

Matter of Morrirt

2008 NY Slip Op 33354(U)

December 11, 2008

Surrogate's Court, Nassau County

Docket Number: 345440

Judge: John B. Riordan

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

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Probate Proceeding, Will of

File No. 345440

ROBERT E. MORRITT,
a/k/a ROBERT EDWIN MORRITT,

Dec. No. 596

Deceased.

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In this probate proceeding, the issues before the court are whether to adopt the guardian ad litem’s recommendations and approve the stipulation of settlement. Additionally, the court must fix the guardian ad litem’s fee.

The decedent, Robert E. Morrirt, died on February 5, 2007. He was survived by a paternal uncle, Thomas G. Morrirt, as his sole distributee.

In July 2007, petitioners, William B. Peterson and Douglas A. Peterson, filed an amended petition seeking probate of an instrument purported to be the decedent’s last will and testament dated August 29, 1994 and the issuance of letters testamentary to them as the co-executors nominated in that instrument. In the petition, the petitioners also request that the court vacate its decree of administration dated June 1, 2007 wherein the court issued letters of administration to Thomas upon his petition for same and that an instrument purported to be the decedent’s last will and testament dated April 3, 2002 not be admitted to probate. The petitioners are also the nominated co-executors under the 2002 instrument. Preliminary letters testamentary under the 1994 instrument issued to them on August 21, 2007 and have been extended two times by further order of this court. The reason proffered by the petitioners for not offering the 2002 instrument for probate is that it was not signed in conformance with the formalities of New York State law.

Under the terms of the 1994 instrument, Betty Anne Morritt and Thomas each receive 10 percent of the estate's residue and William, Douglas, The Community Church of Syosset and The Matinecock Lodge #806 each receive 20 percent of the estate's residue. Under the 2002 instrument, Thomas, William and Douglas each receive \$25,000; The Community Church of Syosset receives \$5,000; Mary Peterson receives \$25,000; and Lauren E. Peterson, Christian B. Peterson, Keegan B. Peterson, Cameron E. Peterson and Matthew Peterson each receive 20 percent of the residue in trust "until they reach 25 years." By order dated December 7, 2007, the court appointed a guardian ad litem to represent the interests of Christian, Keegan¹, Cameron and Matthew, who are infants. Christian, Keegan and Cameron are Douglas' children, and Matthew is William's son. The New York State Attorney General has appeared in the proceeding on behalf of the ultimate charitable beneficiaries.²

¹The December 7, 2007 order mistakenly refers to Keegan as Karen and is hereby amended to reflect that the guardian ad litem was appointed to represent the interests of Keegan B. Peterson.

²The settlement agreement erroneously states that the Nassau County Public Administrator appeared in the proceeding. Although his counsel attended one court conference, the Public Administrator did not file an appearance and is not a necessary party to the proceeding. Further, he did not sign the settlement agreement.

The parties to the proceeding³ have entered into and filed a settlement agreement, the pertinent terms of which are as follows:

1. All parties consent to the court's admission of the 1994 instrument to probate as the decedent's last will and testament, subject to the terms of the settlement agreement.

2. All parties consent to the appointment of William and Douglas as executors of the estate.

3. William agrees to distribute all amounts due to him under the terms of the 1994 instrument to a trust for the benefit of his child, Matthew. The terms of the trust have been approved by the guardian ad litem.

4. Douglas agrees to distribute all amounts due to him under the terms of the 1994 instrument to a trust for the benefit of his children, Lauren⁴, Christian, Keegan and Cameron. The terms of the trust have been approved by the guardian ad litem.

5. William and Douglas are entitled to statutory commissions.

The guardian ad litem's agreement to the terms of the settlement agreement is subject to the approval of the court. The guardian ad litem has filed a report dated August 21, 2008

³The parties to the settlement agreement are: (a) William B. Peterson, individually and as preliminary executor of the instrument propounded as the decedent's last will and testament dated August 29, 1994; (b) Douglas A. Peterson, individually and as preliminary executor of the instrument propounded as the decedent's last will and testament dated August 29, 1994; (c) Lauren Peterson; (d) subject to court approval, Michael G. Zapsen, as guardian ad litem for Christian D. Peterson, Cameron E. Peterson, Keegan B. Peterson and Matthew B. Peterson; (e) Thomas G. Morritt; (f) Betty Ann Morritt; (g) Mary Peterson; (h) The Matinecock Lodge #806; (i) The Community Church of Syosset and (j) the Attorney General of New York, by Robert R. Molic, Assistant Attorney General, Charities Bureau.

⁴Lauren is an adult.

wherein he recommends that the court should admit the 1994 will to probate and approve the settlement agreement as being in the best interests of his wards.

