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Decedents Estates And Trusts—Recovery by Executor for Services of His Accounting Firm

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Here, where the return of the police justice indicated that the defendant was informed of all his rights, including the right to counsel, the return was conclusive to all controverted matter within the police justice's knowledge in the absence of defendant's motion to correct alleged defects therein.[121]

DECEDENTS ESTATES AND TRUSTS

Recovery by Executor for Services of His Accounting Firm

The compensation which an executor or administrator is to receive for his services to an estate is set by section 285 of the Surrogates Court Act at a percentage of the total value of the property which the executor or adminisrator must handle in the course of his duties. This section makes provision for additional compensation for executors and administrators in two instances. First, when the executor or administrator is an attorney, he is allowed, in addition to his statutory compensation, reasonable fees for necessary legal services which he has rendered to the estate.[1] Secondly, when an executor or administrator is called upon to collect rents or manage property of the estate, he is allowed a fixed percentage of the rents or income so derived.[2] If the services for which an executor requests additional compensation do not fall within the provisions set forth above, the additional compensation is generally denied.[3] However, this is not an inflexible rule, and if special circumstances justify compensation, a reasonable amount will be given.[4]

In *In re Tuttle's Estate*,[5] Thomy, an accountant-executor was decedent's accountant for twelve years prior to decedent's death, and at the time of death was rendering services pertaining to an income tax deficiency suit in which decedent was involved. Thomy did not request or receive permission of the court to continue the accounting services for the estate, but with the consent of the two other executors and with no objection by decedent's widow (the principal beneficiary of the estate) he completed his services in the income tax matter and made an audit for the estate. After he had received payment for services rendered to decedent prior to his death and partial payment for the post death services, decedent's widow began proceedings to oust Thomy as executor claiming that his charges were excessive and constituted self-dealing. The surrogate found Thomy's charges for the accounting services to be reasonable and allowed them.

121. N. Y. CODE CRIM. PROC. §§757, 758.

1. N. Y. SURROGATE'S COURT ACT §285(b)(7), N. Y. CIV. PRAC. ACT §1548(a).
2. N. Y. SURROGATE'S COURT ACT §285(b)(1).
3. Collier v. Munn, 41 N.Y. 143 (1869); In re Popp, 123 App.Div. 2, 107 N.Y. Supp. 277 (2d Dep't 1907).
4. Lent v. Howard, 89 N.Y. 169 (1882).
5. 4 N.Y.2d 159, 173 N.Y.S.2d 279 (1958).

The Appellate Division allowed a reduced amount which it found reasonable,[6] and the Court of Appeals unanimously affirmed.

The Court held that the services rendered by Thomy were necessary to the estate and because of their nature and extent not within his duties as executor. From Thomy's prior service to testator, testator's reliance on Thomy just prior to his death, and the fact that the testator had nominated Thomy an executor, the Court found it was testator's intention that Thomy continue and be compensated for the involved accounting services which he was performing.

Cases which have allowed executors extra compensation for necessary services outside the executor's duties have done so on two grounds: the express or implied intention of the testator, or the consent of the beneficiaries of the estate. Intention sufficient to allow compensation has been inferred from testators' directions where testator directed the executors to choose one of his sons as a manager of his business and they chose a son who was an executor,[7] where an architect had served decedent for many years prior to his death,[8] and where the executor who was manager of decedent's business prior to his death was elected president of that business and testator had allowed his executors discretion as to which assets should be kept by the estate.[9]

The decision in this case makes no change in the rules governing the compensation of executors, but merely reinforces numerous lower court decisions which have allowed additional compensation where justly deserved. As the Court indicated, such allowances do raise danger of self-dealing by fiduciaries, but that danger is eliminated by proper judicial surveillance.

Wills—Incorporation by Reference

New York does not permit an unattested instrument to be incorporated into a will by reference.[11] However, this rule against incorporation by reference has not been carried to "a drily logical extreme"; and in *In re Rausch's Will*,[12] a disposition to a trust controlled by an unattested instrument was upheld. On the authority of the *Rausch* case, dispositions to trusts controlled by unattested instruments wherein the settlors reserved the power to amend have also been

6. 4 A.D.2d 310, 164 N.Y.S.2d 573 (4th Dep't 1957).
7. In re Davison, 173 Misc. 323, 17 N.Y.S.2d 790 (Surr.Ct. 1940).
8. Russel v. Hilton, 37 Misc. 642, 76 N.Y.Supp. 233 (Sup.Ct. 1902), *modified on other grounds* 80 App.Div. 178, 80 N.Y.Supp. 563 (1st Dep't 1903).
9. In re Beri, 130 Misc. 527, 224 N.Y.Supp. 466 (Surr.Ct. 1927).
11. Booth v. Baptist Church of Christ, 126 N.Y. 215, 28 N.E. 238 (1891).
12. 258 N.Y. 327, 179 N.E. 755 (1932).