification and protection of the trust value. The guardian ad litem recommends approval of the relief sought by the trustee. He has no objection to a decree settling the trustee's account. The supplemental report filed by the guardian ad litem reviews the updated affirmation of services filed by the trustee's counsel and recommends approval of the fees requested.

## V. FEES

### (A) Fee of the Attorney for the Trustee

The court bears the ultimate responsibility for approving legal fees that are charged to an estate or trust and has the discretion to determine what constitutes reasonable compensation for legal services rendered (*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]). In evaluating the cost of legal services, the court may consider a number of factors, including: the time spent (*Matter of Kelly*, 187 AD2d 718 [2d Dept 1992]); the complexity of the questions involved (*Matter of Coughlin*, 221 AD2d 676 [3d Dept 1995]); the nature of the services provided (*Matter of Von Hofe*, 145 AD2d 424 [2d Dept 1988]); the amount of litigation required (*Matter of Sabatino*, 66 AD2d 937 [3d Dept 1978]); the amounts involved and the benefit resulting from the execution of such services (*Matter of Shalman*, 68 AD2d 940 [3d Dept 1979]); the lawyer's experience and reputation (*Matter of Brehm*, 37 AD2d 95 [4th Dept 1971]); and the customary fee charged by the Bar for similar services (*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]). The burden with respect to establishing the reasonable value of legal services performed rests on the attorney performing those services (*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]).

The trustee has asked the court for approval of the payments for legal fees totaling \$18,406.50 and disbursements of \$724.06 to the attorney for the trust. As noted above, the guardian ad litem recommends approval of these fees. An affirmation of services was filed by Steven P. DeRicco, who was previously a member of Whitman Breed Abbott & Morgan but is now a member of Delbello Donnellan Weingarten Wise & Wiederkehr, LLP. 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 (*Matter of Von Hofe*, 145 AD2d 424 [2d Dept 1988]; *Matter of Phelan*, 173 AD2d 621 [2d Dept 1991]). The record shows that over the course of 15 months, the attorney prepared a nine-year trust accounting covering the period from 2005 through 2014. In order to prepare the accounting, the attorney obtained bank statements and other supporting information. Counsel also prepared the petition, the consents for the eight interested parties, a citation and a proposed decree. In addition, the attorney participated in conferences with the guardian ad litem concerning the interests of the minor beneficiaries and provided him with requested documents.

Legal fees are approved in the amounts requested, which include payment to Whitman Breed Abbott & Morgan in the amount of \$11,750.00, plus additional paid fees of \$4,216.50 to Whitman Breed Abbott & Morgan, and fees paid to DelBello Donnellan Weingarten Wise & Wiederkehr, LLP in the amount of \$2,440.00, for total fees of \$18,406.50 plus disbursements of \$724.06, all of which has been paid.

**(B) 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 almost 18 hours of services on behalf of his wards. He filed three reports. Considering all the factors set forth above concerning attorneys' fees, the court fixes the fee of the guardian ad litem in the sum of \$5,750.00, to be paid within thirty days of the date of decree.

## VI. CONCLUSION

The account, as filed, is approved.

Legal fees in the total amount of \$18,406.50, plus disbursements of \$724.06 are approved.

The guardian ad litem's fee is fixed in the amount of \$5,750.00, to be paid within 30 days of the date of this decision.

The court approves the resignation of BNY Mellon, N.A. as trustee. The commissions of the trustee are approved subject to audit. Upon resigning, BNY Mellon, N.A. shall transfer all of the trust assets to the successor trustee.

This constitutes the decision of the court.

Settle decree.

Dated: July 1, 2016  
Mineola, New York

**E N T E R:**

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