

Matter of Mary L. Kinley 1989 Trust

2007 NY Slip Op 30972(U)

April 26, 2007

Supreme Court, Albany County

Docket Number: 0005192/0061

Judge: Joseph C. Teresi

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In the Matter of the Petition for a Compulsory
Accounting of Mary L. Kinley 1989 Trust,
created under Agreement dated December
14, 1989 as amended.

DECISION and ORDER
RJI NO.:01-06-084580
INDEX NO.: 519-06

Albany County Supreme County All Purpose Term April 5, 2007
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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TERESI, J.:

Petitioner, Linda McCall as Guardian of the Person of Mary L. Kinley, brings this motion for an award of attorney's fees from her action to compel an accounting from Respondent, KeyBank National Association as Trustee of the Mary L. Kinley 1989 Trust (hereinafter the Trust). As per this Court's March 19, 2007 Order, Petitioner has filed an affidavit of services. Respondent opposes the motion and opposes several points contained within Petitioner's affidavit of services.

After fully reviewing the record, this Court rejects Respondent's affidavit of services which cover many dates not related to the action to compel an accounting, but will grant

attorney's fees only for services provided for the obtaining an accounting, upon a proper submission to this Court, on notice. Within fourteen (14) days of the day of this Decision and Opinion Petitioner's attorney shall file and serve an affidavit of services regarding only those services related to obtaining an accounting from respondent, setting forth the nature of the services, the date on which each service was provided, a description of the service and the amount sought per hour and for each service. The attachment of computer printouts is not acceptable. In addition, a list of any disbursements incurred shall be provided identifying the disbursements individually and the amount paid. Within fourteen (14) days of receipt of that affidavit, Respondent's counsel may submit to the Court any affidavit in opposition to the application for attorney's fees in respect to their reasonableness or necessity.

On December 6, 2000, this Court appointed Petitioner to be the Guardian of the person of Mary L. Kinley, but specifically did not grant her financial guardianship over the Mary L. Kinley 1989 Trust. The Guardianship Order granted Linda McCall "authority to direct Key trust Company as attorney-in-fact under Power of attorney dated May 3, 1995 and as Trustee of the Mary L. Kinley Trust... to pay for the care and maintenance of Mary L. Kinley." Petitioner, as Mary L. Kinley's Guardian is required to examine all relevant circumstances, including financial circumstances in order to determine the best care, treatment and place of residence for Mary L. Kinley. After several a lengthy disputes with Respondents regarding the use of Trust assets Petitioner demanded an accounting of Trust assets on the grounds that she required the information to make financial decisions regarding the care of her ward. Respondent refused, arguing that Petitioner did not have standing to compel an accounting. On March 10, 2006 this Court denied Petitioner's motion to compel an accounting. On October 19, 2006, the Appellate

Division, Third Department reversed this Court and held that, as the personal Guardian of Mary L. Kinley, Petitioner did have standing to compel an accounting in Mary L. Kinley's stead.

The current matter before this Court concerns Petitioner as the personal Guardian of Mary L. Kinley, seeking an award of \$111,762.50 in attorney's fees allegedly incurred in the proceeding for the compulsory accounting and subsequent appeal. Petitioner claimed that if Mary L. Kinley were of sound mind and brought the suit for an accounting she would be entitled to have her attorney's fees paid for from Trust assets. On March 19, 2007, this Court agreed that regardless of whether Mary L. Kinley could demand payment of these attorney's fees, Petitioner, as Mary L. Kinley's personal Guardian, is entitled to reasonable attorney's fees for the underlying action. In that same March 19, 2007 Order, this Court expressed concerns regarding the amount of legal fees in question. Specifically, Respondent contended that this Court should deny Petitioner's request for \$111,762.50 in attorney's fees because the request fails to list any of the services rendered or hourly rates, giving this Court no means to review the propriety of the fees. Rather than deny legal fees, this Court Ordered that Petitioner present this Court with an affidavit of legal services.

Petitioner's affidavit of services is facially invalid because it describes services associated with the accounting co-mingled with legal services relating to Petitioner's annual reports as a personal guardian and to a dispute regarding land owned by the Mary Kinley Trust. These matters are outside the scope of this Court's March 19, 2007 Order granting attorney's fees and also outside the scope of Matter of Greatsinger (67 NY2d 177 [1986]) upon which Petitioner's entitlement to attorney's fees relies. As Petitioner has stated, this Court should consider the following factors before awarding attorneys fees from the Trust: whether the

proceeding was necessary, who instituted it, whether the party seeking a fee award was acting solely in his own interest, whether the litigation was successful and whether the benefits applied broadly to persons other than the litigant.

Although, Petitioner claims the litigation was necessary to fulfill her obligations as Mary L. Kinley's guardian, there has been no demonstration of the practical necessity or potential benefit of an accounting at this time. Petitioner clearly had standing to compel an accounting in Mary L. Kinley's stead and had a duty to examine Mary L. Kinley's financial circumstances as it applies to her care, but no demonstration has yet been made regarding care decisions that necessitated an accounting. Nonetheless, it is clear that as a personal Guardian, Petitioner did not bring this suit for her own benefit and does not derive a benefit from the accounting. Moreover, Petitioner was ultimately successful, and should not be burdened personally with the financial cost of Mary L. Kinley's care and maintenance, including reasonable legal fees. The reasonableness of the fees, however, relate directly to the above factors. It cannot be said that Petitioner has blanket authority to press any suit for which Mary L. Kinley might have standing and charge potentially exorbitant or frivolous legal fees to the Trust for which Petitioner bears no direct responsibility. This Court will review the reasonableness of Petitioner's affidavit of legal services upon the receipt of an affidavit that is narrowly tailored only to those services relating to the accounting that was the subject of this Court's March 19, 2007 Order.

Accordingly, this Court grants attorney's fees for legal services relating the accounting upon a proper submission to this Court (with affidavit of service to the opposing party) within fourteen (14) days of the day of this Decision and Opinion their affidavit of services setting forth the nature of the services, the date on which each service was provided, a description of the

service and the amount sought per hour for each service. In addition, a list of any disbursements incurred shall be provided identifying the disbursements individually and the amount paid.

Within fourteen (14) days of receipt of that affidavit by defendant's counsel, defendants' counsel may submit to the Court any affidavit in opposition to the application for attorney's fees in respect to their reasonableness or necessity.

All papers, including this Decision and Order, are being returned to the attorney for the Petitioner. The signing of this Decision and Order shall not constitute entry or filing under CPLR § 2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

SO ORDERED!

Dated: April 26, 2007

Albany, New York



JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Petitioner's Affidavit of Legal Services, dated April 2, 2007 with Attached Exhibit A.
2. Respondent's Affidavit in Opposition, dated April 5, 2007.