Matter of Helmsley
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August 15, 2019
Surrogate's Court, New York County
Docket Number: 2007-2968/B
Judge: Nora S. Anderson
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SURROGATE'S COURT : NEW YORK COUNTY
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In the Matter of the Judicial Settlement of the Final Account of Proceedings of DAVID PANZIRER, WALTER PANZIRER, SANDOR FRANKEL and JOHN CODEY, as Executors of the Estate of

LEONA M. HELMSLEY,

deceased.
--X

New York County Surrogate's Court
Date: AUGUST 15, 2019

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A N D E R S O N, S .

At issue in this final executors' accounting in the estate of Leona M. Helmsley is the compensation of the five executors and whether certain professional fees should be paid by the estate.

Leona Helmsley died on August 20, 2007, leaving an estate in excess of $5 billion. Under her will, she left the bulk of her fortune to The Leona M. and Harry B. Helmsley Charitable Trust, an inter vivos trust that she had established (the "Charitable Trust"). She nominated as executors her brother Alvin Rosenthal, her grandsons David Panzirer and Walter Panzirer, her attorney Sandor Frankel, and her friend and business advisor John Codey. Preliminary letters testamentary issued on August 28, 2007, followed by full letters on April 8, 2008.

Decedent provided in her will that her five executors were not to receive statutory commissions. Rather, they were to be compensated for their services on the following basis:

> "Any one or more executors ... may render services to the Estate ... as an officer, manager or employee of the Estate ..., or in any other capacity, notwithstanding the fact that they may appoint themselves to serve in such capacities, and they

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shall be entitled to receive reasonable compensation for such services. No such person shall be required to furnish any bond in connection with such employment." [emphasis added].

Based upon this language, the executors commenced a proceeding for advance payment of their compensation as executors (the "Advanced Payment Proceeding"), seeking $4.5 million ($900,000 each) as partial compensation for their first year of service, *i.e.*, August 20, 2007, through August 20, 2008.

The Attorney General for the State of New York (the "AG"), as the statutory representative of the ultimate beneficiaries of the Charitable Trust, objected to the size of the requested advance. The court granted the application, subject to the filing of a bond by each fiduciary, reasoning that the advance was "modest when viewed against the backdrop of the mammoth and highly complex estate for which these fiduciaries are responsible and the risk of enormous personal liability they incur" (*Matter of Helmsley*, Sur Ct, NY County, Feb. 5, 2012, Anderson, J., File No. 2007/2968, at 6).

In June 2014, after Alvin Rosenthal had died, the four remaining executors ("Petitioners") commenced their final accounting for the period from decedent's death through April 30, 2014. The fiduciary of Alvin Rosenthal's estate adopted the account for the period of Mr. Rosenthal's service. Thereafter, petitioner John Codey died, and the fiduciary of his estate was substituted into the proceeding.

Petitioners' account reflects decedent's direction that her

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executors receive "reasonable compensation" for their services instead of statutory commissions. Petitioners ask the court to fix their final compensation at a total of $100 million ($25 million each), plus $6,250,000 for Alvin Rosenthal's estate. In comparison, statutory commissions in an estate of this size would exceed $215 million (*see* SCPA § 2307).

The AG filed three objections to the account, none of which alleges that the executors acted improperly in administering this vast and complex estate. Rather, the AG takes exception to 1) the amount Petitioners seek as "reasonable compensation" for their services and the services of Alvin Rosenthal, 2) the legal fees that were paid or are proposed to be paid to two law firms associated with executor Sandor Frankel, and 3) Petitioners' request that the court approve the payment of legal fees incurred in connection with the Advance Payment Proceeding.

The surviving Petitioners (Sandor Frankel, David Panzirer and Walter Panzirer), the fiduciaries of the deceased executors, Alvin Rosenthal and John Codey, the Charitable Trust (represented by "independent counsel" because the surviving Petitioners are also the trustees of the Charitable Trust), and the AG have all briefed the issues raised by the objections. It is noted that the Charitable Trust, which ultimately bears the expense of the fiduciaries' compensation and legal fees, does not support the AG's position with respect to any of its objections. However, the Charitable Trust's

position cannot be evaluated without consideration of the following fact: the Charitable Trust acts through its trustees each of whom is an executor. Given this dual role, Petitioners have an undeniable conflict of interest, which cannot be addressed adequately simply by denominating the Charitable Trust's counsel as "independent." Absent any explanation as to how the conflict has been eliminated in the circumstances here, the court does not consider as significant the fact that the Charitable Trust has no objection to the accounting.

