

Matter of Side
2017 NY Slip Op 32856(U)
October 4, 2017
Surrogate's Court, Nassau County
Docket Number: 233777/F
Judge: Margaret C. Reilly
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**SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

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**Accounting of the Public Administrator of
Nassau County as Trustee of the Trust Created
Under Paragraph FOUR (4) u/w/o**

**DECISION
File No. 233777/F
Dec. No. 33190**

**EDGAR W. SIDE, JR.
f/b/o EDGAR W. SIDE, III,**

Deceased.

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PRESENT: HON. MARGARET C. REILLY

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

Petition	1
Accounting.	2
Waivers and Consents(2)	3
Notice of Appearance and Admission of Service.	4
Affirmation of Legal Services	5
Affirmation of Tax Services	6
Last Will and Testament of Edgar W. Side, Jr.	7
Decision of the court dated January 31, 1995	8

PROCEDURAL HISTORY

Before the court is the account of the Public Administrator of Nassau County as the trustee of a trust created under Article Fourth of the last will and testament of Edgar W. Side, Jr. dated October 9, 1984. The Public Administrator seeks an order and decree: 1) approving and allowing to petitioner fiduciary commissions in the amount of \$2,829.03 pursuant to NY SCPA § 2309 (2) and the reasonable and necessary expenses of the office in the amount of \$1,109.65 pursuant to SCPA § 1207 (4); 2) fixing and determining the attorneys’ fees of Mahon Mahon Kerins & O’Brien, LLC in the amount of \$17,493.75 of which \$9,993.75 has

been paid and \$7,500.00 of which is unpaid; 3) authorizing the payment of accounting fees of Rispoli & Co., CPA's in the amount of \$1,250.00 of which \$0.00 has been paid and \$1,250.00 of which is unpaid; 4) release and discharging the surety¹; 5) directing the net estate to be paid to the beneficiaries in accordance with the trust agreement; 6) granting such other and further relief as to the court is just and proper.

BACKGROUND

Edgar W. Side, Jr. died on October 13, 1984. Pursuant to Article Fourth of the decedent's will, a trust was established for the benefit of his son, Edgar W. Side, III. In addition to the testamentary trust, the decedent established an inter vivos trust for the benefit of his son, with the remainder to be paid 50% to Catholic Charities of the Diocese of Rockville Centre, New York and 50% to the Association for the Help of Retarded Children, Nassau County, New York. By decision dated January 31, 1995, the court approved the consolidation of the testamentary trust and the inter vivos trust. The court further accepted the resignations of the co-trustees and appointed the Public Administrator as successor trustee. Letters of trusteeship issued to the Public Administrator on April 12, 1995. Edgar W. Side, III died on May 19, 2015. Upon his death, the corpus of the testamentary trust is to be distributed 50% to Catholic Charities of the Diocese of Rockville Centre, New York and 50% to the Association for the Help of Retarded Children, Nassau County, New York. Both charities signed waivers of citation and consents to the accounting. The New York

¹Although the petitioner asks that the surety be discharged, no surety is listed as an entrusted party and the account does not show payments of a bond premium.

State Attorney General filed an acknowledgment of service of citation and notice of appearance but has not filed any objections to the accounting.

THE ACCOUNT

The principal account covers the period from April 12, 1995 to December 31, 2014. It shows that there was \$66,435.34 in principal received. This was supplemented by transfers from income in the amount of \$30,547.48, resulting in total charges of \$96,982.82. The charges were reduced by the following credits: funeral and administrative expenses of \$19,508.75 and transfers to income in the amount of \$5,015.43, leaving a balance on hand in the total amount of \$72,459.64. The income account for this time period shows charges for income collected in the amount of \$44,528.88 and transfers from principal in the amount of \$5,015.43 for total income charges in the amount of \$49,545.31. The charges were reduced by the following credits: administrative expenses of \$18,997.83 and transfers to principal in the amount of \$30,547.48, leaving a zero balance.

COUNSEL 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], *affd* 23 NY2d 700 [1968]).

Fee of Counsel to the Public Administrator

Counsel to the Public Administrator submitted an affirmation of services with annexed time records. Counsel affirmed that he received two payments of legal fees: the first payment occurred on July 31, 1996 in the amount of \$2,850.00; and the second payment occurred on November 6, 1998 in the amount of \$2,600.00². Counsel states that subsequent to those two payments, the total time records reflects 34.75 hours or a total of \$10,218.75. The time records show an additional payment of \$4,543.75 on September 9, 2015. The waiver of citation asks for the fixation of legal fees in the total amount of \$17,493.75, of which \$7,500.00 is unpaid. Counsel also seeks approval of \$180.00 paid to Brosnan & Hegler, previous counsel to the Public Administrator. The attorney further anticipates that additional services totaling \$3,900.00 will be required to complete the services required prior to the termination of the estate. Thus, the total fee sought for the petitioner’s attorney is \$19,568.75. The fee of \$180.00 which has been paid to Brosnan & Hegler and \$15,000.00

²These payments were made prior to the requirement of maintaining contemporaneous time records and do not appear on the time records provided.

to Mahon, Mahon, Kerins & O'Brien, LLC are approved.

Fee of the Accountant

The court has also been asked to review the accountant's fees. 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 petition for judicial settlement of account of the Public Administrator seeks authorization of the accounting fees of Rispoli & Co., in the amount of \$1,250.00. The waiver and consents to the accounting show accounting fees to Grassi & Co., Lisa Rispoli, CPA, P.C., Rispoli & Curti and Rispoli & Co. in the total amount of \$10,525.00. The waivers and consents also show a payment of accounting fees to Raich Ende Malter Lerner & Co. in the amount of \$250.00, all of which has been paid. The affirmation filed by the accountant requests approval of a total fee of \$11,775.00, of which \$10,525.00 has been paid. The accountant prepared the fiduciary income tax returns for the years ending December 31,

1996 through December 31, 2016. A return for the year ending December 31, 2017 as well as a final return will also be required. The accounting fees are approved in the amount requested.

CONCLUSION

The account is approved. Commissions and expenses are allowed subject to audit. Legal fees of Mahon, Mahon, Kerins & O'Brien, LLC, the attorney for the petitioner, are approved in the amount of \$15,000.00, inclusive of disbursements. The payment of \$180.00 to Brosnan & Hegler is approved. Accounting fees are approved in the amount requested, \$11,775.00. The payment to Raich Ende Malter Lerner & Co. in the amount of \$250.00, which has been paid, is approved.

The net estate shall be paid in accordance with Article Fourth of the decedent's will as follows: 50% to Catholic Charities of the Diocese of Rockville Centre, New York and 50% to the Association for the Help of Retarded Children, Nassau County, New York.

Settle decree.

Dated: October 4, 2017
Mineola, New York

E N T E R :

MARGARET C. REILLY
Judge of the Surrogate's Court

cc: Richard T. Kerins, Esq.
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