

Matter of Borgenicht
2007 NY Slip Op 31759(U)
June 20, 2007
Surrogate's Court, Nassau County
Docket Number: 0311508/2007
Judge: John B. Riordan
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SURROGATE'S COURT OF THE STATE OF NEW YORK
 COUNTY OF NASSAU

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 In the Matter of the Account of Proceedings of
 CAROL BORGENICHT, as Executor of the Estate
 of LEWIS BORGENICHT, deceased Executor of the
 Estate of

File No. 311508

Dec. No. 160

SONDRA B. BORGENICHT,

Deceased.
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Submitted for decision in this intermediate accounting proceeding is the issue of fees and commissions.

Sondra B. Borgenicht died on October 6, 1999. The decedent's will dated August 8, 1997 was admitted to probate on April 11, 2000, and letters testamentary issued to her son, Lewis Borgenicht, on the same date. Lewis Borgenicht died on May 6, 2002. This is an intermediate accounting by Carol Borgenicht as executor of the estate of the deceased executor Lewis Borgenicht. The accounting covers the period from October 6, 1999 through May 6, 2002. The summary statement shows charges to the accounting party of \$2,384,134.60.

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]).

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 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.

The attorney for the executor of the estate of the deceased fiduciary has supplied the court with an affirmation in support of his fee. The attorney seeks a total fee of \$6,283.87, of which

\$1,500.00 has been paid by the petitioner personally. The proposed fee includes time the attorney anticipates as necessary to bring this matter to a conclusion. The attorney performed services at the hourly rate of \$175.00. It appears from a review of the time records that 1.6 hours on January 8, 2007 was spent on preparation of the affirmation in support of counsel's fee, which is not compensable (*Matter of Farrell*, NYLJ, Apr. 12, 2000, at 35, col 1 [Sur Ct, Nassau County]; *Matter of Gallagher*, NYLJ, Feb. 2, 1993, at 22, col 4 [Sur Ct, Bronx County]). Accordingly, the court fixes the reasonable value of the services rendered by counsel in the amount of \$6,003.87, \$1,500.00 of which has been paid by the accounting party personally and shall be refunded to her by the estate.

Concerning the disbursements paid, it appears that total disbursements in the amount of \$1,828.97 were paid consisting of \$1,250.00 in filing fees paid by the accounting party personally, \$500.00 to an accounting firm for "Review Estate Accounting, Summary Report Issued", \$35.45 for postage and \$43.52 to the Morris County Sheriff. The fee for postage is disallowed. With respect to the accountant's fee, normally accountant's services are not compensable out of estate assets unless there exist unusual circumstances that require the expertise of an accountant (*Matter of Meranus*, NYLJ, Mar. 31, 1994, at 37 [Sur Ct, Suffolk County]). The fee for such services is generally held to be included in the fee of the attorney for the fiduciary (*Matter of Musil*, 254 AD 765 [2d Dept 1938]). As pointed out by Warren's Heaton on Surrogate's Court Practice (7th ed. rev'd.), at §93.08, "[t]he purpose of this rule is to avoid duplication (*Matter of Schoonhein*, 158 AD2d 183 [1990]). Where the legal fees do not include compensation for services rendered by the accountant, there is no duplication and the legal fee is not automatically reduced by the accounting fee (*Matter of Tortora*, NYLJ, July 19, 1995, at 26)." Here, there appears to be no duplication of services. Accordingly, total disbursements in

the amount of \$1,793.47 are approved. The filing fees of \$1,250.00 shall be refunded to the accounting party out of the estate.

The attorney for the deceased executor has supplied the court with an affidavit of legal services concerning the services rendered to him in his capacity as executor. According to counsel, attorneys and legal assistants in her firm rendered approximately 437 hours of legal services to the estate for a total of \$95,391.80, all of which has been paid. The firm also incurred disbursements of \$2,037.00. Counsel states that, during the course of administering the estate, a number of “complicated and unforeseeable issues” arose that took a great deal of time to resolve. The services counsel performed included the following: prepared the probate petition and petition for preliminary letters testamentary, conferred with guardian ad litem appointed in the probate proceeding, assisted with marshalling estate assets and establishing brokerage and checking accounts, advised executor of his duties, conferred with executor’s financial advisers, procured agreement among beneficiaries as to the division of the decedent’s tangible personal property, prepared letters of authorization to allow brokers and potential purchasers to enter the decedent’s home, assisted with the sale of the decedent’s house including arranging for renovations in connection with the sale, advised the executor in obtaining his sister’s cooperation in connection with the sale, negotiated and prepared the contract of sale and attended the closing, researched possible cause of action for wrongful death, analyzed post-mortem tax planning, prepared and filed federal and New York State estate tax returns, represented the executor in the audit of the decedent’s federal estate tax return, conferred with the accountant with respect to the decedent’s final income tax returns and the estate’s fiduciary income tax returns, prepared a receipt and release for the charitable bequest, and assisted the beneficiaries of the decedent’s IRA as to the payouts.

According to counsel, a great deal of time and attention was devoted to “addressing issues raised by Nancy’s irresponsible and difficult behavior.” Counsel states that because of the beneficiary’s behavior, her firm performed services that far exceeded those typically required in the administration of an estate. This additional work included convincing Nancy to vacate the premises and assisting her in finding a suitable home.

The guardian ad litem appointed in the accounting proceeding for the trust has submitted a report wherein he states that in order to perform a comprehensive review of the trust accounting, it was necessary for him to review the estate accounting. The guardian ad litem comments that the estate should have been a relatively simple estate to administer and that there appeared to be no unusual legal problems. Moreover, it appears that some of the work performed was executorial in nature. The law is clear that an attorney will not be allowed legal fees for performing executorial services (*Matter of Jones*, 168 AD2d 448 [2d Dept 1990]). Considering all these factors, the court fixes the fee of counsel to the deceased fiduciary in the amount of \$90,000.00. Any sums paid in excess of that amount shall be refunded to the estate. Disbursements for photocopies, facsimile charges, ordinary postage are disallowed. Accordingly, disbursements in the amount of \$1,394.18 are approved.

Settle decree.

Dated: June 20, 2007

JOHN B. RIORDAN
Judge of the
Surrogate's Court

