

Matter of Katcher

2016 NY Slip Op 32042(U)

June 27, 2016

Surrogate's Court, Nassau County

Docket Number: 2012-372498A

Judge: Margaret C. Reilly

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**SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

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Probate Proceeding, Will of

DECISION

WILLIAM KATCHER,

File No. 2012-372498A

Deceased.

Dec. No. 31655

-----X

PRESENT: HON. MARGARET C. REILLY

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

Petition for Probate.	1
Report of guardian ad litem.	2
Affirmation of legal services.	3

In this probate proceeding, the court is asked to admit the decedent’s last will and testament to probate and to fix the fees of the guardian ad litem.

The decedent William Katcher died on November 3, 2012. He was survived by two sons, Bruce Katcher and Errol Katcher. The decedent’s will, dated May 18, 2012, was offered for probate. Two prior wills of the decedent were filed with the court and a guardian ad litem was appointed to represent two infant residuary beneficiaries of a prior will. The guardian ad litem has filed his report and has no objections to the will being admitted to probate.

The decedent executed three wills in a relatively short period of time. The will, dated December 10, 2007 provided that the infants were to receive from the residuary the amount of \$25,000.00. The remainder was to be divided among the 29 beneficiaries which included

the two infants. The will, dated December 10, 2007, also provided for over \$1,000,000.00 in specific bequests. The guardian ad litem reported that the gross value of the estate is estimated to be \$380,000.00. The decedent also executed a will, dated April 2, 2010, which was filed with the court. The infants had no interest under this will or under the will filed for probate. Several beneficiaries of the April 2, 2010 will, who were adversely affected by the May 18, 2012 will, filed objections. Stipulations withdrawing the objections have been filed by all of the objectants, as well as the Attorney General.

The court, being satisfied that the decedent was of sound mind, memory and understanding and not under any restraint or in any respect incompetent to make a will, admits the will, dated May 18, 2012 to probate.

The guardian ad litem filed his report as well as an affirmation of legal services. The guardian ad litem affirms that he spent over 14.50 hours on this matter and performed the following services: reviewed the file; had conversations and exchanged emails with the petitioner's attorney; reviewed the examinations pursuant to SCPA 1404; reviewed the SCPA 1411 citation; reviewed correspondence; reviewed stipulations; and prepared his report.

In evaluating the cost of legal services, the court may consider a number of factors, including: the time spent (*Matter of Kelly*, 187 AD2d 718 [2d Dept 1992]); the complexity of the questions involved (*Matter of Coughlin*, 221 AD2d 676 [3d Dept 1995]); the nature of the services provided (*Matter of Von Hofe*, 145 AD2d 424 [2d Dept 1988]); the amount of litigation required (*Matter of Sabatino*, 66 AD2d 937 [3d Dept 1978]); the amounts

involved and the benefit resulting from the execution of such services (*Matter of Shalman*, 68 AD2d 940 [3d Dept 1979]); the lawyer's experience and reputation (*Matter of Brehm*, 37 AD2d 95 [4th Dept 1971]); and the customary fee charged by the Bar for similar services (*Matter of Potts*, 123 Misc 346 [Sur Ct, Columbia County 1924], *affd* 213 App Div 59 [4th Dept 1925], *affd* 241 NY 593 [1925]; *Matter of Freeman*, 34 NY2d 1 [1974]).

In discharging this duty to review fees, the court cannot apply a selected few factors that might be more favorable to one position or another, but must strike a balance by considering all of the elements set forth in *Matter of Potts* (123 Misc 346 [Sur Ct, Columbia County 1924], *affd* 213 App Div 59 [4th Dept 1925], *affd* 241 NY 593 [1925]), and as re-enunciated in *Matter of Freeman* (34 NY2d 1 [1974]) (*see Matter of Berkman*, 93 Misc 2d 423 [Sur Ct, Bronx County 1978]). Also, the legal fee must bear a reasonable relationship to the size of the estate (*Matter of Kaufmann*, 26 AD2d 818 [1st Dept 1966], *affd* 23 NY2d 700 [1968]; *Martin v. Phipps*, 21 AD2d 646 [1st Dept 1964], *affd* 16 NY2d 594 [1965]). A sizeable estate permits adequate compensation, but nothing beyond that (*Martin v Phipps*, 21 AD2d 646 [1st Dept 1964], *affd* 16 NY2d 594 [1965]; *Matter of Reede*, NYLJ, Oct. 28, 1991, at 37, col 2 [Sur Ct, Nassau County]; *Matter of Yancey*, NYLJ, Feb. 18, 1993, at 28, col 1 [Sur Ct, Westchester County]). Moreover, the size of the estate can operate as a limitation on the fees payable (*Matter of McCranor*, 176 AD2d 1026 [3d Dept 1991]; *Matter of Kaufmann*, 26 AD2d 818 [1st Dept 1966], *affd* 23 NY2d 700 [1968]), without constituting an adverse reflection on the services provided.

The burden, with respect to establishing the reasonable value of legal services performed, rests on the attorney performing those services (*Matter of Potts*, 123 Misc 346 [Sur Ct, Columbia County 1924], *affd* 213 App Div 59 [4th Dept 1925], *affd* 241 NY 593 [1925]; *see e.g. Matter of Spatt*, 32 NY2d 778 [1973]). Contemporaneous records of legal time spent on estate matters are important to the court in determining whether the amount of time spent was reasonable for the various tasks performed (*Matter of Von Hofe*, 145 AD2d 424 [2d Dept 1988]; *Matter of Phelan*, 173 AD2d 621 [2d Dept 1991]). While there is no hard and fast rule to calculate reasonable compensation to an attorney in every case, the Surrogate is required to exercise his or her authority "with reason, proper discretion and not arbitrarily" (*Matter of Brehm*, 37 AD2d 95, 97 [4th Dept 1971]; *see Matter of Wilhelm*, 88 AD2d 6, 11-12 [4th Dept 1982]).

These factors apply equally to an attorney retained by a fiduciary or to a court-appointed guardian ad litem (*Matter of Burk*, 6 AD2d 429 [1st Dept 1958]; *Matter of Berkman*, 93 Misc 2d 423 [Sur Ct, Bronx County 1978]; *Matter of Reisman*, NYLJ, May 18, 2000, at 34 [Sur Ct, Nassau County]). Moreover, the nature of the role played by the guardian ad litem is an additional consideration in determining his or her fee (*Matter of Ziegler*, 184 AD2d 201 [1st Dept 1992]). With respect to a guardian ad litem's fee, the court bears the ultimate responsibility for approving legal fees that are charged to an estate and has the discretion to determine what constitutes reasonable compensation for legal fees rendered in the course of an estate (*Matter of Stortecky v Mazzone*, 85 NY2d 518 [1995]; *Matter of*

Vitole, 215 AD2d 765 [2d Dept 1995]; *Matter of Phelan*, 173 AD2d 621, 622 [2d Dept 1991]).

After a review of all of the aforementioned factors, the legal fee of the guardian ad litem is fixed in the amount of \$3,500.00 which is to be paid within thirty (30) days of the decree to be entered herein.

Settle decree.

Dated: June 27, 2016
Mineola, New York

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