

**Matter of Lever**

2010 NY Slip Op 31741(U)

June 30, 2010

Sur Ct, Nassau County

Docket Number: 196917

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 Interim Accounting of Bruce H. Belsky,  
 as Trustee for the Primary Benefit of Ellen Lever under the  
 Last Will and Testament of

File No. 196917

Dec. No. 26502

LAWRENCE LEVER,

Deceased.

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Before the court for decision is the interim account for the period January 1, 2004 through December 31, 2006 by the petitioner Bruce H. Belsky, as trustee of a trust created under the last will and testament of the decedent Lawrence Lever for the primary benefit of his daughter Ellen Lever. Ellen filed a waiver and consent to the trustee's account. The decedent's son, Steven Lever, who is the remainderman of the trust, filed 28 objections to the interim account. A half-day bench trial was conducted with respect to seven of the objections. At the conclusion of the hearing, the parties were permitted to submit post-hearing briefs and replies thereto. Prior to the hearing, the parties agreed that the merits of the remaining 21 objections were to be decided based on the arguments made in the post-trial briefs. Based upon the credible evidence, the court makes the following findings of fact and conclusions of law.

The decedent died on December 4, 1978. His last will and testament, dated May 18, 1976, was admitted to probate on December 11, 1978. Pursuant to Article "FOURTH" of the will, the decedent's residuary estate was divided and placed into two equal trusts, one for the benefit of each of his two children, Ellen and Steven. Ellen's trust, which is the subject of this proceeding, is to continue for her benefit until her death and then is to be distributed outright to Steven. Ellen receives on at least a quarterly basis all net income and from time to time principal as the trustee deems necessary for Ellen's welfare. Letters of trusteeship originally issued to

Harold Lever and Jerrold I. Lupoff, the nominated trustees. On August 22, 1991 Harold Lever and Jerrold I. Lupoff were granted leave to resign and Bruce, a first cousin of Ellen and Steven, was appointed successor trustee. According to the account, the gross assets, including principal and income, of the trust was more than \$32,000,000.00, with a balance on hand of \$20,912,706.22. The trustee is seeking commissions of \$75,087.43.

### **BURDEN OF PROOF**

In a contested accounting proceeding, the accounting fiduciary has the initial burden of proving that he has fully accounted for all of the assets of the estate (*Matter of Schnare*, 191 AD2d 859, 860 [3d Dept 1993], *lv denied* 82 NY2d 653 [1993]). Generally, the filing of the account is a prima facie showing of its completeness and accuracy (*id.*; *Matter of Pollock*, NYLJ, Sept. 17, 1998, at 24, col 4 [Sur Ct, Nassau County]). The objectant then bears the burden of coming forward with some evidence to show that the account is inaccurate or incomplete (*Matter of Curtis*, 16 AD3d 725, 726 [3d Dept 2005]; *Matter of Schnare*, 191 AD2d 859 [1993], *lv denied* 82 NY2d 653 [1993]). Once that showing is made, the burden of going forward shifts back to the accounting fiduciary to prove, by a fair preponderance of the evidence, that the account is accurate and complete (*Matter of Curtis*, 16 AD3d 725, 726-727 [3d Dept 2005]).

The court finds, with respect to each of the 28 objections, that the trustee met his initial burden of proving that he has fully accounted for all of the assets of the estate (*Matter of Schnare*, 191 AD2d 859, 860 [3d Dept 1993], *lv denied* 82 NY2d 653 [1993]).

### **THE OBJECTIONS TRIED AT THE HEARING**

On October 23, 2009, the court conducted a hearing with respect to seven of the 28 objections. The trustee was the only witness to testify. Exhibits 1 through 11 were admitted into evidence on his direct case and exhibits 12 through 17 were admitted as objectant's exhibits.

The following objections were the subject of the hearing.

“4.<sup>1</sup> As to Schedule A-2, objects to the \$500,000.00 received from Steven Lever pursuant to a Stipulation of Settlement dated June 2004, as being accounted for as income. Said \$500,000.00 was a receipt of principal by the Trustee and, by treating it as income, the Trustee breached his fiduciary duty to the remainderman by paying out an additional \$500,000.00 of principal to the income beneficiary, or some \$746,935.00 in excess of net income for the year.”

