

**Matter of Sackler**

2007 NY Slip Op 34080(U)

December 13, 2007

Surrogate's Court, Nassau County

Docket Number: 0249220/2007

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 the Final Account and Supplemental Account of Carol Master, Arthur F. Sackler, Gillian T. Sackler and Michael R. Sonnenreich, and Carol Master and Elizabeth A. Sackler, as Executors of the Estate of

File No. 249220

Dec. No. 769

ARTHUR M. SACKLER,

Deceased.

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In this accounting proceeding, the only issue before the court is the fee of the previous guardian ad litem.

Schedule C-1 of the final account shows the balance of a fee to the previous guardian ad litem in the amount of \$54,411.90. Pursuant to this court’s prior decision dated September 28, 2007 (Dec. No. 466), the previous guardian ad litem was directed to submit an affidavit of services before such fee application would be considered.

The guardian ad litem has now submitted a supplemental affidavit of services. According to the guardian ad litem, although prior fee awards had been made to him by orders of this court, a substantial amount of uncompensated time remained after the last payment was received from the estate in January 1997. Counsel’s prior affidavit of services, on which the prior orders were based, recites that the services cover the period through January 1996. The time records submitted for the period commencing February 1996 show that the guardian ad litem spent 79.20

hours of legal services on this matter, which does not amount to the balance shown on Schedule C-1 of the final account. According to petitioners, the amount shown on Schedule C-1 was based on an August 30, 2004 bill from the previous guardian ad litem which shows a balance due of \$54,611.80 (\$53,735 of time and \$876.80 of disbursements). It appears that the unpaid balance on Schedule C-1 includes time spent prior to February 1996 even though the guardian ad litem's prior affidavit of services recited that it covered the period through January 1996. The guardian ad litem states that "since I cannot fully explain this situation because of the absence of computer records, if the Court deems it appropriate, I consent in advance of the fee allowance being based only on services rendered subsequent to January 1996."

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]).

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]).

The time sheets annexed to the guardian ad litem's supplemental affidavit of legal services include time spent traveling to court which is not compensable (*Matter of Trotman*, NYLJ May 13, 1998, at 32 [Sur Ct, Nassau County]). Similarly, the guardian ad litem's time records include time spent on the preparation of his affirmation of legal services. Time spent on an attorney's fee application is not compensable (*Matter of Gallagher*, NYLJ, Feb. 2, 1993, at 22, col 4 [Sur Ct, Bronx County]). In addition, the court can only consider the time shown on counsel's time sheets for the period commencing February 1996. To do otherwise might compensate the guardian ad litem for services covered by the prior orders of the court.

Considering all of the factors used to determine the reasonableness of fees, the court fixes the total fee of the previous guardian ad litem for services rendered for the period commencing February 1996 in the amount of \$27,000.00. The guardian ad litem's fee shall be paid within

thirty (30) days of the date of the decree to be entered herein.

This constitutes the decision and order of the court.

Settle decree.

Dated: December 13, 2007

JOHN B. RIORDAN  
Judge of the  
Surrogate's Court