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Accountants' Fees in Estates and Trusts

By Lansing R. Palmer

This article is an overview of the New York rules and law on the retention and payment of accountants to perform accounting services in estates and trusts.[1] Such services may include preparation of a decedent's final income tax returns, preparation of fiduciary income tax returns for estates and trusts, preparation of federal and state estate tax returns, and the preparation of fiduciary accountings for settling estates and trusts. In addition, accountants are sometimes retained by fiduciaries or their attorneys to "keep the books" or to "straighten out" the books and records of an estate or trust, or to prepare periodic accountings for the fiduciary.

While this article is not fact-specific, it concludes with a note of caution for fiduciaries of substantial estates and trusts with multiple professionals being paid from the funds under their charge: as a general rule, *the buck stops with the fiduciary*. This means that if accountants are hired to perform work that should have been performed by the fiduciary or which was duplicated by the fiduciary's attorneys, there is a risk that a court may disallow payments of accountants' fees from the estate or trust and also order the refund of excess fees already paid. If these fees are not repaid by the accountants, usually with interest from the dates of original payment, a court may, absent special circumstances, look to the fiduciary to repay the fees, either from commissions or even from personal assets.

A. Considerations in Retention of an Accountant

Accountants are routinely retained to assist fiduciaries and their attorneys in administering estates and trusts. In many cases, however, insufficient consideration is given before an accountant is formally retained about whether an accountant should be hired, the nature and scope of an accountant's duties, the fees the accountant will charge, and the source of payment of such fees. Why do we care? First, our clients, as fiduciaries, should be in a position to make an informed decision to hire an accountant, which requires knowledge of the consequences, as discussed in this article, if a court finds either that it was unnecessary to hire an accountant, or the accountant charged an unreasonable fee. Second, as attorneys for fiduciaries, we do not want accountants' fees to be deducted from our fees, and therefore we should take care to ensure there has been no duplication of effort and that we can demonstrate that it was necessary to retain the accountant.

B. Does a Surrogate Have Jurisdiction to Award and Determine the Reasonableness of Accounting Fees?

Yes. The propriety of the employment of an accountant, and the determination of the reasonableness of professional fees awarded to accountants, are well within the sound discretion of the Surrogate's Courts.[2] The power to determine the reasonableness of accounting fees includes the ability to direct the refund of excess fees previously paid.[3]

C. When Is It Appropriate for a Fiduciary, or the Attorney for the Fiduciary, to Hire an Accountant?

The general rule is that, absent special circumstances, and absent express authorization in the will or trust instrument to retain and compensate accountants, the accounting fees for routine record-keeping, accounting services, tax services, and the like, are the responsibility of the fiduciary, and should not be charged to the estate or trust.[4] Indeed, it has been stated that there is a presumption against allowing disbursements against estates and trusts, including accountants' fees.[5] Unlike legal fees, which are viewed as an exception to the rule, "the cost of professional services (accountants, investment advisors, etc.) are not generally compensable from the estate unless there exist unusual circumstances and then only to the extent that same are reasonable and benefited the estate."[6] On the other hand, where it can be shown that difficult or unusual issues require the services of an accountant, payment of the accountant's fees out of the estate or trust has been held to be proper.[7]

Additionally, if the accountant being asked to perform professional services that are normally considered the duties of a fiduciary or within the scope of an attorney's employment, then courts have routinely held that the fees of the accountant may not be paid from the estate or trust, but must be paid personally by the fiduciary or the attorney, depending upon the circumstances. This rule is in addition to and indepen-

Lansing R. Palmer is a partner at Akerman LLP in the New York City and West Palm Beach offices, specializing in estate and trust litigation. A member of the Bars of New York and Florida, he is Co-Chair of the firm's Probate and Fiduciary Litigation team.
Lansing thanks his associates Laura Feitelson and Amanda Klopp for their assistance with this article.

dent of an inquiry concerning the reasonableness of an accountant's fees sought to be charged against an estate or trust.

Whether the employment of an accountant is necessary is determined on a case-by-case basis. In the author's experience, most attorneys representing fiduciaries of significant estates or trusts bill on an hourly basis for services rendered and they do not bill their own time for preparation of the account, which is better left to a fiduciary accountant. This is hardly surprising in view of the rules requiring the submission of accounts in what is referred to in parlance as "in court form."[8] Most attorneys, and certainly lay fiduciaries, would be well advised to delegate the preparation of such accounts to professional accountants. As the purpose of the general rule disallowing accountants' fees is to avoid the duplication of fees for the same services, the rule is not violated because the attorneys are not billing for preparation of the account.[9]

Thus, an appellate court in Manhattan determined that trustees were entitled to the assistance of accountants to prepare their accounts which covered a 26-year period "and involved exchanges of stock holdings, stock splits, stock dividends, stock rights and stock sales with the computation of allocations, receipts and costs as between principal and income."[10] In another case, however, the Second Department in 2014 disallowed accountants' fees and directed the accountants to refund their fees in a decision affirming the determination by the Westchester County Surrogate that the accounting services did not provide a benefit to an insolvent estate.[11] The disallowed accountants' fees involved their due diligence in connection with their interest in the decedent's accounting practice.