At the hearing, the trustee testified that he treated the \$500,000.00 as income based on the terms of a stipulation entered into by Bruce, as trustee, and by Steven and Ellen on June 3, 2004 in connection with two actions in Supreme Court, Nassau County. Paragraph 4 of the stipulation in question states:

“Within 10 days of Notice of Entry of an Order based on this Stipulation, [Steven] Lever, using either personal funds, or his share of any distributions due [him] from the Lever Company, LLC, or any of the other related companies, will pay \$500,000.00 to Belsky, as Trustee of the Trust, for the benefit of Ellen Lever, (“Ellen”) for distribution to Ellen as income beneficiary of the Trust. Belsky agrees to promptly distribute the funds to Ellen.”

On cross-examination, the trustee testified that he had not reported the \$500,000.00 as income on the trust's 2004 fiduciary tax return and that he did not verify Ellen's need for an additional distribution. However, the trustee also testified that he reported the \$500,000.00 on schedule A-2 on the account for the period ending December 31, 2004. In his post-hearing brief,

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<sup>1</sup>The numbers are as they appear in the Verified Objections and in the Note of Issue.

the trustee notes that the priority of the trustee not reporting the income for tax purposes is not before the court; rather, the objection is that the trustee accounted for it as income and paid it to Ellen, the income beneficiary. Steven's reliance on EPTL 11-A-4.4 (1), which requires that a trustee shall allocate to principal, "to the extent not allocated to income under this article, assets received from a transferor during the transferor's lifetime " is unavailing. The court finds that the trustee proved, by a fair preponderance of the evidence, including the language of the stipulation quoted above, that the account is accurate with respect to the \$500,000.00 distribution as income. Accordingly, objection 4 is dismissed.

"5. As to Schedule A-2, objects to the \$531,000.00 [sic - \$531,456.00] received from Lever Company being accounted for as income, but which some part or all may be, upon information and belief, a return of principal."

At the hearing, the trustee testified that Steven owned fifty percent of a limited liability company called 585 Stewart Realty, LLC and the trust for Ellen's benefit owned the other fifty percent. According to schedule K-1, which was attached to the 2004 income tax return for 585 Stewart Realty, LLC, the net rental real estate income owed to Ellen for 2004 was \$531,456.00. The trustee testified that he determined that this money was due to Ellen as income. With respect to this objection, Steven failed to come forward with any evidence to show that the account is inaccurate. Accordingly, objection 5 is dismissed.

"9. As to Schedule E-1, objects to \$1,651,000.00 distributed to Ellen Lever and characterized as income as said sum exceeds by [\$746,935.00] the actual amount of net income received by the Trustee, and represents substantial principal distributions which are not properly accounted for and which were not justified."

With respect to Objection 9, the trustee explained how he arrived at the \$1,651,000.00 income distribution to Ellen as reported on schedule E-1 of the 2004 accounting. Steven presented no evidence in support of objection 9, and, accordingly, objection 9 is dismissed.

“11. As to Schedule CC, objects to the amount of fiduciary income taxes paid by the Trustee in that he failed to take any income distribution deduction on the fiduciary income tax returns which resulted in excess and unnecessary taxes having been paid from Trust assets.”

With respect to Objection 11, the trustee testified that the substantial capital gains of \$8,191,002.00 reported on the 2004 U.S. income tax return for the trust prevented the trust from taking a deduction for any income distributions made to Ellen. Further, in his post-hearing brief, the trustee explains how these numbers were calculated. In contrast, Steven failed to provide any evidence to show that the trustee would have been able to take a deduction for distributable net income. Therefore, objection 11 is dismissed.

“19. As to Schedule J, objects to the implication that the sum of \$185,034.29 is due Ellen Lever, which sum is in addition to the \$1,243,316.71 due Ellen Lever pursuant to the prior Stipulation of Settlement dated June 9, 2004 (the “Stipulation”), and to the proposal to distribute this additional \$185,034.29 to Ellen Lever (which sum was, in fact, distributed to Ellen Lever in 2006).”

