Matter of Speyer
2014 NY Slip Op 32862(U)
November 13, 2014
Sur Ct, New York County
Docket Number: 1981/0866
Judge: Nora S. Anderson

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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In the Matter of the Application of
JPMorgan Chase Bank, N.A., as
Co-Trustee of a Trust, known as the
Herbalisa Trust, created under an
Agreement Dated March 23, 1938 between

JAMES SPEYER, as Grantor

and OTTO DE NEUFVILLE, PAUL T. MOLTKE
and RUDOLPH R. LOENING, as Trustees, for
Payment of Legal Fees for Services
Rendered

*(In re Accounting Proceedings of
Erwin Beit/Hugo Beit)*
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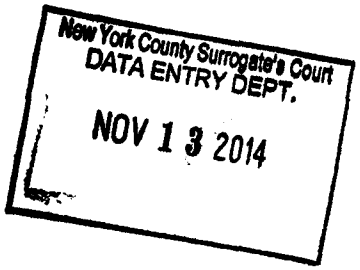

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JPMorgan Chase Bank, N.A., as Co-Trustee
of a Trust, known as the Frankham Trust,
created under an Agreement Dated December
17, 1940 between

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FRANKAM STIFTUNG, as Grantor

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A N D E R S O N, S.

Before the court are multiple petitions seeking payment of attorneys' fees incurred in the preparation of certain trust accountings filed by Hugo ("Hugo") Beit and Erwin ("Erwin") Beit, co-fiduciaries and beneficiaries of the above-named trusts, and by JPMorgan Chase ("Chase"), the corporate trustee. In November, 1990, Erwin filed a petition for judicial settlement of

his intermediate account in the Frankham Trust for the period May 1, 1965 through April 26, 1989, and the Herbalisa Trust for the period May 1, 1965 through January 5, 1989. Erwin objected to certain transactions he attributed to his co-fiduciary and brother, Hugo, accusing him of breaching his fiduciary duties by making investments that benefitted income beneficiaries to the detriment of remainderpersons. Erwin sought Hugo's removal as trustee, as well as restitution and damages.

In July 1992 Hugo filed two cross petitions asserting that he fully informed Erwin of all transactions, to which Erwin failed to object timely.

Chase, appointed by the court as co-trustee of each of the trusts on January 6, 1989, filed cross petitions in the accounting proceedings on or about December 30, 1998. Beneficiaries Lili Beit, Elizabeth Burin, and James and Eduard Beit together with Hugo and Erwin object to the payment of attorneys' fees from the trusts.

More than twenty years of hostility and extensive litigation preceded the filing of these fee applications. Numerous and lengthy delays, caused by multiple discovery disputes and replacement of counsel, added to the hostility among family members and prevented the expeditious resolution of each of the accountings. It was not until the eve of trial on October 30, 2009, that the parties stipulated in open court to a global

settlement of all accounting disputes, the resignation of Hugo as co-trustee and the unconditional approval of Chase's request for leave to resign. The catalyst for finally reaching agreement was the discovery by Erwin's sons that Hugo submitted a claim to the Holocaust Claims Resolution Tribunal in which he asserted falsely that he was the sole distributee of his grandmother who had died in the Holocaust.

The sole matter remaining after settlement is the allocation and approval of attorneys' fees. While each of the parties waived its right to a hearing and agreed that the court should resolve the matter, they continued the disputatious nature of litigation in their submissions to each others' fees claims. The persistent attacks on each others' actions and motives, including those of Chase, the corporate fiduciary, have needlessly cluttered the record with additional venom.

The trustee's duty of loyalty requires that the affairs of the trusts be administered solely in the interests of the beneficiaries, and exclusive of consideration of the interests of the trustees third parties (*see*, Bogert, Trusts, Sixth Edition §95 at 341).

Without question, "a fiduciary owes a duty of undivided and undiluted loyalty to those whose interests the fiduciary is bound to protect" (*Matter of Wallens*, 9 NY 3d 117, 123 [2007], *citing Meinhard v Salmon, 249 NY 458, 463[1928])*. A trustee must be

held to "something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." *Id, citations omitted.* This stringent rule of fidelity requires a fiduciary to avoid those situations where the fiduciary's personal interest may conflict with those to whom she or he owes a fiduciary duty. *Id.*

The authority of a court to "fix and determine" fees for services rendered to a fiduciary is set forth in SCPA 2110(1). The specific factors to be considered, as set forth in *Freeman,* are as follows:

> time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented; the lawyer's experience, ability and reputation; the amount involved and benefit resulting to the client from the services; the customary fee charged by the Bar for similar services; the contingency or certainty of compensation; the results obtained; and the responsibility involved.