In holding that executors were justified in employing certified public accountants to help them unravel the extraordinary problems arising out of the deceased's ownership of the stock of numerous corporations engaged in real estate and restaurant operations, a New York County Surrogate noted that "[i]t has been the practice of this and other Surrogate's Courts to reimburse fiduciaries for the cost of such employment under the special circumstances existing in this case."[12] Moreover, the court held expressly that it had jurisdiction to act upon the claim for accountants' fees despite the fact that the fees had not been paid. In a similar case, the Nassau County Surrogate determined that the assistance of accountants was necessary and proper to prepare a trustees' account covering a 20-year period and involving new investments, stock splits, stock dividends and complex allocations to principal and income.[13]

On the other hand, there are numerous decisions imposing fines (also known as "surcharges") against fiduciaries either for retaining accountants where no special circumstances were shown, or for excess accounting fees even if hiring the accountant was proper in the first place. For example, trustees were surcharged the sum of $21,300 paid for accounting services for the "routine preparation of fiduciary income tax returns and allocation of income among the residual trusts."[14] An important factor in this decision was that one of the trustees was a former employee of the Internal Revenue Service and represented himself as an estates expert. In another decision, the New York County Surrogate disallowed all but $7,500 of the claimed accountant's fees, and directed that the disallowed fees "be borne by the successor executor and not by the estate."[15] One reason for this result was the failure of the successor executor to have kept detailed records and accounts, which the accountant had to reconstruct.

In *Matter of Weinberg*, the Second Department affirmed the decision of the Kings County Surrogate that "the fee the accountant charged the estate was clearly excessive," but reduced the surcharge against the administrator personally by $1,000 upon a finding that this was a reasonable charge for such services.[16]

In *Matter of Schoonheim*, the First Department reversed a New York County Surrogate who failed to disallow $93,000 in accounting fees charged for preparing the estate tax and other fiduciary income tax returns, which the court found were within the function of the attorney for the executor.[17]

In *Matter of Tollner*, a Nassau County case, Surrogate Radigan, after noting that "[t]he burden of showing that the fees paid to an accountant for services rendered to the fiduciary are just and reasonable rests with the fiduciary [citation omitted]," disallowed all accounting fees.[18] Not only was there no showing that the services of an outside accountant were necessary, the fiduciary failed even to reveal the exact nature of the accounting services involved. Accordingly, the Surrogate surcharged the fiduciary with the disallowed accounting fees, plus interest. A similar result was found in *Matter of Wolf*, in which the Second Department upheld the Surrogate's direction that an executor pay all of an accountant's fees from his statutory commission.[19]

D. How Does the Surrogate Decide How Much the Accountant Can Charge, and Who Pays?

First, a Surrogate can direct that an accountant submit an application to the court, which usually consists of an affidavit describing the accounting services for which compensation is sought.[20] Even in the absence of an application for fees, the court on its own motion has a duty to make an independent inquiry and assessment of the reasonableness of all professional fees, including accountants' fees.[21] Once the inquiry has been initiated, the criteria applied by courts to determine the reasonableness of an accounting fee are identical to those applied by Surrogates to determine the reasonableness of attorneys' fees. These are sometimes referred to as

the "Potts-Freeman" criteria, named after two leading decisions in this area.[22] An example of this is found in *Matter of Hyman,* a case in New York County,[23] in which Surrogate Glen noted:

> The accountant seeks fees of $19,000 and costs of $63.96. These are reviewed under the Freeman criteria and the accountant has provided an affidavit as to his services. The time spent is somewhat excessive, given the work required to complete the account. Accordingly, the court will reduce the fee requested from the estate by $2,000.00, but the request is otherwise approved.

