

Matter of the Estate of Lewis

2007 NY Slip Op 30422(U)

March 29, 2007

Sur Ct, Nassau County

Docket Number: 0273459

Judge: John B. Riordan

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

-----X
In the Matter of the Estate of

ANNA LEWIS,

Deceased.
-----X

File No. 273459

Dec. No. 90

In this proceeding originally commenced as a SCPA 2103 discovery proceeding, the parties agreed that a construction of the will, rather than a discovery proceeding, was required and memoranda of law on the construction issue were filed with the court and the matter submitted for decision. The decedent's son, who is under a disability, was represented by a guardian ad litem. By decision and order dated September 26, 2005, the court concluded that the decedent's will devised her real property equally to her three children and directed the parties to appear in court to finalize the terms of sale.

On October 11, 2005 a stipulation was placed on the court's record which provided for the sale of the property to decedent's daughter Donna on certain terms. Evidently those terms were not or could not be complied with and the parties have now executed and seek the court's approval of a stipulation amending the prior stipulation of settlement. All parties, including the temporary Mental Hygiene Law Article 81 guardian of decedent's son have executed the stipulation, as has the guardian ad litem, subject to the court's approval. The court has been involved with the negotiations leading up to the execution of this supplemental stipulation of settlement and finds that the resolution of these proceedings is clearly in the best interests of the estate and the decedent's disabled son. The stipulation amending the prior stipulation of

settlement is therefore approved (SCPA 2106) and the court authorizes the guardian ad litem to execute the amended stipulation on behalf of his ward.

The court is also considering the reasonableness of the fee sought by the guardian ad litem.

As with any request for a 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]. 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.

The court has reviewed the affirmation of legal services submitted by the guardian ad litem wherein he indicates that he has spent 32.1 hours on this matter since his appointment approximately three years ago. His duties necessarily involved participation in a will construction proceeding, review of legal memoranda of opposing counsel as well as his own legal research on the construction issue and extensive efforts on his part to bring the matter to ultimate resolution. His efforts were instrumental in reaching the final settlement which is a very good one for his disabled ward. Accordingly, the court awards the guardian ad litem a fee of \$9,630.00 which shall be paid within 30 days of entry of the decree.

Settle decree on five days' notice with five additional days if service is by mail.

Dated: March 29, 2007

JOHN B. RIORDAN
Judge of the
Surrogate's Court