

Matter of Hanwacker
2018 NY Slip Op 30733(U)
April 16, 2018
Surrogate's Court, Nassau County
Docket Number: 2014-378675/B
Judge: Margaret C. Reilly
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**SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

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**In the Matter of the Account of Proceedings of
 Lawrence R. Hanwacker,
 as the Executor of the Estate of**

**DECISION
 File No. 2014-378675/B
 Dec. No. 34039**

LEONA HANWACKER,

Deceased.

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PRESENT: HON. MARGARET C. REILLY

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

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In connection with the first and final account of Lawrence R. Hanwacker for the estate of Leona Hanwacker, the petitioner requests that the account of proceedings be judicially settled, and seeks an order with the following relief: (i) the payment of legal fees and disbursements to Davidoff Hatcher & Citron, LLP in the amount of \$23,978.88, as set forth in the Schedule C of the accounting; (ii) approving the reimbursement of out-of-pocket expenses to the Executor, Lawrence Hanwacker, of \$24,421.17, as stated in Schedule C and \$2,024.19 as stated in Schedule D of the accounting; (iii) approving the executor's

commission of \$15,525.38, as stated in Schedule I of the accounting; (iv) the payment of legal fees in the sum of \$3,250.00 to Kenneth P. Mahon, Esq.; (v) the payment of legal fees in the sum of \$1,600.00 to John J. O’Grady, Esq.; (vi) the payment of legal fees in the sum of \$655.10 to Greco & Wolf, PLLC; (viii) the payment of additional legal fees in the sum of approximately \$7,500.00 to Davidoff Hutcher & Citron, LLP; and that process be issued to all necessary parties who have not appeared to show cause why the relief requested should not be granted; and that an order be granted directing the service of process pursuant to the provisions of SCPA Article 3 upon such persons named in paragraph [6] whose names or whereabouts are unknown and cannot be ascertained or who may be persons on whom service by personal delivery cannot be made.

In addition, the court must set the fee for the guardian ad litem.

BACKGROUND

Leona Hanwacker (the decedent) died on January 15, 2014, a resident of Carle Place. Initially, Lawrence R. Hanwacker (the petitioner) filed for probate a purported will dated December 18, 2009 (the 2009 will). The petitioner was unsuccessful in having the 2009 will admitted to probate. Pursuant to a stipulation dated September 8, 2014,¹ he withdrew his petition,² and on December 3, 2014, he filed for probate an earlier purported will, dated April 15, 1996 (the 1996 will).

¹ The stipulation was executed by counsel for the petitioner and the guardian ad litem appointed in the proceeding to probate the 2009 will to represent the interests of the decedent’s infant great-grandson, Thomas Daly.

² The petition was withdrawn by affirmation dated September 19, 2014.

The 1996 will was admitted to probate, and letters testamentary issued to the petitioner on June 23, 2015. Under the terms of the 1996 will, the decedent left her residuary estate to her issue, per stirpes. At the time of her death, the decedent was survived by: her son, the petitioner; and her daughter, Lisa A. Gregory. The decedent had been predeceased by another daughter, Lorene Lauer, but was survived by Lorene Lauer's daughter, Marlene Lauer, and her infant grandson, Thomas Daly.

On November 2, 2016, the petitioner filed his account as executor; an updated account was filed on May 16, 2017. In the context of this accounting proceeding, on December 16, 2016 the court appointed a guardian ad litem to represent the interests of Thomas Daly, who is a 1/6th beneficiary under the 1996 will. One of the disputed issues in the present account, discussed at greater length below, is the objection of the current guardian ad litem to her ward's participation in the payment of legal and guardian ad litem fees incurred in connection with the attempted probate of the 2009 will.

THE ACCOUNT

The petitioner's updated account covers the period from January 15, 2014 through October 31, 2016. It shows the receipt of \$410,610.52 of estate principal, which was supplemented by income collected totaling \$874.38. This resulted in total charges of \$411,484.90. This amount was reduced by administrative expenses in the amount of \$44,532.80, and payment of creditors' claims in the amount of \$2,024.19, leaving a balance of \$364,927.91 on hand.

