

Matter of Hirschhorn
2007 NY Slip Op 30945(U)
April 24, 2007
Surrogate's Court, Nassau County
Docket Number: 0287636/2007
Judge: John B. Riordan
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SURROGATE'S COURT OF THE STATE OF NEW YORK
 COUNTY OF NASSAU

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 Accounting by Francis Liantonio as the Successor Trustee
 of the 1983 Trust u/a dated 6/17/83 by

File No. 287636

HAROLD HIRSCHHORN,

Dec. No. 152

As Settlor,
 Deceased.

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 In this final uncontested accounting proceeding for this trust which has been pending in this court for approximately thirteen (13) years, submitted for decision is the approval of the account, the fixing of legal fees and other ancillary relief as set forth in the petition. All parties were cited and failed to appear other than McCoyd, Parkas & Ronan LLP; Jaspan Schlesinger Hoffman, LLP; Alvin Stern, Esq.; and Greenfield, Stein & Senior LLP. Greenfield, Stein & Senior LLP filed a notice of appearance and a request for SCPA 2211 examination of the petitioner. After several conferences the court was advised that Greenfield, Stein & Senior LLP would not be filing any objections to this accounting petition. Affidavits of legal services have been filed by McCoyd, Parkas & Ronan LLP; Jaspan, Schlesinger, Hoffman LLP and Alvin Stern, Esq.

Besides praying for the judicial settlement of his account, the petitioner prays for the following additional relief:

1. That legal fees to the firm of McCoyd, Parkas & Ronan, LLP in the sum of \$302,876 and disbursements of \$607.53 be approved, \$40,000 of which has been paid, and that the trustee be directed to make a payment of \$201,065 to the firm on the settlement of this accounting in partial payment of the balance due and the trustee be further directed to assign to McCoyd, Parkas & Ronan, LLP 84% of the balance of the trust's claim against Reliance Insurance

Company, after allocation of 32% of the recovery, if any, to Helen Hirschhorn's estate, to be applied towards the remaining balance of the firm's legal fees as set forth in Schedule J of this accounting;

2. That legal fees to the firm of Jaspan Schlesinger Hoffman LLP be approved in the sum of \$92,441, \$17,500 of which has been paid, and that the trustee be directed to make a payment of \$38,298 to the firm on the settlement of this account, provided that the firm has correctly docketed the marital trust judgments as directed in paragraph 9 below, and that the trustee assign to Jaspan Schlesinger Hoffman LLP 16% of the balance of the trust's claim against Reliance Insurance Company, after allocation of 32% of the recovery, if any, of the Helen Hirschhorn estate, to be applied towards the firm's remaining balance of these legal fees;

3. That the trustee be directed to draw from the trust account the sum of \$24,102 and to pay such sum to Francis Liantonio as the balance of the trustee commissions due him on this accounting;

4. That the trustee be directed to draw from the trust account \$2,500 and to pay that sum to Alvin Stern for services previously rendered as guardian ad litem to infant parties in prior proceedings involving this trust;

5. That the trustee be directed to pay \$10,000 to Alvin Stern for legal services previously rendered to this trust;

6. That within fifteen (15) days from the issuance of the decree settling this accounting, the Nassau Country Treasurer shall be directed to deliver the balance held in Folio account #10676 held in the name of the Marital Trust to Francis Liantonio as trustee of the 1983 Harold

Hirschhorn Trust, which funds shall then be distributed in accordance with the decree settling this accounting;

7. That within fifteen (15) days after the issuance of the decree settling this accounting the firm of Shaw, Licitra, Gulotta, Esernio & Schwartz, P.C. with offices at 1475 Franklin Avenue, Garden City, New York 11530, shall be directed to deliver the balance held in their escrow account f/b/o the Hirschhorn Trust to Francis Liantonio, as trustee of the 1983 Harold Hirschhorn Trust, who shall then distribute these funds in accordance with the decree settling this accounting;

