

Matter of Colin
2013 NY Slip Op 33569(U)
December 10, 2013
Surrogate's Court, Nassau County
Docket Number: 147450/D
Judge: Edward W. McCarty III
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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 Account of Proceedings of
Ralph F. Colin, Jr., and Mal L. Barasch, as Trustees
of the “Andreas Family Trust” under the
Last Will and Testament of

File No. 147450/D

Dec. No. 29149

JULIE FEININGER,
a/k/a/ JULIA FEININGER,

Deceased.
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In connection with the first and final account of Ralph F. Colin, Jr. and Mal L. Barasch, as Trustees of the “Andreas Family Trust” created under the Last Will and Testament of Julie Feininger, filed on October 12, 2010, this court previously issued a decision on August 12, 2013 (Dec. No. 28793). The decision concluded that before the court could review and approve the trustees’ account, a guardian ad litem had to be appointed to represent the interests of Veronica Erica Townsend (“Veronica”), an infant who is a permissible beneficiary of the trust. The court immediately appointed the guardian ad litem who had previously been appointed to represent the interests of three other infants who are permissible beneficiaries of the Andreas Family Trust: Elsa Feininger Hughes, Lucy Feininger Hughes and James Feininger Hughes (“Elsa,” “Lucy,” and “James”).¹

BACKGROUND

As discussed in the prior decision issued by this court, Julie Feininger (“decedent”) died on August 7, 1970, and her will was admitted to probate by this court. Decedent created a

¹The guardian ad litem was originally appointed to also represent the interests of Anneliese Wysse Fong-Jean Feininger, but this ward reached the age of 18 before the guardian ad litem filed her report.

testamentary trust for the primary benefit of her son, Andreas B. L. Feininger (“Andreas”), his issue and his wife, Gertrud E. Feininger (“Wysse”). On September 14, 1970, letters of trusteeship issued to Ralph F. Colin and Ralph F. Colin, Jr. On March 19, 1985, Ralph F. Colin died; successor letters of trusteeship issued on April 15, 1985 to Mal L. Barasch as successor trustee. Ralph F. Colin, Jr. and Mal L. Barasch have continued to act as trustees through the present.

While Andreas and Wysse were alive, the trustees were directed to pay so much of the net income and principal of the trust as they determined to one or more members of a class consisting of Andreas, his issue and Wysse. Andreas was given a limited power of appointment over the trust principal, to be exercised after his death and the death of Wysse.

Andreas exercised the power in his will and died on February 18, 1999. Andreas directed the trustees to continue holding the trust property in a trust (the “Tomas Appointive Trust”) for the benefit of Andreas’ son, Tomas Feininger (“Tomas”), his spouse and issue. During the life of Tomas, the trustees are directed to pay to one or more of the trust beneficiaries so much of the net income and principal as the disinterested trustee shall determine. Tomas was given a limited testamentary power of appointment. To the extent that Tomas fails to exercise this power, unappointed principal will be divided among the surviving issue of Tomas or, if there are no surviving issue, then the property will be divided between the issue of Andreas’ brother and the issue of Wysse’s sister. In the event that none of those issue survive, unappointed principal will become payable to the University of Arizona Foundation.

Wysse died on March 3, 2006. Tomas is alive and unmarried. He is the father of three adult children, Anna Feininger, Ingrid Feininger and Erica Feininger (“Anna,” “Ingrid” and “Erica”). Anna has three minor children under the age of 14: Elsa, Lucy and James. Erica has

one daughter, Anneliese Wysse Fong-Jean Feininger (“Annaliese”), who was a minor when the account was filed but who has since reached the age of majority. Ingrid had no children when the account was originally filed but subsequently had a daughter, Veronica.

THE ACCOUNT

The account as supplemented covers the period from March 19, 1985 through April 30, 2013. It shows the receipt of \$1,525,708.60 of trust principal. This amount was increased by subsequent receipts of principal in the amount of \$545,016.30, realized increases of \$12,647,257.00 and unrealized increases of \$723,472.24, resulting in total principal charges of \$15,441,454.14. The principal account was reduced by decreases in principal of \$4,070,663.53 and administration expenses which totaled \$3,947,395.94. The trustees made distributions of principal totaling \$1,593,163.16. There were unrealized decreases in principal of \$187,602.38. The principal balance on hand at the close of the accounting period is thus \$5,642,629.13.

The income account reflects income received in the amount of \$3,512.94, income collected of \$3,566,855.21, for total income charges of \$3,570,368.15. These charges were offset by administration expenses of \$711,875.43 and distributions of income which totaled \$2,853,969.33, leaving an income balance of \$4,523.39. The total combined amount on hand as of April 30, 2013 was \$5,647,152.52.

The trustees ask the court to: (a) judicially settle and allow the trustees’ account; (b) discharge the trustees; (c) approve the payment of commissions to the trustees from the principal of the Andreas Family Trust; (d) approve the payment of commissions to the trustees from the income of the Andreas Family Trust; (e) approve the payment of legal fees; and (f) authorize the trustees to distribute the balance of the remaining principal and income to themselves as trustees of the Tomas Appointive Trust. In addition, the court must fix the fee of the guardian ad litem

who represents the interests of the infant beneficiaries.

