

Matter of Sawyer

2017 NY Slip Op 32060(U)

September 14, 2017

Surrogate's Court, Nassau County

Docket Number: 267949/C

Judge: Margaret C. Reilly

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This opinion is uncorrected and not selected for official publication.

**SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

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**Final Account by Bank of America N.A. (formerly
Norstar Trust Company), as Trustee of the Trust
Under the Last Will and Testament of**

**DECISION & ORDER
File No. 267949/C
Dec. No. 33185**

**CLIFFORD G. SAWYER,
a/k/a CLIFFORD GEORGE SAWYER,**

Deceased.

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PRESENT: HON. MARGARET C. REILLY

The following papers were considered in the preparation of this decision:

Petition for Judicial Settlement of Trustee’s Final Account; Resignation and Discharge of Trustee; and Appointment of Successor Trustee.	1
Account.	2
Affidavit of Tax Service;.	3
Affirmation of Legal Services	4
Waiver of Citation Consents and in Accounting.	5

Before the court is a petition by Bank of America, N.A. (formerly Norstar Trust Company), trustee of the trust for the benefit of Lorna S. Lawrence under the last will and testament of Clifford G. Sawyer, for judicial settlement of the trustee’s account, resignation of the trustee and the appointment of a successor trustee. There is no opposition.

BACKGROUND

Clifford Sawyer (the decedent) died on October 8, 1990. He was survived by his wife, Vivian Klemme Sawyer who died on December 9, 2005, and two children, Lorna S. Lawrence and Donna V. Sawyer. His last will and testament dated February 29, 1988 was

admitted to probate by this court on November 13, 1990 and letters of trusteeship were issued to Norstar Trust Company by order dated September 13, 1999. Pursuant to Article Fourth of the decedent's will, a trust was established for the benefit of the decedent's wife. Upon her death, the trust was to be divided into two equal shares for the benefit of each of his daughters. With regard to the trust for the benefit of Lorna S. Lawrence, which is the subject of this accounting, upon her death, Lorna S. Lawrence's share is to be held in further trust for the benefit of her two children, Robert Christopher Lawrence and Lynda Christine Lawrence. Lorna S. Lawrence, Robert Christopher Lawrence and Lynda Christine Lawrence have filed waivers of citation and consents to the accounting and agreed to the relief requested.

RELIEF REQUESTED

The petitioner seeks the following relief: judicial settlement of the final account; permission for Bank of America, N.A. to resign as trustee and its letters of trusteeship be revoked; the appointment of Premier Trust, Inc. as successor trustee and the issuance of successor letters of trusteeship to Premier Trust, Inc.; payment for the preparation of the accounting to Bank of America, N.A.; payment of legal fees and disbursements to Bond Schoeneck & King PLLC; and the discharge of Bank of America N.A. upon the distribution of trust assets to Premier Trust, Inc.

THE ACCOUNT

The principal account covers the time period from August 10, 2006 through August

10, 2016. The trust account reflects the receipt of principal in the amount of \$400,616.52 and realized increases in principal of \$118,131.10 for total principal charges of \$518,747.62. This amount was reduced by realized decreases in principal of \$48,106.73, administration expenses and taxes of \$47,665.79, and distributions and transfer of \$45,206.33, leaving a balance on hand of \$377,768.77.

The income account reflects the receipt of \$126,168.14 in income collected and \$3,975.58 in realized increases in income for total income charges of \$130,143.72. This amount was reduced by administration expenses of \$17,464.54 and amounts to beneficiaries and transfers in the amount of \$114,204.96, leaving a deficit in the income account of \$1,525.78. The total of the principal and income accounts on hand is the sum of \$376,242.99.