The guardian ad litem explains that after meeting with the one witness to the 2002 instrument that he was able to locate, the guardian ad litem concluded that it is unlikely that the 2002 instrument, under which his wards benefit, could be probated. Since his wards are not beneficiaries of the 1994 instrument, the guardian ad litem recommends that the court approve the settlement reached by the parties. In his report, the guardian ad litem uses the estimated value of \$600,000.00 to compare the effect of the two instruments on his wards' shares. Using that value, under the 2002 instrument, each of his four wards would receive \$99,000.00, whereas under the 1994 instrument, they each receive nothing. Under the terms of the settlement agreement, William will distribute to a trust for the benefit of his son, Matthew, the amount William will receive under the 1994 instrument, which the guardian ad litem calculates to be \$120,000.00. Accordingly, under the settlement agreement, Matthew receives considerably more than he would have if the 2002 instrument were admitted to probate. Similarly, under the terms of the settlement agreement, Douglas will distribute to a trust for the benefit of his children, Lauren, Christian, Keegan and Cameron, the amount Douglas will receive under the 1994 instrument, which the guardian ad litem calculates to be \$120,000.00. Accordingly, under the terms of the settlement agreement, Douglas' infant children, Christian, Keegan and Cameron, will each receive \$30,000.00, or approximately thirty percent of what each of them would have received if the 2002 instrument were probated.

Being satisfied that the 1994 will was executed in compliance with the requirements of EPTL 3-2.1 and that the proposed settlement is in the best interests of the infants, the court

adopts the guardian ad litem's recommendation to allow probate of the 1994 instrument and to approve the terms of the settlement agreement. The court was not provided with the trust agreements for the infants that are referred to in the settlement agreement and the guardian ad litem's report. The court reminds the guardian ad litem to file his supplemental report within six months of the date of the decree to be entered herein to inform the court that trusts for each of the infants have been funded in accordance with the terms approved by the guardian ad litem (22 NYCRR 207.13 [b]). Since they have filed their oath and designations, letters testamentary will issue to William and Douglas after a decree is settled. The decree shall contain a provision revoking the preliminary letters testamentary and the letters of administration issued to Thomas in the decree of administration dated June 1, 2007.

With respect to the guardian ad litem's fee, 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]). Although 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], *affd* 213 App Div 59 [4th Dept 1925], *affd* 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], *affd* 213 App Div 59 [4th Dept 1925], *affd* 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], *affd* 23 NY2d 700 [1968]; *Martin v Phipps*, 21 AD2d 646 [1st Dept 1964], *affd* 16 NY2d 594 [1965]). A sizeable estate permits adequate compensation, but nothing beyond that (*Martin v Phipps*, 21 AD2d 646 [1st Dept 1964], *affd* 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], *affd* 23 NY2d 700 [1968]), without constituting an adverse reflection on the services provided. 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]).

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], *affd* 213 App Div 59 [4th Dept 1925], *affd* 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 the guardian ad litem's fee, the guardian ad litem states in his affirmation of attorney services that he rendered 35 hours of legal services on this matter at his usual rate of \$475.00 per hour for a total of \$16,625.00, an associate at the guardian ad litem's firm rendered 14.75 hours of legal services at an hourly rate of \$325.00 for a total of \$4,493.75 and a paralegal spent 5 hours on the matter at an hourly rate of \$125.00 for a total of \$625.00. When added together, the fees total \$22,043.75. The guardian ad litem is also seeking disbursements in the amount of \$21.04.

As shown on the guardian ad litem's affirmation of attorney services, prior to settlement, the guardian ad litem participated in various court conferences, reviewed the court file and motion papers, conferred with a witness to the 2002 instrument, conferred with other counsel, performed legal research, prepared and filed an interim report, participated in settlement

discussions, reviewed and revised the settlement agreement and the proposed trusts and prepared his final report. The guardian ad litem's colleague performed analysis of the two instruments, performed legal research and prepared a probate petition seeking the probate of the 2002 instrument. The paralegal spent 5 hours attempting to speak to a witness to the 2002 will. The court disallows the \$625.00 fee for that endeavor.

The proceeding was fairly complicated procedurally. Before a settlement was achieved, the guardian ad litem was in a position where the instrument that favored his ward was not offered for probate by the executors nominated therein, who, instead, sought probate of the earlier instrument which favored them. The guardian ad litem sought the probate of the later instrument and had to do his own due diligence in order to conclude that the later instrument would likely not be probated. The guardian ad litem was also called upon to help fashion a settlement that was in the best interests of his wards.

Considering all of the factors the court must ordinarily assess in fixing compensation (*Matter of Freeman*, 34 NY2d 1 [1974]) and the exemplary services on behalf of his wards in reaching a settlement favorable to their interests, the court fixes and allows the fee of the guardian ad litem in the amount of \$19,000.00, which includes compensation for additional services to be rendered in connection with preparing and filing his supplemental report. This fee also includes compensation for the services rendered by his associate. The guardian ad litem's fee shall be paid within thirty days of the date of the decree herein.

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. Accordingly, since the disbursements sought by the guardian ad litem are part of normal office overhead, payment of them by the estate is disallowed.

Settle decree.

Dated: December 11, 2008

JOHN B. RIORDAN
Judge of the
Surrogate's Court