Because the parties have waived an evidentiary hearing and have consented to adjudication of the issues based on their submissions, the court now considers the merits of the objections.

The Executors' Reasonable Compensation

Decedent provided for her executors to receive "reasonable compensation" in lieu of statutory commissions, but did not provide guidance as to the meaning of that term as applicable to her estate. Petitioners argue that the court's analysis should be guided by well-settled law in New York concerning the factors to be considered in determining "reasonable compensation" payable from estates to attorneys and corporate fiduciaries. These factors include the time spent, the value of the assets involved, the nature of the services rendered, the difficulty of the issues and the skills required to handle them, the benefits to the estate or trust from the services performed, and the service provider's experience, ability, and

reputation (*see Matter of Freeman*, 34 NY2d 1 [1974]; *Matter of Potts*, 213 App Div 59 [4th Dept 1925], *affd* 241 NY 593 [1925]; see also *Matter of McDonald*, 138 Misc 2d 577 [Sur Ct, Westchester County 1988][applying similar factor-based analysis in determining reasonable compensation for corporate trustees under SCPA § 2312]).

The AG counters that the application of this multi-factor approach is inappropriate here. The AG argues that the determination of the executors' compensation should be based on a simple arithmetic formula which considers only the reasonable amount of time spent multiplied by an appropriate hourly rate. To that end, the AG "urges the Court to appoint a neutral expert to advise the Court and the parties on the reasonable value of each Executor's contribution to the Estate administration, based on the services actually rendered by him and on his individual knowledge and skills."

The AG cites no compelling authority to support its proposed methodology for determining fiduciary compensation. She contends that the equitable remedy of quantum meruit provides the basis for her approach. Such remedy's aim is to compensate parties for what they have earned, *i.e.*, the value of their services, in the absence of a contract containing all necessary terms. However, the AG's arguments are based on an unfairly narrow view of the principle of quantum meruit. They ignore that New York courts often employ a multi-factor approach when awarding compensation based upon quantum

meruit (*see e.g. Mann v Lovett & Gould*, 289 AD2d 206, 207 [2d Dept 2001] [court awarded compensation to attorneys based on quantum meruit "in light of all relevant factors," citing *Matter of Freeman*, 34 NY2d 1]; *Matter of Karp*, 145 AD2d 208 [1st Dept 1989][court rejected a time-based analysis in favor of the *Freeman-Potts* standard to determine reasonable legal fees in a conservatorship matter]).

More important, the AG fails to demonstrate how her methodology, which stresses only time spent and would require an expert to ascribe an appropriate hourly rate, would yield a better result than the multi-factor approach. In fact, executorial services, by their nature, do not lend themselves to precise timekeeping, as do more circumscribed legal or other professional services. The executors' time records are a testament to this fact. Nor can a single hourly rate accurately reflect the many varied services executors perform and the inevitable risk they incur in performing them. As a result, the AG's efforts to compare the annual compensation that Petitioners seek to the salaries (and extrapolated hourly rates) of various executives within the Helmsley real estate empire do not aid her position. In these circumstances, the AG's reliance on anyone, including an expert, to bring precision, after-the-fact, to the issues of time spent and an appropriate hourly rate is misguided, at best.

For these reasons alone, the AG's call for a time and rate-

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based formula to determine the executors' "reasonable compensation" fails. But also worth noting is at least one additional reason to reject the AG's proposed methodology. The AG's lengthy and detailed suggested "guidelines" for the expert amply demonstrate that the application of the AG's standard is unworkable. Indeed, the AG's procedure would foist an unwieldy, time-consuming and costly process onto the parties and the estate. At minimum, it would require the court to select the expert, would likely involve the retention of additional professionals to assist the expert, would necessitate more discovery and possibly a hearing, all at the expense of the estate.

Lost in the AG's call for an expert is one simple fact - this court is uniquely qualified to determine compensation to be paid from an estate or trust based upon a reasonableness standard. Indeed, the Legislature has seen fit to confer upon this court the authority to determine "reasonable compensation" not only for preliminary executors in certain instances (SCPA § 1412[7]), but also, for corporate trustees (SCPA § 2312) and attorneys (SCPA § 2110).

