

Matter of Fritz

2007 NY Slip Op 32122(U)

June 7, 2007

Surrogate's Court, Nassau County

Docket Number: 0343029/2007

Judge: John B. Riordan

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

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Administration Proceeding, Estate of

File No. 343029

EDWARD F. FRITZ,

Decision No. 260

Alleged Deceased.

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This is a proceeding for letters of administration and a declaration that Edward F. Fritz be presumed dead pursuant to EPTL 2-1.7 [a] by virtue of his unexplained, continuous absence from January 29, 2002. The proceeding was commenced by Laura Calabro, Edward’s mother. Jurisdiction was obtained over Edward by service of process by publication (SCPA 1003 [1]). A guardian ad litem was appointed to represent Edward’s interests.

The matter was referred to a court attorney-referee pursuant to SCPA 506. A hearing was conducted for the purpose of taking proof about Edward’s disappearance, to determine whether a diligent search had been conducted to try to ascertain his whereabouts, and to establish that there is no other explanation for his continuous absence, other than his presumed death. Various documents were admitted into evidence at the hearing. The petitioner was the only witness who testified.

The petitioner and the guardian ad litem consented to waive the report of the referee and to allow the issue of Edward’s death to be decided by the court based upon the oral testimony adduced and the documents admitted into evidence at the hearing. After the hearing, the guardian ad litem filed a report in which she recommends, based on the evidence, that the court declare that Edward is presumed to be dead.

EPTL 2-1.7 [a] provides, in relevant part, that

"[a] person who is absent for a continuous period of three years, during which, after diligent search, he or she has not been seen or heard of or from, and whose absence is not satisfactorily explained shall be presumed . . . to have died

three years after the date of such unexplained absence commenced, or on such earlier date as clear and convincing evidence establishes is the most probable date of death."

Petitioner's testimony and the exhibits in evidence establish the following facts. At the time of his disappearance, Edward was forty-five-years-old with a history of mental illness dating back to 1973 when he was diagnosed with schizophrenia. Edward's father died in 1981. Edward was the oldest of three sons from petitioner's marriage to Edward's father. Edward's youngest brother, Clifford, died in 1982 as a result of an automobile accident; his brother, Jeffrey, is married. At the time of his disappearance, he resided with the petitioner and her second husband in Farmingdale, New York.

Edward graduated from high school in 1974, but did not attend classes after his diagnosis the year before. Instead, he was tutored at home. He attended college for two months. Edward never learned to drive. He never held a job and did not have any vocational training. He spent most of his day at home watching television and reading the encyclopedia and the almanac. He was incapable of traveling on his own. The petitioner either transported him or arranged for his transportation. He voted each year.

Prior to his disappearance, Edward was being treated by a psychiatrist on a monthly basis at the Sunrise Psychiatric Clinic in Amityville, New York. The psychiatrist prescribed medication for Edward. Edward had also attended ten sessions at the clinic of a day program on Mondays and Tuesdays from 10:00 a.m. to 3:00 p.m. The clinic provided transportation by van to and from the program to Edward. He was picked up at home at about 9:30 a.m. and dropped off there at about 4:45 p.m.

On Tuesday, January 29, 2002, the van picked up Edward at about 9:30 a.m. to go to the day program. He had \$1.25 for lunch and \$.25 to call home in case of an emergency. At about

4:45 p.m., while petitioner was waiting for Edward to return home, she received a telephone call from the clinic asking if Edward was home. The Petitioner responded that he was not. This was how the petitioner found out that Edward was missing. The petitioner then spoke to the people who transported Edward to and from the clinic and to the supervisor of the clinic.

Petitioner was in contact by telephone with the police on January 29, 2002. She informed them that Edward had not returned home. A certified copy of the Nassau County Police case report, which was entered into evidence at the hearing, confirms that Edward was reported missing on that date. The case report shows that Edward was last seen at the clinic at approximately 1:00 p.m. on January 29, 2002.

The fifty-seven-page case report shows that the police notified other law enforcement agencies as far away as Binghamton, New York; conducted interviews of the staff at the clinic and with Edward's family, neighbors and acquaintances; conducted several aerial searches in and around the area where Edward was last seen; contacted more than thirty hospitals on Long Island and the surrounding New York area; contacted jails and morgues on Long Island and New York City boroughs; contacted the Nassau and Suffolk Departments of Social Services, the New York State Department of Health, the New York State Department of Motor Vehicles and various centers for missing persons; followed up on alleged sightings of Edward; posted "missing person" fliers with Edward's photograph and description; interviewed staff members and residents at three group homes in the area; issued press releases to the media; and contacted psychics at the request of the petitioner. According to petitioner, the case is ongoing.

Petitioner contacted politicians, including then-Governor Pataki and Senator Charles Schumer, missing person organizations, the media, and six psychics, all in the hope that they would assist in locating Edward. At the apparent request of Governor Pataki, the petitioner received a letter from an official with the New York State Police stating that her letter was

forwarded to a police captain who would inquire into the matter. The petitioner also received a response from Senator Schumer, along with a letter to Senator Schumer from the Federal Bureau of Investigation stating that it had no authority in this instance. Newsday published two articles regarding Edward's disappearance and two local television stations aired a report using Edward's photograph. Several missing person organizations assisted the petitioner. The National Missing Children Organization posted Edward's information on their nationwide website.

Petitioner and her son, Jeffrey, searched the area for Edward and, in various towns and in New York City, hung more than fifty posters the petitioner received from the police department. The petitioner remains in contact with the police.

A certified copy of Edward's voting history shows that he voted every year in November from 1992 through 2001, less than three months prior to his disappearance, but not since. Edward was receiving Social Security disability and Medicaid prior to his disappearance. The petitioner notified the government agencies after Edward disappeared and had his checks discontinued. He has not reapplied for government assistance.

There is no evidence in the record to suggest that Edward's disappearance is attributable to an estrangement from his family or to legal problems. He has not contacted his family since the date of his disappearance, although he was in regular daily communication with them prior to his disappearance.

Based on the above, the court concludes that the petitioner has met her burden of satisfying the statutory mandates of EPTL 2-1.7 [a]. Accordingly, the relief requested in the petition is granted, Edward R. Fritz is declared dead as of January 29, 2005, three years after his disappearance, and letters of administration shall issue without bond to petitioner upon her qualifying as such.

The guardian ad litem has submitted an affirmation in which she states that she spent a total of twelve hours on this matter and asks the court to fix her fee.

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]). Although 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 that 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]). Additionally, 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 Misc 2d 423 [Sur Ct, Bronx County 1978]; *Matter of Reisman*, NYLJ, May 18, 2000, at 34, col 5 [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]).

Based on the above, the court approves a fee for the guardian ad litem in the sum of \$2,400.00 and thanks her for her zealous representation of Edward's interests. As there are no administrable assets, the fee of the guardian ad litem is to be paid by the petitioner personally, within 30 days of the date hereof.

This constitutes the decision of the court.

Settle decree on notice.

Dated: June 7, 2007

JOHN B. RIORDAN
Judge of the
Surrogate's Court