

Matter of Schwartz

2017 NY Slip Op 32138(U)

October 12, 2017

Surrogate's Court, New York County

Docket Number: 2006-2459/B

Judge: Rita M. Mella

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

New York County Surrogate's Court

Date: October 12, 2017

-----X
In the Matter of the Account of the Proceedings of DS,
as the Executor of the Estate of

DECISION

BARBARA ANN SCHWARTZ,
a/k/a BARBARA BLACK SCHADE,

File No.: 2006-2459/B

Deceased.

-----X
M E L L A, S.:

This is a contested proceeding for the settlement of the interim account of DS as executor of the Will of decedent Barbara A. Schwartz for the period from the date of her death, May 8, 2006, to April 8, 2014. During the administration of the estate, DS, an attorney, has served as counsel for himself as fiduciary for the estate. Verified objections to the executor's account were filed in November 2016 by two of the three residuary beneficiaries under the decedent's Will.

The parties have stipulated to a determination by this court of the reasonableness of the legal fees charged by DS based upon the papers submitted, and to the court's holding the remaining accounting objections in abeyance pending this determination. A brief history of this proceeding is warranted before turning to the issue of the reasonableness of DS's fees.

Background

Decedent died on May 8, 2006, leaving a Will dated April 30, 2006, which was drafted by decedent's "friend and attorney [DS]." DS, who was nominated as executor under Article Sixth (1) of the Will, received preliminary letters on July 7, 2006, and full letters testamentary on February 6, 2008, by decree admitting the Will to probate on the same date.¹ Decedent's Will makes certain cash and tangible bequests to various friends and relatives and leaves her residuary

¹ The probate decree limited DS's commission to one half of what he would have been entitled to if he had complied with the provisions of SCPA 2307-a.

estate in equal shares to her step-daughter Megan, Megan's minor child, Elliot, and decedent's close friend Richard.

It is clear from the record that, during the administration of this estate, the interaction between DS and the two adult residuary beneficiaries has been difficult. Megan alleges that, because of DS's failure to provide information, she retained counsel in April 2014, and filed a petition in this court to compel him to account. This court granted Megan's petition, and DS filed the instant petition for the settlement of his intermediate account on November 12, 2014. The following day, DS made an interim distribution of \$200,000 to each of the three residuary beneficiaries. Late in 2015, Megan filed a petition pursuant to SCPA 2102 seeking another interim distribution. By decision dated December 16, 2015, this court directed that the 2102 application be consolidated with the pending accounting proceeding.

Current Proceeding

Schedule A of the account shows the value of the principal received by DS as approximately \$2.1 million, including various stocks, bank accounts, works of art, and the shares of stock allocated to a cooperative apartment valued at \$1,600,000. On the amended Schedule C-1, DS lists several unpaid administration expenses for the accounting period, the largest of which is his legal fee of \$499,622.50 and disbursements of \$2,064.01.² The amount sought for legal fees does not include DS's request for \$13,450 for legal services that he provided to decedent before she died. Despite the provisions of section 1805(1) of the SCPA, DS paid himself this amount on August 24, 2006, without court authorization. Additionally, Schedule C reflects that,

² DS has not supplemented his account since its filing and has not indicated whether he, or any other counsel whom DS may have retained, will seek the approval of any additional legal fees.

during this accounting period, DS, as executor, paid \$83,158.89 to other professionals for legal and accounting services. It is undisputed that DS neither executed a retainer agreement nor generated any bills for legal services rendered and that the time records that he has presented to the court were not produced contemporaneously.³

Objections to the Requested Legal Fees

The residuary beneficiaries maintain that DS's fee request is patently unreasonable. The Guardian ad Litem (GAL) appointed to protect the interests of the infant residuary beneficiary argues that the time that DS claims to have spent providing legal services is excessive in this uncomplicated estate and that some of the time was spent on matters which failed to benefit the estate. The GAL adds that DS failed to use his time efficiently and that his fee request neglects to take into account the value of the estate. When combined with legal fees previously paid by DS to other professionals, the fee request amounts to approximately 28% of the assets listed on Schedule A, which in the GAL's estimation "effectively makes [DS] an equal residuary beneficiary."