8. That within fifteen (15) days after the issuance of the decree settling this accounting, Richard Hirschhorn and Stewart Hirschhorn, individually, and Francis Liantonio, as trustee of the Harold Hirschhorn Marital Trust, shall be directed to execute an assignment of their interests in claim #93115575 filed against Reliance Insurance Company with respect to losses that occurred on September 28, 1993 at the premises located at Bruckner Blvd, Bronx, New York, which premises were insured by Reliance Insurance Company under policy #NZAO102497, which claim was subsequently filed as proof of claim #2078185 in the liquidation proceeding for Reliance Insurance Company, which assignment shall provide as follows: 32% of the net recovery to the estate of Helen Hirschhorn, 84% of the balance to the firm of McCoyd, Parkas & Ronan, LLP or so much as is necessary to satisfy the unpaid balance of its legal fees approved in this accounting, whichever is less, and 16% of the balance to the firm of Jaspan Schlesinger Hoffman LLP, or so much as is necessary to satisfy the unpaid balance of its legal fees approved in this accounting, whichever is less. The remaining balance, if any, to David Hirschhorn, Roger

Hirschhorn, Mark Hirschhorn, Matthew Hirschhorn, Mara Hirschhorn and Melissa Hirschhorn, in equal shares as tenants in common;

9. That within fifteen (15) days after the issuance of the decree settling this accounting proceeding, Alvin Stern and the firm of Jaspan Schlesinger Hoffman LLP, at their own cost and expense, shall take all reasonable steps necessary to have the five (5) judgments below described correctly docketed as being in favor of Francis Liantonio as trustee of the Harold L. Hirschhorn 1983 Trust. After these judgments are correctly docketed, Francis Liantonio, as trustee of the Harold L. Hirschhorn Trust u/a dated 6/17/1983, shall be directed to execute an assignment in the form annexed to Schedule J to assign his interest as trustee in the five (5) judgments entered June 11, 1998 in the Nassau County Surrogate's Court against Richard Hirschhorn and Stewart Hirschhorn in the following amounts, which assignment shall then be recorded by the Nassau County Clerk and reflect the following as assignee: David Hirschhorn, Roger Hirschhorn, Mark Hirschhorn, Melissa Hirschhorn, Matthew Hirschhorn and Mara Hirschhorn in equal shares as tenants in common:

Judgment #1 in the sum of \$526,602.28 with interest at 9% from April 16, 1999;

Judgment #2 in the sum of \$1,057,300.15 with interest at 9% from April 16, 1999;

Judgment #3 in the sum of \$2,634,484.05 with interest at 9% from April 16, 1999;

Judgment #4 in the sum of \$314,457.31 with interest at 9% from April 16, 1999;

Judgment #5 in the sum of \$176,625.71 with interest at 9% from April 16, 1999.

10. That this court (a) approve the claim of Richard Hirschhorn and Stewart Hirschhorn under a 1984 unrecorded deed to the 10,000 square foot parcel comprising approximately 32% of the real property located at Bruckner Blvd, Bronx, New York as set forth on Schedule A of this

accounting, and (b) approve the allocation to this claim of 32% of the net sale proceeds of the Bruckner Blvd premises, (c) approve the allocation to this claim of 32% of the following additional assets listed on Schedule A of this accounting that relate to the Bruckner Blvd real property: (i) the Shaw Licitra escrow account; (ii) the Nassau County Treasurer escrow held under Folio account #10676; and (iii) the potential recovery of the claim filed against Reliance Insurance Company; (d) approve reducing this claim amounting to a maximum of \$100,917 by 32% of the fees and expenses related to the Bruckner Boulevard property in the sum of \$28,160, for a net maximum claim of \$72,757 (which may be further reduced if the maximum recovery is not obtained in settlement of the Reliance Insurance claim) and (e) direct payment of the assets allocated to Richard Hirschhorn's and Stewart Hirschhorn's claim to the Harold Hirschhorn Marital Trust in partial satisfaction of the judgments filed against Richard and Stewart Hirschhorn pursuant to the June 11, 1998 decree of this court, which assets shall then be distributed in six equal shares to the assignees of this judgment - David, Mark and Roger Hirschhorn and Alvin Stern as trustee of the subtrusts for Melissa Hirschhorn, Matthew Hirschhorn and Mara Hirschhorn under the 6/17/83 Harold Hirschhorn Trust;

