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

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In the Matter of the Account by Timothy W. Sullivan,
as Executor of the Estate of File No. 334650

ROBERT EAGLE, Dec. No. 638

Deceased.

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In this accounting proceeding, the decedent, Robert Eagle, died testate on June 15, 2004, at 74 years of age, without a spouse or issue. The decedent's last will and testament dated November 21, 1996 was admitted to probate by decree dated September 29, 2005. The will named Judith Brown as the nominated executor. She predeceased the decedent, and letters testamentary issued to Timothy W. Sullivan, the nominated substitute executor, on September 30, 2005. Mr. Sullivan is the attorney who prepared the will. Mr. Sullivan has filed a disclosure statement executed by the decedent on November 21, 1996, which complied with the statutory requirements of SCPA 2307-a as it then existed. Mr. Sullivan also filed with the court his affidavit pursuant to SCPA 2307-a that was sworn to on October 6, 2004 and his affidavit pursuant to SCPA 207.16 (e) sworn to on October 30, 2004.

Mr. Sullivan has filed his account as executor for the period from April 15, 2005 to January 31, 2009. The account shows total charges of $951,949.88, total credits of $534,915.54 and a balance on hand of $417,034.34. The petitioner is seeking a decree judicially settling the account, approving legal fees, accounting fees and commissions, relief under the doctrine of cy pres as to two charities named in the will that are no longer in existence and approval to deposit the remaining assets on hand with the New York State Comptroller on behalf of any unknown distributees of the decedent. The Attorney General of New York appeared and filed objections to

certain legal fees requested by the petitioner's firm and to the amount of the executor's commissions as calculated. The Attorney General supports the petitioner's requests that the balance of the residuary estate be deposited with the New York State Comptroller and that the court direct that the bequests to the two charities no longer in existence be distributed to charities with substantially similar purposes.

The decedent bequeathed 10 percent of his gross estate in equal shares among 30 named charitable institutions "or those that are in existence at the time of [the decedent's] death" (Article THIRD). There is no gift over provision. In Article FOURTH of the will, he bequeathed the remainder of his estate to Judith Brown. The will provides no alternative provision in the event that Judith predeceased the decedent, as she did.

Two of the charities named in the will are no longer functioning. They are the Famine Relief Fund Inc. and the Garden City Community Fund. The petitioner asks that the doctrine of cy pres be used to so that bequests to them go instead to two of the other charities named in the will, Capuchin Franciscans and Covenant House, or, in the alternative, to two charities to be named by the court. The Attorney General supports this request to the extent that his office asks that the bequests to these two charities be distributed to charities with substantially similar charitable purposes pursuant to EPTL 8-1.1 (c).

EPTL 8-1.1 (c) (1) gives the court the authority to "substitute another charitable beneficiary named in the decedent's will in the place of a charitable legatee named in the will which no longer exists" (*Matter of Stokar*, NYLJ, Sept. 17, 1998, at 22, col 6 [Sur Ct, New York County]). The power to "prevent the failure of, and to give effect to the dispositions for . . . charitable . . . purposes is not defeated by the circumstance that the beneficiary of any such

disposition does not exist . . .” (EPTL 8-1.1 [d]). Before the cy pres power may be applied, it must be shown that the testator’s principal intent was a general charitable one rather than to benefit only the named charity (*Matter of Potter*, 307 NY 504, 518 [1954]; *Matter of Syracuse Univ. (Heffron)*, 3 NY2d 655, 670-672 [1957]; *Matter of Rothstein*, NYLJ, Oct. 15, 2007, at 30, col 2 [Sur Ct, New York County]). Here, the doctrine need not be applied since the decedent directed that 10 percent of his gross estate be distributed in equal shares to 30 charities or to those that existed at the time the decedent died (*see Matter of Jacobs*, NYLJ, Feb. 18, 2009, at 37, col 3 [Sur Ct, New York County]). Thus, the decedent anticipated the possibility that one or more of the named charities might no longer be in existence at the time of his death and provided that the bequest go to “those in existence at the time of my death.” Accordingly, 10 percent of the decedent’s gross estate is to be distributed in equal shares to the 28 charities in existence.

Regarding the prayer to deposit the net assets of the estate with the New York State Comptroller, the petitioner made an exhaustive search for any distributees the decedent may have had. In that regard, he filed his detailed affidavit of due diligence and an affidavit of due diligence by Lorraine Lutsiak, the assistant research manager for International Genealogical Search Inc. Based on her affidavit, the exhibits annexed thereto and the entirety of the record, the court is satisfied that the decedent’s parents and grandparents predeceased the decedent and that the decedent never married and had no issue, natural or adopted. Further, the court is satisfied that a diligent effort was made to locate any paternal or maternal aunts, uncles or cousins of the decedent and that the search yielded no known distributees. However, the record does not support a definitive conclusion that no such people exist. Accordingly, the court directs

the petitioner to deposit the balance of the residuary estate with the New York State Comptroller on behalf of any unknown distributees of the decedent.

In evaluating the cost of legal services, the court may consider a number of factors, including: 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 that 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 [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]). 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]). 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]).

