

Matter of Jakab (Lasdon)

2023 NY Slip Op 32281(U)

July 10, 2023

Surrogate's Court, New York County

Docket Number: File No. 1993-0703/C

Judge: Rita Mella

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

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In the Matter of the Judicial Settlement of the Final
Account of Proceedings of Susan Abrams Jakab, formerly
Susan Lasdon Abrams, as Co-Trustee of the Trust Created
For the Benefit of Jacqueline M. Lasdon Under Article
FIFTH of the Last Will and Testament of

DECISION

STANLEY S. LASDON,

File No.: 1993-0703/C

Deceased.

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M E L L A, S.:

This is a contested final accounting by a co-trustee of a trust established under Article Fifth of the will of decedent Stanley Lasdon (Trust). The petitioning co-trustee is decedent's daughter, Susan Abrams Jakab, formerly Susan Lasdon Abrams (Susan or Petitioner). Decedent's other child, his son, Jeffrey Lasdon (Jeffrey) is co-trustee, and he has filed certain objections to Susan's account, as amended (Account). Also objecting to the Account is Jeffrey's daughter, Jacqueline Lasdon (Jacqueline), who is the lifetime beneficiary of the Trust. The guardian ad litem (GAL) appointed to represent Jacqueline's unborn issue who are the presumptive remainder beneficiaries in the event she dies before age 35, did not file objections and recommended in her report that the Account be approved.

The accounting period spans from the trust's inception on January 31, 1993 through December 23, 2020. The principal and income accounted for over this period totals \$4,726,028.

The parties, including the GAL, filed a stipulation, dated November 21, 2021, in which they agreed that the remaining objections may be resolved without a hearing on the papers submitted (Stipulation). Those objections center on whether commissions and legal fees as well as disbursements for certain investment and accounting professionals should be paid from the Trust.

Background

This Trust is not the first for the benefit of decedent's grandchildren under his will that has been the subject of litigation by the parties. Previously, Susan and Jeffrey battled at length as co-trustees in accounting proceedings regarding the trusts established under Article Fifth of decedent's will for the benefit of each of Susan's two children (*see Matter of Lasdon*, NYLJ, June 29, 2010, at 30, col 1 [Sur Ct, NY County 2010] *affd as modified*, 105 AD3d 499 [1st Dept 2013]; *Matter of Lasdon*, NYLJ, June 29, 2010, at 37, col 1 [Sur Ct, NY County]; *Matter of Lasdon*, NYLJ, Nov. 19, 2010, at 36 [Sur Ct, NY County]). As to the current proceeding, it was first commenced by Susan as an intermediate account in 2012. Litigation ensued immediately, culminating in the filing of objections and a partial summary judgment motion (*Matter of Lasdon*, 41 Misc 3d 1204[A], 2013 NY Slip Op 51578[U] [Sur Ct, NY County, Sept. 24, 2013]).

Thereafter, the matter lingered, with the parties, other than the GAL, eventually claiming that they had settled and that the proceeding should be discontinued. However, because the GAL was not involved in the settlement discussions, the discontinuance, and the purported settlement on which it was based, were never effectuated. Although the parties continued to devote substantial time to resolving the issues among them, they were ultimately unable to reach a settlement.

During this period, Susan petitioned to resign as co-trustee of the Trust, which was granted, and she was replaced as co-trustee by Jacqueline, who has since served with her father as co-trustees of the Trust. After resigning, Susan amended her account through December 23, 2020, the date that her resignation was approved by the court, thus making this a final accounting by Petitioner as a co-trustee of this Trust. Jacqueline and Jeffrey, as co-trustees, filed new objections to the amended account, and eventually, as aforementioned, the parties agreed to have

the court resolve them on the papers, foregoing a hearing, in their Stipulation.