New York courts are not often called upon to address the meaning of "reasonable compensation" for individual executors, since most testators rely on the formula the Legislature has provided for reasonable compensation in any given estate by providing for standard statutory commissions (SCPA § 2307). However, there are

instances in which courts are required to determine compensation for individual fiduciaries outside the statutory scheme. They occur when 1) a fiduciary resigns or dies before the estate is fully administered, or 2) a preliminary executor does not receive full letters for any reason, including when the will is denied probate (*see* SCPA § 1412[7]).

In these instances, courts generally consider the statutory commission schedule (SCPA § 2307) as indicative of "reasonable compensation" and apply statutory rates to the amounts received and paid out during the fiduciary's tenure (*see e.g. Matter of Hahn*, NYLJ, March 15, 2006, at 17, col 2 [Sur Ct, Suffolk County 2006]). However, in the few cases where courts have grappled with determining "reasonable compensation" without resort to the statutory commission schedule alone, they have generally turned to a multi-factor approach consistent with *Matter of Freeman* (34 NY2d 1) and *Matter of Potts* (231 AD 59). For example, in *Matter of Smith* (NYLJ, June 19, 1980, at 15, col 3 [Sur Ct, Bronx County 1980]), the court determined the reasonable compensation of a resigning property guardian after consideration of several *Freeman-Potts* factors. Likewise, in *Matter of Bernstein* (94 Misc 2d 898 [Sur Ct, NY County 1978]), the court considered the circumstances of a deceased preliminary executor's tenure in determining the reasonable compensation to be paid to his estate.

The AG is simply wrong to posit that a multi-factor approach

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would violate the "letter and spirit" of decedent's will by allowing the court to consider the magnitude of her estate. Decedent's election to remove her executors from the statutory commission scheme does not signify, as the AG claims, that she wished the court to ignore the size of her estate in determining her executors' compensation. If that had been her intent, she could have very readily said as much. Instead, all that can be drawn from the language of the will is that decedent did not intend that her fiduciaries' compensation would be tied solely to the size of the estate (and the attendant risks of liability such size necessarily brings), as it would have been under the graduated schedule for commissions set forth in SCPA § 2307.

Also without merit is the AG's argument that the multi-factor approach set forth in *Matter of Freeman* and *Matter of Potts* should be rejected here because individual fiduciaries generally do not bring to the administration of an estate the expertise and qualifications that attorneys or corporate trustees do. The AG fails to demonstrate that the multi-factor approach is only well-suited to such professionals and not to individual fiduciaries, who are often lay persons. In fact, the *Freeman-Potts* standard, by its very nature, requires consideration of the type and degree of expertise and experience an executor brings to the administration of an estate.

Finally, it is worth noting that the AG's rejection of a multi-

factor approach represents a stark reversal from its own position in the Advanced Payment Proceeding. There, the AG had agreed that such approach would be the standard for determining the executors' compensation in a final accounting. Indeed, the AG specifically listed 10 factors she expected the court to consider, including the estate's size, the risk and responsibility involved, and the results achieved. Notably, in endorsing the consideration of multiple factors, the AG cited *Matter of McDonald* (138 Misc 2d 577) and *Matter of Prankard* (187 Misc 2d 566 [Sur Ct, Westchester County 2000]), two decisions in which the court employed a multi-factor approach to determine "reasonable compensation" of a corporate trustee under SCPA § 2312.

Now, years later, the AG argues that the multi-factor approach "is not the applicable legal standard" and that the cases using such an approach have no bearing here. However, had the AG offered then the entirely different framework for analysis that she proffers now, the executors would have been on notice and able to guide themselves accordingly. Instead, as their submissions make clear, the executors sought to demonstrate the value of their services under the multi-factor *Freeman-Potts* approach previously embraced by the AG only to be faulted by the AG for having "failed to provide the Court with the requisite evidentiary basis" for determination of "reasonable compensation" under the time-based standard the AG now embraces.

Many other jurisdictions have rejected the type of time-based

formula proposed by the AG here and have instead adopted a multi-factor approach similar to the one used in *Matter of Freeman* and *Matter of Potts* (*see e.g. Robert Rauschenberg Found. v Grutman*, 198 So 3d 685 [Fla 2016]; *Ruttenberg v Friedman*, 97 So 3d 114 (Ala 2012); *Hayward v Plant*, 98 Conn 374 [1923]). Simply put, the AG's proposed methodology for determining compensation of individual fiduciaries is unsupported by case law in this and other jurisdictions. Its use would require the appointment of an expert that would usurp the court's traditional role as the arbiter of what constitutes "reasonable compensation" in estate matters. Under these circumstances, the court concludes that a multi-factor approach is the best method to determine "reasonable compensation" of individual executors.[1] However, the question remains as to what factors the court should consider.