11. That a determination be made that the Harold Hirschhorn Marital Trust is not obligated to contribute any funds towards any outstanding Florida estate tax obligation of the Helen Hirschhorn Estate by reason of the insolvency of the marital trust; and

12. That all claims and potential claims of Elaine Hirschhorn, Greenfield, Stein & Senior, LLP and the Florida Department of Revenue be rejected.

With respect to the issue of attorney fees, the court 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 fees rendered in the course of an estate (*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 (*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], *aff'd* 213 App Div 59 [4th Dept 1925], *aff'd* 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], *aff'd* 213 App Div 59 [4th Dept 1925], *aff'd*

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 (*Matter of Kaufmann*, 26 AD2d 818 [1st Dept 1966], *aff'd* 23 NY2d 700 [1968]; *Martin v Phipps*, 21 AD2d 646 [1st Dept 1964], *aff'd* 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]). Moreover, the size of the estate can operate as a limitation on the fees payable (*Matter of McCranor*, 176 AD2d 1026 [3rd 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 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], *aff'd* 213 App Div 59 [4th Dept 1925], *aff'd* 241 NY 593 [1925]; *see e.g., Matter of Spatt*, 32 NY2d 778 [1973]). 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]).

These factors apply equally to an attorney retained by a fiduciary or to a court-appointed guardian ad litem (*Matter of Burk*, 6 AD2d 429 [1st Dept 1958]; *Matter of Berkman*, 93 Misc2d 423 [Sur Ct, Bronx County 1978]; *Matter of Reisman*, NYLJ, May 18, 2000, at 34 [Sur Ct, Nassau County]). Moreover, the nature of the role played by the guardian ad litem is an

additional consideration in determining his or her fee (*Matter of Ziegler*, 184 AD2d 201 [1st Dept 1992]).

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 other items of the same matter (*Matter of Graham*, 238 AD2d 682 [3rd Dept 1997]; *Matter of Diamond*, 219 AD2d 717 [2d Dept 1995]; Warren's Heaton on Surrogate's Court Practice §106.02 [2][a], [7th ed.]). In *Matter of Corwith* (NYLJ, May 3, 1995, at 35 [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 [Sur Ct, New York County]). The court prohibited reimbursement for ordinary postage and telephone charges other than long distance.

The affidavits of each of the law firms submitted support the relief requested and indeed support legal fees far in excess of the lesser amounts agreed to by counsel and not objected to by any of the beneficiaries. For example, McCoyd, Parkas & Ronan LLP spent a total of 2,710 hours on various proceedings in this matter since 1995. A proper fee for this matter over these many years would be \$522,807 plus disbursements of \$3,505.21. Considering all the factors set forth above, the court fixes the fee of McCoyd, Parkas & Ronan, LLP in the reduced amount of \$302,876 and disbursements of \$607.53 in the manner set forth in paragraph one (1) of the petition's wherefore clause.

Similarly, the legal fees of Jaspan, Schlesinger Hoffman LLP are approved in the reduced sum of \$92,441.00 to be paid as set forth in paragraph two (2) of the petition's wherefore clause. Additionally, the substantial reduced legal fees of Alvin Stern, Esq. are approved in the sum of \$12,500.00 as set forth in paragraphs four (4) and (5) of the petition's wherefore clause.

There being no objections, the court grants all the items of additional relief set forth in the petition. A decree consistent with this decision will resolve this longstanding matter and give the decedent's six grandchildren appropriate interests in any other possible assets of the trust.

Settle decree on notice by regular mail to all parties.

Dated: April 24, 2007

JOHN B. RIORDAN
Judge of the
Surrogate's Court