

Matter of Borgenicht
2007 NY Slip Op 33227(U)
September 18, 2007
Surrogate's Court, Nassau County
Docket Number: 0311508/2007
Judge: John B. Riordan
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SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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In the Matter of the Judicial Settlement of the Final Account
of Proceedings of MARK ZILBERMAN as Trustee of the
Article FOURTH Trust under the Will of

File No. 311508

Dec. No. 514

SONDRA B. BORGENICHT,

Deceased.

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In this accounting proceeding, the court issued a decision dated June 20, 2007 (Dec. No. 162) which granted the guardian ad litem the authority to enter into a stipulation of settlement on behalf of his wards and fixed the fees of the attorneys and the guardian ad litem. The petitioner also sought approval of accounting fees to the firms of Earl Henderson, CPA and Kehnle-Mayers, Ltd.; however, no affidavits of accounting services were provided by either firm. Accordingly, the court directed each firm to submit an affidavit describing the services rendered to the trust.

The accounting seeks approval of accounting fees to the firm of Kehnle-Mayers, Ltd. in the amount of \$17,025.35, all of which has been paid, and approval of the sum of \$4,550.00 to Earl Henderson, CPA, all of which has been paid. The summary statement for the initial accounting shows charges to the accounting party of \$385,997.04. The supplemental account filed for the period November 1, 2003 through March 31, 2006 shows charges of \$406,857.67.

With respect to accountants’ fees, normally, an accountant’s services are not compensable out of estate assets unless there exist unusual circumstances that require the expertise of an accountant (*Matter of Meranus*, NYLJ, Mar. 31, 1994, at 37 [Sur Ct, Suffolk County]). The fee

for such services is generally held to be included in the fee of the attorney for the fiduciary (*Matter of Musil*, 254 AD 765 [1938]). “[T]he purpose of this rule is to avoid duplication (*Matter of Schoonhein*, 158 AD2d 183 [1st Dept 1990]). Where the legal fees do not include compensation for services rendered by the accountant, there is no duplication and the legal fee is not automatically reduced by the accounting fee (*Matter of Tortora*, NYLJ, July 19, 1995, at 26)” (Warren’s Heaton on Surrogate’s Court Practice §93.08 [7th ed]).

Earl Henderson, CPA has submitted an affidavit of accounting services which shows that Mr. Henderson’s services relate to preparation of annual Federal and New York State fiduciary income tax returns for the trust for the years 2000 through 2006. The fee appears to be reasonable and, therefore, the accounting fees paid to Earl Henderson, CPA in the amount of \$4,550.00 are approved.

With respect to the fee of the firm of Kehnle-Mayers, Ltd., the firm has submitted an affidavit in support of its fee wherein it is asserted that the firm spent 134.3 hours on this matter at the rate of \$125.00 per hour. The accountant states that the firm performed the following services: (i) reviewed financial statements, covering a time span of approximately 6-1/4 years; (ii) analyzed cash and non-cash entries in accordance with the decedent’s will and EPTL 11-2.1; (iii) tracked purchases and sales, as well as capital changes such as stock dividends and splits, corporate name changes, mergers and spinoffs and income earned; (iv) conducted research to accurately identify insufficient information on brokerage statements; (v) prepared an affidavit bringing the account down to date for the period November 1, 2003 through December 31, 2004, which was then extended through March 31, 2006; (vi) prepared an affidavit to show changes in the account for the period April 1, 2006 to August 31, 2006; (vii) calculated

commissions; and (viii) prepared the Statement of Interested Parties and Statement of Pertinent Facts. According to the affidavit, the accounting was complicated due to changes in the trust assets. Although the account started with only 18 principal assets valued at less than \$400,000, it is claimed that, due to an aggressive trading program, the number of assets increased to approximately 57 during the first year and thereafter to 80.

Kehnle-Mayers, Ltd. is a firm that provides estate and trust paralegal services for attorneys. Accordingly, the services rendered by the firm were performed under the direct supervision of counsel for the estate. Pursuant to SCPA 2110[4], paralegal services performed under an attorney's supervision are compensable. The statute does not distinguish between services rendered by an outside paralegal firm or in-house paralegals so long as the services were supervised by the attorney (*Matter of Trotman*, NYLJ, May 13, 1998, at 32 [Surr Ct, Nassau County]).

The court recognizes that paralegals perform services at a lower rate than services performed by an attorney, thereby reducing the overall cost of legal services. This court previously reduced the trustee's attorney's fee from the \$36,202.30 requested, which represented approximately nine percent (9%) of the principal charges, to \$25,000.00. Essentially, the fee of Kehnle-Mayers, Ltd. represents a fee for paralegal services performed on behalf of such firm. The amount of hours spent to prepare the accounting appears unreasonably high in view of the fact that the accounting was routine and uncomplicated. Moreover, the affidavit claims that updates to the accounting were necessary because the initial accounting was not filed until January 2004. Apparently, the trust accounting was prepared first and it was thereafter discovered that an accounting had not been filed for the decedent's estate. Such delay, however,

does not warrant a higher fee. Counsel should have realized that an executor's accounting was required in order to ensure that the trust was properly funded. For the foregoing reasons, the court fixes the fee of Kehnle-Mayers, Ltd. in the sum of \$10,000.00. Any fees paid in excess of such amount shall be refunded to the trust within thirty (30) days of the date of the decree to be settled herein.

Settle decree.

Dated: September 18, 2007

JOHN B. RIORDAN
Judge of the
Surrogate's Court