

Matter of Orozco

2007 NY Slip Op 33386(U)

October 10, 2007

Surrogate's Court, Nassau County

Docket Number: 0324936/2007

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 Application of DAVID GUGERTY,
Public Administrator of Nassau County, as Limited
Administrator of the Estate of

File No. 324936

Dec. No. 712

DOLMAN RONY OROZCO,

Deceased,

for leave to compromise a cause of action for wrongful death
and pain and suffering and to render and have judicially
settled an account of his proceedings as Limited Administrator.

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Submitted for decision in this proceeding is the issue of attorneys’ fees charged to the
Public Administrator by counsel.

The proceeding concerns the estate of Dolman Rony Orozco, who died a resident of
Nassau County on July 25, 2002. Limited letters of administration were issued to the Public
Administrator on September 16, 2002, in order to prosecute an action for wrongful death and
conscious pain and suffering. Upon receiving letters, the Public Administrator engaged the
services of two law firms, one to prosecute the suit in the Supreme Court, the other to handle the
estate’s administration up to and including this accounting. The Public Administrator approved a
fee structure whereby one-third of the recovery would go to legal fees, 27-1/3 percent to the
personal injury attorneys and 6 percent to the estate attorneys. The estate counsel for the Public
Administrator was later replaced by new counsel. The two firms agreed to share, equally, the 6
percent fee.

The action for wrongful death and pain and suffering has now been settled for
\$197,000.00. The proceeds would be allocated as follows: \$150,000.00 for pain and suffering;

\$47,000.00 for wrongful death. The legal fees on this settlement are \$53,170.65 for litigation counsel and \$5,835.81 each for both estate counsel (27-1/3 percent, 3 percent and 3 percent of the recovery). The accounting before the court is combined with the standard proceeding to compromise the wrongful death and personal injury action pursuant to EPTL 5-4.6. Although their fees were calculated on the basis of the retainers, both the current and former estate counsel for the Public Administrator have supplied the court with their affirmations of services.

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 services rendered in the course of the administration 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 [2d Dept 1991]). This remains true even in the event that the parties have consented to the requested fee (*Matter of Stortecky v. Mazzone*, 85 NY2d 518, 525 [1995]; *Matter of Phelan*, 173 AD2d 621, 622 [2d Dept 1991]). The Surrogate is obligated to limit the attorney's fees to reasonable amounts regardless of any agreement made by the attorney with the interested party (*Stern & Greenberg v. Doris Duke Charitable Foundation*, 297 AD2d 469 [1st Dept 2002], aff'g NYLJ, May 3, 2000 at 28 [Sur Ct, New York County, Surrogate Preminger thorough analysis]; *Matter of Cook*, 41 AD2d 907 [1st Dept 1973], aff'd 33 N.Y.2d 919 [1973]) or the existence of a retainer agreement (*Matter of Gluck*, 279 AD2d 575 [2d Dept 2001]; *Matter of Driscoll*, 273 AD2d 381 [2d Dept 2000]; *Matter of Pekofsky v. Estate of Cohen*, 259 AD2d 702 [2d Dept 1999]; *Matter of Stern*, 227 A.D.2d 636 [2d Dept 1996]; *Matter of Bobeck*, 196 AD2d 496 [2d Dept 1993]). The retainer agreement is merely some evidence of reasonable value of legal services (*Matter of Lerner*, 52 Misc2d 967 [Sur Ct, Kings County 1967]).

The fact that a retainer agreement was entered into by the Public Administrator does not bind the beneficiaries (*see Matter of Middagh*, 267 AD2d 593 [3d Dept. 1999]; *Matter of Bloomingdale*, 172 Misc 2d 218 [Sur Ct, New York County 1939]; *Matter of Woolfson*, 158 Misc 928 [Sur Ct, Kings County 1936]; *Matter of Layden*, NYLJ, Mar. 8, 1993, at 32) or the court (*Matter of Stortecky v. Mazzone*, 85 NY2d 518 [1995]). However, the court will enforce a retainer agreement if it is reasonable and does not violate any of the following criteria and as long as it is understood that "[r]etainer contracts between attorney and client, as a matter of public policy, are of special interest and concern to the courts" (*Matter of Schanzer*, 7 AD2d 275, 278 [1st Dept 1959], *aff'd* 8 NY2d 972 [1960]). Therefore, the attorney has the burden of proving that the retainer agreement was reasonable and fully understood by the client (*Matter of Duke*, NYLJ, May 3, 2000 at 28 [Sur Ct, New York County], *aff'd* 297 AD2d 469 [2002]; *Matter of Schlesinger*, NYLJ, June 1, 1988 at 22).

