

Matter of Borgenicht
2007 NY Slip Op 31760(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
MARK ALAN ZILBERMAN, as the Trustee of
the Article FOURTH Trust under the Will of

File No. 311508

Dec. No. 162

SONDRA B. BORGENICHT,

Deceased.

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Submitted for decision in this accounting are the issues of attorneys’ fees and the fee of the guardian ad litem. The guardian ad litem also seeks the court’s authorization to enter into a stipulation resolving the outstanding issues.

Sondra B. Borgenicht, the decedent, died on October 6, 1999. Her will dated August 8, 1997 was admitted to probate on April 11, 2000. Letters testamentary issued to the decedent’s son, Lewis Borgenicht. Lewis Borgenicht died on May 6, 2002. Following his death, successor letters testamentary issued to Judith Wortman on June 20, 2002.

Under Article THIRD of her will, the decedent bequeathed her residuary estate to her surviving issue subject to trusts created under Articles FOURTH, FIFTH and SIXTH. The decedent was survived by her son, Lewis, a daughter, Nancy Borgenicht, and a granddaughter, Stephanie Gomory, who is the daughter of the decedent’s predeceased daughter Eileen Borgenicht Gomory. Pursuant to the will, the share for the decedent’s son, Lewis, was set apart for his benefit in trust to be administered in accordance with the provisions of Article FOURTH. Letters of trusteeship issued to Lewis Borgenicht and Mark Alan Zilberman as trustees of the Article FOURTH trust. Pursuant to the terms of the trust for Lewis, the trust terminated upon

Lewis' death and the then principal and income became payable to his surviving issue, subject to further trusts for any such issue under the age of thirty-five.

Lewis Borgenicht was survived by two children, his son Phillip and his daughter Katherine. Both Phillip and Katherine are under the age of 35 and, therefore, separate trusts were created for the benefit of each pursuant to Article SIXTH. Letters of trusteeship issued to Carol Borgenicht as trustee of the trusts for the benefit of Phillip and Katherine.

Mark Alan Zilberman, as the surviving trustee of the Article FOURTH trust for Lewis' benefit, has filed his first and final accounting for the period May 6, 2000 to October 31, 2003. The summary statement shows charges to the accounting party of \$385,997.04. A supplemental account was filed for the period November 1, 2003 through March 31, 2006, which shows charges of \$406,857.67. A further supplemental account was also filed for the period April 1, 2006 through August 31, 2006. By order dated April 20, 2004, a guardian ad litem was appointed for Phillip and Katherine, who were both infants. During the pendency of the proceeding, Katherine attained the age of majority.

The attorney for the successor executor of the estate of Sondra Borgenicht filed an affirmation requesting that a reserve of \$43,039.42 be maintained by the surviving trustee of the Article FOURTH trust in order to pay certain administration expenses and to cover certain distributions Lewis Borgenicht made to himself. That request was partially opposed by the trustee of the Article FOURTH trust who argued that distributions which Lewis Borgenicht, as executor, allegedly made to himself individually would not be properly chargeable to the Article FOURTH trust. The parties entered into a stipulation dated November 4, 2006 wherein the parties have resolved the objections raised by the successor executor. Being satisfied that the

terms of the stipulation are fair and further the ward's best interests, the court authorizes the guardian ad litem to execute the stipulation.

With respect to the issue of attorneys' 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.

With respect to accountants' fees, normally, an 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 [1938]). "[T]he purpose of this rule is to avoid duplication (*Matter of Schoonhein*, 158 AD2d 183 [1st Dept 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)" (Warren's Heaton on Surrogate's Court Practice §93.08 [7th ed]).

