

Matter of Zirinsky

2007 NY Slip Op 34079(U)

December 18, 2007

Surrogate's Court, Nassau County

Docket Number: 0206440/2007

Judge: John B. Riordan

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

----- X
Probate Proceeding, Will of

RUTH ZIRINSKY,
a/k/a RUTH ZIRINSKY SPECTOR,
RUTH W. ZIRINSKY

File No. 329098

Dec. No. 846

Deceased.

----- X
In the Matter of the Application of Linda Zirinsky
Gilbert and Jill Zirinsky Hirsch to remove Robert
Zirinsky as trustee of the trusts created under the
Last Will and Testament of

RALPH ELLIOT ZIRINSKY,

File No. 206440

Dec. No. 774

Deceased,

and to revoke the letters of trusteeship hereto before
issued to him

----- X
ACCOUNTING by Robert Zirinsky, as the Executor of
the Estate of Ruth Zirinsky, deceased executor of
the Estate of Ralph Zirinsky, and Robert Zirinsky,
as executor of the estate of

RALPH ELLIOT ZIRINSKY,

Deceased,

----- X
ACCOUNTING by Robert Zirinsky, as the Executor of
the Estate of Ruth Zirinsky, deceased co-trustee, and
Robert Zirinsky, as co-trustee of the Trust created under
Article 2(B)(i) of the Last Will and Testament of

RALPH ELLIOT ZIRINSKY,

Deceased.

-----X

ACCOUNTING by Robert Zirinsky, as the Executor of the Estate of Ruth Zirinsky, deceased co-trustee, and Robert Zirinsky, as co-trustee of the Trust created under Article 2(B)(ii) of the Last Will and Testament of

RALPH ELLIOT ZIRINSKY,

Deceased.

-----X

ACCOUNTING by Robert Zirinsky, as the Executor of the Estate of Ruth Zirinsky, deceased co-trustee, and Robert Zirinsky, as co-trustee of the Trust created under Article 2(B)(iii) of the Last Will and Testament of

RALPH ELLIOT ZIRINSKY,

Deceased.

-----X

ACCOUNTING by Robert Zirinsky, as the Executor of the Estate of Ruth Zirinsky, deceased co-trustee, and Robert Zirinsky, as co-trustee of the Trust created for the benefit of Linda Gilbert under Article 3 of the Last Will and Testament of

RALPH ELLIOT ZIRINSKY,

Deceased.

-----X

ACCOUNTING by Robert Zirinsky, as the Executor of the Estate of Ruth Zirinsky, deceased co-trustee, and Robert Zirinsky, as co-trustee of the Trust created for the benefit of Jill Hirsch under Article 3 of the Last Will and Testament of

RALPH ELLIOT ZIRINSKY,

Deceased.

-----X

ACCOUNTING by Robert Zirinsky, as the Executor of the Estate of Ruth Zirinsky, deceased co-trustee, and Robert Zirinsky, as co-trustee of the Trust created for the benefit of Robert Zirinsky under Article 3 of the Last Will and Testament of

RALPH ELLIOT ZIRINSKY,

Deceased.

-----X

One of the interested parties to these proceedings was until recently a minor. Harry Thomas David Zirinsky became eighteen years of age on March 16, 2007. The guardian ad litem who was appointed to represent his interest in these proceedings has now filed his affidavits seeking final fees for both the probate proceeding in the estate of his grandmother, Ruth Zirinsky, and the several accounting proceedings in the estate of his grandfather, Ralph Zirinsky. The applications are made without opposition.

In noting the hotly contested nature of all these proceedings, it may be useful to summarize the facts. There are seven accounting proceedings pending, all arising through the estate of Ralph Zirinsky. There was also a probate proceeding before the court on the will of Ruth Zirinsky. The court granted petitioners summary judgment in the probate proceeding and the court's decision was affirmed by the Second Department. The litigation continues on the accountings and has been contentious and the discovery demands have been voluminous.

Ralph Zirinsky died a resident of Nassau County on June 29, 1980. His will was admitted to probate in this court and letters testamentary were issued on August 11, 1980, to his wife, Ruth Zirinsky, and his son, Robert Zirinsky. The will established several trusts and letters of trusteeship issued to Ruth Zirinsky, Robert Zirinsky, and the decedent's brother, Richard Zirinsky, as co-trustees. Ruth Zirinsky and Richard Zirinsky have since passed away. Robert

Zirinsky is accounting as the executor of his father's estate and also as the surviving co-trustee of the six testamentary trusts.