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 [1982]). Moreover, when multiple attorneys are employed by the fiduciary of a decedent's estate, the aggregate fee should approximate what one attorney would charge (*Matter of Leopold*, 244 AD2d 411 [2d Dept 1997]; *Matter of Mattis*, 55 Misc 2d 511 [Sur Ct, New York County 1967]). Some overlap in services may necessarily occur (*Matter of Patchin*, 106 AD2d 730 [3d Dept 1984]), and should be a factor when considering the aggregate fee (*see In re Mergentime*, 155 Misc 2d 502 [Sur Ct, Westchester County 1992], *aff'd*, 207 AD2d 453 [2d Dept 1994]). There can be some exceptions or stretching of this rule. For

example, where the separate counsel does separate work, where counsel are under time pressures, or there are complex or exceptional circumstances (*Matter of Duke*, NYLJ, May 3, 2000, at 28, [Sur Ct, New York County]).

In evaluating the cost of legal services, the court may consider a number of factors. These include:

1. the time spent (*Matter of Kelly*, 187 AD2d 718 [2d Dept 1992]);
2. the complexity of the questions involved (*Matter of Coughlin*, 221 AD2d 676 [3d Dept 1995]) ;
3. the nature of the services provided (*Matter of Von Hofe*, 145 AD2d 424 [2d Dept 1988]);
4. the amount and complexity of litigation required (*Matter of Sabatino*, 66 AD2d 937 [3d Dept 1978]);
5. the amounts involved and the benefit resulting from the execution of such services (*Matter of Shalman*, 68 AD2d 940 [3d Dept 1979]);
6. the lawyer's experience and reputation (*Matter of Brehm*, 37 AD2d 95 [4th Dept 1971]); and
7. the customary fee charged by the Bar for similar services (*Matter of Freeman*, 34 NY2d 1 [1974]; *Matter of Potts*, 123 Misc 346 (Sur Ct, Columbia County 1924, aff'd 213 App Div 59 [1925], aff'd 241 NY 593 [1925]).

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* (241 NY 593 [1925]), 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 McCranor*, 176 AD2d 1026 [3d Dept 1991]; *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 N.Y.2d 594 [1965], *Matter of Ault*, 164 Misc. 2d 272 [Sur Ct, New York County 1995]). Moreover, it is well-settled that time spent is, in fact, the least important factor considered by a court in fixing reasonable compensation (see *Matter of Snell*, 17 AD2d 490, 494 [3d Dept. 1962]; *Matter of Potts*, 241 NY 593 [1925]; *Matter of Kentana*, 170 Misc. 663 [Sur Ct, Kings County 1939]).

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 *Matter of Spatt*, 32 NY2d 778 [1973]). Contemporaneous records of legal time spent on estate matters are important to the court in the determining whether the amount of time spent was reasonable for the various tasks performed (*Matter of Phelan*, 173 AD2d 621 [2d Dept 1991]; *Matter of Von Hofe*, 145 AD2d 424 [2d Dept 1988]). In the absence of contemporaneous time records, little weight is given to estimates of time after the services have been performed (*Matter of Phelan*, 173 AD2d 621 [2d Dept 1991]).

Returning to the question of retainer agreements in trusts and estates practice, it is clear that the law does not prohibit an attorney and fiduciary from entering into a retainer agreement and will enforce the contract if it is reasonable (*Matter of Schanzer*, 7 AD2d 275 [1st Dept 1959], aff'd w/o opn 8 NY2d 972 [1960]). As the First Department ruled in *Schanzer*,

Retainer contracts between attorney and client, as a matter of public policy, are of special interest and concern to the courts. They are not always enforceable in the same manner as ordinary commercial contracts. This is especially true when an agreement is consummated after the relationship has been established, and trust and confidence have been reposed in the attorney by the client. In this case, the confidential relationship of attorney and client came into being several months before the retainer was signed. Under the circumstances, our courts, as well as those in other jurisdictions, have repeatedly held that the burden of proving that the arrangement for compensation was fair and reasonable and fully comprehended by the clients rests with the attorney. (Citations omitted)

Based upon the foregoing, the fees are approved. The court finds the services were necessary and the fees bear a reasonable relationship to the services provided.

The legal fees should be paid within 30 days of the date of the decree to be entered herein.

Settle decree.

Dated: October 10, 2007

JOHN B. RIORDAN
Judge of the
Surrogate's Court