

Matter of Rubinfeld (Fishbein)
2007 NY Slip Op 33583(U)
October 30, 2007
Surrogate's Court, Nassau County
Docket Number: 0338347/2007
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 by HERBERT RUBENFELD
 as the Executor of the Estate of

File No. 338347

Dec. No. 601

BRUCE J. FISHBEIN,

Deceased.

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In this accounting proceeding, the petitioner seeks approval of the attorney's fee and commissions. The petitioner also asks for permission to reimburse the decedent's former spouse for the decedent's funeral expenses paid by her, to the extent there are assets remaining on hand after the payment of legal fees and commissions.

The decedent died on June 4, 2005. The decedent's will dated July 30, 1991 was admitted to probate and letters testamentary issued to the petitioner on August 5, 2005. The decedent was survived by his three children, Seth, Sara and Joseph. The will bequeaths one-half (½) of the decedent's residuary estate each to Seth and Sara. No provision is made for Joseph. The decedent's former spouse, Jacqueline Fishbein, paid the decedent's funeral expenses in the amount of \$9,814.00, of which \$2,772.50 was assigned by her from the \$33,547.03 proceeds of an AIG Sun America life insurance policy payable to her. The account shows a number of unpaid creditors. Jurisdiction has been obtained over all of the unpaid creditors and no objections have been filed to the account.

Since there are insufficient assets on hand, the court must not only fix the attorney's fee but must likewise determine the priority of all the payments to be made. Administration expenses have priority over the payment of funeral bills (SCPA 1811[1]; *Matter of Tangerman*, 226 App Div 162 [3d Dept 1972]; *Matter of Levy*, 27 Misc 2d 671 [Sur Ct, Kings County 1960]; *Matter of Lieberman*, 137 NYS 2d 81 [Sur Ct, Kings County 1954]; *Matter of Horn*, 151 Misc

261 [Sur Ct, Monroe County 1934]). Thus, the attorney's fee and disbursements, to the extent reasonable, and executor's commissions must receive priority in payment.

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 [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]).

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]; 8 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.

The attorney has submitted an affirmation and a supplemental affirmation in support of his fee. The attorney avers that he has spent a total of 64.65 hours on this matter at the rate of \$350.00 per hour for a total of \$23,982.50. The services performed by the attorney include a significant amount of time spent in connection with a commercial lot owned by the decedent. According to counsel, the estate consisted primarily of a commercial lot of approximately 13,000 square feet which had been used by the decedent to operate a junk yard business. Prior to his death, the decedent had discontinued this business and attempted to sell the vacant land; however, there were some environmental concerns with respect to the land. The attorney-fiduciary tried to sell the property, however none of the contracts drafted were ever signed. There was a first mortgage on the premises in the amount of \$450,000.00 at a 20% interest rate. In addition, there was a second mortgage for \$42,908.95. The real estate taxes were not being paid, and the mortgagee foreclosed on the property. The property went to the mortgagee since there were no bidders. The other assets in the estate totaled \$12,040.64. After payment of expenses, only \$10,176.55 remains on hand.

Considering all of the factors used in determining the reasonableness of fees, the court fixes the total fee of counsel in the amount of \$10,176.55. The assets of the estate are insufficient to allow for the payment of commissions or reimbursement of the funeral expenses paid by the decedent's former spouse.

A proposed decree has been submitted to the court and will be signed if found to be in proper form.

This constitutes the decision of the court.

Dated: October 30, 2007

JOHN B. RIORDAN
Judge of the
Surrogate's Court

