

**Matter of Tatem**

2016 NY Slip Op 32047(U)

May 13, 2016

Surrogate's Court, Nassau County

Docket Number: 2015-384957

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, Estate of**

**DECISION**

**VIRGINIA TATEM,**

**File No. 2015-384957**

**Dec. No. 31533**

**Deceased.**

-----X  
**PRESENT: HON. MARGARET C. REILLY**

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

Petition For Probate .....	1
Final and Supplemental Report of the Guardian Ad Litem .....	2
Affidavit Regarding Petition to Reform Will .....	3
Affirmation of Legal Services .....	4

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, Virginia Tatem, died on April 13, 2015. She was survived by four children, one of whom is under a disability and for whom a guardian ad litem was appointed. The decedent’s will, dated November 10, 2005, has been offered for probate. Article Third provides that the residue of the estate be divided equally between her four children. With regard to her disabled son, the will provides the following “I hereby direct that my son’s . . . share shall be held in trust by my Executrix named herein until such time as he shall have been gainfully employed for at least two (2) years, for at least three (3) days a week . . . .” The guardian ad litem reports that his ward resides in an extended care facility and receives government benefits. He further reports that unless the will is reformed or the trust paid into a supplemental needs trust, his ward will lose his benefits.

As a result of the guardian ad litem's report and conferences with the nominated co-executors, the nominated co-executors of the decedent's will have agreed to bring a proceeding to reform the will.

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 November 10, 2005, 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 15.75 hours in connection with the matter. He performed the following services: reviewed the file; interviewed the attorney-drafter as well as the attesting witnesses; engaged in multiple phone conversations with the attorney for the petitioner; reviewed documents; met with his ward; attended court conferences; reviewed the stipulation; and drafted his report and supplemental report.

In evaluating the cost of legal services, the court may consider a number of factors, including: the time spent (*see Matter of Kelly*, 187 AD2d 718 [2d Dept 1992]); the complexity of the questions involved (*see Matter of Coughlin*, 221 AD2d 676 [3d Dept 1995]); the nature of the services provided (*see Matter of Von Hofe*, 145 AD2d 424 [2d Dept 1988]); the amount of litigation required (*see Matter of Sabatino*, 66 AD2d 937 [3d Dept 1978]); the amounts involved and the benefit resulting from the execution of such services (*see Matter of Shalman*, 68 AD2d 940 [3d Dept 1979]); the lawyer's experience and reputation (*see Matter of Brehm*, 37 AD2d 95 [4th Dept 1971]); and the customary fee charged by the Bar for similar services (*see 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 (*see 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 (*see 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 (*see 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 (*see 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 (*see 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 (*see 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 (*see 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 (*see 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 \$4,500.00 which is to be paid within thirty (30) days of entry of the decree. The petitioners are also directed to commence a proceeding to reform the will within thirty (30) days of entry of the decree.

Settle decree.

Dated: May 13, 2016  
Mineola, New York

**E N T E R:**

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**HON. MARGARET C. REILLY**  
**Judge of the Surrogate's Court**

cc: Tip Henderson, Esq.  
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