

Matter of Buse

2009 NY Slip Op 32196(U)

August 31, 2009

Surrogate's Court, Nassau County

Docket Number: 321226/2009

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 Account of Proceedings of
Beverly Weisman and Isabel Buse,
as Co-Executors of the Estate of

File No. 321226

Dec. No. 420

FREDERICK W. BUSE
a/k/a FRED BUSE
a/k/a FRED W. BUSE,

Deceased.

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Before the court is the first and final account of Beverly Weisman and Isabel Buse, as co-executors of the estate of Frederick W. Buse, who died on June 27, 2001 at the age of 94 years, a resident of Roslyn, leaving a last will and testament dated March 29, 1995. Letters testamentary were issued to the co-executors on December 6, 2001, and they filed their initial account on September 20, 2004. A guardian ad litem was appointed by the court on December 23, 2004, to represent the interests of decedent’s three infant grandchildren, each of whom is to receive 10% of decedent’s residuary estate: (1) Daniel Abdirkin, the infant son of Isabel, and (2) Carrie Weisman, the infant daughter of Beverly, both of whom were born in 1988 and reached the age of majority during the administration of the estate, and (3) Alexis Weisman, who is also an infant daughter of Beverly, and who was born on April 12, 1992 and therefore has not yet reached the age of majority. The decedent named two other grandchildren to each receive 10% of the residuary estate, Jared Abdirkin and Jessica Weisman; both reached the age of majority prior to their grandfather’s death. The balance of the residuary estate passes as follows: 20% to Yale Medical School, 5% to each of Beverly and Isabel, and 10% each to Susan Karen and Felicitas Borges. Jurisdiction was obtained over all of the interested parties, and notices of appearance

were filed by the Office of the New York State Attorney General on behalf of the charitable beneficiary and by an attorney representing Susan and Felicitas.

An amended petition and accounting was filed on January 22, 2007, which was followed on March 23, 2007 by the initial report of the guardian ad litem, which report noted some problems in the accounting, all of which were subsequently corrected, and which are discussed more fully below. Shortly thereafter, verified objections to the executors' commissions and to legal and accounting fees, as well as to the charging of any taxes against the charitable share of the residuary estate, were filed by the Attorney General's office. An answer to the objections was filed by Isabel on July 10, 2007, in which she explained and defended the delays in the administration of the estate and justified payment of the executors' commissions and attorney's and accountant's fees.

Following negotiations and court conferences, the objections were withdrawn pursuant to a one-sentence stipulation, circulated and executed in August of 2008, in which the parties agreed to the uncontested submission of the accounting as amended and supplemented. The agreement was signed by (1) the attorney for the co-executors; (2) the Attorney General on behalf of the charitable beneficiary; (3) the guardian ad litem; (4) the attorney for Susan and Felicitas; (5) an attorney for Yale University; (6) Beverly as parent and natural guardian of Alexis, an infant; and the following parties, individually, all of whom are above the age of majority: (7) Carrie; (8) Jessica; (9) Jared; and (10) Daniel. Subsequently, the guardian ad litem filed an updated report on April 15, 2009, addressing the additional fees requested by the attorney and accountant for petitioners, which were incurred primarily for services rendered in connection with the significant legal and estate tax issues which arose in the context of the administration.

The revised final summary of account filed on January 20, 2009, shows the receipt of \$2,227,544.79. This amount was reduced by total credits of \$464,845.93. The resulting principal balance on hand is \$1,762,698.86.

The executor seeks approval of the accounting, the fixing of fees for the services of the attorney and accountant, denial of a claim in the amount of \$1,000.00 (this request for relief is rendered moot by the stipulation), and authorization to distribute the net estate to the residuary beneficiaries in accordance with the terms of the will. In addition, the court must set a fee for the guardian ad litem.

Regarding the fee of the attorney for the estate, 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 services 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], *affd* 213 App Div 59 [4th Dept 1925], *affd* 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], *affd* 213 App Div 59 [4th Dept 1925], *affd* 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], *affd* 23 NY2d 700 [1968]; *Martin v Phipps*, 21 AD2d 646 [1st Dept 1964], *affd* 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 [3d Dept 1991]; *Matter of Kaufmann*, 26 AD2d 818 [1st Dept 1966], *affd* 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], *affd* 213 App Div 59 [4th Dept 1925], *affd* 241 NY 593 [1925]; *see e.g. Matter of Spatt*, 32 NY2d 778 [1973]).

The executor has petitioned the court for approval of legal fees in the amount of \$107,132.50, which includes \$23,087.50 paid and \$84,045.00 unpaid. The executor also seeks reimbursement of the attorney for unpaid disbursements in the amount of \$1,785.09. The fee requested is a bit lower than the amount shown on schedule C-1 of the revised accounting schedules filed on January 20, 2009, but it is higher than one might expect to see in an administration which did not involve actual litigation. The attorney further reserves the right to render an additional request for compensation should the matter be further complicated or contested. The only objections filed to these fees were withdrawn.

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 attorney filed an affidavit of services with annexed time records on September 20, 2004 and a second affidavit with voluminous time records on March 31, 2009. The court has carefully reviewed these affidavits of legal services and time records, which reflect the period between July 18, 2001 and December 29, 2009, almost eight and one-half years. The court has also considered the report of the guardian ad litem, discussed below, which indicates that at least some of the complications and delays in the settlement of this estate resulted from a misguided effort on the part of the attorney and accountant to avoid amending the estate tax returns to reflect bonds discovered after the tax returns were filed. This presumably well-intentioned attempt at a short cut in reporting the bonds resulted in the attorney and accountant treating the bonds as income on the estate income tax returns, rather than as principal on the estate tax returns. This was incorrect and it affected the distributions payable to the named beneficiaries.

