SURROGATE'S COURT : NEW YORK COUNTY

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Proceeding by Cowan, Lattman & Lieberman, P.C., as Former Attorneys for the Executor of the Estate of

HAROLD ANTIN,

Deceased,

for an Award of Fees and Disbursements pursuant to SCPA § 2110.

----------x File No. 2002-0111

Accounting Proceeding, Estate of

HAROLD ANTIN,

Deceased.

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A N D E R S O N , S .

Before the court are two applications for legal fees for services rendered by successive counsel to the executor of the Estate of Harold Antin. The parties have waived a hearing and agreed to a determination of legal fees on the papers submitted. The firm which first represented the executor seeks approval of legal fees and disbursements for services rendered from January 2002 through March 2009; successor counsel seeks approval of fees from March 2009 through June 2014. The executor's accounting includes the fees of other law firms the executor consulted from time to time. The total amount at issue exceeds $350,000, or 25 percent of this $1,400,000 estate.

Decedent died on January 9, 2002, survived by his son, Mark Antin, the executor, and his daughter, Dana Antin. In his will decedent left Mark stock in decedent's business, valued at

approximately $208,000, and the balance of his estate equally to Mark and Dana.

Mark engaged the first firm to represent him in his capacity as executor of his father's estate; however, they did not enter into a formal retainer agreement. The bulk of the administration of the estate was completed within three years of decedent's death. Counsel's services during this period included preparation of the probate petition; assisting the executor with the collection, valuation and liquidation of assets; reviewing decedent's tax liability and preparation of estate and income tax returns; communications with the IRS; and preparation of an inventory of assets. The firm also gave tax advice concerning decedent's IRA and assisted in distribution of estate assets, including a house deeded to Mark and Dana as tenants in common, as well as other routine legal tasks.

In mid-2007, the relationship between Mark and Dana deteriorated into bitter hostility. Disagreements about estate and non-estate assets escalated and invaded every remaining estate issue, no matter how minor. Eventually, Dana filed a petition to compel Mark to account, and objected to his account on numerous grounds. She brought a separate proceeding seeking removal of the executor. More litigation ensued, including a proceeding by Mark to gain access to property held in storage (which he alleged Dana had blocked), and a contempt proceeding

brought by Dana against Mark. The parties were simultaneously engaged in a separate contentious partition action in New York Supreme Court with respect to the house devised to them in the will. The court made repeated but unsuccessful efforts to achieve a global settlement of this highly emotionally charged litigation. In March 2009, in the heat of the battle between the parties, Mark discharged his first attorneys and hired successor counsel.

Mark then moved for summary dismissal of the various petitions filed against him. The contempt and removal proceedings were ultimately dismissed (*Matter of Antin*, NYLJ Jan. 7, 2013, at 20, col 4 [Sur Ct, NY County 2012]; *Matter of Antin*, NYLJ 1202586275533 [Sur Ct, NY County 2013]). Certain objections to the accounting were also dismissed, and the court ruled that the remaining issues could only be resolved at trial *(Matter of Antin*, NYLJ Feb. 1, 2013, at 22, col 4 [Sur Ct, NY County 2012]). However, these issues were finally settled by a stipulation filed with the court on June 2, 2014. The issue of legal fees was reserved for the court's determination.

It is not uncommon for such contentious litigation to generate high legal fees. The first firm which represented the executor seeks the court's approval of legal fees of $253,115.11 and disbursements of $5,665.25, of which $95,320.80 has been paid. Successor counsel seeks approval of $93,745.49 in legal

fees and disbursements of $5,066.72 for his services.

The affirmation of services by the first firm shows billings for 558.5 hours of attorney time, mostly incurred by three partners at rates of $355/hr. to $545/hr. These billings were reduced by 15 percent beginning in early 2008. One of the partners handled the bulk of the administration of the estate before hostilities arose, a second worked on settlement efforts and litigation after hostilities erupted, and the third prepared the accounting and rendered tax advice. The bills also reflect minimal services provided by three other lawyers at the firm for a combined total of 17.1 hours, and approximately 50 hours of services provided by paralegals and a managing clerk. The firm billed monthly; bills were paid in full until the beginning of 2008, when all payments stopped. The lawyers assert that all work was performed at Mark's request and with his specific involvement in every detail and decision. Mark does not dispute this assertion, and there is no dispute that he was aware of and never contested the firm's billing rates.

Both children oppose the first firm's application. Mark argues on the one hand that the estate administration was straightforward and unexceptional, and that the firm used too many lawyers and charged unreasonable hourly rates. He also argues that once the hostilities erupted, the firm spent too much time on the court's settlement efforts, allowed his sister to get

the upper hand by initiating litigation, and suggests (without any supporting rationale) that had the firm acted more quickly and aggressively and commenced proceedings first, the dispute might have been resolved earlier and at lower overall expense. He also complains about specific litigation decisions and the lack of results achieved. Mark argues that the $95,320.80 heretofore received by the firm is too large a fee for this relatively modest estate. He asks the court to fix its total fees at $50,000 and to order repayment of any excess to the estate.

Dana opposes this fee application on similar grounds, *i.e.*, that the work was excessive and disproportionate to the value and complexity of estate.

The application of the first firm cannot be considered in isolation from the application of successor counsel, since, in fixing a fee, the court must consider whether there was overlap in the efforts of various counsel and whether the total fees claimed were reasonable (*Matter of Bove,* NYLJ Jan. 10, 2011 at 24, col 3 [Sur Ct Kings County]). Successor counsel documents 221.9 hours of legal services between March 3, 2009, and the close of the accounting period. One attorney performed nearly all of the work at an initial rate of $375/hr., which increased over time to $450/hr. The time charges for this period total $85,753.75, plus $5,066.72 for disbursements. An additional

$2,925 is requested for 6.5 hours after the filing of the supplemental account; however, counsel has failed to provide any details of the work performed. Pursuant to their retainer agreement, the executor paid in full the bills of successor counsel from his personal funds with an understanding that court approval of these fees as an expense of administration would be sought in the accounting proceeding.