Richard and Megan share the concerns of the GAL and argue strongly for a finding that DS's time was used inefficiently, that the time charged is excessive (in excess of 1,700 hours for legal services in an estate administration that has yet to be completed) and not commensurate to what would be reasonable for each particular task, and that the services provided were, in many cases, unnecessary for the administration of the estate or were executorial in nature. According

³ At his SCPA 2211 deposition, DS stated that the time records he submitted were not created contemporaneously, but that he had kept relevant notes contemporaneously, and "from time to time they would be typed." The handwritten notes, DS acknowledged, were disposed of and thus have not been produced.

to the beneficiaries, the fact that DS spent so much time on tasks which did not provide any benefit upon the estate demonstrates DS's lack of experience or knowledge of estate administration, failings on DS's part for which the beneficiaries should not be charged.

DS offers a robust defense against the attacks on his fee request and has provided several submissions in support of his position. DS also relies on a narrative of relevant estate events found in Schedule J of his account and avers that objectants' version of events is a simplification of many of the challenges that he encountered as a lawyer in relation to the administration of this estate, including the probate proceeding and the sale of decedent's cooperative apartment. DS takes the position that "there is a fair and reasonable relationship between the size of [his] claim for legal fees, the size of the estate, and the large number of years and hours which [he] fairly and reasonably put i[n]" (DS Aff, Mar. 6, 2017).

An attorney, including one who acts as fiduciary, is allowed "such compensation for his legal services as appear to the court to be just and reasonable" (SCPA 2307[1]; *see also* EPTL 11-1.1[b][22]). The Surrogate has authority to inquire into the reasonableness of a fee and "bears the ultimate responsibility to decide" the compensation for legal services rendered to an estate (*Matter of Verplanck*, 151 AD2d 767 [2d Dept 1989]; *Stortecky v. Mazzone*, 85 NY2d 518, 525-26 [1995]).

In determining the reasonable value of the services provided by an attorney, the court reviews a requested fee under certain non-exclusive criteria articulated in *Matter of Freeman* (34 NY2d 1 [1974]), which includes the "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 the 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 responsibilities involved” (*id.* at 9, citing *Matter of Potts*, 213 App Div 59, 62 [4th Dept 1925], *aff’d* 241 NY 593 [1925]). The burden of proof of the reasonableness of any requested compensation lies with counsel performing those services (*Matter of Potts, supra*).

It is well established that the time spent on estate matters is not the controlling factor to be considered by the court (*Matter of Snell*, 17 AD2d 490 [3d Dept 1962]). Contemporaneous time records, however, are highly relevant to the court’s acceptance of the attorney’s representations as to the amount of time spent on various tasks performed (*Matter of Phelan*, 173 AD2d 621 [2d Dept 1991]). In the absence of contemporaneous time records, after-the-fact estimations of time spent are granted small deference (*Matter of Phelan, supra; Matter of Quell*, NYLJ, Oct. 2, 1997, at 4, col 6 [Sur Ct, Kings County]).

In addition, where the fiduciary employs multiple attorneys, the aggregate fee should approximate the reasonable fee a single attorney would have received for services rendered (*Matter of Leopold*, 244 AD2d 411, 412 [2d Dept 1997]). Duplication of services rendered to an estate is a factor to be considered in setting the aggregate fee (*Matter of Mergentime*, 155 Misc 2d 502, 507 [Sur Ct, Westchester County 1992], *aff’d* 207 AD2d 452 [2d Dept 1994]). Exceptions to this general rule are allowed when separate counsel fulfill different responsibilities, or where counsel faces time pressures or complex issues (*Matter of Duke*, NYLJ, May 3, 2000, at 28, col 6 [Sur Ct, New York County]).

Pre-Death Legal Services

Where in a formal proceeding a fiduciary claims to be a creditor of the estate that he serves, the conflict of interest inherent in such a circumstance requires the court to act as arbiter of the claim's validity. The claim may be approved either in the accounting proceeding (SCPA 1805[1]) or in a separate proceeding (SCPA 1805[2]) at any time prior to an accounting proceeding (1 Harris N.Y. Estates: Probate, Administration & Litigation, § 13:87; *Matter of Bender*, 56 Misc 2d 585 [Sur Ct, Nassau County 1968]; McKinney's Cons. Laws of N.Y., Book 58A, Practice Commentaries to SCPA 1805). Such claims are closely scrutinized by the court and must be established "clearly and fully" to the court's satisfaction (*Matter of Zalaznick*, 90 Misc 2d 113 [Sur Ct, Bronx County 1977]; *Matter of Taisey*, NYLJ, July 14, 2014, at 28, col 8 [Sur Ct, New York County]).

As part of the relief sought in this accounting proceeding, DS seeks court approval, nunc pro tunc, for his payment to himself for legal services rendered to decedent prior to her death from March 8, 2002 to May 2, 2006, in the amount of \$13,450.