Counsel for the surviving trustee has submitted to the court an affirmation in support of her fee application as well as a supplemental affirmation. The affirmations show that the attorney rendered more than 119 hours at various hourly rates. The fees of the attorney's firm total \$36,202.30, which includes disbursements, and which represents approximately nine percent (9%) of the principal charges. The attorney has been paid \$33,616.03. The court notes some duplication of services by attorneys at the attorney's firm. There are some entries for secretarial work, such as faxing and copying, which should be part of overhead. In addition, it appears that the only contested issue with respect to the accounting concerned the amount of the reserve. The affirmations also include time entries for time spent on preparation of the affirmations in support of the fee application. Time spent on an attorney's fee application 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]). In addition, a number of time entries include time spent traveling to court for court appearances which is not compensable (*Matter of Trotman*, NYLJ, May 13, 1998, at 32 [Sur Ct, Nassau County]). The fee requested also includes copying charges of \$392.68. There is no indication whether the copying was done by an outside supplier. Accordingly, the amount is disallowed. Similarly, transportation costs totaling \$49.00 are considered part of office overhead and are disallowed. Considering all of the factors in determining the reasonableness of attorneys' fees, the court approves a total fee in the amount of \$25,000.00, inclusive of disbursements, as fair and proper compensation for the services rendered. Any sums paid in excess of this amount shall be refunded to the trustee.

The attorney for the deceased co-trustee has submitted an affirmation with respect to services her firm rendered to the deceased co-trustee. According to counsel, her firm rendered 22

hours of legal services to the trustee for a total fee of \$5,960.00, which has been paid in full. The services counsel provided included, but were not limited to, the following: (i) assisted with the requisite documentation to make funeral arrangements following Lewis' death; (ii) advised surviving co-trustee on his status and responsibilities after Lewis' death and the steps that had to be taken to terminate the Article FOURTH trust and fund the trusts for Phillip and Katherine, (iii) took steps necessary to terminate counsel's representation of the surviving co-trustee and provided new counsel with information and documents necessary to prepare accounting. A review of the time sheets annexed to counsel's affidavit indicates that travel time was included. Travel time is not compensable (*Matter of Trotman*, NYLJ, May 13, 1998, at 32 [Sur Ct, Nassau County]). Moreover, time spent in connection with obtaining the requisite documentation to make funeral arrangements for Lewis is not properly chargeable to the trust. Considering all of the factors in determining the reasonableness of attorneys' fees, the court approves a total fee in the amount of \$4,500 as fair and proper compensation for the services rendered. Any sums paid in excess of this amount shall be refunded to the trustee.

Concerning the guardian ad litem's fee, the guardian ad litem has submitted an affirmation of services wherein he avers that he spent 50-1/4 hours at his hourly rate of \$250/hour for a total of \$12,562.00. The guardian ad litem notes that even though he was not appointed as guardian ad litem in the accounting proceeding for Sandra's estate, in order to determine if the Article FOURTH trust was properly funded, he reviewed pertinent records of the estate. A review of the time sheets annexed to the guardian ad litem's report includes time spent delivering his report to the court and preparing his affirmation in support of his fee. The services performed by the guardian ad litem were of the utmost quality. Nevertheless, the court is constrained by the size of the trust. Accordingly, the court approves a fee for the guardian ad

litem in the amount of \$8,500.00, which shall be paid within thirty (30) days of the decree to be entered herein.

The accountings also seek approval of the accounting fees of the firm Kehnle & Meyers in the amount of \$17,025.35, of which \$15,737.80 has been paid. The accountings also show fees paid to Earl Henderson, CPA for preparation of income tax returns. Neither firm has submitted an affidavit of accounting services to the court. Accordingly, the court cannot review the reasonableness of these fees at this time. The firms of Kehnle & Meyers and Earl Henderson, CPA are each directed to serve and file an affidavit of accounting services within twenty days after the date of this decision. Failure to do so will result in disallowance of the fee for which approval is sought.

Commissions are approved subject to audit.

This constitutes the decision and order of the court.

Proceed accordingly.

Dated: June 20, 2007

JOHN B. RIORDAN
Judge of the
Surrogate's Court

