

Matter of Bouton

2011 NY Slip Op 30577(U)

February 23, 2011

Sur Ct, Nassau County

Docket Number: 312728/D

Judge: III., Edward W. McCarty

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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 Resignation and Account of
Bank of America, N.A., as Trustee,
and the Appointment of the Edward Jones Trust Company,
as Successor Trustee, of the
GST Exempt Trust
f/b/o Irene Olmstead,
under Article Fourth of the Last Will and Testament of

File 312728/D

Dec. No. 27008

GEORGE E. BOUTON,

Deceased.

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In the Matter of the Resignation and Account of
Bank of America, N.A., as Trustee,
and the Appointment of the Edward Jones Trust Company,
as Successor Trustee, of the
GST Non-Exempt Trust
f/b/o Irene Olmstead,
under Article Fourth of the Last Will and Testament of

File 312728/G

Dec. No. 27009

GEORGE E. BOUTON,

Deceased.

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Before the court are two related trust accounts filed by Bank of America, N.A.¹ These separate but initially identical trusts consist of a Generation Skipping Transfer Tax Exempt Trust (GST Exempt Trust) and a Generation Skipping Transfer Tax Non-Exempt Trust (GST Non-Exempt Trust). They were created pursuant to a qualified severance of the residuary trust under Article Fourth of the Last Will and Testament, dated July 15, 1992, of George E. Bouton, who died on January 12, 2000, a resident of Glen Head in Nassau County.

Each trust provides for the discretionary payment of income and principal to decedent's

¹Bank of America appears as the successor-in-interest to Fleet National Bank, which was the successor-in-interest to Fleet Bank which, on March 6, 2000, was granted letters of trusteeship by this court in connection with the above-named two trusts.

daughter, Irene Olmstead, during her lifetime. Upon the death of Irene Olmstead, the trusts will be paid over to her issue, per stirpes. Irene Olmstead is alive, and the presumptive remaindermen of the two trusts are decedent's five surviving grandchildren, Karen White, Irene Goransson, Harold Olmstead, III, Gary A. Olmstead and Richard Olmstead, and decedent's two great-grandchildren, Sara Fletcher and Casey Fletcher, who are the daughters of decedent's predeceased granddaughter Holly Fletcher. All of these parties are of full age and sound mind, and each was served with citation in connection with each account. No objections to the accounts were filed.

The account filed in connection with the GST Exempt Trust, as amended and brought down to date through May 31, 2010, shows the receipt of principal charges, beginning on February 11, 2000, in the amount of \$1,643,647.68 and principal credits of \$555,627.61, leaving a balance of principal on hand in the total amount of \$1,088,020.07. Income charges as of May 31, 2010 are \$336,568.46, and income credits are \$326,261.33, for a balance in income in the amount of \$10,307.13. The combined accounts total \$1,098,327.20.

The account filed in connection with the GST Non-Exempt Trust shows the receipt of principal charges between February 11, 2000 and May 31, 2010 in the amount of \$1,486,076.78 and principal credits of \$697,920.09, leaving a balance of principal on hand in the total amount of \$788,156.69. Income charges as of May 31, 2010 are \$471,861.01, and income credits are \$470,395.29, for a balance in income in the amount of \$1,465.72. The combined accounts total \$789,622.41.

In both accounts, the trustee seeks approval of (a) the resignation of Bank of America, N.A.; (b) the appointment of Edward Jones Trust Company as successor trustee; (c) the account;

and (d) legal fees, commissions, and payment of the trustee's miscellaneous fees and expenses. For the reasons set forth below, the court grants all of the relief requested.

In connection with the request for the resignation of the current trustee, Bank of America, N.A., and the appointment of a successor trustee, Edward Jones Trust Company, a review of the underlying will reveals that the decedent failed to nominate a successor trustee, nor did he grant to any particular person or entity the authority to nominate a successor trustee. However, counsel for the current trustee has advised the court, in the petition filed on behalf of Bank of America, N.A., that the request for relief concerning the appointment of Edward Jones Trust Company as successor trustee is being made at the request of Irene Olmstead, the lifetime trust beneficiary; none of the interested parties has objected to this request for relief.

Granting a trustee's application to resign rests in the court's discretion (*Matter of Busto's Will*, 173 Misc 25, 29 [Sur Ct, Queens County 1939], *affd* 258 App Div 980 [2d Dept 1940]). The court's primary concern in exercising its discretion is whether the resignation is in the best interests of the beneficiaries and whether the prospective administration of the trust will be advanced (*Barch v Avco Cor.*, 30 AD2d 241 [4th Dept 1968]; *Matter of Antonecchia*, NYLJ, Feb. 10, 2004, at 27, col 3 [Sur Ct, Westchester County]; *Matter of Barber*, NYLJ, June 12, 2000, at 37, col 2 [Sur Ct, Westchester County]). Accordingly, the court grants the application of Bank of America, N.A., to resign and will grant letters of trusteeship to Edward Jones Trust Company upon its duly qualifying.

Regarding the fee of the attorney for the trusts, the court bears the ultimate responsibility for approving legal fees that are charged and has the discretion to determine what constitutes reasonable compensation for legal services rendered in the course of an estate or trust

administration (*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 or trust (*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 trust or 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 trust or 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 GST Exempt Trust reflects, on Schedule C, that payments totaling \$13,124.64 were made to counsel between July 30, 2009 and May 28, 2010. These payments represent \$11,510.75 in connection with legal services and \$1,613.89 for disbursements. Schedule C-1 of the account reflects that an additional \$445.00 was incurred through May 31, 2010 and paid on June 9, 2010. In connection with the GST Non-Exempt Trust, the account filed also reflects that payments of \$13,124.65 for legal services and disbursements were made to counsel prior to May 31, 2010, and that an additional payment of \$445.00 was made on June 9, 2010. These parallel amounts paid out of the two trusts are reflective of counsel's decision to evenly divide the legal expenses between the trusts. The court has carefully reviewed the two separate affidavits of legal services filed with this court, and finds that the fees charged for the services rendered were reasonable in connection with each of the trusts. The court approves payment of

the fees and disbursements in the amounts requested, all of which have been paid in full.

The trustee has also requested court approval of its miscellaneous fees and expenses of \$2,083.77 and \$825.98, as shown on Schedules C and C-2 of the account filed in connection with the GST Exempt Trust, and the trustee's miscellaneous fees and expenses of \$3,005.24 and \$479.09, as shown on Schedules C and C-2 of the account filed in connection with the GST Non-Exempt Trust. While the schedules do not provide underlying data concerning these disbursements of cash, which represent monthly expenditures over the course of a time period in excess of ten years, the court notes that the amounts are relatively small and none of the interested parties has objected to the payment of these expenses. The listed fees and expenses are approved.

The trustee's commissions as reflected on the two accounts are approved subject to audit.

Settle decree.

Dated: February 23, 2011

EDWARD W. McCARTY III
Judge of the
Surrogate's Court