The Stipulation confirmed the agreement of all parties that the court “may determine contested attorneys’ and accountants’ fees and disbursements, and any and all objections, on the written submissions of the parties and without a hearing.” In addition to the papers listed in the Stipulation to be considered, the court permitted counsel for Jeffrey and Jacqueline to file a brief in support of their remaining objections and a response to the GAL’s report.¹

The objections to be determined by the court are to the: (1) statutory commissions (SCPA 2309) sought by Susan as co-trustee; (2) fees in the amount of \$6,000 for a Trust investment analysis by the Donegan-Smith firm; (3) accounting fees in the amount of \$12,500, for preparation of the account and the amended account, submitted to the court; and (4) legal fees totaling \$411,479.45 sought by Susan’s attorneys. Before discussing each in turn, the court notes that although the Stipulation provides that the court will determine the “contested . . . accountant’s fees,” as a technical matter, no formal objections to the fees of the accountants were filed in this proceeding. Nevertheless, because the parties agreed to have the court determine such fees, the court will adjudicate the issue as though a formal objection had been filed.

Trustee Commissions

To the extent that Jeffrey and Jacqueline object that Susan by her behavior has forfeited commissions or that they should be reduced, extended analysis is not required. For incurring the significant duties and obligations of trustee, the court “must allow” commissions (SCPA 2309[1]) in the amounts provided by statute, except where the trustee has engaged in “fraud,

¹ To the extent that the initial objections of Jeffrey and Jacqueline raise additional, more technical, issues with Susan’s account, Objectants did not address them, let alone seek to substantiate them in their submissions. Accordingly, the court considers these issues abandoned.

gross neglect of duty, intentional harm to the trust, sheer indifference to the rights of others, or disloyalty” (*Matter of Lasdon*, 105 AD3d 499, 500 [1st Dept 2013]), with a significant consideration being whether the trustee’s actions resulted in pecuniary loss to the trust (*Matter of Pavlyak*, 139 AD3d 1338, 1340 [4th Dept 2016]; *Matter of JPMorgan Chase Bank, N.A.*, 133 AD3d 1292 [4th Dept 2015]; *see Kim v Solomon*, 132 AD3d 463 [1st Dept 2015]).²

Here, notwithstanding the opportunity for discovery, Objectants’ narrative regarding Susan’s possible fiduciary misdeeds falls short. They do not allege that the Trust suffered losses due to Susan’s conduct as co-trustee. Instead, they point to: Susan’s alleged personal animus toward her brother or her niece (which she denies); her inquiries as co-trustee into the concentration of the Trust’s investments or the need for a third co-trustee; and her failure to settle their objections to her accounting or resign as co-trustee earlier.

On the record before the court, Jeffrey and Jacqueline did not establish that personal animus amounting to bad faith existed on Susan’s part that impaired her proper functioning as co-trustee or that damaged the Trust (*see Matter of Gregory Stewart Trust*, 109 AD3d 755 [1st Dept 2013]; *see also Matter of Collins*, 36 AD3d 1191 [3d Dept 2007]). Nor did they establish bad faith in connection with Susan’s inquiries into the concentration of the Trust’s investments in the stock of one company or the option of adding a third trustee (not forbidden by decedent’s will) to assist with possible deadlocks in Trust administration decisions by them. These were well within a trustee’s discretion to examine and pursue (*see Matter of JP Morgan Chase Bank, N.A.*, 133 AD3d 1292; *Matter of Saxton*, 274 AD2d 110 [3d Dept 2000]; *see also Tibble v*

² The court would also note in this regard that in the prior appeal regarding commissions allowable to Jeffrey in his accounts as co-trustee of the trusts for the benefit of Susan’s children, the Appellate Division, First Department refused to deny commissions to Jeffrey even upon a determination that he had delayed distribution of stocks to those beneficiaries and did not maintain all records of the trusts at issue (*Matter of Lasdon*, 105 AD3d at 500).

Edison International, 575 US 523, 530 [2015] [“[U]nder trust law, a fiduciary normally has a continuing duty of some kind to monitor investments and remove imprudent ones.”]).

Finally, other than their own self-serving speculation, Objectants have offered no proof in their submissions to substantiate their allegations that Susan acted in bad faith because she should have or could have settled their objections to her account on appropriate terms earlier. Likewise, nothing in the decedent’s will establishing the Trust required Susan to seek to resign at a particular time, nor did Objectants offer any factual basis necessitating an earlier request for her resignation as co-trustee.

Nothing provided by Objectants here rises to the level of misconduct, much less the serious misconduct necessary to deny or reduce Susan’s commissions (*see Matter of Gregory Stewart Trust*, 109 AD3d 755 [1st Dept 2013]; *see also Armstead v Morgan Guar. Trust Co. of NY*, 13 AD3d 294 [1st Dept 2004]; *Matter of JPMorgan Chase Bank*, 133 AD3d at 1296).³ Accordingly, the objections to Susan’s receipt of statutory commissions are dismissed.