The executor asserts that all work performed after the situation became hostile was attributable to Dana's unreasonable allegations and that she should thus pay such fees herself. Dana, on the other hand, argues that Mark should be solely responsible for any legal fees since the work was performed for his individual benefit.

The executor's account shows payments to several other law firms totalling nearly $20,000. However, since the accounting offers no description or affirmation of the services rendered, the court disallows these additional legal fees as expenses of administration *(Matter of Antin*, NYLJ Feb. 1, 2013, at 22, col 4 [Sur Ct, NY County 2012]; Uniform Rules for Surrogate's Court § 207.45 [a]).

The determination of the reasonableness of fees is within the sound discretion of the Surrogate *(Matter of Stortecky v Mazzone*, 85 NY2d 518 (1995); *Matter of Marsh*, 265 AD2d 253 [1st Dept 1999]). The factors to be taken into account in the

fixation of fees include the time expended by the attorneys, the size of the estate, the billing practices in the community, the difficulties involved in the matter, the skill required, the attorney's experience, ability and reputation, the responsibilities involved, and the benefit resulting to the estate from the services rendered (*see, Matter of Freeman*, 34 NY2d 1 [1974]; *Matter of Potts*, 213 App Div 59 [4th Dept], *affd* 241 NY 593 [1925]).

As is all too common in estate matters, bitter hostilities foreclose a timely disposition. Precedents recognize that such friction leads to a higher level of legal activity, with its attendant expense (*see, e.g., Matter of Tobias,* 232 AD2d 341 [1st Dept 1996]; *Matter of Sabatino,* 66 AD2 973 [3d Dept 1978]; *Matter of Bove,* NYLJ Jan. 10, 2011 at 24, col 3 [Sur Ct, Kings County]; *Matter of Haber*, NYLJ 1202670841811 at *1 [Sur Ct, Bronx County, decided Aug. 27, 2014]). Where the beneficiaries have complicated a resolution by their own actions, the resulting high cost of legal fees is a self-inflicted wound, and they cannot avoid the expenses caused by their own behavior (*Matter of Matrone,* NYLJ Apr. 15, 2002 at 23, col 1 [Sur Ct, Bronx County]). The court rejects Mark's argument that Dana, as the initiator of most of the litigation, bears full responsibility for the parties' disputes and thus should exclusively be charged with any legal fees, citing to *Matter of Hyde,* 32 Misc 3d 661 (Sur Ct,

Warren County 2011). The court also rejects Dana's argument that the legal services were expended to serve Mark's individual interests and should therefore be borne solely by him. The court has had ample opportunity to observe the parties' conduct and finds that each contributed to needless complication and prolongation of the litigation, including consequent spiraling expenses. The court thus concludes that any fees should be equally apportioned between Mark and Dana *(Matter of Colangelo*, 2006 NY Misc LEXIS 5824 [Sur Ct, Westchester County 2006]).

The court has not overlooked Mark's suggestion that his first counsel represented him poorly by not providing a retainer letter or requiring a release and receipt before the distribution of assets. Although a retainer letter would have been the better practice, it is undisputed that the executor was aware that the firm would bill at its customary rates and that bills were paid in full for six years without protest. Only when the parties' antagonisms gave rise to increased billings did the executor refuse to render any further payments. With respect to distribution without a release and refunding agreement, its significance eludes the court since the hostilities arose over undistributed tangible assets and Dana's claims that additional assets had been withheld. The court has considered the remaining criticisms of the lawyers' conduct, and deems them to be without merit.

As to the other *Potts-Freeman* criteria, the court recognizes that the lawyers were experienced and faced difficult circumstances. The hourly rates of both firms are within community norms before this court. Further, both firms actively attempted to limit costs by encouraging settlement. The refusal of the parties to timely resolve their disputes cannot be attributed to the attorneys. Outgoing and incoming counsel cooperated with each other during the transition and thus ensured that services did not overlap.

Notwithstanding the foregoing, some discounting of the requested fees by both counsel is appropriate. A portion of the first counsel's billing records contain insufficient detail for purposes of a *Potts-Freeman* evaluation. Many billing entries do not identify the subject matter of the attorney's communications with the executor or a third party, and daily and monthly entries do not identify the time spent on each service rendered.

With respect to successor counsel's application, some entries are too vague to assess the specific work performed, and services rendered after the close of the accounting period are not described. Most important, despite the fact that the legal work of both attorneys was necessitated by the level of animosity between their clients, the court cannot ignore the magnitude of each counsel's billings in proportion to the size of the estate (*Matter of Freeman, supra*).

Accordingly, the court fixes the fee of the first counsel at $185,000, of which $95,320.80 has been paid; and fixes the fee of successor counsel at $76,000, which also covers bringing the accounting proceeding to a close. First counsel's request for disbursements of $5,665.25 is granted in full, based on the firm's representation that its billing rates are set by taking into account that disbursements will be separately billed (*Matter of Aitkin*, NYLJ, March 18, 1994 at 22, col 3 [Sur Ct, NY County]). Successor counsel's disbursements are reduced by the inclusion of overhead expenses (*i.e.*, in-house photocopying and local travel), and are fixed at $4,747.72.

To the extent that there are insufficient funds to pay outstanding legal fees, they are allocable to Dana and Mark individually.

Settle a decree in conformity with the court's decision.

Dated: April 5, 2016

SURROGATE