There were also reporting errors in the initial schedules prepared by the attorney and the accountant. While it is impossible to quantify precisely the portion of the legal fee incurred as a result of the errors and deficiencies noted by the guardian ad litem, the court must attempt to account for any excess billable time caused by these factors, as best as can be determined.

Moreover, the attorney's time sheets include ten entries for time spent traveling to and from the court, the accountant's office, and the office of the guardian ad litem. The court must disallow local travel (*Matter of Trotman*, NYLJ, May 13, 1998 at 32, col 2 [Sur Ct, Nassau County]). The time records also include two entries totaling \$275.00 for the attorney faxing documents, which amount is disallowed, and another \$875.00 for making necessary revisions to the accounting. Time billed for revising the accounting is disallowed in this case on the basis that the estate should not have to pay twice to have judicial accounting schedules completed accurately and in the proper format.

Accordingly, the attorney's fee is fixed in the sum of \$94,270.88. This reflects the disallowance of 1½ hours of travel time for each of the ten travel entries, which was generally billed at \$450.00 per hour, for a total of \$6,750.00, and the disallowance of \$275.00 for faxing and \$875.00 for revisions, which reduces the billable amount to \$99,232.50. The court then reduces this amount by five percent to adjust for the abovementioned factors which caused delays and additional billable time for which the estate should not be charged. These adjustments result in a total fee of \$94,270.88 plus disbursements of \$1,785.09, of which \$23,087.50 has been paid and \$72,968.47, which includes the unpaid disbursements, remains to be paid.

The court has also been asked to review the accountant's fees. Typically, an accountant's services are not compensable from estate assets unless there exist unusual circumstances that

require the expertise of an accountant (*Matter of Meranus*, NYLJ, Mar. 31, 1994, at 37, col 2 [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 App Div 765 [2d Dept 1938]). The 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, col 2 [Sur Ct, New York County] [internal citation omitted]; Warren’s Heaton on Surrogate’s Court Practice § 93.08 [7th ed] [citing *Tortora*]).

The accountant has submitted an affidavit of services dated March 31, 2009, requesting a fee of \$40,000.00. The revised schedule C-1 filed with the court on January 20, 2009 shows paid amounts of \$6,650.00 and an unpaid fee of \$34,426.00, for a total of \$41,076.00. This includes a \$10,000.00 charge for estimated time to complete additional work. The actual billed time of \$31,076.00 includes a charge of \$15,457.00 for the preparation of the initial court accounting. The affidavit indicates that the services of the accountant, which totaled 170.85 hours, were necessitated in part by the complicated tax calculations resulting from the bequest to Yale Medical School and the income allocable to that bequest. The accountant notes that his efforts resulted in a savings of \$8,000.00 to the estate. The accountant was responsible for the estate’s tax compliance, which was initially complicated by the disordered farrago of decedent’s records. The accountant prepared the estate’s annual federal and state fiduciary income tax returns and anticipates spending an additional 20 hours prior to the issuance of a final decree.

The fee of \$15,457.00 charged by the accountant for the preparation of the initial account seems excessive, even after factoring in decedent’s messy records and the tax complications

which derived from the charitable bequest. The court disallows \$3,000.00 of the amount and allows \$12,457.00, which is still a significantly higher fee than that allowed for the preparation of a typical accounting, particularly one for which the attorney is also being paid. The court is also reluctant to approve a fee of \$10,000.00 for an estimated additional 20 hours of service, when the accountant has not clarified why so much additional time should be required or why the time would be billed at \$500.00 per hour. Moreover, the accountant, along with the attorney, is responsible for the deficiencies and errors in the accounting. The correction of these errors undoubtedly resulted in additional time charges by the accountant.

Based on all of the above, the accountant's fee is fixed in the sum of \$29,172.20. This reflects the \$31,076.00 actually billed, as reduced by the disallowance of \$3,000.00 for the preparation of the initial accounting (while allowing a fee of \$12,457.00 for this service), resulting in billable time in the amount of \$28,076.00. This amount is then reduced by five percent to adjust for estimated time the accountant spent correcting the errors and deficiencies. This results in a fee of \$26,672.20, to which the court is adding \$2,500.00 for the completion of any future tax services necessitated by the winding down of the estate, for a total of \$29,172.20. Of this amount, \$6,650.00 has been paid and \$22,522.20 remains to be paid.

With respect to the fee of the guardian ad litem, the court notes that the guardian ad litem has requested a fee of \$22,757.50, and has waived his prior request for an additional payment of \$2,025.00 for the services of his legal assistant and clerk. The guardian ad litem avers that he devoted more than 50 hours to his responsibilities hereunder, noting that the assignment was particularly complex, time consuming and difficult. The expertise of the guardian ad litem enabled him to identify anfractuious tax issues and errors which were ultimately corrected as a

result of his diligent efforts. The court thanks the guardian ad litem for his masterful, thorough and punctilious representation of his infant wards and fixes the fee of the guardian ad litem in the sum of \$22,757.50, to be paid within thirty days of the date of decree.

The decree shall authorize the executor to distribute the balance of the net estate as directed in decedent's will.

This constitutes the decision of the court.

Settle decree.

Dated: August 31, 2009

JOHN B. RIORDAN
Judge of the
Surrogate's Court