

**Matter of Johnston**

2007 NY Slip Op 31764(U)

June 6, 2007

Surrogate's Court, Nassau County

Docket Number: 0329289/2007

Judge: John B. Riordan

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

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In the Matter of the Final Account by  
William R. Johnston as the Executor of

File No. 329289

Decision No. 182

JAMES BURT JOHNSTON,  
a/k/a JAMES JOHNSTON,

Deceased.

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In the Matter of the Guardianship of

File No. 329654

RYAN WILLIAM JOHNSTON,

Decision No. 191

an infant.

----- X

In the Matter of the Guardianship of

File No. 329655

KELLY ANN JOHNSTON,

Decision No. 192

an infant.

----- X

In the Matter of the Guardianship of

File No. 329656

MATTHEW TYLER JOHNSTON,

Decision No. 193

an infant.

----- X

Submitted for review is an accounting filed by the executor of the estate of James Burt Johnston. The executor is the decedent’s father and co-guardian along with his wife of the person and property of decedent’s children. Also submitted for decision is the fee of the guardian ad litem. The executor also seeks approval of attorney’s fees.

The decedent James Burt Johnston died a resident of Nassau County on June 10, 2003. Letters testamentary issued to the executor on November 21, 2003. This accounting is the first and final accounting. The summary statement shows charges to the accounting party of

\$876,416.25. A guardian ad litem was appointed to represent the decedent's three minor children. The decedent's will dated October 31, 2002 divides his residuary estate into three equal shares for his minor children, subject to trusts for any beneficiary under the age of twenty-eight (28) years. Letters of trusteeship with respect to each trust issued to the petitioner on November 21, 2003.

The guardian ad litem has submitted a report and a supplemental report which address certain concerns regarding the distribution of estate assets. The guardian ad litem reports that the petitioner has distributed \$100,000.00 to each of his wards. Although the will creates a trust for each of the decedent's three minor children, the distributions were made to petitioner as custodian of a separate account for each child at Astoria Federal Savings Bank. The guardian ad litem suggested that in order to more closely follow the terms of the will, the accounts be retitled in the names of William R. Johnston as trustee for the benefit of Ryan W. Johnston, Kelly A. Johnston and Matthew T. Johnston, respectively. The guardian ad litem reports that the accounts have been retitled in accordance with his suggestions.

The guardian ad litem also noted that a distribution of \$116,696.26 had been made to petitioner for the purchase of a second home for family vacations in Cutchogue, New York. The home was purchased in the names of petitioner and his wife. As security for the loan, petitioner executed a promissory note from himself as trustee to the guardian ad litem's three wards. The guardian ad litem suggested instead that a note and purchase money mortgage in the amount of \$116,696.26 should be executed by petitioner and his wife, individually, made payable to petitioner as trustee under the will of James Burt Johnston for the benefit of Ryan William Johnston, Kelly Anne Johnston and Matthew Tyler Johnston, with said purchase money

mortgage to be recorded against the Cutchogue property. The guardian ad litem advises that there is sufficient equity in this property to protect the mortgage. The guardian ad litem further advises that the documents required to incorporate his suggestions have been executed.

Accordingly, the guardian ad litem (i) consents to the approval of the purchase money mortgage, (ii) agrees that the purchase money mortgage be recorded against the Cutchogue property and (iii) agrees that petitioner and his wife, Erika M. Johnston, pay all recording fees and mortgage tax thereon in connection with the recording of the purchase money mortgage. In addition, the guardian ad litem also believes that the trustee is qualified to continue to act in his fiduciary capacity notwithstanding that he utilized trust funds to purchase the Cutchogue property without a court order. The guardian ad litem points out that the trustee is the grandfather of his wards and that he is raising the children following the death of their parents. The guardian ad litem has met with the trustee and states that he is certain that the trustee is acting in the wards' best interests.

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 [Ct App1995]; *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 [4<sup>th</sup> 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 Misc2d 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 [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 [3d Dept 1997]; *Matter of Diamond*, 219 AD2d 717 [2d Dept 1995]; Warren's Heaton on Surrogates' Court Practice §106.02 [2][a], 7<sup>th</sup> 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's firm rendered more than one hundred and ten (110) hours of legal services of a partner and paralegal at hourly rates of \$300.00 and \$100.00 respectively. The attorney seeks a total of \$29,878.38 in attorney's fees, of which \$18,688.00 has been paid and \$11,190.38 remains unpaid. The court notes that there are some entries for secretarial work which should be part of office overhead. There are also a number of entries for telephone conferences with the petitioner and the court. The court is also aware that additional work was required to correct certain problems created by the establishment of the custodial accounts and the way in which the purchase of the second home was initially structured. The disbursements on the invoices also include total charges of \$77.00 for postage and fees for a process service to deliver envelopes and affidavits of service to the court. Such charges are not compensable. Considering all these factors, the court fixes the total fee and disbursements of counsel for the petitioner in the amount of \$25,000.00.

The guardian ad litem has supplied the court with an affidavit of legal services and it shows that the guardian ad litem rendered 11.5 of services on this matter. The guardian ad litem's normal hourly rate is \$350.00. The guardian ad litem made suggestions which were ultimately adopted to restructure the distributions which had not been made strictly in accordance

with the will provisions. The guardian ad litem's work was of the utmost quality. Considering all these factors, the court believes the sum of \$3,000.00 is fair and proper compensation for the services rendered by the guardian ad litem.

Petitioner's claim for reimbursement of expenses, including funeral expenses, is approved (SCPA 1805). Commissions are approved subject to audit. In all other respects the account is approved.

A proposed decree has been submitted and will be signed if found to be in proper form. The fee of the guardian ad litem shall be paid within thirty (30) days of the decree to be entered herein.

With respect to the guardianship proceedings, there is no need for the letters of guardianship of the property previously issued to William R. Johnston and Erika H. Johnston to remain in effect in view of the testamentary trusts created for each infant. Accordingly, letters of the guardianship of the property and person issued to William R. Johnston and Erika M. Johnston for Ryan William Johnston, Kelly Anne Johnston and Matthew Tyler Johnston shall be amended to revoke the letters of guardianship of the property. Letters of guardianship of the person issued to William R. Johnston and Erika M. Johnston for Ryan William Johnston, Kelly Anne Johnston and Matthew Tyler Johnston shall remain in effect. New letters shall issue to William R. Johnston and Erika M. Johnston as guardians of the person only of Ryan William Johnston, Kelly Anne Johnston and Matthew Tyler Johnston.

This constitutes the decision and order of the court.

Dated: June 6, 2007

JOHN B. RIORDAN  
Judge of the  
Surrogate's Court