In the Advance Payment Proceeding, the AG assumed that the court would apply the factors courts consider when determining reasonable compensation for corporate trustees under SCPA § 2312, as set forth in *Matter of McDonald* (138 Misc 2d 577) and *Matter of Prankard* (87 Misc 2d 566). However, the factors considered in these cases are essentially subsumed within the broader factors set forth

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[1] Petitioners have submitted affidavits from three experts "concerning the amount of reasonable compensation that should be approved" utilizing the multi-factor approach of *Matter of Freeman* (34 NY2d 1) and *Matter of Potts* (231 AD 59) and their progeny. The court has considered none of these affidavits, since, as noted above, the determination of reasonable compensation is a matter squarely within the purview of the court (see SCPA § 1412[7]; SCPA § 2312; SCPA § 2110).

in *Matter of Freeman* (34 NY2d 1) and *Matter of Potts* (231 AD 59).[2] Thus, for example, the *Freeman* court considered "the difficulty of the questions involved," while the *McDonald* Court considered, "the character of the work involved," and "the knowledge, skill and judgment required and used." As pertinent to evaluating the services of an individual fiduciary, in all of these cases, the courts' multi-factor approach recognized, in no particular order, the following factors: 1) the expertise, knowledge and reputation of the service provider, 2) the difficulty of the issues involved and the skills required to handle them, 3) the size of the estate or trust being administered, 4) the time and labor involved, 4) the responsibilities undertaken and the risks assumed, 5) the benefits and results achieved for the estate or trust, and 6) the customary fee charged for similar services. Accordingly, these are the factors that this court shall consider.

When this court first examined the services the executors performed in connection with the Advance Payment Proceeding, the full magnitude and complexity of the estate were unknown. The court now has the benefit of the full record of the estate's administration which details the many difficulties the executors faced.

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[2] In *Matter of Prankard* (187 Misc 2d 566), the court held that, in contested proceedings, it would apply the factors set forth in *Matter of McDonald* (138 Misc 2d 577), but also consider the corporate fiduciary's public fee schedule. There is no analogue to the public fee schedule for individual fiduciaries.

Under normal circumstances, the administration of an estate of this size would have required significant time commitments by the executors over an extended period of time simply to handle routine executorial functions. But here the estate's administration became even more protracted because of the unusually complex nature of the estate's assets. The terms of the will charged the executors with overseeing the liquidation of the estate's more than $5 billion in assets. These assets included not only diverse stocks, pre-refunded municipal bonds valued at more than $2 billion, and hundreds of items of valuable tangible personal property, but also, real estate interests in more than eighty (80) properties in 17 states and the District of Columbia, held by the estate directly or indirectly through a variety of complex ownership structures. At the same time, the executors also had to address other issues, such as the ongoing management of the estate's real estate assets prior to sale, as well as numerous litigations and potential litigations.

Apart from the exceptional responsibility the administration of such an estate necessarily entails in the best of economic times, the executors also faced an unprecedented financial crises in 2008 and 2009 which significantly complicated their ability to sell the estate's complex and diverse real estate interests. Yet, there is no dispute that the executors managed to liquidate in an orderly manner all of the estate's assets, including its real estate interests in hotels, office buildings, retail properties, apartment buildings and

warehouses. Moreover, they did so while addressing the complicated tax aspects of many of the transactions. All of these achievements enured to the enormous benefit of the residuary beneficiary, the Charitable Trust.

Petitioners' submissions, together with the account itself, set forth in detail the services performed by the executors and the results that they achieved. The net gain reflected in the account is approximately $400 million, an impressive amount given the existing perilous economic conditions. Along the way, the executors faced consistently difficult situations, many of them unique, ranging from a probate contest, which was resolved quickly and on favorable terms, to the complexities of liquidating $2 billion in pre-refunded municipal bonds, to the demands for oversight of the operations of decedent's hotels, to the formation of a real estate investment trust containing the Empire State Building and other properties in which the estate had an interest, shares of which were successfully sold in an initial public offering.