The residuary of Ralph Zirinsky's estate is bequeathed pursuant to Articles SECOND and THIRD of his will. Article SECOND establishes three trusts, each to be equally funded from a sum of money that equals the maximum marital deduction. The Article SECOND (B)(i), (B)(ii), and (B)(iii) trusts are identical in that Ruth is given a lifetime income interest together with discretionary access to principal. In each of the three Article SECOND trusts, Ruth is given a general testamentary power of appointment over the remainder. The three trusts differ in that each has a different taker in default of the exercise of the power of appointment, the decedent's three children, Robert, Linda, and Jill, respectively. Ruth's will purports to exercise the powers of appointment in favor of distribution through Article FIFTH of Ruth's will so as to distribute the remainders of the three Article SECOND trusts in continuing trusts in the following percentages: two-thirds for Robert's trust, one-sixth for Linda's trust, and one-sixth for Jill's trust.

Article THIRD of Ralph Zirinsky's will distributes the balance of the residuary after deduction of the Article SECOND marital deduction trusts. The Article THIRD trust is divided into three sub-trusts each for the income benefit of one of Ralph Zirinsky's children as well as the income benefit of Ruth Zirinsky, with discretionary access to principal. The remainder of each of these three subtrusts (THIRD (B) [Robert], THIRD (B) [Jill], and THIRD (B)[Linda]) passes to the issue of each of Ralph's children upon the expiration of twenty-one years from the death of Ruth and all three children of the decedent. There is a GST aspect to the distribution of these remainders, but it is not relevant to this issue.

Harry's guardian ad litem has filed two affidavits of service. The affidavit relevant to the accountings show a total of 41.6 hours for a fee of \$18,532.50. The affidavit relevant to the probate proceeding reminds the court that an interim fee of \$33,000.00 was awarded May 18, 2006, and that an additional fee of \$16,257.00 based upon an additional 36.2 hours of legal services is warranted.

It is useful to keep in mind that 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 [1992]);
2. the complexity of the questions involved (*Matter of Coughlin*, 221 AD2d 676 [1995]);
3. the nature of the services provided (*Matter of Von Hofe*, 145 AD2d 424 [1988]);
4. the amount and complexity of litigation required (*Matter of Sabatino*, 66 AD2d 937 [1978]);
5. the amounts involved and the benefit resulting from the execution of such services (*Matter of Shalman*, 68 AD2d 940 [1979]);
6. the lawyer's experience and reputation (*Matter of Brehm*, 37 AD2d 95 [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 [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* (213 App Div 59 [1925], *aff'd* 241 NY 593 [1925]), as re-enunciated in *Matter of Freeman* (34 NY2d 1[1974]) (see *Matter of Berkman*, 93 Misc 2d 423 [1978]). Also, the legal fee must bear a reasonable relationship to the size of the estate and to the interest of the ward of the guardian ad litem (*Matter of McCranor*, 176 AD2d

1026 [1991]; *Matter of Kaufmann*, 26 AD2d 818 [1966], *affd* 23 NY2d 700 [1968]; *Martin v Phipps*, 21 AD 2d 646 [1964], *affd*, 16 N.Y.2d 594 [1965], *Matter of Ault*, 164 Misc2d 272 [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 [1962]; *Matter of Potts*, 213 App Div 59, 62 [1925], *aff'd* 241 NY 593 [1925]).

The guardian ad litem is entitled to a fee for his or her services rendered (SCPA 405). The above factors apply equally to an attorney retained by a fiduciary or to the court-appointed guardian ad litem (*Matter of Graham*, 238 AD2d 682; *Matter of Burk*, 6 AD2d 429 [1958]; *Matter of Ault*, 164 Misc. 2d 272 [1995]; *Matter of Berkman*, 93 Misc 2d 423 [1978]; *Matter of Burnett*, NYLJ, Aug. 31, 2006 at 31; *Matter of Reisman*, NYLJ, May 18, 2000, at 34). 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 [1992]).

Based upon the foregoing, and given the highly contentious nature of these litigations, the court approves the fees in the amounts requested by the former guardian ad litem.¹ Said fees, to the extent they have not already been paid as to the interim award, are to be paid within thirty (30) days of the date of this decision.

This is the decision and order of the court.

Dated: December 18, 2007

JOHN B. RIORDAN
Judge of the
Surrogate's Court

¹The court notes that these are large estates involving very complex and sophisticated issues of real estate development and management. The trust accountings encompass over twenty (20) years of books and records for trusts and estate holdings amounting to tens of millions of dollars.