Contested Professional Fees for Report on Concentration of Trust Investments

Among the disagreements Susan and Jeffrey had over how the Trust should be administered was one as to how the Trust assets should be invested. In 2011, Susan sought an opinion on whether it was prudent for the Trust to hold 70% of its investments in one stock, Pfizer, Inc. She hired the investment advisory firm of Donegan-Smith, which rendered a report for which she seeks to pay \$6,000 from Trust assets to which Jeffrey and Jacqueline object.

In general, a co-trustee’s reasonable expenses should be allowed and paid (SCPA

³ To the extent that Objectants argue that certain of the fees for legal work should be offset by or included within statutory commissions, that issue will be addressed below in the discussion of the attorneys fees to be allowed.

2309[1]; see *Matter of Pavlyak*, 139 AD3d 1338 [reasonable and necessary accounting expenses allowed]). Based on the reasoning of *Matter of Janes* (223 AD2d 20 [4th Dept 1996], *aff'd* 90 NY2d 41 [1997]), Susan has established the reasonableness and appropriateness of the expense. The *Janes* court noted that, “in appropriate circumstances, liability for imprudence may be predicated solely on a fiduciary’s investment of a large portion of the estate or trust fund in a single security, regardless of whether the concentration is coupled with other elements of hazard” (223 AD2d at 29). In response, Objectants have not demonstrated that it was unreasonable for Susan to seek a professional opinion regarding the concentration of Trust assets given *Matter of Janes* and her disagreements with Jeffrey. As a result, the objection to the cost of the Donegan-Smith report is dismissed and its payment from the Trust allowed.⁴ Susan should be reimbursed for this expense because she advanced the payment.

Accounting Fees

Petitioner seeks approval of the payment from Trust assets of \$12,500 to accountants who prepared the fiduciary account and amended account. In light of the significant time period and assets accounted for, Petitioner demonstrated the reasonableness of this disbursement for accountants (SCPA 2309[1]; see *Pavlyak*, 139 AD3d at 1338). Objectants offered nothing to establish that such fees were unreasonable for the Petitioner to incur under the circumstances. Moreover, as set forth in the accountants’ affidavit of services in support of its fees and the entire record here, the court considers the \$12,500 in fees to be reasonable in the context of this

⁴ Objectants state that decedent had a historical connection to the Warner Lambert stock with which the Trust was originally funded (and with which company Pfizer merged in 2000), in attempting to demonstrate the unreasonableness of this Trust investment concentration report. Decedent’s will however directed that \$1 million be given to his grandchildren subject to the Article Fifth trust provisions, and there was no direction that the Trusts for each grandchild be funded with a particular company’s stock.

proceeding. Accordingly, to the extent there is an objection to the accountants' fees, it is dismissed. Susan advanced these fees and she should be reimbursed for them from the Trust.

Contested Attorneys Fees

By far the most forcefully argued objections are the ones to the fees charged by Susan's attorneys. Jeffrey and Jacqueline contend those fees were "unreasonable, unnecessary and improper." The court reviews legal fees under the familiar non-exclusive "*Freeman/Potts*" criteria (*Matter of Potts*, 213 App Div 59 [4th Dept 1925], *aff'd* 241 NY 593 [1925]; *Matter of Freeman*, 40 AD2d 397 [4th Dept 1973], *aff'd* 34 NY2d 1 [1974]):

"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 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 responsibility involved" (*Matter of Freeman*, 34 NY2d at 9).

Before examining Susan's claimed legal fees within the *Freeman/Potts* framework, three preliminary issues Jeffrey and Jacqueline raise in support of their objections require discussion. First, Objectants complain that they were deprived of the retainer agreements that Susan executed with counsel. The timing of Objectants's request for these agreements is unclear from the record, but in any event, the agreements with both firms representing Petitioner have been provided to Objectants. No further issues have been raised regarding the retainer agreements.