That the AG does not object to any aspect of the estate's administration is a testament to the prudence and diligence the executors employed as fiduciaries under difficult circumstances. What is certain is that, had the executors failed at any point to employ the level of care required of a fiduciary, the AG, as it routinely does, would have sought to hold them accountable (*see e.g. Matter of Rothko*, 43 NY 305 [1977] [affirming surcharges obtained by

the AG and others for the executors' conduct in connection with the sale of decedent's paintings]; *Estate of Donner*, 82 NY2d 574 [1993] [affirming surcharges based upon the AG's objections asserting that the executors' conduct in marshaling estate assets resulted in losses to the estate]). It cannot be emphasized enough that the decisions that the executors made on an almost daily basis subjected them to great personal financial risk. Given the enormous size and complexity of the estate, the risks inherent in serving as a fiduciary were astronomical.

Contrary to the AG's contention, the executors here carried a greater risk of personal liability than ordinarily faced by a fiduciary. To fulfill their responsibilities, the executors were required to seek appropriate expertise and advice. They bore the responsibility for selecting all outside professionals, supervising their services, and then evaluating their recommendations and advice when making their own decisions. Their retention of professionals to advise them in the administration of this complex estate did not "neutralize" the risk of massive surcharges. *Matter of Rothko* (43 NY2d 305) illustrates this point. There, the Court of Appeals specifically rejected an executor's effort to shield himself from liability by claiming he had relied on advice of counsel in assenting to the sale of decedent's paintings in transactions which personally benefited his co-fiduciaries. The court found him negligent in carrying out his fiduciary duties and surcharged him

more than $6 million, noting that "[a]lleged good faith on the part of a fiduciary forgetful of his duty is not enough" (*see id.* at 320 [citation omitted]).

For the AG to argue that the executors here were protected because they could assert malpractice claims against the professionals they retained is speculative and without merit. The argument is based on two erroneous assumptions, the first, that every decision upon which a surcharge could be based could also be the subject of a malpractice action, and, the second, that such lawsuit would be successful and that the executors would be able to recover on the judgment. In reality, the executors served without any meaningful personal liability protection.

The AG conveniently ignores that the executors elected to forgo insurance coverage because they discovered that the costs to the estate would have been "prohibitive." Had Petitioners obtained sufficient insurance to cover even some of their personal risks as fiduciaries, its total cost over the course of the estate's administration may have very well exceeded the total compensation that they seek for themselves and the Rosenthal estate. Because the executors bore the financial risk of serving, the estate and therefore the Charitable Trust benefited.

These are the circumstances under which the court must evaluate the fiduciaries' compensation. Yet, the AG would have this court focus almost entirely on the time the executors spent administering

the estate and what it contends is a lack of sufficient documentation of such time. Courts have repeatedly advised, however, that time spent is among the least important factors to be considered in determining "reasonable compensation" (*see e.g. Matter of Potts*, 23 AD at 62 [in discussing factors to be considered, the court stated, "[we] do not think items as to time actually employed in work on a case are of much importance"]).

Moreover, executorial services, by their nature, do not lend themselves to precise time keeping. Indeed, it is clear from the executors' detailed submissions that the time records that they did maintain vastly understate the actual time they spent on this enormous, complex and multifaceted estate. Significantly, the AG does not dispute Petitioners' contention that "[e]ven a cursory comparison of the Estate's attorney time records with the Executors' time records reveals that the Executors did not reflect in their time records tens of thousands of Estate-related emails and other communications which took place during many years."

As this court noted in the Advance Payment Proceeding, decedent "entrusted her executors with an estate of singular magnitude and extraordinary complexity" (*Matter of Helmsley*, at 3). She did not set a cap on the compensation that they could receive. The fact that Petitioners seek an enormous sum, more than $100 million in total compensation for themselves and for the estate of Alvin Rosenthal, is not, and should not be in and of itself, a basis for reduction. The statutory commission scheme (SCPA § 2307), which is the

Legislature's effort to approximate the fair and reasonable compensation for an executor in any given estate, would yield in this case total commissions that are more than twice what Petitioners seek.

The AG claims that it would be error for the court to consider SCPA § 2307 in determining the executors' "reasonable compensation" because decedent specifically provided for a different standard from the statute's. However, decedent's will does not preclude the court's acknowledgment of the considerations that guided the Legislature in crafting SCPA § 2307. As this court stated in its decision in the Advance Payment Proceeding,

> "[a]lthough SCPA § 2307 does not govern the ultimate compensation to which the executors will be entitled, it is based upon certain wisdom that is relevant here. The statute governing commissions acknowledges the risks and responsibilities of the fiduciaries' undertakings, as measured by the value of the property with which they are entrusted, recognizing that there presumptively should be a direct correlation between the burdens and the rewards of office."

Matter of Helmsley, at 6.