REPORT OF THE GUARDIAN AD LITEM

The guardian ad litem filed her initial report on March 20, 2017, based upon the account filed with the court on November 2, 2016. After reviewing the account and the schedules, the guardian ad litem states that there are multiple bank accounts missing from Schedule J: (1) Capitol One Account xx1391, in the amount of \$3,523.84, held in the name of the decedent or Lawrence R. Hanwacker; (2) Capitol One Account xx4820, in the amount of \$23,781.40, held in the name of the decedent and Lawrence R. Hanwacker; and (3) Janney Account xx 0611, in the amount of \$492,606.81, which names Lawrence R. Hanwacker and Lisa Gregory as the transfer-on-death beneficiaries. In connection with the Capitol One accounts, the guardian ad litem argues that the presumption of joint tenancy and presumption of survivorship do not apply to these accounts, as no signature cards have been produced to support joint accounts or the right of survivorship, although the guardian ad litem demanded the production of these signature cards.

In addition, the guardian ad litem suggests that the start date of the account should be the decedent's date of death rather than the date letters issued, and that there should be an adjustment to the petitioner's legal fees, based upon the fact that some of these fees were incurred by the petitioner in his unsuccessful attempt to probate the 2009 will. According to the current guardian ad litem, it was only as a result of the efforts of the guardian ad litem appointed in the probate proceeding for the 2009 will that the petitioner withdrew his petition to probate the 2009 will, which did not provide for the infant distributee, and offer the 1996 will for probate, pursuant to which Thomas Daly receives a 1/6 share of the decedent's net

estate. The current guardian ad litem maintains that her ward's share should not be reduced by legal fees incurred by the petitioner in connection with the earlier proceeding, nor should the ward be responsible for payment of the prior guardian ad litem's fee of \$3,250.00. The guardian ad litem argues that the court should disallow the petitioner's legal fees for the entire period of July 2014 through November 12, 2015.

The guardian ad litem concludes that she finds the estate to have been properly administered, other than the exclusion of the decedent's interest in the two Capitol One accounts mentioned above, and that she objects to the premature payment of legal fees and their amounts. She recommends that the petitioner submit an updated account to reflect the Capitol One accounts and the Janney account, which should be served on all beneficiaries under the will, before the account can be settled with adjustments to the legal fee as requested by the guardian ad litem.

AFFIRMATION IN RESPONSE TO REPORT OF GUARDIAN AD LITEM

On May 16, 2017, counsel for the petitioner filed a response to the report of the guardian ad litem, as well as an updated account. Counsel advises the court that an effort was made to obtain the Capitol One signature cards sought by the guardian ad litem, but that the bank had advised the petitioner that the records are unavailable. Based upon the absence of signature cards, the petitioner updated his account to include both Capitol One accounts in Schedule A, and to transfer \$27,305.24, the combined date of death value of the accounts, into the estate bank account. Schedule J of the updated account reflects the Janney account, and the start date of the updated account is the decedent's date of death.

Counsel for the petitioner rejects the guardian ad litem's suggestion that legal fees for the period of July 2014 through November 12, 2015 of approximately \$9,400.00, inclusive of the fee payable to guardian ad litem in the probate proceeding for the 2009 will, should be denied by the court. He notes that the court's disallowance of the fees would only entitle the infant distributee represented by the guardian ad litem to an additional \$1,500.00, based upon his 1/6th interest in the net estate.