FEES

“The Surrogate's Court bears the ultimate responsibility for deciding what constitutes a reasonable attorney's fee, and the evaluation of what constitutes a reasonable attorney's fee is a matter within the sound discretion of the court” (*Matter of Goliger*, 58 AD3d 732, 732 [2d Dept 2008] [citations omitted]; *accord*, *Matter of Freeman*, 34 NY2d 1, 9 [1974]; *Matter of Potts*, 123 Misc 346 [Sur Ct, Columbia County 1924], *affd* 213 App Div 59 [4th Dept 1925], *affd* 241 NY 593 [1925]). In determining what constitutes a reasonable attorney's fee, the court may consider factors such as “the time and labor expended, the difficulty of the questions involved and the required skill to handle the problems presented, the attorney's experience, ability, and reputation, the amount involved, the customary fee charged for such

services, and the results obtained" (*Matter of Szkambara*, 53 AD3d 502, 502-503 [2d Dept 2008] [citations omitted]; *see Matter of Freeman*, 34 NY2d 1 [1974]). The legal fee must bear a reasonable relationship to the size of the estate (*see Matter of Kaufmann*, 26 AD2d 818 [1st Dept 1966], *aff'd* 23 NY2d 700 [1968]).

The attorney for the petitioner submitted an affirmation regarding fees and annexed copies of his time records. The attorney is asking for approval of a fee request in the amount of \$6,500.00 and \$700.00 in disbursements. He spent approximately 25 hours on this matter. The legal fee and disbursements are approved in the amount requested.

The petitioner has also requested approval for the fee for hiring Ernst & Young, LLP to prepare the intermediate accounting for the period of August 10, 2006 through August 10, 2016 in the amount of \$5,000.00. The account is approximately 350 pages and includes both the principal and income charges.

Typically, an accountant's services are not compensable from estate assets unless there exist unusual circumstances that require the expertise of an accountant (*Matter of Meranus*, NYLJ, Mar. 31, 1994, at 28, col 2 [Sur Ct, Suffolk County]). The fee for such services is generally held to be included in the fee of the attorney for the fiduciary (*Matter of Musil*, 254 App Div 765 [2d Dept 1938]). The purpose of this rule is to avoid duplication (*Matter of Schoonheim*, 158 AD2d 183 [1st Dept 1990]). "Where the legal fees do not include compensation for services rendered by the accountant, there is no duplication and the legal fee is not automatically reduced by the accounting fee" (*Matter of Tortora*, NYLJ, July

19, 1995, at 26, col 2 [Sur Ct, New York County] [citation omitted].

The fee for hiring Ernst & Young, LLP is therefore approved.

TRUSTEE RESIGNATION AND APPOINTMENT OF SUCCESSOR

The will named the petitioner as trustee of any trusts created under his will. The successor trustees nominated in the will have all either renounced or died. “A fiduciary may present to the court at any time a petition praying that he or she be permitted to resign. . .” (SCPA § 715; *see e.g., Matter of Corwin*, NYLJ, October 22, 2003, at 30, col. 4 [Sur Ct, Suffolk County]; *Matter of Hakim*, NYLJ, July 25, 2007, at 34, col. 5 [Sur Ct, New York County]). “The petition shall show the facts upon which the application is founded” (SCPA § 715). All interested parties have consented to the resignation. Petitioner’s request to resign is accordingly granted and the letters previously issued to him shall be revoked. Surrogate’s Court Procedure Act § 1502 [1] empowers the court to appoint a trustee or successor trustee whenever there is no trustee and a successor is necessary to execute the trust. With the resignation of Bank of America, N.A., there is no other trustee in place to execute the trust and the prayer in the petition for the appointment of Premier Trust, Inc. as successor trustee is also granted.

CONCLUSION

The account is approved. Within 45 days of the issuance of this decision, the petitioner is directed to file an affidavit bringing the account down to date. Legal fees and disbursements are approved in the amount of \$7,200.00. Fees of the accountant are approved

in the amount of \$5,000.00. The petitioner's request to resign granted. Letters of trusteeship issued to the petitioner are revoked. The application to appoint Premier Trust, Inc. successor trustee is granted. Letters of trusteeship shall issue to Premier Trust, Inc. upon its duly qualifying.

Submit decree.

Dated: September 14, 2017
Mineola, New York

E N T E R :

HON. MARGARET C. REILLY
Judge of the Surrogate's Court

cc: Edward C. Radin, Esq.
Bond Schoeneck & King, PLLC
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