“26. As to Schedule E and E-1, reflecting total distributions to Ellen Lever in the sum of \$1,453,316.66, objects to the distributions that are in excess of the \$1,243,316.71 to be distributed pursuant to the Stipulation, which excess is in the sum of \$209,999.95 and includes the \$185,034.29 referenced in Schedule J of the 2005 Account and an additional \$24,965.66.”

“28. As to Schedule J, objects to the distributions that are in excess of the \$1,243,316.71 to be distributed pursuant to the Stipulation, which excess is in the sum of \$209,999.95 and includes the \$185,034.29 referenced in Schedule J of the 2005 Account and an additional \$24,965.66.”

At the hearing, the trustee testified about how he determined the income due to Ellen for 2005 and why she was entitled to an additional \$185,034.29. His testimony is as follows:

Q: Would you continue with your testimony as to how you determined that Ellen Lever was entitled to the additional \$185,000.00?

A: I made a determination that the minimum distribution was 1,000,000 - - \$1,243,316.71, that is on J-1. I also received that year tax certiorari refunds of \$310,550.57. After consulting with counsel, I made a determination that was additional income that should have been distributed to Ellen Lever because that was a tax certiorari refund relating to the years prior to 2004 at a time when Ellen was to receive one-half of the income, what ever the income was, so in addition to the minimum distribution on Schedule J, it also shows that she is entitled to \$310,550.57, and I subtracted the income overdraft of \$125,512.99, and that is how we - - how I determined that Ellen was due in the year 2005 a total of \$1,428,354.29.

The remainder of the trustee's testimony as to objections 19, 26 and 28 substantiates the accuracy of the distributions as listed on the account. Steven's argument as set forth in his post-hearing brief, that the trustee over distributed to Ellen \$31,550.57, and in doing so abused his discretion and breached his fiduciary duty, is not substantiated by the record before the court. Accordingly, objections 19, 26 and 28 are dismissed.

### **THE REMAINING OBJECTIONS**

The following objections were submitted for decision based on the arguments set forth in the parties' post-hearing submissions.

"3. As to Schedule C, objects to the \$42,611.88 in management fees allocable to principal and paid to Smith Barney and Bank of New York, collectively, as such fees were paid for services that should have been provided by the Trustee or, if not provided by the trustee, the fees for such services should have been paid by the Trustee from his commissions."

"8. As to Schedule C-2, objects to the \$30,636.36 in management fees allocable to income and paid to Smith Barney and Bank of New York, collectively, as such fees were paid for services that should have been provided by the Trustee or, if not provided by the

Trustee, the fees for such services should have been paid by the Trustee from his commissions.”

“14. As to Schedule C, objects to the \$53,337.06 in management fees allocable to principal and paid to Smith Barney and Bank of New York, collectively, as such fees were paid for services that should have been provided by the Trustee or, if not provided by the trustee, the fees for such services should have been paid by the Trustee from his commissions.”

“17. As to Schedule C-2, objects to the \$53,337.61 in management fees allocable to income and paid to Smith Barney and Bank of New York, collectively, as such fees were paid for services that should have been provided by the Trustees or, if not provided by the Trustee, the fees for such services should have been paid by the Trustee from his commissions.”

“22. As to Schedule C, objects to the \$54,866.81 in management fees allocable to principal and paid to Smith Barney and Bank of New York, collectively, as such fees were paid for services that should have been provided by the Trustee or, if not provided by the Trustee, the fees for such services should have been paid by the Trustee from his commissions.”

“25. As to Schedule C-2, objects to the \$54,078.74 in management fees allocable to income and paid to Smith Barney and Bank of New York, collectively, as such fees were paid for services that should have been provided by the Trustee or, if not provided by the Trustee, the fees for such services should have been paid by the Trustee from his commissions.”