While counsel for the petitioner concedes that her client attempted to probate the 2009 will that was ultimately found to have defects in its execution, she notes that her client engaged counsel's firm in July 2014 specifically to represent the petitioner in his withdrawal of the 2009 will. Counsel asserts that the defects in the decedent's execution of the 2009 will were not apparent upon a review of the document and only became known to the petitioner, who is not an attorney, after discussions with the witnesses and the draftsman. Thus, the petitioner did not know that the 2009 will he offered for probate was invalid, and he did not act improperly in offering it for probate. Accordingly, there is no basis, according to counsel, for forcing the petitioner to bear alone the financial burden of the prior proceeding. Moreover, the legal services provided during the same time period included the sale of the decedent's home and the accounting proceeding, and counsel argues that her firm should be compensated for their work.

**REPLY TO AFFIRMATION IN RESPONSE
TO REPORT OF GUARDIAN AD LITEM**

The guardian ad litem filed a reply in which she notes that her recommendations

concerning the Capitol One and Janney accounts, and the starting date of the account, were accepted by the petitioner. However, the issue of legal fees remains disputed.

The guardian ad litem notes that the petitioner paid legal fees of \$24,633.98 without court approval and now seeks approval of an additional \$7,500.00 of estimated legal fees, bringing the total, if approved, to \$32,133.98. Arguing that this amount is excessive in a simple estate, the guardian ad litem reiterates her request that the court adjust the amount of legal fees payable to counsel.

Finally, the guardian ad litem reiterates her request that the court require the petitioner to serve the previously filed updated account on all interested parties. The court denies this request, as the waivers filed by the interested parties are knowledgeable and reflect all of the relief sought by the petitioner.

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]).

Legal Fees

The petitioner has asked the court for approval of legal fees totaling \$23,978.88, inclusive of expenses totaling \$957.63, incurred in connection with the administration of the estate, all of which have been paid. In addition, petitioner seeks approval of estimated fees of \$7,500.00 for work performed and to be performed after October 31, 2016. The guardian ad litem has objected to these payments.

Counsel filed an affirmation of services which reflects that the actual time billed between July 7, 2014 and October 31, 2016 amounts to \$20,521.25 for 60.75 hours of services, at rates ranging from \$185.00 to \$600.00 an hour, plus disbursements of \$957.63. In addition, the firm was paid a flat fee of \$2,500.00 for legal services provided in connection with the sale of the decedent's real property. The firm also requests payment of \$7,500.00 for estimated additional costs and expenses to complete the accounting for the estate after October 31, 2016, including responses to potential objections, and to make the final distributions. Contemporaneous time records were not provided to the court, even though contemporaneous records of legal time spent on estate matters are important to the court in determining whether the amount of time spent was reasonable for the various tasks performed (*Matter of Von Hofe*, 145 AD2d 424 [2d Dept 1988]; *Matter of Phelan*, 173 AD2d

621 [2d Dept 1991]).

The court has carefully reviewed the affirmation of services and the summary of time records submitted to the court, as well as the objections raised by the guardian ad litem, who asks that the court refrain from charging her ward with a share of the attorney and guardian ad litem fees incurred in connection with the unsuccessful filing by the petitioner of a later document for probate, which document was subsequently withdrawn. Counsel's affirmation reflects that a different law firm filed the first probate petition; the present petition and Schedule C reflect that the previous firm was paid \$655.10.

After considering all of the above factors, the fee of Davidoff Hatcher & Citron, LLP, is approved in the amount of \$23,978.88, inclusive of expenses totaling \$957.63, all of which have been paid. The court denies counsel's request for approval of an additional \$7,500.00 for future services, but will reconsider a request for additional fees for services performed upon submission, within 45 days of the issuance of this decision, and on notice to the guardian ad litem, of a supplemental affirmation of services, which must include contemporaneous time records, for the period of November 1, 2016 through the date of this decision.

Fees of the Guardians ad Litem

The guardian ad litem is entitled to a fee for services rendered (SCPA 405). The factors discussed above apply equally to an attorney retained by a fiduciary or to the court-appointed guardian ad litem (*Matter of Graham*, 238 AD2d 682 [3d Dept 1997]; *Matter of Burk*, 6 AD2d 429 [1st Dept 1958]). The nature of the role played by the guardian

ad litem is an additional consideration in determining an appropriate fee (*Matter of Ziegler*, 184 AD2d 201 [1st Dept 1992]). Normally, the fee of a guardian ad litem is an administration expense of an estate and is paid from estate assets.