In re Freeman, 34 NY 2d 1 [1974], *citations omitted.*

Forty years later, the court of appeals in *Matter of Hyde,* 15 NY3d 179 [2010]), required the surrogate to undertake a multi-factored assessment, taking into account the following factors:

1) whether the objecting beneficiary acted solely out of self-interest;
2) any possible benefit to individual beneficiaries;
3) the extent of the individual beneficiaries participation in the proceeding;
4) the good or bad faith of the objecting beneficiary;
5) whether there was justifiable doubt about the fiduciaries' behavior;
6) the portions of interest in the estate held by the non-objecting parties as compared to that of the

objecting party; and
7) the future interests that could be affected by reallocation of fees.

Hyde at 186-187.

Here the court must analyze objections filed by Hugo and Erwin against each other's accountings as well as objections by both against Chase. Were the objections legitimate? Did the actions of the fiduciaries protect the trust or did they inure to their own concerns as beneficiaries? The ultimate question is of course whether each fiduciary should bear his or its own attorneys' fees.

Of course, legal fees must bear a reasonable relationship to the size of the estate or trust (*see*, *Matter of Kaufman*, 26 AD 2d 818 [1st Dept 1966]). Here, the combined value of the trusts is $14.7 million and the total attorneys' fees sought by all counsel is $1,168,294, or nearly eight percent of the total value of the estate.

The court now turns to the request by each fiduciary to be reimbursed for disbursements. Even though each fiduciary asserts that clients are regularly charged with payment of photocopying, transportation and meals, the tradition in surrogate's practice is that an attorney may not be reimbursed for expenses that the court normally considers to be a part of overhead, such as photocopying, postage, telephone calls and other items of the same nature (*In re DeLuca*, 2011 N.Y. Misc LEXIS 2037 [Surr.

Nassau]), *citations omitted*. "Attorneys should not be permitted to charge clients for expenses long considered to be part of law office overhead when there has not been a corresponding decrease in the hourly rate charged for legal services[.]" *Matter of Herlinger*, 1994 N.Y. Misc LEXIS 707 [Surr. NY]). Thus, the court declines to approve those disbursements, and has reduced the amount of reimbursement accordingly. Reimbursement for approved expenses, including court filing fees, is allowed.

ATTORNEYS' FEES FOR CHASE, THE INDEPENDENT TRUSTEE

Hugo, Patricia Beit as executor of the Estate of Erwin Beit, Lili and Elizabeth Beit, and James and Eduard Beit all filed objections to the Chase fee applications, asserting that Chase sought excessive payments. Despite the availability of in-house counsel, they further allege, outside counsel overstaffed, over-billed, and performed work not necessary to the resolution of the pending disputes.

Chase submits time records for outside counsel noting the allocation of work among the four specific trusts. In response to the claim that Chase should not have filed its accountings while the family trustees' accountings were pending, Chase argues that it merely fulfilled its duty as a trustee to account. "[A] judicial accounting may be necessary if the parties cannot agree to the accounting, . . . or if there are issues which need to be settled by the court[,]" however "[n]o statutory provision exists

that requires a trustee to account at certain specified intervals." 7 Warren's Heaton, Surrogate's Court Practice, §100.01[1].

Chase argues further that the assignment of multiple attorneys over twenty years of litigation was not overstaffing, but rather efficient staffing. It contends that assigning associates with less experience and having their work reviewed by partners resulted in cost savings in attorney billings. The fact that some attorneys left the firm during the twenty years of litigation to be replaced by different lawyers who needed to review prior files does not require a different analysis.

Respondents complain that outside counsel for Chase responded to each of their correspondence when in-house counsel was available. This assertion fails to recognize that Chase is entitled to decide how it will manage its litigation. As respondent appears to have initiated such correspondence, he cannot be heard to complain of the source of his adversary's response.

Hugo, James, Eduard and Patricia complain that Chase's efforts to resign as co-trustee were undertaken purely for its own benefit. Chase argues that it was solely motivated by the ongoing disputes among family members. Legal fees attributable to the resignation may be awarded when a resigning fiduciary is not guilty of any impropriety (*see In re Hawwa A*, 9 AD3d 362, 364

(2nd Dept 2004), *citations omitted*). The court dispenses with respondents' statements as conclusory and without evidentiary support.

