

Matter of Van Rensselaer

2009 NY Slip Op 30562(U)

January 30, 2009

Surrogate's Court, Nassau County

Docket Number: 302420

Judge: John B. Riordan

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SURROGATE’S COURT: STATE OF NEW YORK
COUNTY OF NASSAU

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Application of Stephen R. Wasserman for Leave to Resign
as Trustee of The Van Rensselaer Irrevocable Family Trust
Created Under an Agreement of Trust dated February 5,
1999 made by Stephen R. Wasserman as Guardian of the
Person and Property of

File No. 302420

Decision No. 747

LILLIE VAN RENSSELAER,

Deceased,

and Appoint William Pirolli as Successor
Trustee and for Judicial Settlement of the Trustee’s
Accounting of Proceedings of said Trust.

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Before the court is the petition and account of Stephen R. Wasserman as trustee of the Van Rensselaer Irrevocable Family Trust, created pursuant to an order of the Nassau County Supreme Court dated October 7, 1998. In a decision issued on September 30, 2008 this court (1) approved the attorney’s fee, (2) permitted petitioner to resign, (3) appointed a successor trustee, (4) allowed judicial settlement of petitioner’s account, (5) allowed commissions as shown on the accounting subject to audit, and (6) fixed the fee of the guardian ad litem. The only issue remaining before the court is approval of fees for accounting services provided to the trust by (a) petitioner, and (b) Barbara A. McConnell.

The previous decision set forth the factors to be considered by the court in its review of accountant’s fees charged to an estate or trust. These include the existence of unusual circumstances necessitating an accountant’s expertise (*Matter of Meranus*, NYLJ, Mar. 31, 1994, at 37 [Sur Ct, Suffolk County]), and whether the attorney’s fees include charges for the

same services as those provided by the accountant (*Matter of Tortora*, NYLJ, July 19, 1995, at 26) (Warren’s Heaton on Surrogate’s Court Practice §93.08 [7th ed]). The two accountants who provided services to this trust have each submitted an affidavit of accounting services.

(a) Petitioner’s Affidavit of Accounting Services

Petitioner served as trustee from the creation of the trust in 1998 until his resignation was approved by decision dated September 30, 2008. Subsequently, petitioner filed an affidavit of accounting services as directed by this court. Petitioner acknowledges that the accounting services that he personally provided to the trust were reflected in his account as having been paid to 38 Leroy LLC, “an entity that I formed, in the State of New York, to receive fees for bookkeeping and accounting work, to be done by myself and members of my family.” He further states that, “as the trust gave me the power to engage accountants, I paid myself for the accountings and accounting work already done, and for the work that would have to be done in the future.” The affidavit as well as Schedule C of the account reflect that petitioner paid himself \$17,000.00.

Petitioner’s affidavit is troubling on multiple levels. First, in filing his petition and account with this court, petitioner failed to disclose his relationship with 38 Leroy LLC, to whom he, as trustee, paid \$17,000.00, by means of which he paid himself. Second, petitioner made these payments without obtaining prior court authorization to do so. Third, the court must consider whether the services for which petitioner paid himself \$17,000.00 were in fact part of his duties as trustee.

Unfortunately, petitioner’s affidavit of accounting services provides very little information concerning the accounting services provided by petitioner. “The burden of proving

the claim created by an executor for counsel fees or other expenses of administration rests upon him. He must show the justice of the claim, that it was necessary, and that it was of the value charged. The relationship existing between the respondent and the counsel should increase rather than lessen the rigidity of the rule” (*Matter of Hull*, 172 App Div 509, 520 [3rd Dept 1916] [internal citations omitted]). Rather than justifying the trust’s need for outside accounting services, or the charges for these services, petitioner’s affidavit largely focuses on his extremely devoted service to the decedent. The court acknowledges the time and effort dedicated by petitioner to decedent and to the trust under circumstances which, according to the record, were challenging at times. However, petitioner has already been compensated for his services as guardian and trustee. In his affidavit, dated October 28, 2008, petitioner advises the court that as decedent’s Article 81 guardian he “was rewarded by the late Judge Rossetti with compensation of \$1000 per month, while she was alive, and I was also paid a partial real estate commission when her house was sold.” As trustee of The Van Rensselaer Irrevocable Family Trust, petitioner’s statutory commissions amount to \$53,396.86, reduced by an adjustment of \$3,892.16, which was charged against the trustee’s commissions for interest and penalties for late tax return filings. It is not within the court’s powers, nor would it be appropriate, to approve accounting fees paid to petitioner in addition to the compensation he already received and his commissions unless he can demonstrate that the services were (1) outside the usual scope of fiduciary responsibility, (2) necessary (*Matter of Musil*, 254 App Div 765 [2nd Dept 1938]), and (3) paid for with a reasonable fee (*Matter of Loeb*, 19 Misc 2d 139, [Sur Ct, Westchester County 1959]) and no more.