The petitioner asks the court to approve the fee of \$1,600.00 previously paid to the guardian ad litem in the probate proceeding for the 1996 will, and the fee of \$3,250.00 previously paid to the guardian ad litem in the probate proceeding for the 2009 will. However, there is no need for the court to approve fees that were previously approved.³ The court must also consider the request of the present guardian ad litem that her ward not be required to contribute 1/6th of the \$3,250.00 fee, or \$541.67. Since the infant indisputably benefitted from the services of the guardian ad litem, the court will allow the ward's 1/6th interest in the estate to be charged with his proportionate share of this expense.

The court must also address the fee of the guardian ad litem in the present proceeding. The guardian ad litem's affirmation and supplemental affirmation reflect 14.35 hours of services. The guardian ad litem's usual hourly rate is \$400.00, resulting in a billable time of \$5,740.00.

In setting the fee of the guardian ad litem, the court must consider the value of the ward's interest in the estate. The size of the estate can operate as a limitation on the fees payable (*Matter of McCranor*, 176 AD2d 1026 [3d Dept 1991]; *Matter of Kaufmann*, 26 AD2d 818 [1st Dept 1966], *affd* 23 NY2d 700 [1968]), without constituting an adverse

³ Dec. No. 30860, dated June 2, 2015 and the decree in the probate proceeding dated June 23, 2015.

reflection on the services provided. The court fixes the fee of the present guardian ad litem in the sum of \$4,305.00, to be paid within 30 days of the date of the decree to be issued in connection with this accounting proceeding.

CONCLUSION

The updated account, as filed, is approved. Within 45 days of the date of the issuance of this decision, counsel for the petitioner shall file and serve an affidavit bringing the account down to date from the closing date of the account.

The commission of the executor is approved subject to audit.

The court approves the reimbursement of out-of-pocket expenses to the petitioner, in the amount of \$24,421.17, as stated in Schedule C, and in the amount of \$2,024.19, as stated in Schedule D of the accounting, all of which has been paid.

The fee of counsel to the petitioner, Davidoff Hutcher & Citron, LLP, is fixed in the amount of \$23,978.88, inclusive of expenses totaling \$957.63, all of which have been paid. The court denies the payment of additional legal fees in the sum of approximately \$7,500.00 to Davidoff Hutcher & Citron, LLP. A request for an additional payment of legal fees will be considered if a supplemental affirmation of services is filed with this court within 45 days of the date of this decision.

The payment of legal fees in the sum of \$3,250.00 to Kenneth P. Mahon, Esq., for services rendered as a guardian ad litem in connection with the petition to probate the 2009 will, was previously approved by this court, in a decision dated June 2, 2015 and in the probate decree dated June 23, 2015.

The payment of legal fees in the sum of \$1,600.00 to John J. O'Grady, Esq., for services rendered as a guardian ad litem in connection with probate of the 1996 will, was previously approved by this court, in the probate decree dated June 23, 2015.

The court does not approve or disapprove the payment of legal fees in the sum of \$655.10 to Grego & Wolf, PLLC, as no affidavit of legal services was submitted for the court's review.⁴

The fee of the guardian ad litem for services rendered in connection with the present accounting proceeding is fixed in the amount of in the sum of \$4,305.00, to be paid within 30 days of the date of the decree to be issued in connection with this accounting proceeding.

The decree shall authorize the petitioner to distribute the balance of the net estate, after payment of any outstanding legal and guardian ad litem fees, in accordance with the terms of the will dated April 15, 1996 and admitted to probate by this court.

Settle decree.

Dated: April 16, 2018
Mineola, New York

E N T E R:

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

⁴ Court approval is not required, as the fee was previously paid in full, as reflected on Schedule C of the account.

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