Throughout these proceedings, the parties held rigidly opposing positions, for example, specifically, with regard to the identification of remainderpersons. The inability of Hugo and James and Eduard to resolve their issues required intervention by the court. Previously, on January 27, 2003, a prior surrogate ruled that the "trust remainder shall be paid 'to the lawful issue of the Life Beneficiaries, Erwin Rudolf Beit von Speyer and Hugo Beit Von Speyer, share and share alike, per capita'. . . the remainder shall be distributed upon the trust termination per capita and not per stirpes among the issue of Erwin Von Speyer and Hugo Von Speyer.'" The court declines to deviate from the ruling and finds Hugo's objection to Chase having undertaken this work to be groundless.

The objections of Patricia, James and Eduard that the fees incurred by Chase in responding to the resignations of Hugo's counsels can only be described as spurious, particularly in light of Chase's obligation to evaluate any claims for fees or otherwise, that seek to be paid from the trusts(*see Bauer v. Bauernschmidt*, 187 AD 2d 477, 478 [2d Dept 1992])("[T]he essential ingredient of a trust is the accountability of a trustee").

Hugo, Lili and Elizabeth contend that Chase's fees exceed the value of the initial, underlying claim of forty thousand dollars and therefore should be disallowed. The analysis of the value of the underlying claim is not in and of itself controlling. (See, *National Fire Ins v. Marangi*, 214 AD 2d 469 [1st Dept 1995]).

Applying the appropriate *Freeman/Hyde* standards, it is clear that Chase's attorneys have expended substantial labor requiring a great deal of billable time for legal work associated with these trusts. In accordance with *Freeman,* the court has considered counsels' experience, ability and reputation, and as such, recognizes Chase's principal attorneys as having skills, experience, ability and reputation in keeping with their billing rates. Chase is entitled to a substantial fee recovery.

While the guardian ad litem reports that some of the work undertaken by Chase did not benefit the trusts, the court finds otherwise. Chase did not act solely for its own benefit in these proceedings. *Hyde* at 186. Rather, all parties participated actively in the proceedings, and while arguments were asserted vigorously, the court finds that Chase made none of its claims in bad faith. *Id.* at 187. All parties also benefitted from the work of the independent trustee, whose efforts promoted resolution of the dispute among family members.

However, the Chase fee award is reduced by the amounts

attributable to the insufficiently identified Power Point presentation, all documents with redacted entries that do not clearly identify the tasks as attributable to these proceedings, fees sought for time spent on matters not directly associated with these proceedings, and any duplicative entries in time records, the total amount of which is $44,291.

Where the contentious nature of the relationship among the parties infected every aspect of the administration, the court finds the fees sought by the co-trustee Chase as reasonable, minus the amounts identified above. (See *Estate of Rockefeller*, 44 AD 3d 1170, 1173 [3rd Dept 2007]). Chase is seeking a total of $706,608.05 for all work in all trusts, of which $16,755.27 is sought for disbursements. The court approves disbursements in the amount $12,955.76 and a total fee of $658,517.5450. The Chase award is assessed equally against each of the trusts, with one of the trust's shares to be divided equally among the subtrusts.

ATTORNEYS' FEES FOR HUGO BEIT

Hugo seeks reimbursement for fees paid from his personal resources to the several firms who represented him during this litigation.

The law firm of Eaton & Van Winkle submits that Hugo had paid their firm $28,000 for work done in the period November 1988 through December 1989 by a partner who died ten years prior to

the 2010 submission of the fee request. However, the firm was unable to produce any bills or any detailed records whatsoever for such work. Without such records, the court cannot evaluate the legitimacy of this claim, and therefore denies the request for fees attributed to work performed by the deceased partner.

Katten Muchin ("KMR") submits their affirmation of legal services rendered in connection with their representation of Hugo from 1989 through 1993. They assert that they represented him both in connection with the administration of his mother's estate and in his capacity as co-trustee of family trusts. This firm also asserts that their services applied only to the trust matters, although they have submitted correspondence which suggests their billing for work in his mother's estate was included. KMR seeks fees in the amount of $151,000 for its five years of work.