In cases where fiduciaries satisfy their own individual claims without prior court approval in violation of SCPA 1805, the court may ratify the payment and surcharge the fiduciary (*Matter of Lieberman*, NYLJ, Dec. 14, 2004, at 25, col 3 [Sur Ct, New York County], citing *Matter of Pritchard*, 138 Misc 2d 945 [Sur Ct, Suffolk County 1988]). Upon the proof presented, the court authorizes the payment to DS of \$6,000.00, nunc pro tunc, for services DS provided to decedent, most of them performed in the two months prior to her death, including drafting two wills, a living will and a healthcare proxy, and several meetings with decedent to discuss these matters. DS must refund \$7,450.00 to the estate and, additionally, he is surcharged for the interest lost by

the estate as a result of the unauthorized payment of \$13,450, at the rate of nine percent per annum (CPLR 5004) from the date of the improper payment to the date of this decision.

Analysis of Compensation for Legal Services Rendered to the Executor

Time spent.

Examination of the time sheets submitted by DS reveals inefficiencies in the use of time and duplication of services provided to the estate. As an example, approximately nine of DS's legal time entries, totaling more than thirty-eight hours, reference drafting the amended probate petition, a fairly straightforward document. These charges for the time DS spent on the probate application are in addition to time charged by his co-counsel, SBP, whose name appears together with DS's name on all probate documents filed with the court. SBP claims to have spent almost 73 hours in a period of five months providing legal services in the probate proceeding and received \$18,425.50 in payment for the services rendered. DS's time sheets reflect an excessive amount of time spent on reviewing and "further drafting" documents such as affidavits of service, affidavits in support of substituted service, and supplemental citations.

As another example, DS retained SBP to prepare the federal and New York State estate tax returns, work that SBP began in November 2006 and completed in December 2008. SBP billed the estate for more than 60 hours and received \$15,277.75 in payment for those services. During the same period of time, DS's time sheets contain at least twenty entries addressing time spent on a "memorandum," preparation, or further work related to the IRS Form 706, resulting in more than 30 additional hours of time charged.

These examples are not isolated incidents. DS's time sheets are replete with entries for time spent reviewing work of other professionals and revising documents prepared by others,

resulting in excessive time spent on a given task and duplication of efforts. Additionally, the time actually spent by DS on various tasks is often difficult to determine. In support of his claim for compensation for more than 1,700 hours purportedly spent working on this estate, DS has submitted hundreds of pages of time sheets containing thousands of entries, many of which are hard to decipher, and which, in addition, “bundle” time for various services without allocation to any particular task. In any event, the court is not obligated to make a precise calculation of the charges attributable to each particular service (*Matter of Nicastro*, 186 AD2d 805, 805 [2d Dept 1992]). Finally, certain entries are confusing as written. For example, the entries on DS’s time records for February 2007 are almost identical in content to the majority of the entries recorded for February 2008.

Based upon the above, a very substantial reduction in the number of hours that are compensable is appropriate.

Results Achieved.

The results achieved, such as successful negotiation and litigation, are factors in the determination of the reasonableness of a legal fee (*Turano & Radigan, NY Estate Administration*, § 13.03). DS spent a significant number of hours on tasks associated with the handling of decedent’s cooperative apartment, and whether undertaking those tasks was necessary to sell the apartment or gave a benefit upon the estate is unclear.

For example, DS’s time sheets reflect that he spent an inordinate amount of time determining whether to amend the certificate of occupancy, which decedent allegedly was violating during her life, and addressing what he described as an anomaly in decedent’s proprietary leases. Also, DS avers that he sought legal advice to ascertain the consequences of

decedent's noncompliance with the certificate of occupancy and whether the space should be marketed as commercial or residential, which advice proved "inconclusive." It is undisputed that the apartment was marketed by two reputable brokers and that it sold in 2013 to a commercial buyer without amendment to the certificate of occupancy. Further, DS's time records and the explanations that he provides for his actions as counsel in the administration of the estate reveal that he spent time on matters such as drafting a proposed commercial sublease with a neighboring hotel (which did not come to fruition), the prosecution in 2006 of the cooperative apartment's managing agent for embezzlement, and litigation, between decedent's building and the neighboring hotel, that was being handled by other attorneys, without a clear showing by DS that time spent on such tasks contributed to the sale of decedent's apartment or in any way protected its value.