The *"Potts-Freeman"* factors generally include:

1. The time spent;
2. The complexity of the questions involved;
3. The nature of the services provided;
4. The amount and complexity of litigation required;
5. The amounts involved and the benefit resulting from the execution of such services;
6. The lawyer's [accountant's] experience and reputation; and
7. The customary fee charged by the Bar [accounting profession] for similar services.[24]

Courts have broad discretion in awarding fees to attorneys and other professionals, and may give "lip service" to one or more of these criteria and then fix a fee in an amount determined to be fair and reasonable in a given case. If a fiduciary is confronted with runaway accounting fees, a court may well find that these fees exceed the customary fee charged by others for similar services, and direct a refund of any excess fees. As with multiple attorneys, the fees of multiple accountants may not exceed in the aggregate one "reasonable" fee: "[w]hen multiple professionals have rendered services to the estate, the aggregate fee should not exceed the fee of one attorney and/or professional."[25]

Moreover, the fact that an estate or trust is substantial does not create a license to charge large fees: "The size of the estate cannot increase the value of the services . . . A sizable estate permits adequate compensation but nothing beyond that."[26] In an instructive decision by Surrogate Radigan, the court was presented with an application in which accounting fees of $29,650 were sought for the preparation of a complex trustee's account.[27] First, the court determined that the employment of accountants was necessary and proper in this case because of the number of new investments, stock splits, and other complex transactions. Because the accounting services were not routinely performed by the trustee, nor duplicated by the attorneys, the court awarded fees. Nevertheless, the requested fees were reduced from $29,650 to $10,000.[28]

Who pays when a court finds an accountant's fee excessive? It depends. First, it may depend upon the provisions of an engagement agreement with the accountant, if one exists.[29] Absent a governing agreement on fees, courts will usually look to the fiduciary, who is ultimately responsible for demonstrating the propriety of expenses paid from the estate or trust.

Some cases are easier than others. For example, a Surrogate in Monroe County found that the fiduciary in that case was personally obligated to pay the fair and reasonable value of the work performed by the accountant because the fiduciary had expressly agreed with her attorney that he should employ an accountant to "get the books in shape."[30] In contrast, consider the view of the Surrogate in Nassau County who ruled that, "[w]hile the *attorney for the estate is principally and personally liable* for the return of these funds to the estate, to the extent that such funds or any portion thereof are not recoverable by the estate, the executrix is jointly and severally liable since the action of the executrix in paying these excessive fees is a surchargeable event."[31]

E. Conclusion

It is the fiduciary who is usually called upon to show that it was necessary to hire an accountant, and absent special circumstances, to act as guarantor of the accountant's fees to the extent they are not found to be a proper charge to the fund under his or her care.

Endnotes

1. This article is limited in scope to the New York rules on retaining accountants to perform accounting services in estates and trusts. It does not address attorneys' fees, disbursements, or agreements crafted under the doctrine of *U.S. v. Kovel*, 296 F.2d 918 (2d Cir. 1961), and its progeny, which are intended to maintain the confidentiality of the accountants' work. For a discussion of the fees of accountants as disbursements, see B. Balter and P. Forster, *Attorney Reimbursement, Accountant Fees in Estate or Trust Accountings* N.Y.L.J., Jan. 10, 2011, p. 4, col. 1.
2. *Matter of Musil*, 254 A.D. 765, 4 N.Y.S.2d 577 (2d Dep't 1938); *Matter of Kramer*, *n.o.r.,* 70 N.Y.S.2d 239 (Sur. Ct., Monroe Co. 1947). *See also, Matter of Hare,* N.Y.L.J., July 14, 2006, p. 37, col. 4 (Sur. Ct., Westchester Co. 2006); *Matter of Weinstock*, N.Y.L.J., May 30, 2003, p. 20, col. 3 (Sur. Ct., N.Y. Co. 2003); *Matter of Brandon*, N.Y.L.J., July 24, 2001, p. 24, col. 5 (Sur. Ct., Westchester Co. 2001) (citing *Matter of Graham,* 238 A.D.2d 618, 656 N.Y.S.2d 434 [3d Dep't 1997]).
3. *See* Surrogate's Court Procedure Act §2215(3). *See also, Matter of Kellner*, 215 A.D.2d 560, 626 N.Y.S.2d 854 (2d Dep't 1995).
4. *See Matter of Wolf*, 147 A.D.2d 487, 537 N.Y.S.2d 585 (2d Dep't 1989); *Matter of Musil*, *supra*; *Matter of Badenhausen*, 38 Misc.2d 698, 237 N.Y.S.2d 928 (Sur. Ct., Richmond Co. 1963).

5. *See* 2 Harris N.Y. Estates: Probate Admin. & Litigation § 19:111 (6th ed. 2019).

6. *Matter of Mehring*, N.Y.L.J., May 24, 2006, p. 31, col. 3 (Sur. Ct., Suffolk Co. 2006) (citing *Matter of Badenhausen*, 38 Misc.2d 698, 237 N.Y.S.2d 928 [Sur. Ct., Richmond Co. 1963]).

7. *See Matter of Valente,* 24 A.D.2d 945, 265 N.Y.S.2d 370 (1st Dep't 1965); *Matter of Kramer*, *n.o.r.,* 70 N.Y.S.2d 239 (Surr. Ct. Monroe Co. 1947).