Objections 3, 8, 14, 17, 22 and 25 all relate to management fees reported on schedules C and C-2 of the 2004, 2005 and 2006 accountings. The essence of these objections is that the fees were paid for services that should have been provided by the trustee or, in the alternative, that the fees for these services should have been paid by the trustee from his commissions. In support of these fees, the trustee relies upon EPTL 11-2.3 (a) (4), which, under the prudent investor standard, authorizes a trustee to delegate investment and management functions and to incur costs only to the extent they are appropriate and reasonable, and EPTL 11-2.1 (1) (6), which provides, among other things, that “[n]otwithstanding the provisions of subparagraphs 1 and 4 of

this subparagraph, fees paid at least annually to banks, trust companies and registered investment advisors for investment advisory and custodial services shall be charged one-third (1/3) against income and two-thirds (2/3) against principal. In his post-hearing brief, the trustee delineates how management fees were paid as to the accounts ending December 31, 2004, December 31, 2005 and December 31, 2006. The trustee states that he erroneously charged management fees equally between income and principal, rather than as provided by EPTL 11-2.1 (1) (6), which allows two-thirds (2/3) to be charged to principal and one-third (1/3) to income. In that regard, Steven, who is the remainderman of the trust and who has no interest in income, benefitted by the fact that principal was undercharged with respect to the management fees paid. Although Steven argues that these fees are excessive, the court finds that the fees are reasonable given the large sums being managed by the delegees. Accordingly, Objections 3, 8, 14, 17, 22 and 25 are dismissed.

“1. As to Schedule C, objects to the \$49,999.95 paid to Trustee Bruce Belsky as and for annual commissions in that i) the Trustee failed to comply with the requirements set forth in SCPA 2309 which would have allowed him to retain annual commissions, and ii) the commissions are excessive when compared with the in excess of \$72,000.00 paid in money management fees during the same period.”

“12. As to Schedule C, objects to the \$70,268.71 paid to Trustee Bruce Belsky as and for annual commissions in that i) the Trustee failed to comply with the requirements set forth in SCPA 2309 which would have allowed him to retain annual commissions, and ii) the commissions are excessive when compared with the \$106,674.67 paid in money management fees during the same period.”

“20. As to Schedule C, objects to the \$47,333.33 paid to Trustee Bruce Belsky as and for annual commissions in that i) the Trustee failed to comply with the requirements set forth in SCPA 2309 which would have allowed him to retain annual commissions, and ii) the commissions are excessive when compared with the \$108,945.55 paid in money management fees during the same period.”

Objections 1, 12 and 20 allege that the trustee failed to comply with the requirements set forth in SCPA 2309 and that the commissions are excessive in light of the management fees paid for the years 2004, 2005 and 2006. SCPA 2309 governs the commissions of trustees under wills of persons dying after August 31, 1956. Steven has objected to these commissions based, in part, on the fact that the trustee did not provide on an annual basis “a statement showing the principal assets on hand on that date” or “a statement showing all receipts of income and principal during the period with respect to which the statement is rendered including the amount of commissions retained on the basis upon which the commissions were computed.” There is no dispute that the trustee did not provide annual statements to Steven. However, Steven is not an income beneficiary and he did not provide any proof that he, as remainderman, demanded such statements from the trustee. Further, Steven does not have standing to object on Ellen’s behalf as to whether or not the trustee failed to timely provide her, the sole income beneficiary, with the required statements. Steven has not met his burden of showing that the trustee’s commissions are excessive. Accordingly, objections 1, 12 and 20 are dismissed. The commissions are approved subject to audit.

“6. As to Schedule C-2, objects to the \$25,005.05 paid to Trustee Bruce Belsky as and for annual commissions in that i) the Trustee failed to retain income sufficient to pay the commissions ii) the Trustee failed to comply with the requirements set forth in SCPA 2309 which would have allowed him to retain annual commissions, and iii) the commissions are excessive when compared with the in excess of \$72,000.00 paid in money management fees during the same period.”

“10. Objects to Schedule I in that it allows for the carry over of commission payments, when the trustee, by virtue of his failure to retain income sufficient to pay the income commissions and his failure to abide by the requirements of SCPA 2309, is precluded from carrying over commissions from one year to the next, and further objects, as indicated above with respect to the Objections to Schedules C and C-1, to any and all payments of commissions to the Trustee.”

“15. As to Schedule C-2, objects to the \$35,134.37 paid to Trustee Bruce Belsky as and for annual commissions in that i) the Trustee failed to retain income sufficient to pay the commissions ii) the Trustee failed to comply with the requirements set forth in SCPA 2309 which would have allowed him to retain annual commissions, and iii) the commissions are excessive when compared with \$106,674.67 paid in money management fees during the same period.”