DS has thus failed to meet his burden to demonstrate that all the services he claims to have provided in connection with the handling of decedent's apartment, for which he charged the estate, provided a benefit to it (*see Matter of Ross*, NYLJ, Dec. 30, 1996, at 24, col 4 [Sur Ct, New York County]).

Executorial Services.

DS's time sheets show that many of the tasks for which DS seeks compensation, such as addressing the inventory, management, and release of tangible personal property belonging to the estate and negotiating the sale or consignment of any artwork owned by the estate, are executorial in nature. These tasks are not properly charged as legal services (*Matter of Blau*, 24 Misc 3d 1249[A], 2009 NY Slip Op 51934[U] [Sur Ct, Bronx County]; *Matter of Verplanck*, 151 AD2d at 767-768), but are instead compensable through the executor's commissions. Upon a close

examination of the time records, the court determines that at least 15% of DS's time was spent on executorial duties.

Size of the Estate.

Legal fees charged must not exceed a reasonable proportion of the size of the estate (*Matter of Efstathiou*, 41 Misc 3d 1219[A], 2013 NY Slip Op 51770[U] [Sur Ct, Nassau County 2013], citing *Matter of Kaufmann*, 26 AD2d 818 [1st Dept 1966], *aff'd* 23 NY2d 700 [1968]). The legal fee requested by DS for his services, i.e., \$499,622.50, represents more than 17% of the value of the assets reported on the combined Schedules A, A-1 and A-2 of the account and, without a doubt, is far in excess of a typical fee for an estate of this size and complexity (*see Turano & Radigan*, NY Estate Administration, § 13.03 [“The courts often approve attorney’s fees ranging up to 5% of the estate for the first \$50,000 or so and smaller percentages on higher amounts.”]). This amount is in addition to the legal and professional fees already paid by DS, as shown on Schedule C, to other counsel retained by him, which total approximately \$72,000. Moreover, DS is requesting approval of an additional \$10,000 in compensation for attorney SBP. Adding all those figures together, the total requested is approximately \$581,000, which is more than 20% of the value of the assets that came into DS’s hands as executor.

While percentages or hourly rates are not determinative, they nonetheless serve as a guide in assessing whether the amount sought is reasonable (*Kaufmann, supra*). In this case, the legal fee requested by DS for services rendered to this estate, which, after more than 10 years, is not yet fully administered and did not present particularly complex issues, represents too large a percentage of the value of the estate’s assets and is not warranted (*id.*; *Matter of McCranor*, 176 AD2d 1026, 1027 [3d Dept 1991]; *Matter of Marsh*, NYLJ, July 6, 2015, at 32, col 5 [Sur Ct,

Westchester County]).

Conclusion as to Legal Services Rendered to the Estate

In consideration of the foregoing factors, including the acknowledged limited experience of counsel in the administration of estates, the court fixes the compensation of DS for his representation of himself as the executor of the Will of decedent in the total amount of \$175,000. In reaching this conclusion, the court has afforded particular weight to the facts that: the time charged by DS to complete the tasks described in his time records is excessive when compared to the time that would have been reasonable to spend on those tasks; many of the tasks performed by DS are executorial in nature or have not been demonstrated to have been necessary and did not provide any benefit to the estate; the administration of this estate did not present complex issues; and the results obtained by DS through his work are in no way exceptional. In awarding DS this fee, the court recognizes that obtaining jurisdiction over all necessary parties in the probate proceeding, ensuring that a number of claims were satisfied and specific bequests were paid, and responding to the litigation initiated by objectants required him to spend substantial time providing legal services but concludes that a significant proportion of the time for which he seeks compensation is excessive.

Disbursements

As part of his legal fee request, DS seeks approval of reimbursement for his disbursements in his capacities as attorney and executor in the amount of \$5,315.67.⁴ Disbursements paid by DS, as attorney, for postage, photocopies, and local travel are disallowed

⁴ Out of this amount, \$3,251.66 has been paid. It is unclear from DS's records whether DS reimbursed himself in this amount in his capacity as executor or as attorney or a combination of both.

as part of regular office overhead (*Matter of Diamond*, NYLJ, October 23, 1992 at 37, col 5 [Sur Ct, Westchester County], *aff'd* 219 AD2d 717[2d Dept 1995]; *Matter of Herlinger*, NYLJ, April 28, 1994, at 28, col 6 [Sur Ct, New York County]). Disbursements paid by DS in both capacities, in the reduced amount of \$4,113.50, are allowed.

This decision constitutes the order of the court.

Clerk to notify.

Dated: October 12, 2017



SURROGATE