The court finds that the record before it is more than sufficient to evaluate the "reasonable compensation" of all of the fiduciaries. The submissions are painstaking in their detail of the issues and difficulties the executors faced and the services they performed during the accounting period. There can be no doubt that the executors were confronted with the daunting problem of administering a mammoth and enormously complex estate. Apart from the time commitment demanded by an estate of this magnitude, they

each took enormous personal financial risks in serving as fiduciaries. That in hindsight they achieved excellent results does not negate the risks that they faced.

When Petitioners asked the court in 2014 to fix their final compensation as well as Alvin Rosenthal's, they had been serving for more than six years. At that point, Petitioners' compensation would have amounted to approximately $3.85 million per year and Alvin Rosenthal's approximately $2.2 million per year for his almost three years of service. The estate is now in its eleventh year of administration without an increase in requested compensation. Sandor Frankel, David Panzirer and Walter Panzirer have served the entire time. John Codey served for more than eight years before his death in May 2016.

Based upon the foregoing and, after careful consideration of all the criteria noted above, the court fixes Petitioners' final compensation in the amount requested or $100 million ($25 million each for Sandor Frankel, Walter and David Panzirer and the estate of John Codey) and $6.25 million for the estate of Alvin Rosenthal (less any amounts previously received on account).[3]

As explained above, such total compensation to all of the executors ($106,250,000), which amounts to less than 2% of the estate, reflects the unique and complex nature of this massive

[3] In May 2015, the court granted a second application for advance payment of compensation (this time uncontested) in which the executors sought $900,000 each and $100,000 for the estate of Alvin Rosenthal, subject to the filing of a bond by each fiduciary.

estate and the attendant services the executors were called upon to perform at great personal financial risk. Alvin Rosenthal's share, which is exactly 25% of the other fiduciaries', recognizes not only that his service during the beginning of the estate's administration helped to set the estate on a proper course, but also, that his participation declined as his health failed. As for Petitioners, the record amply supports the determination that Petitioners should be compensated equally for their services. They acted collectively, bearing the same responsibilities and risks while serving. Under these particular circumstances, to the extent that any one executor may have spent more or less time than another during any given period, the benefits and results for the estate reflect their equal contributions and effort.

Moreover, although not dispositive, the court has considered that the surviving executors, fully familiar with the services of each other, have, based on their own sense of fairness, concluded that equal division of their compensation is appropriate. To that end, Sandor Frankel, David and Walter Panzirer, and the executor of the estate of John Codey have agreed to split equally their total "reasonable compensation" as determined by the court just as they could have done under SCPA § 2313 if SCPA § 2307 had applied.

<u>Legal Fees to Sandor Frankel's Law Firms</u>

The AG objects to Schedules C and C-1 to the extent that they include $1,747,710.87 in legal fees paid and unpaid to two law firms

associated with executor Sandor Frankel (the "Frankel Law Firms").[4] Of this total, Frankel billed approximately $700,000 and his partner and associates billed the balance. The AG contends that the Frankel Law Firms' fees 1) include compensation for services that were performed without a retainer agreement and were not authorized in advance by the other executors, 2) were unnecessary, duplicative or otherwise exceed the reasonable value of the services, 3) do not account for Frankel's having a right to receive compensation as an executor, and 4) include payment for executorial services.

A fiduciary who provides legal services is allowed "compensation for [such of] his ... services as appear to the court to be just and reasonable" (SCPA § 2307[1]; EPTL 11-1.1[b][22]). The attorney/executor has the burden to substantiate the fees and differentiate between executorial and legal services for billing purposes (*see e.g. Matter of Epstein*, 158 AD2d 183 [1st Dept 1990]). Ultimately, however, it is the Surrogate who has the authority and broad discretion to fix legal fees (*see e.g Stortecky v Mazzone*, 85 NY2d 518 [1995]; *Matter of Marsh*, 265 AD2d 253 [1st Dept 1999]).

Frankel met his burden by sufficiently detailing the broad array of services performed for the estate by him and others at the

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[4] The AG notes that the Frankel Law Firms were paid an additional $1 million in legal fees which were allocated to and paid by non-estate Helmsley entities and therefore are not reflected in the accounting. The AG claims that more than $850,000 of this amount is allocable to the estate, but does not object to Petitioners' account on this basis or explain how this fact supports its objection to the legal fees of the Frankel Law Firms as reflected in Petitioners' account.