8. For example, Uniform Surrogate's Court Rule § 207.40(c) provides in part that, "[i]nsofar as may be practical, all accounts shall conform with and contain such schedules and information as may be called for in such forms as may from time to time be provided by the Chief Administrator of the Courts. . . ." 22 NYCRR 207.40. One such form is Official Form JA-4, denominated "Account for trustees and for executors where trust involved."

9. *Matter of Valente, supra; Matter of Cohen*, N.Y.L.J., December 5, 1997, p. 35, col. 1 (Sur. Ct. Nassau Co.), discussed *infra*.

10. *Matter of Valente,* 24 A.D.2d 945, 265 N.Y.S.2d 370 (1st Dep't 1965).

11. *In re Elenidis*, 120 A.D.3d 1229, 992 N.Y.S.2d 128 (2d Dep't 2014).

12. *Matter of Sheresky, n.o.r.,* 157 N.Y.S.2d 829 (Sur. Ct., N.Y. Co. 1956).

13. *Matter of Cohen*, N.Y.L.J., December 5, 1997, p. 35, col. 1 (Sur. Ct., Nassau Co. 1997).

14. *Matter of Acker*, 128 A.D.2d 867, 513 N.Y.S.2d 786 (2d Dep't 1987).

15. *Matter of Hakim*, N.Y.L.J., December 27, 2004, p. 29, col. 2 (Sur. Ct., N.Y. Co. 2004).

16. *In re Weinberg*, 107 A.D.3d 729, 968 N.Y.S.2d 509 (2d Dep't 2013).

17. *Matter of Schoonheim*, 158 A.D.2d 183, 557 N.Y.S.2d 907 (1st Dep't 1990).

18. *Matter of Tollner*, N.Y.L.J., June 7, 1995, p. 30, col. 5 (Sur. Ct., Nassau Co.).

19. *Matter of Wolf, supra.*

20. *See, e.g., Matter of Alpert*, N.Y.L.J., March 3, 1997, p. 33, col. 1 (Sur. Ct., Westchester Co. 1997), in which the court describes such an application:

> With respect to compensation for accounting services, the court has received an affirmation from the accountant hired by counsel, who has already received $2,100.00 in compensation. Said affirmation indicates, in some detail, the services performed by the accountant—some of which are services normally expected to be performed by the estate's fiduciaries—and the aggregate number of hours spent on accounting matters (102 hours).

21. *See Matter of Stortecky v. Mazzone,* 85 N.Y.2d 518, 626 N.Y.S.2d 733 (1995); *Matter of Mehring*, *supra*.

22. *Matter of Potts*, 213 A.D. 59, 209 N.Y.S. 655 (4th Dep't 1925), *aff'd*, 241 N.Y. 593 (1925), and *Matter of Freeman*, 34 N.Y.2d 1, 9, 355 N.Y.S.2d 336, 341 (1974).

23. *Matter of Hyman*, N.Y.L.J., January 3, 2008, p. 33, col. 2 (Sur. Ct., N.Y. Co. 2008).

24. *See Matter of Zirinsky*, 2007 N.Y. Slip. Op. 34079 (U) (2007 WL 4473348) (Sur. Ct., Nassau Co., Dec. 18, 2007) (a discussion, with citations, of the *Potts-Freeman* factors and their application in that case). *See also Matter of Maryott*, 62 Misc. 3d 1208(A) (Sur. Ct., Rockland Co. 2018).

25. *Matter of Alpert*, N.Y.L.J., Mar. 3, 1997, p. 33, col. 1 (Sur. Ct., Westchester Co.) (citing *Matter of Mattis,* 55 Misc.2d 511, 285 N.Y.S.2d 551 [Sur. Ct., N.Y. Co. 1967]).

26. *Matter of Cohen*, N.Y.L.J., December 5, 1997, p. 35, col. 1 (Sur. Ct., Nassau Co.) (citing *Martin v. Phipps*, 21 A.D.2d 646, 249 N.Y.S.2d 179 [1st Dep't 1964]):

> [T]he vastness of estate assets is not a license to ignore the obligation to preserve them. While the quality of the services rendered to the estate has been consistently high, as would be expected from the eminent counsel employed, the temptation to over-prepare, to engage in unnecessary efforts and to perform duplicative services has not been resisted.' Taking into consideration all the criteria a court should employ, there is a limitation of fees the court may allow under the circumstances presented (*Matter of Duke*, N.Y.L.J., July 24, 1997, p. 27, col. 1).

27. *Id.*

28. *Id.*

29. It is highly recommended that accountants be retained pursuant to written agreements to avoid misunderstandings over the identity of the client, the scope of any engagement, and the source of the payment of fees.

30. *Matter of Kramer, supra.*

31. *Matter of Tollner*, N.Y.L.J., June 7, 1995, p. 30, col. 5 (Sur. Ct., Nassau Co.) (emphasis added).