

Matter of Fruim (Singer)
2007 NY Slip Op 33582(U)
October 30, 2007
Surrogate's Court, Nassau County
Docket Number: 0241238/2007
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 Accounting of Harnett Starolitz Fruim and Lillian Kalish, as Surviving Co-Trustees of the Residuary Trust under the Will of the Estate of

File No. 241238

Dec. No. 642

ESTELLE SINGER,

Deceased.

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 Submitted for decision is an intermediate accounting filed by Harnett Starolitz Fruim and Lillian Kalish who are the surviving co-trustees of the residuary trust under the will of Estelle Singer. The third co-trustee, Adeline Spiro, died intestate on January 19, 2006, a domiciliary of California, leaving her son, Lawrence Spiro, as her sole distributee, as affirmed in an affidavit of heirship filed with the court on May 14, 2007 by Morton Weinstein, a nephew of Adeline Spiro's deceased husband. Lawrence Spiro, as the sole distributee of his mother's estate, filed a Waiver of Citation and Consent in Accounting, in connection with this proceeding, on June 18, 2007.

The petition asks the court to judicially settle this intermediate account and to approve legal fees.

The decedent, Estelle Singer, died on February 13, 1986. In her last will and testament, the decedent made numerous personal and charitable bequests and legacies. The residuary estate was left in trust for the benefit of decedent's niece, Lillian Kalish, during her lifetime, with the remainder to be paid to nine charitable organizations in varying proportions of 32nds. The will contained invasion provisions for the benefit of Lillian Kalish and required that at least \$25,000 be paid to her annually. The will also included ambiguous language limiting investment of trust assets and in a decision dated March 4, 1992, this court construed the will to authorize "any

investment which [the Trustees] deem advisable within the restrictions of EPTL 11-2.2,” effective June 25, 1992.

Lillian Kalish, the lifetime beneficiary, was named as a co-trustee, along with Harnett Starolitz Fruim and Adele Spiro. While Lillian Kalish and Harriet Starolitz Fruim continue to act as co-trustees, it was the death of Adele Spiro on January 19, 2006, which prompted this intermediate accounting for the period from March 8, 1989 through October 31, 2006.

The Attorney General was cited on behalf of the charitable organizations and a notice of appearance was filed on behalf of the Attorney General on June 19, 2007. There were no other appearances.

The petition prays for approval of legal fees in the amount of \$49,425.00 for services rendered to decedent’s estate, of which \$22,000 remains unpaid, as reflected on Schedules C and C-1 of the accounting. Total principal charges are approximately \$702,500.00.

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]).

The court notes that a stipulation dated July 3, 2007 was entered into between the New York State Attorney General's Office and attorney for petitioners, which provided that the Attorney General has no objection to petitioners' account provided that the fee to petitioners' attorney be reduced from \$49,425.00 to \$39,425.00, exclusive of disbursements, as approved by the court. The court has reviewed the supporting affirmation of services provided by attorney for petitioners which shows more than 625 hours of services rendered by the attorney and his staff through the date of the petition.

The court notes that the trust administration required an application for construction of the will and advising non-professional trustees in the management and taxation of a complex trust as defined under the Internal Revenue Code. In view of the fact that pursuant to a stipulation with the Attorney General, attorney for petitioners has voluntarily reduced his fee by twenty percent, the court fixes the fee at the agreed upon amount of \$39,425.00 plus reimbursement of expenses.

In all other respects, the account is approved as filed.

Settle decree.

Dated: October 30 , 2007

JOHN B. RIORDAN
Judge of the
Surrogate's Court