The petitioner is seeking approval for the following paid attorney's fees: $103,743.00 paid to petitioner, $6,409.94 paid to Alan Reardon and $5,000.00 paid to Sullivan and Sullivan, a firm at which the petitioner is a partner. These payments are reflected on Schedule C of the account. The petitioner is also seeking approval for unpaid attorney's fees to be paid to him in the amount of $42,007.00. This amount is reflected on Schedule C-1.

The Attorney General has objected to the unpaid fees of $42,007.00 requested by the petitioner on the grounds that these fees are "unreasonable and excessive for the legal service required by this estate," are for services that are executorial in nature for which the petitioner is

requesting approval of commissions and because the estate paid more than $26,000.00 to various accounting firms (discussed below) for the preparation of tax returns and the estate account.

The court has reviewed the affirmation of legal fees of the petitioner. The affirmation shows that the petitioner handled the probate of the decedent's will, the extensive search that was required to try to locate any unknown distributees the decedent may have had, the marshaling and clearing out of the decedent's personalty, the sale of the decedent's house, including a potential sale that failed when the purchaser was determined to have been arrested for passing bad checks, dealing with a lis pendens that encumbered the property, a boundary line dispute, a personal injury action, locating and communicating with the 28 existing charities, confirming that the two other charities were no longer in existence, communicating with the Attorney General's Office and preparing the accounting petition. The statement filed by petitioner details the issues that complicated every phase of the administration of the estate. The petitioner spent more than 442 hours on these matters from 2004 through April 30, 2009. He states that his usual billing rate of $300.00 per hour. Additionally, a paralegal billed 260 hours from 2004 through 2008 at an hourly rate of $100.00. As stated, the petitioner has been paid $103,743 per Schedule C, and the Attorney General objects to the payment of any additional fees.

The court is aware of the monumental amount of work done by the petitioner in relation to this estate. However, a review of the time records provided shows that some of the services performed were executorial in nature, for which the petitioner will be compensated by the executor's commissions to which he is entitled. For this reason, and due to the size of the estate, the fees of other attorneys and accountants who performed work for the petitioner and the fact that the petitioner's firm was paid $5,000.00 in relation to the personal injury action, the court

approves the fees already paid, including the $5,000.00 to the firm of Sullivan and Sullivan, and approves payment to petitioner of additional fees of $25,000.00.

Although the petitioner has waived payment of most disbursements, he is seeking approval of the payment of court filing fees in the amount of $1,235.00, which the court hereby approves.

The petitioner retained the firm of Burns, Russo, Tamigo & Reardon, LLP, to defend the personal injury action in which the decedent was named a defendant. Schedule C shows that $150,000.00 was paid from the estate to settle the action and that Alan Reardon was paid $6,409.94 for his services. The services rendered by Mr. Reardon are set forth in his firm's invoices and are approved.

With respect to accountant's fees, normally, 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 [2nd Dept 1938]). "[T]he purpose of this rule is to avoid duplication (*Matter of Schoonheim*, 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]).

The petitioner retained Anthony Finazzo, C.P.A., who was paid $6,000.00 for accounting services he performed. Mr. Finazzo billed a total of $10,364.43 in fees and disbursements, but

agreed to the reduced fee of $6,000.00. His time charges show that he was engaged as the estate's accountant and tax return preparer and that he prepared the decedent's final federal and state income tax returns and prepared the estate's 2004 and 2005 fiduciary income tax returns. His time sheets also reflect that he analyzed a number of brokerage statements. Although Mr. Finazzo billed his time at $150.00 per hour, the court notes that he spent 69 hours on these services, a number that appears to be excessive in view of the work performed. However, since Mr. Finazzo voluntarily reduced his fees and in view of the complications that plagued this estate, the court approves the reduced amount of $6,000.00 since the work performed was necessary and not duplicative of other services for which fees were paid.

The petitioner also engaged the New Jersey accounting firm of Rothbart, Baranek & Baron, P.A., and is seeking approval of the $14,125.00 fee paid to that firm. The time charges filed by that firm in support of the fee show that it performed work for the estate from July 27, 2006 through July 9, 2007, less than a year. The statement reflects many telephone consultations and a number of meetings, tax return preparation and research. The statement does not provide any details at all about any of these services. Additionally, there are multiple entries for data entry and copying, which are generally not billable to the client. The court cannot approve any portion of the fee without being able to ascertain whether the services were necessary and reasonable. Therefore, the petitioner is directed to obtain and file a detailed billing statement from Rothbart, Baranek & Baron, P.A. within 30 days of the date of this decision and order or the fees paid to that firm will be disallowed and will have to be refunded to the estate.

Finally, the petitioner is seeking approval to pay $6,000.00 to Peter J. Murphy, C.P.A. for his services in connection to preparing the estate account. These fees are unpaid. The bills

provided by Mr. Murphy do not appear to be duplicative of those performed by the petitioner or the other accountants and are approved accordingly.

The executor's commissions are approved subject to audit.

This is the decision and order of the court.

Dated: December 24, 2009

JOHN B. RIORDAN
Judge of the
Surrogate's Court