

Matter of Lemmie

2008 NY Slip Op 31294(U)

March 24, 2008

Surrogate's Court, Nassau County

Docket Number: 0329427/2007

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 Judicial Settlement of the
Account of Christopher Lemmie, as Administrator
of the Estate of

File No. 329427

Dec. No. 854

CEDRIC LEMMIE,

Deceased.

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Submitted for review in this accounting proceeding is the account of Christopher Lemmie, the administrator of the estate of Cedric Lemmie, for the period from September 3, 2003 to March 16, 2006. The petition for settlement of the account was amended by attorney affirmation dated August 25, 2006. The account was amended by the administrator's affidavit, sworn to on November 20, 2007, which amended and updated the account through September 30, 2007. The administrator requests that a decree be entered settling his account of proceedings, allowing distribution of estate assets to the distributees and allowing the payment of attorney's fees and commissions. The total of the charges shown on the account, as amended is \$443,689.63. Also before the court is issue of the fee of the guardian ad litem.

The decedent died on July 16, 2002, leaving his wife, Raisa Mendoza-Lemmie, and an infant son, Gabriel Lemmie, as his sole distributees. Letters of administration were issued to decedent's brother Christopher on September 3, 2003 based on Raisa's waiver and consent to his appointment. By order dated December 14, 2006, the court appointed a guardian ad litem to appear for and protect Gabriel's interest in this proceeding. Raisa had filed objections to the account, but later withdrew them. Raisa has also been appointed guardian of Gabriel's property by this court.

The guardian ad litem's report details the issues that arose with respect to the account. The first issue involved the decedent's interest in a condominium in Freeport, New York. The original account listed the property as non-probate property held jointly with the decedent's spouse. The deed, however, showed that the property was registered in the decedent's name only. This has been corrected in the amended account.

The guardian litem advises that the most significant issue in the account is that the income tax liability was paid two-and-one-half-years late. This resulted in the estate incurring interest of \$13,631.03 and penalties of \$32,953.91. The penalties have been refunded to the estate by the taxing authorities. The administrator attributes the late filing to the law firm handling a medical malpractice and wrongful death action for the estate. Since that firm was not handling the administration of the estate, the guardian ad litem concludes that a malpractice action against that firm would not be successful. In any event, the parties have agreed that the administrator's commissions will be reduced by the difference between the amount of interest attributable to the late filing and the interest earned by the estate on the amount of taxes paid late. Thus, although the guardian ad litem notes that the administrator's commissions are incorrectly calculated in Schedule I of the amended account, this is not an issue since the parties have agreed to fix the administrator's commissions at \$6,000 rather than the statutory amount of \$14,673, making the estate roughly whole.

The court adopts the guardian ad litem's recommendation that a new deed be recorded, if one has not already been, for the condominium in Freeport, New York, placing title in the surviving spouse's name, individually, as to an undivided fifty per interest, and in her name, as guardian for the decedent's infant son, as to an undivided fifty per cent interest, as tenants in

common, and directs the administrator to do so within thirty days of the date of the decree. The court also adopts the guardian ad litem's recommendation that the account, as amended, which is termed a final account by the administrator, should be treated as an intermediate account until the medical malpractice and wrongful death action is resolved since any portion of a recovery allocated to pain and suffering would be an asset of the estate to which her ward would have a fifty per cent interest. Further, the court also adopts the guardian ad litem's recommendation that the account, as amended by the administrator's affidavit, sworn to on November 20, 2007, and in keeping with the parties' agreement with respect to the administrator's commissions, be approved. Finally, the court adopts the guardian ad litem's recommendation to approve the agreed-upon amount of commissions, subject to audit.

In evaluating the cost of legal services, the court may consider a number of factors, including: 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 that 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]). 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]).

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 Misc 2d 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 a guardian ad litem's attorney's 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]).