REPORTS FILED BY THE GUARDIAN AD LITEM

The guardian ad litem who currently represents Elsa, Lucy, James and Veronica filed her original report, dated April 25, 2013, with the court on May 3, 2013. The trust accounting was supplemented by the trustees on June 12, 2013, for the period beginning August 1, 2010 and ending April 30, 2013. After being appointed on August 15, 2013 to represent Veronica, the guardian ad litem filed a supplemental report dated August 28, 2013, in which she reviewed the trustees' affidavit supplementing the final account as well as the attorney's affidavit of legal services.

After thoroughly reviewing each schedule of the account and supplemental account filed, the guardian ad litem concludes by recommending that the court approve the account, the legal fees, and the commissions. She further recommends that the trustees be directed to distribute the balance of the trust principal and income to themselves as trustees of the Tomas Appointive Trust.

LEGAL FEES

1. The fee of the attorney for the trustees

Regarding the fee of the attorney for the trustees, the court bears the ultimate responsibility for approving legal fees that are charged to an estate or trust and has the discretion to determine what constitutes reasonable compensation for legal services rendered in the course of an estate or trust (*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 fund (*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 fund 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 fund 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 \$105,442.56 in legal fees for services rendered through October 1, 2010, and an additional \$17,405.56 for services provided between October 2, 2010 and May 30, 2013. Of these amounts, \$104,250.96 had been paid and \$18,597.16 remains unpaid.

The account covers a period in excess of 25 years. 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 and trust 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]). Counsel maintained contemporaneous time records and annexed them to the affidavit. Counsel notes that no work performed which was fiduciary in nature was charged to the Andreas Family Trust.

The services provided by counsel included the preparation of an informal account in 1986, upon the death of Ralph F. Colin, and an agreement settling the account, which covered a 15 year period. Among other issues, counsel advised the trustees on the tax implications of making distributions to non-resident alien beneficiaries and rendered advice in connection with ownership of a painting and trading property owned by the trust for property owned by a different trust. The attorneys provided services in connection with the preparation of the

trustees' annual report, fiduciary income tax returns, the sale of a painting and a loan to a beneficiary. When Lyonel Feininger LLC was formed to consolidate the management of certain copyrights and artwork owned by the trust and by various family members, counsel provided the necessary legal services and assisted Lyonel Feininger LLC in recovering more than 224 works of art that had been stolen during World War II, only charging the trust with its pro rata share of the fees. Counsel also advised the trustees on withholding obligations and on the present proceeding to settle the trustees' account.

The time spent by counsel on this matter exceeded 350 hours. Personnel included attorneys, a paralegal, a fiduciary accountant, a fiduciary bookkeeper, a managing clerk and others. There are no objections to the fees.

The fee is approved in the amount requested, \$105,442.56 in legal fees for services rendered through October 1, 2010, and an additional \$17,405.56 for services provided between October 2, 2010 and May 30, 2013, for a total fee of \$122,848.12. Of this amount, \$104,250.96 was paid and \$18,597.16 remains unpaid.

2. The fee of the guardian ad litem

The guardian ad litem is entitled to a fee for services rendered (SCPA 405). In fixing the fee of the guardian ad litem, the court must consider the same factors applied to the determination of a fee for an attorney retained by a fiduciary (*Matter of Graham*, 238 AD2d 682 [3d Dept 1997]; *Matter of Burk*, 6 AD2d 429 [1st Dept 1958]; *Matter of Ault*, 164 Misc 2d 272 [Sur Ct, New York County 1995], *Matter of Berkman*, 93 Misc 2d 423 [Sur Ct, Bronx County 1978]; *Matter of Burnett*, NYLJ, Aug. 31, 2006 at 31, col 5 [Sur Ct, Kings County]; *Matter of Reisman*, NYLJ, May 18, 2000, at 35, col 4 [Sur Ct, Nassau County]). Moreover, the nature of the role played by the guardian ad litem is an additional consideration in determining his or her

fee (*Matter of Ziegler*, 184 AD2d 201 [1st Dept 1992]). Normally, the fee of a guardian ad litem is an administration expense of an estate and is paid from estate assets.

An initial affidavit of services dated April 30, 2013 was filed by the guardian ad litem. The report and the time records indicate that the guardian ad litem rendered 30.9 hours of legal services on behalf of her wards. In view of her usual hourly rate of \$350.00, the guardian ad litem requests a fee in the amount of \$10,815.00 for services through April 14, 2013.

The guardian ad litem also filed a supplemental affidavit of services dated August 29, 2013. The affidavit and annexed time records reflect that the guardian ad litem provided an additional 10.8 hours between June 13, 2013 and August 28, 2013, reviewing the supplemental schedules of account. She again notes her usual billing rate of \$350.00 an hour and asks that the court award her an additional \$3,780.00 in for services rendered in connection with the supplemental account. This brings her total requested fee to \$14,595.00.

The guardian ad litem's representation of her wards was thorough. In view of all of the above factors, the court is constrained to fix the fee of the guardian ad litem in the amount of \$7,500.00.

CONCLUSION

The trustees' account, as filed, is approved.

The commission of the trustees is approved subject to audit.

Fees of counsel and the guardian ad litem are fixed as set forth above.

The trustees are authorized to distribute the balance of the remaining principal and income to themselves at trustees of the Tomas Appointive Trust

Settle decree.

Dated: December 10, 2013

EDWARD W. McCARTY
Judge of the
Surrogate's Court