

**Matter of Westborg**

2007 NY Slip Op 33228(U)

September 28, 2007

Surrogate's Court, Nassau County

Docket Number: 0318315/2007

Judge: John B. Riordan

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

-----X  
In the Matter of the Account of Proceedings of David Gugerty,  
Public Administrator of Nassau County, as the Administrator  
of the Estate of

File No. 318315

Dec. No. 460

ROBERT F. WESTBORG,  
Deceased.

-----X  
This is a contested accounting proceeding.

Submitted for review is an accounting filed by the Public Administrator in the estate of Robert F. Westborg. The Public Administrator also seeks approval of commissions, attorneys' fees and accountant's fees. In addition, the fees of the guardian ad litem are to be fixed. Objections have also been filed by the guardian ad litem to certain administration expenses.

The decedent, Robert F. Westborg, died intestate a resident of Nassau County on January 3, 2001. Letters of administration issued to the Public Administrator and this accounting is the first and final accounting. The summary statement shows charges to the accounting party of \$87,822.80. A guardian ad litem was appointed to represent the interests of decedent's unknown distributees; paternal distributees were located. Objectant Antoinette Visalli claimed to be the decedent's common law wife, a claim, which, if upheld, entitled her to decedent's entire net estate. The claim was settled pursuant to a stipulation of settlement dated March 6, 2007. The stipulation provided, among other things, that objectant receive one-half (1/2) of the net residuary estate.

The guardian ad litem filed his initial report raising a jurisdictional objection concerning petitioner's efforts to locate maternal heirs. Petitioner submitted an affirmation of due diligence and the guardian ad litem withdrew his jurisdictional objection. The court is satisfied that

jurisdiction has been obtained.

The guardian ad litem's report objects specifically to the following items in the accounting:

1. That Schedule A of the account be adjusted downward by \$23.20 to reflect the terms of the stipulation of settlement that such item be paid to objectant as it was the proceeds of a joint bank account;
2. Payment to the law firm of Brosnan & Hegler for disbursements in the amount of \$90.00, the purpose for which is not identified in the accounting;
3. Payment to Atlantic Adjusters to the extent that such payments exceed the sum of \$515.00;
4. The amount of accounting fees for the preparation of decedent's tax returns;
5. The amount of attorneys' fees to the extent that the fees exceed the sum of \$10,000.00.

With respect to the \$23.20 item in Schedule A, the proceeds of a Citibank account, said item is to be paid to the objectant pursuant to the terms of the stipulation dated March 6, 2007 and the account should be adjusted accordingly.

The burden of proof as to the propriety of expenses is on the accounting party (*Matter of Naumoff*, 301 AD2d 802 [4<sup>th</sup> Dept 2003]; *Matter of Shulsky*, 34 AD2d 545 [2d Dept 1970] app dismd 27 NY2d 743 [1970]). The fiduciary bears the burden of proving the nature and character of the expenses and that they were fair and reasonable (*see Matter of Fiore*, NYLJ, Dec. 28, 2000 at 27 [Sur Ct, Westchester County]). Here, the nature of the disbursement in the amount of \$90.00 to Brosnan & Hegler listed in Schedule C has not been satisfactorily detailed and is, therefore, disallowed. The payment of \$2,379.38 to Atlantic Adjustment Corp. representing a

commission (public adjuster fee) is allowed and the objection thereto is dismissed.

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 [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 [3rd Dept 1997]; *Matter of Diamond*, 219 AD2d 717 [2d Dept 1995]; Warren's Heaton on Surrogate's 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 affirmation of legal services and it shows that the attorney rendered more than 290 hours of combined legal services of a partner, associate and paralegal at various hourly rates. The services include not only those normally associated with the administration of an estate, but also negotiation with the insurance companies for settlement of a fire insurance claim and claim for personal property that decedent possessed, investigation to locate maternal heirs, litigating the claim of objectant asserting her status as decedent's common law spouse, settling the claim of the objectant and preparation of the petition

to compromise the claim and the stipulation of settlement. Counsel also prepared the account and affidavit bringing the account current. The attorney seeks a reduced total of \$19,283.75 (stating that his firm's accrual time records equal a total fee of \$45,000.00) of which \$11,683.00 has been paid. An additional sum of \$1,500.00 was paid to counsel for the closing of title of decedent's residence. The court finds that the legal services performed herein were necessary. As noted, the size of the net estate may serve as a limitation in fixing the full value of the services rendered (*see Matter of McCranor*, 176 AD2d 1026 [3d Dept 1991]; *Matter of Kaufmann*, 26 AD2d 818 [1<sup>st</sup> Dept 1966] *affd* 23 NY2d 700 [1988]) without constituting an adverse reflection on the services provided. Considering all these factors, the court fixes the total fee of counsel for the Public Administrator in the amount of \$17,500.00.

The accounting shows paid accounting fees of \$1,525.00. The use of an accountant appears to be reasonable. The estate, however, should not bear the \$400.00 expense of the amended 2000 federal and New York State income tax returns and said expense is disallowed and the account should be adjusted accordingly.

With respect to the guardian ad litem, the factors recited above apply equally to a court-appointed guardian ad litem (*Matter of Burk*, 6 AD2d 429 [1<sup>st</sup> Dept 1958]; *Matter of Berkman*, 903 Misc 2d 423 [Sur Ct, Bronx County 1978]). Moreover, the nature of the role played by the guardian ad litem is an additional consideration in the determination of the fee (*Matter of Ziegler*, 184 AD2d 201 [1<sup>st</sup> Dept 1992]). The guardian ad litem has submitted an affirmation of services advising the court he has rendered approximately 72 hours of legal services on this matter. Although the services performed by the guardian ad litem were of the utmost quality and assisted in bringing the matter to a conclusion, the court is constrained by the size of the estate (*cf Matter*

*of McCranor*, 176 AD2d 1026 [3d Dept 1991]). Accordingly, the court fixes the fee of the guardian ad litem for services rendered in the amount of \$ 4,500.00, payable as an administration expense of the estate (*see Matter of DeAngelis*, 14 Misc 3d 1236A [Sur Ct, Nassau County 2007]). The fee of the guardian ad litem shall be paid within 30 days of the date of the entry of the decree herein.

The commissions of the public administrator are approved, subject to audit.

Settle decree.

Dated: September 28, 2007

JOHN B. RIORDAN  
Judge of the  
Surrogate's Court