

Matter of Lagin

2007 NY Slip Op 31528(U)

June 8, 2007

Sur Ct, Nassau County

Docket Number: 0301483/2007

Judge: John B. Riordan

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

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 Accounting by Milton Sosinsky and Ellen Joan Ross, as
 Trustees of the Trust created under the Will of

File No. 301483

ANN C. LAGIN,

Dec. No. 149

f/b/o Max Lagin
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Submitted for review is an accounting filed by the trustees of the trust under the decedent's will for the benefit of Max Lagin. The trustees also seek the approval of attorneys' fees and accountants' fees as well as approval of the resignations of the current trustees and appointment of successor trustees.

Letters of trusteeship issued to Milton Sosinsky and Ellen Joan Ross on October 29, 1997. This is their first and final accounting. The current value of the trust is \$110,173.00.

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 [4th Dept 1925], *aff'd* 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 (*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 [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 (*Matter of McCranor*, 176 AD2d 1026 [3d 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 [3d Dept 1997]; *Matter of Diamond*, 219 AD2d 717 [2d Dept 1995]; Warren's Heaton on Surrogate's 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 this case, the attorney has supplied the court with an affidavit of legal services and it shows that the attorney rendered more than thirty-five (35) hours of combined legal services for this trust and another testamentary trust created by the decedent's will at \$250 per hour. The attorney seeks a total of \$3,809.00 in attorneys' fees representing one-half of the total fees charged to both trusts, of which \$1,309.00 has been paid and \$2,500.00 remains unpaid by this trust. It appears that approximately \$20.00 included in the fee represents charges for photocopying and facsimile charges which are not compensable. Considering all these factors, the court fixes the total fee of counsel in the amount of \$3,790.00. The account shows accounting fees paid of \$1,725.00 and unpaid accounting fees of \$1,000.00. The use of an accountant, in this case, appears to be reasonable. Therefore, the fee of the accountant in the amount of \$2,725.00 is approved.

The guardian ad litem has submitted an affirmation of services. The guardian ad litem has advised the court that she has rendered approximately 18 hours of legal services on this matter at an hourly rate of \$275.00 per hour. Although the services performed by the guardian ad litem were of the utmost quality, the court is constrained by the size of the trust. Accordingly, considering all of the factors used to determine the reasonableness of fees, the court fixes the fee of the guardian ad litem for services rendered in the amount of \$3,000.00. The guardian ad litem's fee shall be paid within thirty (30) days of the date of the decree to be entered herein.

Concerning the issue of the resignation of the current co-trustees, granting a trustee's application to resign rests with the court's discretion (*Matter of Busto's Will*, 173 Misc 25 [Sur Ct, New York County 1939], *aff'd* 258 App Div 980 [1st Dept 1940]). The court's primary concern in deciding whether to exercise its discretion is whether the resignation is in the best interests of the beneficiaries and whether the prospective administration of the trust will be advanced (*Barch v Avco Corp.*, 30 AD2d 241 [4th Dept 1968]; *Matter of Antonecchia*, NYLJ, Feb. 10, 2004, at 21 [Sur Ct, Westchester County]; *Matter of Barber*, NYLJ, June 12, 2000, at 37 [Sur Ct, Westchester County]).

Sufficient reason appearing that the resignations of Milton Sosinsky and Ellen Joan Ross will be in the best interests of the trust and the beneficiaries, the application to approve their resignations as co-trustees is approved. The named successor Randi Butwin has renounced her appointment. The will provides that the last surviving trustee may appoint a successor trustee. The petitioners seek approval of the appointment of Steven Lagin and Bente Poulsen as co-trustees of the trust. The court's approval is required because Steven Lagin and Bente Poulsen are not named trustees (*see Colson v Peilgram*, 235 AD 137 [1st Dept 1932]; *rev'd on other grounds*, 259 NY 370 [1932]). Here the appointment of Steven Lagin and Bente Poulsen is not opposed and will not contravene the express terms of the will (SCPA 1502). Their appointment is therefore approved. The will dispenses with a bond only for named trustees and successors. Steven Lagin and Bente Poulsen are not named successors. Accordingly, a bond is required. Therefore, letters of trusteeship issued to Milton Sosinsky and Ellen Joan Ross shall be revoked in all respects and successor letters of trusteeship shall issue to Steven Lagin and Bente Poulsen

upon their duly qualifying under the law and filing a bond in the amount of \$110,000.00.

This is the decision and order of the court.

Settle decree.

Dated: June 8, 2007

JOHN B. RIORDAN
Judge of the
Surrogate's Court