

Matter of E. & H. Goldstein Family Trust

2009 NY Slip Op 32214(U)

September 24, 2009

Surrogate's Court, Nassau County

Docket Number: 352494/2009

Judge: John B. Riordan

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SURROGATE'S COURT OF THE STATE OF NEW YORK
 COUNTY OF NASSAU

-----X
 Accounting of Kenneth J. Goldstein as Co-Trustee
 of the E. & H. GOLDSTEIN FAMILY TRUST,
 created u/a/d November 13, 1994.
 -----X

File No. 352494

Dec. No. 587

Submitted for review is an accounting filed by a co-trustee of the E. & H. Goldstein Family Trust. The co-trustee also seeks the approval of attorneys' fees, accountants' fees, reimbursement to petitioner of certain administrative expenses and distributions. This is the first and final accounting for the period November 13, 1994 to April 30, 2008.

The trust was created by Ellsworth Goldstein by agreement dated November 13, 1994. The trust terminated on the death of the grantor on April 11, 2002. The co-trustees are the petitioner, Kenneth Goldstein, and his two brothers, Marvin Goldstein and Norman Goldstein. The trust has engendered much litigation among the brothers during the administration of the trust. The gross value of principal and income accounted for in this period totals \$1,207,455.71. As of April 30, 2008, the sum of \$545,184.32 remains on hand.

Objections to the accounting were filed by Marvin Goldstein. By order dated April 24, 2009, the objections were stricken (Decision No. 304).

With respect to the issue of attorneys' 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 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], *affd* 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], *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]). 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]).

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, col 2 [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, col 6 [Sur Ct, New York County]). The court prohibited reimbursement for ordinary

postage and telephone charges other than long distance.

In this case, the attorney has supplied the court with an affidavit of legal services and it shows that the attorneys rendered more than 337.50 hours of legal services of partners and an associate at various hourly rates. The attorneys seek a total of \$70,000.00 in attorneys fees, \$5,000.00 of which has been paid by the petitioner from his personal funds. In addition, the attorneys provided additional legal services for the trust for which they do not seek compensation. The detailed affidavit in support of the application demonstrates that counsel was hampered in its efforts by the non-cooperation of the two co-trustees. Much of the accounting had to be reconstructed from documents obtained from the Internal Revenue Service as the co-trustees failed to provide proper trust documentation. Extensive work was performed by petitioner's counsel addressing Internal Revenue Service income tax issues, analyzing potential claims, ferreting out appropriate documentation and collecting trust assets. Counsel prepared an accounting of the administration of the trust covering a period of approximately 14 years. Considering all the factors set forth above, the court awards counsel the amount requested. Disbursements of \$1,635.50 are also approved.

In addition, legal fees to the firm of Janvey, Gordon, Herlands, Randolph & Cox LLP in the amount of \$2,153.00 are also approved.

The account shows accounting fees of \$2,486.00 of which \$561.00 has been paid. The use of an accountant, in this case, appears to be reasonable. Therefore, the fee of the accountant in the total amount of \$2,486.00 is approved.

Reimbursement to petitioner of the sum of \$5,561.00, representing administrative expenses of legal and accounting fees paid from his personal funds, is also approved.

Commissions were waived.

Petitioner is directed to file an affidavit bringing the account down to date.

This is the decision of the court.

Settle decree.

Dated: September 24, 2009

JOHN B. RIORDAN
Judge of the
Surrogate's Court