

**Matter of Brown**

2010 NY Slip Op 30746(U)

March 29, 2010

Surrogate's Court, Nassau County

Docket Number: 242015/F

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 Judicial Settlement of the Second  
 Intermediate Account of Proceedings of Samuel H. Laitman,  
 Theresa H. Brown and Irwin A. Cantor, as trustees of the  
 trust under the last will of

File No. 242015/F

WILLIAM H. BROWN, JR.,

Deceased.

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Before the court is the amended second intermediate account of Samuel H. Laitman, Theresa H. Brown and Irwin A. Cantor, as trustees of the trust under the Last Will of William H. Brown, Jr. and an account of their acts and proceedings as trustees for the period September 22, 1993 through January 5, 2006. William H. Brown, Jr. died a resident of Nassau County on March 8, 1986, leaving a Last Will and Testament dated October 10, 1985 which was admitted to probate on May 30, 1986. Letters testamentary and letters of trusteeship were issued on May 30, 1986 to John M. Lewis, Theresa H. Brown and Irwin A. Cantor as executors and trustees. John M. Lewis resigned as trustee effective September 22, 1993 and Samuel H. Laitman was designated as his successor with letters of trusteeship issued.

Under the will, decedent bequeathed his residuary estate to his trustees to hold in trust for the benefit of his sister, June Cary Brown. Upon the death of the sister, if decedent's wife Theresa H. Brown survived, the remainder of the trust was to be held in a further trust for her benefit providing her with the income for her life. Upon her death, the remaining fund is to be paid to the Masonic Charity Foundation of New Jersey. June Cary Brown died on January 5, 2006. Decedent's wife, Theresa H. Brown, is alive and is one of the accounting trustees.

The petition as amended seeks judicial settlement of the account as rendered, discharge of the three trustees with respect to all matters embraced in the accounting, approval of commissions and approval of legal and accounting fees.

The account filed by the trustee shows the receipt of \$505,217.93 of estate principal, which was supplemented by realized increases of \$215,827.98 and income collected totaling \$1,287.52. This resulted in total principal charges of \$721,045.91. This amount was reduced by realized decreases in principal of \$57,236.85, administrative expenses in the amount of \$188,542.73, and distributions of principal of \$322,226.06, leaving a principal balance of \$153,040.27 on hand.

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]).

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]).

The trustees have petitioned the court for approval of the payment of \$7,665.49 to Weil, Gotshal & Manges LLP as attorneys for the trustees, of which \$2,165.49 has been paid (in 1994 for a prior interim accounting) and \$5,500.00 remains unpaid.

The court has carefully reviewed the affirmation of services and the time records submitted to the court. 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 record shows that the attorney devoted 9.2 hours to this matter between November 29, 2004 and August 3, 2007. The services identified in counsel's affirmation of services were "all of the services necessary in connection with the preparation and filing of the documents necessary for the judicial settlement of the intermediate account of the Trustees including the review of the Accounting, preparation of the Petition for Settlement of the account, review of backup information to the account, discussions with the Trustees concerning the same, and the filing and service of such papers." None of the interested parties have objected to the requested fee and it does not appear unreasonable. Accordingly, attorneys' fees are allowed in the amount sought.

The court has also been asked to review the request for accounting fees by KBMG in the amount of \$10,950.00, \$1,450.00 of which has been paid and \$9,500.00 of which is unpaid.

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 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, 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 November 4, 2009, requesting an additional fee of \$9,500.00. Schedule C-1 breaks down this request as \$7,000.00 for preparation of the interim accounting and \$2,500.00 for preparation of the 2005 fiduciary tax returns. The affidavit indicates that the accounting firm "prepared an accounting for the period from September 12, 1993 to January 5, 2006 and prepared fiduciary income tax returns." No time records or bills were submitted. A supplemental affirmation by counsel had a hand written schedule reflecting bills rendered and paid for the annual preparation of fiduciary tax returns and reports from 1998 through 2004. It reflects that \$18,815.85 was paid and 139 hours expended. It notes that "no time record information is available for the period prior to 1999." Schedule C reflects a \$1,450.00 payment to KBMG on March 2, 2005 for 2004. Schedule C also reflects accounting fees paid to Hoff Metkiff & Romano of \$10,639.92 from 1993 through December 31, 2001 and Krant & Bialick LLC of \$2,762.50 for 2002 and 2003. Presuming that KBMG is a

successor to the prior accounting firms (the submitted affidavit is that of Robert N. Metkiff), the numbers do not balance. The fees reflected in Schedule C are approximately 50% of those reflected in the schedule attached to counsel's affirmation where the fees are listed as paid. This disparity must be addressed in the audit. Finally, KBMG seeks \$2,500.00 for preparation of the 2005 tax returns whereas only \$1,450.00 was charged for the 2004 returns.

However, the work performed by KBMG with respect to the current interim accounting and the 2005 tax returns was not duplicative of the services rendered by the estate attorney and no objections have been filed. Based upon the foregoing, the court approves an additional fee for the current interim accounting and 2005 tax returns in the total amount of \$9,500.00, none of which has been paid.

The interim accounting, attorney and accounting fees and commissions are approved subject to audit. The decree shall provide for the discharge of the three trustees with respect to all matters embraced in the interim accounting.

Settle decree.

Dated: March 29, 2010

JOHN B. RIORDAN  
Judge of the  
Surrogate's Court