Frankel Law Firms and addressing each of the issues raised in the AG's objections. First, Frankel showed how the services performed were, in fact, authorized by his co-fiduciaries in advance, notwithstanding the lack of a formal retainer agreement. He then demonstrated that the bills from the Frankel Law Firms, like all other legal bills submitted to the executors, were paid only after a vetting process, which involved initial review by the Office of the General Counsel of Helmsley Enterprises, Inc., followed by another review by counsel for the respective executors. In any event, the fact that the executors did not formally retain the Frankel Law Firms would not preclude compensation for the services performed (*see e.g. Frechtman v Gutterman*, 140 AD3d 538 [1st Dept 2016] [holding that plaintiff's failure to comply with court rules regarding retainer agreements (22 NYCRR § 1215.1) did not preclude recovery for services rendered on a quantum meruit basis]).

With regard to the time entries that the AG specifically charges were for executorial services or duplicative legal services, they totaled approximately $50,000 or less than 3 percent of the $1.7 million billed. With two exceptions, Frankel established that those services were legal in nature and necessary to the administration of the estate. The two exceptions involved approximately $2,500 in billable time, and Frankel has voluntarily refunded that amount to the estate, acknowledging either a billing error ($150) or an inability to recall sufficient details to defend

the time entries ($2,168.75).

Finally, Frankel effectively refuted the AG's contention that his firms' fees were unreasonable because Frankel "presented no justification for the hourly rates charged." In fact, as Frankel correctly notes, the AG does not dispute that the rates charged by the firm were no greater than rates charged by firms providing similar services, including those that provided services to the estate. Nor does the AG challenge Frankel's contention that his firms' hourly rates had been below the prevailing market rate prior to decedent's death and that any increase during the accounting period was to make them commensurate with what other firms were charging.

The AG's reply to Frankel's extensive defense of his firms' fees is most notable for its proposal of a novel and entirely new (to the proceeding) basis for challenging them. The AG argues, without any authority whatsoever, that there should be a "brighter line" test for determining legal fees of an attorney-executor in "an estate such as this." According to the AG, the court should allow compensation for legal services by an attorney-executor or his or her firm only when the following conditions are met:

> "(a) the attorney or law firm serves as sole or lead counsel on specific legal matters; (b) the services are necessary; (c) the services are solely legal in nature, (d) the fees are reasonable; and (e) there is a written retainer or engagement letter between the attorney-executor and the estate when there is at least one other executor of the estate and there is more than one law firm performing legal services for the estate."

The AG claims that her "brighter line" standard would help to eliminate what she perceives as a risk that attorney-fiduciaries such as Frankel will seek compensation for services that call upon their legal knowledge, but do not rise to the level of actual legal work.

SCPA § 2307(1) expressly provides for an attorney-executor to receive compensation for legal services without any conditions other than that it be "just and reasonable." In determining such compensation, courts apply the multi-factor approach set forth in *Matter of Freeman* (34 NY2d 1) and *Matter of Potts* (231 AD 59). The AG fails to demonstrate how the application of the *Freeman-Potts* standard, which gives courts broad discretion to reduce or deny compensation, cannot adequately address her concerns.

Surrogate's Courts routinely address objections to legal fees of attorney-executors. Such objections often include claims, such as those here, that services were duplicative or executorial in nature or that services were inefficient or unnecessary. There is no need to engraft onto existing law additional conditions to a attorney-fiduciary's compensation. Moreover, even if that were not the case, it would be unfair to apply the AG's new "brighter line test" in the circumstances here, since the AG first proposed its application in her reply papers in order to affect a "substantial reduction" of the Frankel Law Firms' fees.

The court has examined not only Frankel's detailed responses to

the issues raised in the objections, but also, the extensive record of the services Frankel and the others at the Frankel Law Firms provided for more than six and one-half years. The court concludes that Frankel was a key member of the estate's legal team and that the Frankel Law Firms ably provided a broad variety of appropriate legal services to the estate that were sometimes complementary, but never duplicative, to those being provided by other firms. In the end, the legal fees of the Frankel Law Firms were modest when compared to the total legal fees of other law firms providing services to individual executors and/or to the estate generally.