“18. Objects to Schedule I in that it allows for the carry over of commission payments, when the Trustee, by virtue of his failure to retain income sufficient to pay the income commissions and his failure to abide by the requirements of SCPA 2309, is precluded from carrying over commissions from one year to the next, and further objects, as indicated above with respect to the Objections to Schedules C and C-1, to any and all payments of commissions to the Trustee.”

“23. As to Schedule C-2, objects to the \$23,666.67 paid to Trustee Bruce Belsky as and for annual commissions in that i) the Trustee failed to retain income sufficient to pay the commissions ii) the Trustee failed to comply with the requirements set forth in SCPA 2309 which would have allowed him to retain annual commissions, and iii) the commissions are excessive when compared with \$108,945.55 paid in money management fees during the same period.”

“27. Objects to Schedule I in that it allows for the carry over of commission payments, when the Trustee, by virtue of his failure to retain income sufficient to pay the income commissions and his failure to abide by the requirements of SCPA 2309, is precluded from carrying over commission from one year to the next, and further objects, as indicated above with respect to the Objections to Schedule C and C-1, to any and all payments of commission to the Trustee.”

The trustee correctly notes in his post-hearing brief that:

“[a] trustee shall not be deemed to have waived any commissions by reason of his failure to retain them at the time when he becomes entitled thereto; provided however that commissions payable from income for any given trust here shall be allowed and retained only from income derived from the trust during that year and shall not be supplied from income on hand in respect of any other trust year.”

The court finds that Steven does not have standing to raise objections 6, 10, 15, 18, 23 and 27 as he is not an income beneficiary of the trust, and objections 6, 10, 15, 18, 23 and 27 are dismissed.

“2. As to Schedule C, objects to the \$83,612.76 paid in legal fees to Jaspan Schlesinger Hoffman, LLP as said fee is excessive and not commensurate with the legal services actually required, and that any and all payments of fees for preparation of the accounting is duplicative of the work done by and fees paid to the Schneider accounting firm.”

“7. As to Schedule C-2, objects to the \$83,612.77 paid in legal fees to Jaspan Schlesinger Hoffman, LLP as said fee is excessive and not commensurate with the legal services actually required, and that any and all payments of fees for preparation of the accounting is duplicative of the work done by and fees paid to the Schneider accounting firm.”

“13. As to Schedule C, objects to the \$4,553.34 paid in legal fees to Jaspan Schlesinger Hoffman, LLP as said fee is excessive and not commensurate with the legal services actually required and that any and all payments of fees for preparation of the accounting is duplicative of the work done by and fees paid to the Schneider accounting firm.”

“16. As to Schedule C-2, objects to the \$4,553.34 paid in legal fees to Jaspan Schlesinger Hoffman, LLP as said fee is excessive and not commensurate with the legal services actually required, and that any and all payments of fees for preparation of the accounting is duplicative of the work done by and fees paid to the Schneider accounting firm.”

“21. As to Schedule C, objects to the \$15,643.07 paid in legal fees to Jaspan Schlesinger Hoffman, LLP as said fee is excessive and not commensurate with the legal services actually required, and that any and all payments of fees for preparation of the accounting is duplicative of the work done by and fees paid to the Schneider accounting firm.”

“24. As to Schedule C-2, objects to the \$15,643.08 paid in legal fees to Jaspan Schlesinger Hoffman, LLP as said fee is excessive and not commensurate with the legal services actually required, and that any and all payments of fees for preparation of the accounting is duplicative of the work done by and fees paid to the Schneider accounting firm.”

The trustee’s attorneys are directed to serve and file an affidavit by August 31, 2010 clearly setting forth the number of hours claimed to have been spent on this matter and parsing out disbursements from the total fees billed, keeping in mind that 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, and telephone calls (*Matter of*

*Graham*, 238 AD2d 682 [3d 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. Steven has until September 30, 2010 to file a response thereto and, thereafter, objections 2, 7, 13, 16, 21 and 24 will be resubmitted for decision.

This is the decision and order of the court.

Dated: June 30, 2010

JOHN B. RIORDAN  
Judge of the  
Surrogate's Court