

Matter of Edward Kaplan
2007 NY Slip Op 30162(U)
March 8, 2007
Surrogate's Court, Nassau County
Docket Number: 0321837
Judge: John B. Riordan
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SURROGATE'S COURT: STATE OF NEW YORK
COUNTY OF NASSAU

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In the Matter of the Application of Penny Kaplan, income beneficiary of the QTIP trust established under the Last Will and Testament of Edward Kaplan, deceased, to convert said trust to a four percent (4%) unitrust; compelling the sale of the family business interests for fair market value, or, alternatively, demanding that the family business interests are properly managed so that they show income produced; removing Deborah Kaplan Brooks as co-Trustee; and disqualifying Robert Kaplan as successor co-Trustee and immediately appointing an independent corporate-fiduciary to succeed as co-Trustee.
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File No. 321837
Decision No. 189

In this proceeding, the court previously granted that portion of petitioner's motion to strike respondent's answer and for other relief to the extent that it sought payment of her counsel fees from respondents. The fees were incurred in connection with petitioner's motion which was necessitated by respondents' failure to produce certain documents, despite the court's oral ruling on September 13, 2006, obtained during the deposition of one the respondents, directing them to do so (Dec. 944 - January 5, 2006).

Petitioner has filed her attorney's affirmation of legal services associated with the motion. The affirmation includes a recitation of the primary attorney's qualifications, the work performed, who performed it, the amount of time associated with the work, and the actual dollar amount attributable to the work performed. Petitioner is seeking \$4,445.50 in total. The primary attorney on the matter billed at his usual hourly rates of \$380 in 2005 and \$390 in 2006. The hourly rate for his legal assistant's was \$100. Petitioner does not seek reimbursement for disbursements or for the time her counsel spent attempting to obtain the documents prior to making the motion.

Respondents oppose the requested amount of fees to the extent that they question (1) whether petitioner's attorney billed the file at his usual hourly rate, since that is not explicitly stated in his affirmation; (2) why making the motion required a "senior, experienced" litigation attorney and not a "more junior" litigator; (3) a number of time entries as "insufficiently detailed" because they do not specify that the work was performed in connection with the motion to strike; (4) a particular entry of 3.9 hours to "review files of West Maple documents produced by respondents", which respondents assert should be reduced to 2 hours because, they assert, the review was done in "connection with the overall proceeding" and was not limited to the motion; (5) several time entries by the legal assistant for work that respondents assert should have been performed by clerical personnel and one entry by the legal assistant of .5 hours for filing an affidavit of service with the court which respondents deem excessive; and (6) the attorney's request for reimbursement for .75 hours to review the court's January 5, 2006 order and draft his affirmation of legal services.

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], *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 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], *affd* 213 App Div 59 [1925], *affd* 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]).

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]).

On petitioner's attorney's affirmation of legal services, the breakdown of the charges for

the work performed shows that petitioner's attorney billed his time spent on the motion at \$380 per hour in 2006 and \$390 per hour for the one entry in 2007. The court does not question why making the motion required a "senior, experienced" litigation attorney and not a "more junior" litigator since it is the former who has been litigating this proceeding. The court also finds that the time entries that respondents characterize as "insufficiently detailed" because they do not specify that the work was performed in connection with the motion to strike are adequate since petitioner's attorney has affirmed that the services in question were "rendered . . . with respect to the motion to strike." Additionally, the court does not deem improper the amount of time it took for the legal assistant to file the affidavit of service nor the fact that certain work was undertaken by a legal assistant rather than a secretary.

The court agrees with respondents that the review of the West Maple documents would have had to be performed even in the absence of petitioner's motion to strike and reduces that charge to 2 hours. Finally, the court reduces the requested time of .75 hours to .10 hours for review of the order, eliminating the remainder as attributable to the preparation of the affirmation of legal services.

Considering all the factors, the court awards \$3,470.00 to petitioner as and for the legal fees attributable to the motion to strike. Respondents are direct to pay that amount to petitioner by check made payable to petitioner's attorney's firm, as attorneys for petitioner, within fifteen days of entry of this order.

This constitutes the decision and order of this court.

Dated: March 8, 2007

JOHN B. RIORDAN
Judge of the
Surrogate's Court