Schulte Roth & Zabel LLP ("SRZ") represented Hugo during the period July 1999 to December 2002, at which point prior Surrogates granted their request to be relieved as counsel in both Frankam and Speyer matters. SRZ seeks approval and payment of $42,825.38 for its work on the Frankham Trust and $52,342.12 for the Herbalisa work, for a total of $95,167.50 for all work during the three and a half year period.

The law firm of Wiggin and Dana LLP represented Hugo from December 2007 through October 30, 2009. The court accepts Hugo's

assertion that because the firm did not represent him from the beginning of the litigation, any time devoted to familiarizing itself with all prior proceedings was warranted. When it was clear that the parties could not settle the matter, the firm undertook appropriate trial preparation. Wiggin and Dana claims a total fee of $94,711.20 for their work performed within the designated period.

Patricia urges that KMR incurred its fees based solely on the fact that Hugo continually changed his position regarding settlement and he allegedly changed attorneys thirteen times. She asks that time attributable to a review of prior proceedings be disallowed against the trust, as such work was also necessitated by Hugo's frequent change of counsel. She urges that any billing for work on Hugo's mother's estate, which of course is not compensable here under any circumstances; and that an award for fees claimed for the work of eight attorneys but information was provided with respect to the credits of two, cannot be evaluated against the *Freeman* standards. Finally, she complains of duplicate billing.

Patricia also objects to SRZ's fee application on the grounds that it was filed late, included only vague descriptions of work done, and failed to substantiate the amount of time expended during its representation when, she alleges, there were no positive results obtained for the trusts

Patricia's objection to fees for Wiggin and Dana essentially reiterates her complaints about Hugo's other attorneys, that is, that they reviewed the work of others and needed time to familiarize themselves with the litigation, solely as a result of Hugo's repeated replacement of counsel.

James and Eduard assert that fees for Hugo's attorneys be paid only out of the trust for his benefit, again citing the number of times Hugo changed attorneys and changed his mind at the eleventh hour regarding proposed settlements. They also contend that the lateness of the SRZ filing should preclude any reimbursement or approval of their fees. Their objection to the Wiggin & Dana fee reiterates their claim of repetitious work.

Once again, applying the appropriate *Freeman/Hyde* standards, there is no question that Hugo's attorneys have expended a substantial amount of time and in legal work associated with these trusts. It is also true that his principal attorneys are recognized as having skills, experience, ability and reputation in keeping with their billing rates. Nonetheless, with much of the work having been duplicative due to the multiple changes in attorneys due to his disagreements with his various counsel, and the fact that arguments he raised were virtually entirely for his personal benefit, and his false claim to the Holocaust Claims Tribunal that he was sole distributee of his grandmother, for all these reasons any attorneys' fees he incurred must be paid either

by him or the trust for his benefit.

ATTORNEYS' FEES FOR THE ESTATE OF ERWIN BEIT

Patricia, as Executrix of the estate of Erwin Bait, seeks compensation for fees paid to the law firm retained by her, Curtis, Mallet-Prevost, Colt & Mosle, LLP ("Curtis"). Their work commenced in September 1999 and continued through and is inclusive of the submission of its petition for fees, dated September 9, 2010. Recognizing the court's ruling denying most requests for disbursements *supra,* the total fee sought is $297,135.75.

While Hugo contends that Erwin, as an income beneficiary for life of the Frankham and Speyer trusts, had only a limited interest that predated the engagement of Curtis, he fails to recognize that the accounting disputes continued years after Erwin's death, and that his estate retained an interest in those matters until the October 30, 2009 stipulation of settlement. The remainder of Hugo's objections to Erwin's estate's fee petition not surprisingly echo the same objections asserted by Patricia and James and Eduard, i.e., the underlying amount at issue was less than the amount of fees sought; work undertaken was unnecessary; fees sought were excessive, etc. However, James and Eduard and their mother sought to settle these disputes, agreeing to do so with Hugo on several occasions while Hugo subsequently refused to go forward.

Lili objects that Curtis sought fees six times the amount in dispute in the underlying accounting proceeding. However, the court has already dealt with that claim in its earlier discussion of Chase's application. Nothing here alters the court's view. *See discussion supra.*

Fees for some specific time entries identified by Hugo must be denied. The total fee award to the estate of Erwin is $286,462.02, to be awarded from the four trusts as set forth above with regard to the Chase fee application.

This decision constitutes the order of the court.

Dated: 13 November, 2014

SURROGATE