The trustee made two separate payments to himself for accounting services. The affidavit first reflects that the trust paid \$12,500.00 to 38 Leroy LLC for the preparation and

filing of tax returns on behalf of the trust. The court finds that the preparation of fiduciary tax returns were necessary in this instance, and may be deemed to be beyond the usual fiduciary responsibilities. Petitioner states that he prepared returns for the years 1999 through 2008. He points out that the \$12,500.00 paid to him reflects an average of \$1,250.00 per year over the ten years he served as trustee, an amount which he assures the court is not excessive.

The court is dismayed at petitioner's lack of transparency in reflecting these payments in his account. Based upon the account filed, the court had no way to discern that the trustee was paying himself. It was only through the diligent work of the guardian ad litem, as reflected in her report, that this matter came to the court's attention. Moreover, the trustee should have sought court authorization prior to making these payments to himself, though not having done so does not necessarily require that the court disallow the payment (*Matter of Tuttle*, 4 NY2d 159, 169 [1958]).

There is precedent for court approval of a payment made by a trustee to an accountant for assistance with complex matters, even where the payment has been made to a trustee or his firm (*Matter of Kline*, 101 NYS2d 285, 287 [Sur Ct, New York County 1950]). Where the trust administration requires the services of an accountant, the court may review the propriety of retaining the trustee's own firm to provide accounting services. If such services are found to be beneficial to the trust, the court may approve payment of an appropriate fee for the services provided (*Matter of Loeb*, 19 Misc 2d 139, 139 [Sur Ct, Westchester County 1959]).

The court finds that a fee of \$12,500.00 for the preparation of ten fiduciary returns is not reasonable, particularly in view of the fact that late filing fees and penalties were incurred. While the court recognizes that these fees and penalties have been charged against the trustee's

commissions, the charges still reflect poorly on the quality of accounting services provided by petitioner to the trust. To the extent that petitioner's fee for accounting services may include time spent collecting and organizing the data necessary for the preparation of the returns, the court finds that these duties fall within a trustee's fiduciary responsibilities. The court fixes the fee for accounting services provided by petitioner to the trust at \$550.00 per year, for a total amount of \$5,500.00.

Petitioner's affidavit further states that an additional \$4,500.00 was paid to 38 Leroy LLC for the preparation of the court accountings, including many hours spent learning the computer program chosen by petitioner for the preparation of the accountings, and many additional hours entering the necessary data. Furthermore, the court must also consider that fees for accounting services are being awarded to Barbara A. McConnell and that the trustee will be receiving a commission in excess of \$50,000. Clearly, the account was necessary, but the trustee cannot be compensated from the estate for time spent learning how to use the computer software in which the accounting was prepared. Considering all of the foregoing, the court allows the trustee a fee of \$3,500.00 for preparation of the initial account.

(b) Barbara A. McConnell's Affidavit of Accounting Services

An additional affidavit for trust accounting services was filed by Barbara A. McConnell on November 13, 2008. According to this affidavit, Ms. McConnell was engaged by the attorney for the trustee to provide accounting services from October 19, 2005 through February 9, 2007. Ms. McConnell states that it was she who prepared the supplemental accounting filed on November 16, 2006 and the amended supplemental accounting filed on February 6, 2007. In addition, she reviewed and reconciled the bank, brokerage fund and tax records and revised the accounting schedules accordingly; reviewed the fiduciary income tax returns for 2003 through

2006; and participated in numerous conferences. For these services, Ms. McConnell charged \$7,375.00, which represents approximately two percent of the trust corpus, and received no other compensation. The court fixes the fee of Ms. McConnell in the amount requested, of which \$4,125.00 has been paid and \$3,250.00 remains unpaid.

Petitioner is directed to return to the trust any amount he received in excess of the fee approved by the court.

Submit decree.

Dated: January 30, 2009

JOHN B. RIORDAN
Judge of the
Surrogate's Court