Second, Jeffrey and Jacqueline assert that certain line or word redactions to counsels' contemporaneous time records are improper. Such redactions are generally permitted to protect privileged information (*see Soiefer v Soiefer*, 17 AD3d 268, 269 [1st Dept 2005]). Here, Objectants were provided with revised time records with many of the redactions reduced or eliminated. Nevertheless, they continued to complain that the revised redactions were improper,

relying on *Priest v Hennessy* (51 NY2d 62 [1980]), for the proposition that “billing record and information about fees are not covered by the attorney-client privilege” (Objectants’ Brief in Support of Objections, at 2). That decision, however, does not stand for such proposition; redactions of attorney time records were not at issue in *Priest*. Instead, that case noted that a disclosure of fee arrangement whereby another pays for one’s attorneys fees does not necessarily, standing alone, create an attorney-client relationship – a situation that is not analogous to the situation now before the court.

In any event, issues related to the record to be submitted to the court should be resolved prior to the submission of the fee determination, which was not the case here. Neither Jeffrey nor Jacqueline sought to compel the production of unredacted records or request in camera review (*see* CPLR 3124).⁵ Moreover, the time records as provided with limited redactions did not prevent the parties from providing voluminous and detailed submissions regarding the legal fees sought; nor have Petitioner’s redactions impeded the court’s ability to assess the reasonableness of the fees at issue.

The third preliminary issue is one previously addressed in the court’s prior partial summary judgment decision: Objectants again complain that this accounting proceeding was unnecessary and should not have been brought at all. However, as noted in this court’s prior decision, granting partial summary judgment and dismissing certain of the objections, trustees have the right and duty to account and can seek judicial settlement of their accounts as fiduciaries (*Matter of Lasdon*, 41 Misc3d 1204[A], 2013 NY Slip Op 51578[U]; *see* SCPA

⁵ Objectants cite to *Matter of Melendez* (NYLJ, June 22, 2015, at 22, col 4 [Sur Ct, Suffolk County]) for the proposition that a privilege log was required here, but that case does not stand for the proposition that fiduciaries seeking approval of their attorneys’ fees must provide unredacted time records or a privilege log if the records are redacted. In any event, on this record, Objectants did not establish their entitlement to a privilege log in connection with the attorneys’ time records.

2208), as well as have the court approve payment of their reasonable and necessary expenses and legal fees incurred as trustees from the trust (SCPA 2309[1]).

Fee Analysis Under *Freeman/Potts*

Susan seeks fees for services provided to her as trustee by two law firms. First, fees are sought for the Putney, Twombly, Hall & Hirson firm⁶ in the amount of \$226,128.50 for 366.06 hours of work done between November of 2010 and November of 2014 and also claimed are \$3,675.09 in out-of-pocket disbursements for this period by this firm. Second, fees are sought for the Akerman LLP firm, in the amount of \$165,350.95 for 220.96 hours of work for the period October 1, 2014 through August 31, 2021 and also \$323.63 for out-of-pocket disbursements.⁷ Petitioner's counsel requests an additional \$20,000 for anticipated supplemental work through the entry of the accounting decree. This is a total of \$391,479.45 in fees for a total of 587.02 hours of legal work done, leading to a blended rate of \$666.89 per hour. With the addition of fees requested for post-decision work, the total legal fee request is \$411,479.45.

After review of the substantial record here, including the contemporaneous time records, the court finds that the time spent over an almost 11-year period was for the most part consistent with the amount of work needed to be performed in this highly contested matter. As the GAL in her report concluded, the fees “appear to be fair and reasonable considering the nature, quality, complexity and extent of itemized services rendered over a substantial period of time, including the additional time that was required to counter the wide array of family disputes which interfered with an efficient settlement of this matter. . .” (GAL Report at 29). Nevertheless, the

⁶ Now known as Bond, Schoeneck & King, according to Petitioner.

⁷ Petitioner paid most of such amounts personally and seeks reimbursement.

court, after review of the record, concludes that the time spent by Petitioner's lawyers on this matter was slightly excessive.

Objectants also argue that certain of the work characterized as legal should have been done by Susan personally as co-trustee, and therefore should be paid out of her commissions. Specifically, they complain that Susan should have personally communicated with the Trust's accountant and bank manager, rather than through her counsel. The court concludes that once litigation was imminent, it was reasonable for Susan to rely more on counsel to communicate with bankers and accountants to ensure the proper Trust administration and avoid further disputes.

