

**Matter of Mahon**

2007 NY Slip Op 30160(U)

March 6, 2007

Surrogate's Court, Nassau County

Docket Number: 0320668

Judge: John B. Riordan

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SURROGATE'S COURT: STATE OF NEW YORK  
COUNTY OF NASSAU

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Accounting by Beth A. Mahon as Administrator of the  
Estate of

File No. 320668

THOMAS A. MAHON,

Decision No. 176

Deceased.  
-----X

This is an uncontested accounting proceeding in which the issues of approval of the account as brought down to date, approval of attorneys fees paid and unpaid and determination of the fees of the guardian ad litem are before the court.

Thomas A. Mahon died intestate on September 11, 2001 at the World Trade Center. He was survived by his wife Beth A. Mahon, the petitioner herein, and his infant daughter Shay Mahon. A guardian ad litem has been appointed for the infant and she has filed her report.

The guardian ad litem has reviewed the account and the affidavit bringing it current to February 28, 2006 as well as numerous documents and proof supporting the entries on the various schedules of the account. The guardian ad litem finds all the schedules complete and correct and that the legal fees requested by the administrator's attorneys are reasonable and should be allowed in the amount requested.

With respect to the issue of attorney fees, 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]). 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]).

In evaluating the cost of legal services, the court may consider a number of factors. These include: 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], *aff'd* 213 App Div 59 [4th Dept 1925], *aff'd* 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 which 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], *aff'd* 213 App Div 59 [1925], *aff'd* 241 NY 593 [4th Dept 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], *aff'd* 23 NY2d 700 [1968]); *Martin v. Phipps*, 21 AD2d 646 [1st Dept 1964], *aff'd* 16 NY2d 594 [1965]. A sizeable estate permits adequate compensation, but nothing beyond that (*Martin v. Phipps*, 21 AD2d 646 [1st Dept 1964], *aff'd* 16 NY2d 594 [Ct App 1965] [Sur Ct, Nassau County]; *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 [3rd Dept 1991]; *Matter of Kaufmann*, 26 AD2d 818 [1st Dept 1966], *aff'd* 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], *aff'd* 213 App Div 59 [4th Dept 1925], *aff'd* 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]).

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 Misc2d 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 disbursements, the tradition in Surrogate's Court practice is that the attorney may not be reimbursed for expenses that the court normally considers to be part of overhead, such as photocopying, postage, telephone calls, and other items of the same matter ( *Matter of Graham*, 238 AD2d 682 [3rd Dept 1997]; *Matter of Diamond*, 219 AD2d 717 [2d Dept 1995]; Warren's Heaton on Surrogates' Court Practice §106.02 [2][a], 7th ed.). In *Matter of Corwith* (NYLJ, May 3, 1995, at 35 [Sur Ct, Nassau County]), this court discussed the allowance of charges for photocopies, telephone calls, postage, messengers and couriers, express deliveries

and computer-assisted legal research. The court concluded that it would permit reimbursement for such disbursements only if they involved payment to an outside supplier of goods and services, adopting the standards set forth in *Matter of Herlinger* (NYLJ, Apr. 28, 1994, at 28 [Sur Ct, New York County]). The court prohibited reimbursement for ordinary postage and telephone charges other than long distance.

In the instant matter the attorneys have agreed to discount actual legal fees incurred fifty percent (50%). Thus actual fees incurred of \$32,570.00 have been reduced to \$16,285.00 and at this point counsel is seeking only \$14,846.24 in legal fees of which \$13, 899.36 have been paid and \$946.88 remains unpaid. Considering all of the above factors and the report of the guardian ad litem, all of the fees requested are approved.

The guardian ad litem has spent a total of 10.75 hours on this matter at an hourly rate of \$200 for a total fee of \$2,150.00. This fee is approved in the sum requested.

Settle decree on notice to the guardian ad litem.

Dated: March 6, 2007

JOHN B. RIORDAN  
Judge of the  
Surrogate's Court