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]; 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 administrator is seeking approval of attorney's fees totaling \$17,658.50 through November 14, 2007. The guardian ad litem does not object to the amount requested. Of that amount, \$3,500 was paid to the administrator's attorneys as shown on Schedule C of the original account. The total amount requested includes a flat fee of \$700 charged to transfer title to the condominium to the decedent's distributees.

The attorneys billed the estate at an hourly rate of \$350 and the paralegal at a rate of \$185 per hour. The attorneys billed a total of 44.55 hours and a paralegal billed a total of 3.6 hours. The attorneys assisted the administrator with the administration of the estate, prepared the original account and the amended account that updated the original account for an eighteen-month period. Additionally, they reviewed documents, met with the administrator, attended court conferences, communicated with the guardian ad litem about her ward's interest in estate assets and with counsel for the decedent's surviving spouse about various issues, defended the estate against the surviving spouse's objections, which were ultimately withdrawn, and handled protracted tax issues that arose in the course of the administration of the estate. After reviewing the attorneys' time records, the court approves a total fee of \$16,200, which includes the amount already paid and the \$700 fee for the transfer of the decedent's real property.

The administrator seeks approval of \$1,128 in disbursements paid by his attorneys. Of that amount, \$625 was for the filing fee for the petition in this proceeding and \$320 was for fees paid to a process server. These amounts, totaling \$945, are approved. As the guardian ad litem points out in her report, the remainder, in the amount of \$183, was for postage, photocopying and telephone calls, and is not approved as those expenses are part of normal office overhead (*Matter of Graham*, 238 AD2d 682 [3d Dept 1997]; *Matter of Diamond*, 219 AD2d 717 [2d Dept 1995];

Matter of Corwith (NYLJ, May 3, 1995, at 35 [Sur Ct, Nassau County]; Warren's Heaton on Surrogate's Court Practice §106.02 [2][a][7th ed.]).

The guardian ad litem has submitted an affidavit of services in which she advises the court that she rendered 26.5 hours of legal services on this matter. Her billing rate through September 30, 2007 was \$300 per hour and thereafter was \$330 per hour. The guardian ad litem is not seeking reimbursement for disbursements or for the preparation of her affidavit of legal services.

The guardian ad litem's contemporaneously-maintained time records show that she reviewed the original account, a draft of the amended account and the final version of the amended account. She also reviewed copies of checks, bank statements, mortgage and deed documents and other documents to confirm the date of death values and ownership of the assets. The guardian ad litem determined that two major assets in which her ward has a fifty per cent interest were either omitted or incorrectly reported in the original account. The first such asset is a pending wrongful death action, which the guardian ad litem informs the court is expected to result in a substantial recovery. The other asset is the condominium, which has a date of death value of \$324,000. The original account incorrectly listed the condominium as property jointly held by the decedent with the surviving spouse. In fact, it was owned by the decedent alone. The guardian ad litem's efforts resulting in having her ward's fifty per cent interest deeded in his mother's name as his court-appointed guardian, rather than in her ward's name, so that court approval will be necessary should the condominium need to be sold before her ward attains the age of majority. The guardian ad litem also monitored the administrator's attempts to have tax penalties refunded, thus increasing her ward's share of the estate by more than \$16,000. Also, as

discussed herein, the guardian ad litem facilitated a reduction of \$8,673 in the administrator's commissions of which her ward will realize \$4,336.50. Additionally, she attended several conferences with the court and counsel for the estate.

The guardian ad litem's services were of the utmost assistance to her ward and to the court. Considering all the factors used to determine the reasonableness of fees, the court fixes the guardian ad litem's fee at \$8,467.50. The guardian ad litem's fee shall be paid within thirty days of the decree to be entered herein.

The decree to be entered should contain a provision restraining the administrator from distributing any recovery in the wrongful death action without further order of this court.

Settle decree on notice.

Dated: March 24, 2008

JOHN B. RIORDAN
Judge of the
Surrogate's Court