Frankel's experience in handling the legal and business matters of decedent's vast real estate interests proved invaluable after decedent's death. The estate's administrative needs required him to continue many of the legal services that he had provided to decedent prior to her death as well as to handle new ones. The issues addressed by the Frankel Law Firms were far from routine given the complex ownership structures of decedent's assets and the unprecedented size of the estate. Based upon consideration of the *Freeman-Potts* factors, including 1) the time and labor required, 2) the value of the estate, 3) the difficulty of the questions presented and the skill required to handle them, 4) the responsibilities involved, 5) the attorney's experience, ability and reputation, and 6) the benefit resulting to the estate from the services rendered, the court fixes the fees of the Frankel Law Firms

in the amount requested less the small sum Frankel voluntarily refunded to the estate.

In making this determination, the court has considered Frankel's compensation as executor and the AG's claim that the specific examples she cited as a basis to reduce the Frankel Law Firms' fees are "illustrative and not exhaustive." However, with two exceptions involving less than $2,500, none of the instances the AG selected for challenge provides a basis for reducing the Frankel Law Firms' legal fees. The voluminous record examined by the court is one that reflects Frankel's sensitivity to possible ambiguities in his dual role and his efforts to distinguish between his executorial and legal time. The court is satisfied that the balance of the Frankel Law Firms' legal bills do not reflect time billed for executorial functions or for unnecessary or duplicative services.

Allocation of Legal Fees Incurred in Advance Payment Proceeding

The AG's final objection relates to the allocation of attorneys' fees incurred in the preparation of the Advance Payment Proceeding. Initially, the executors' legal fees were paid from the estate. However, the parties later agreed that those fees would be refunded to the estate subject to a determination of their allocation upon the executors' final accounting. It is the AG's position that the legal fees and expenses should be the personal responsibility of the surviving executors and the estates of the deceased executors.

Only the Charitable Trust has weighed in on the AG's position in this connection. It contends that the fees are appropriately borne by decedent's estate because the application was "beneficial to the estate as a whole." According to the Charitable Trust, the following statement of this court in the Advance Payment Proceeding decision is conclusive on the issue: "[A]dvances on the executors' compensation are a practical and necessary device to enable the executors to remain available to meet the estate's needs without financial sacrifice pending the submission of a final accounting" (*Matter of Helmsley*, at p. 6). However, this statement was made in relation to the court's determination that advance compensation was allowable to the executors despite the absence of statutory authority for advances outside the statutory-commission structure (SCPA §§ 2310 and 2311). The issue as to allocation of the legal fees incurred in bringing the proceeding was not before the court.

Although the statutory-commission structure is inapplicable here, the court is not without some guidance for resolution of this last issue. SCPA § 2310 (Payment on account of commissions) and SCPA § 2311 (Ex parte application for advance payment of commissions) reflect the Legislature's recognition that 1) there should be a mechanism for fiduciaries to obtain advances on their compensation without the need to commence an interim accounting, and 2) the expenses of such a proceeding should not be borne by the estate except in limited circumstances.

Thus, where the fiduciary elects to seek compensation before accounting, the Legislature saw fit to direct that the expenses of such an application be paid "by the person or persons to whom an award of commissions may be made, or, if the application be denied by the petitioner personally" (SCPA § 2310[4]). By contrast, where the application is made ex-parte, the Legislature provided that the expense might be paid from the estate or by the fiduciary or allocated between them according to "the benefit derived from the payments" (SCPA § 2311[4]), but only in limited circumstances. To obtain relief at all, the fiduciary must show that 1) if the court denies the petition, he or the estate will lose "substantial" state or federal income tax advantages or 2) he will experience "inconvenience or hardship" or 3) all parties are competent and consent to the payment.

The AG contends that, under the circumstances here, the Advance Payment Proceeding "was akin to" a SCPA § 2310 proceeding, where the petitioner is responsible for payment of the legal fees. Notably, the executors themselves shared this view of the Advanced Payment Proceeding when they commenced it, characterizing it as one brought "pursuant to SCPA § 2310." In any event, as the Charitable Trust correctly notes, as a general matter and without regard to SCPA §§ 2310 and 2311, the court has discretion to allocate legal fees to the estate when they are incurred for its benefit (*see e.g. Matter of Del Monte*, 37 AD2d 827 [1st Dept 1971]). Here, however, the

executors were silent regarding how the estate may have benefited from their receipt of advance compensation, and the Charitable Trust has failed to establish that the executors' efforts saved the estate taxes or otherwise benefited it in a manner that would warrant the estate's payment of any portion of the legal fees. Accordingly, the surviving executors individually and the estates of the deceased executors shall bear the cost of the efforts to obtain advance payment of their compensation.

The objections having been determined, the account should be brought up to date in accordance with this decision and order of the court.

Dated: August 15, 2019

S U R R O G A T E