Regarding the complexity of the questions involved, the nature of the services provided, and the amount of litigation required, notwithstanding Objectants' claims that this was a simple trust accounting, its administration, the accounting objections, and the issues relevant to the parties' settlement were significant. They were also robustly contested. This required an aptitude on the part of counsel for significant trust administration and accounting issues, as well as a proficiency in litigation skills for contested court proceedings. Also, it is difficult to overstate the vigorousness with which any issue in this matter was argued, including matters as simple as scheduling. There was significant litigation including dispositive motion practice, and many conferences and meetings, with and without the court, and significant information exchange. There was a petition to resign and amended accounting petitions and a twice amended accounting to bring it through the date of Petitioner's resignation, for which legal work was properly charged.

In this regard, Objectants again assert that work on certain issues was improper. Specifically, they complain that legal work was not reasonable for Susan's questioning of a

possible overconcentration of the Trust's investments in Pfizer stock and her inquiry into whether a third co-trustee could or should be appointed. Nor, from their position, was it reasonable for Susan to bring the accounting in the first place, or the previous partial summary judgment motion she made which was determined by the court. These arguments were rejected as a basis for challenging commissions, and, for these same reasons, they fare no better as grounds to disallow legal fees.

Regarding the amounts involved and the benefit resulting from the performance of the services provided, the trust estate here is substantial, and the services of counsel ensured that the co-trustee's account could be settled, and all issues resolved during the course of protracted proceedings. The compensation request is not excessive relative to the size of the gross trust estate. Although Objectants complain that no benefit resulted from counsel's effort, such effort fulfilled the co-trustee's duty to account. As the Court of Appeals stated in *Matter of Hyde* (15 NY3d 179, 184 n3 [2010]): "[T]he actions of fiduciaries, absent misconduct, are undertaken to benefit the estate, and the estate should therefore be charged with the fiduciaries' costs." In other words, the Trust cannot avoid costs incident to settlement of a trustee's account, except to the extent that they are unreasonable or unnecessary.

As to the lawyer's experience and reputation, and the customary fees charged by the Bar for similar services, the attorneys who provided services to Susan are experienced and have knowledge of trusts and estates matters, including their litigation. However, the court views his requested blended rate of \$666.89 per hour in this matter slightly excessive for the type of services provided. For work of the nature provided by the Petitioner's counsel, the blended

hourly rate⁸ of \$575 for the time charges for the Putney firm and the blended hourly rate of \$600 for the later time charges of the Akerman firm would come within the bounds of the customary fee charged for services of the nature performed by counsel with such experience in New York County.

The request for an additional \$20,000 for fees incident to entry of the decree settling this account is denied, but the court will allow an additional \$1,800 for such anticipated and necessary post-decision work, including settlement of the accounting decree for signature.

Disbursements

Petitioner's counsel confirms that all disbursements were for out-of-pocket expenses and that none is properly considered part of office overhead. Disbursements in the amounts requested—\$3,675.09 to the Putney firm and \$323.63 to the Akerman firm—are allowed (*Matter of Herlinger*, NYLJ, April 28, 1994, at 28, col 6 [Sur Ct, NY County]).

CONCLUSION

The objections seeking to disallow or reduce commissions to Petitioner are dismissed. The objections to the payment from Trusts assets for the \$6,000 cost of the report on trust investment concentration and the \$12,500 for accountants fees are also dismissed.

The court allows compensation from the Trust for Petitioner's counsel as follows. For the Putney firm, it will allow payment for 356.6 hours of work at the blended hourly rate of \$575 per hour, or \$205,045; and for the Akerman firm, payment for 215.21 hours at the blended hourly rate of \$600 per hour, or \$129,126 is allowable. With the additional allowance of \$1,800 in legal fees for post-decision work, the total allowed for Petitioner's attorneys fees is \$335,971.

⁸ Use of the blended rate takes into account that some time will be spent by attorneys with higher per hour billing rates and that other time is spent by associates or paralegals with lower billing rates.

Disbursements of counsel are allowed in the amounts requested. To the extent that Petitioner has personally paid any of the fees or disbursements allowed herein, she should be reimbursed for such payments from the Trust.

Settle accounting decree with direction for the GAL's compensation.

Dated: July 10, 2023



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