

**Matter of Florio**

2009 NY Slip Op 31433(U)

June 26, 2009

Surrogate's Court, Nassau County

Docket Number: 330525

Judge: John B. Riordan

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

-----X  
 In the Matter of the Account by WILLIAM A. FLORIO, JR.,  
 as the Administrator of the Estate of

File No. 330525

IRIS FLORIO, a/k/a  
 IRIS S. BECKER,  
 IRIS BECKER FLORIO,

Dec. No. 165

Deceased.

-----X  
 This is an accounting by the administrator of the estate of Iris Florio. Submitted for decision are the following issues: (i) attorney's fees; and (ii) accountant's fees and guardian ad litem fees.

The decedent, Iris Florio, died on November 2, 2003. She was survived by her husband, William A. Florio, Jr., the petitioner herein, and her two infant children, Brandon and Jenna. The summary statement shows charges to the accounting party of \$499,684.27. A guardian ad litem was appointed to represent the interests of the decedent's infant children. Brandon has now attained the age of majority and has filed a waiver and consent.

With respect to the issue of 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]). 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 Freeman*, 34 NY2d 1 [1974], *Matter of Potts*, 123 Misc 346 [Sur Ct, Columbia County 1924], *affd* 213 App Div 59 [4th Dept 1925], *affd* 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* (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.

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]).

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, col 5 [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 accountants' fees, normally, an accountant's services are not compensable out of estate assets unless there exist unusual circumstances that require the expertise of an accountant (*Matter of Meranus*, NYLJ, Mar. 31, 1994, at 37, col 2 [Sur Ct, Suffolk County]). The fee for such services is generally held to be included in the fee of the attorney for the fiduciary (*Matter of Musil*, 254 AD 765 [2d Dept 1938]). "[T]he purpose of this rule is to avoid duplication (*Matter of Schoonhein*, 158 AD2d 183 [1st Dept 1990]). Where the legal fees do not

include compensation for services rendered by the accountant, there is no duplication and the legal fee is not automatically reduced by the accounting fee (*Matter of Tortora*, NYLJ, July 19, 1995, at 26, col 2 [Sur Ct, New York County]”); Warren’s Heaton on Surrogate’s Court Practice §93.08 [7th ed]).

In this case, the administrator’s attorney has supplied the court with an affirmation of legal services and it shows that the attorney rendered more than 46 hours of legal services at the hourly rate of \$250.00 for part of the time covered by the affirmation and some time at the rate of \$350.00 per hour. The work performed includes, but is not limited to, the preparation and filing of the petition for letters of administration and accompanying affidavits, preparation of interim and final accounts and related court papers, and communications with the guardian ad litem. In addition, the attorney spent an additional 9 hours of legal services in connection with the sale of the decedent’s cooperative apartment. The attorney seeks a total of \$12,655.60 for fees and \$1,757.08 for disbursements of which he states \$6,000.00 has been paid. According to the contemporaneous billing records submitted, however, a total of \$7,000.00 was actually paid, which includes a \$1,000.00 retainer. There are disbursements charged for internal photocopying and mail which should be part of office overhead. Accordingly, the court approves a total fee of counsel to the administrator in the requested sum of \$12,655.60 as fair and proper compensation for the services rendered. Disbursements in the amount of \$1,724.00 are allowed.

Concerning the accountant’s fee, the accountant has submitted an affidavit of accounting services requesting a fee of \$2,200.00, of which \$1,050.00 has been paid and \$1,150.00 remains unpaid. The affidavit indicates that the accountant has prepared the fiduciary income tax returns for the estate. The work performed by the accountant was not duplicative of the services

rendered by the estate attorney, and the requested amount for these services is reasonable. Thus, the court approves the fee in the amount of \$2,200.00, of which \$1,150.00 remains unpaid.

The guardian ad litem has supplied the court with an affirmation of services for work performed through March 19, 2008 and an affirmation of services for work performed from April 24, 2008 to December 24, 2008. For the period through March 19, 2008, the guardian ad litem spent 6.2 hours at the rate of \$375.00 per hour and a paralegal spent 1.2 hours at the rate of \$175.00 per hour for a total of \$2,535.00. In addition, during this period, disbursements of \$15.00 for Federal Express charges were incurred. For the period from April 24, 2008 to December 24, 2008, the guardian ad litem spent 2.9 hours at the rate of \$400.00 per hour and a paralegal spent 12.5 hours at \$200.00 per hour. The total for services performed during this period amounts to \$3,660.00. In addition, during this time period, disbursements of \$15.00 for Federal Express charges were incurred. Considering all these factors, the court believes the sum of \$4,000.00 is fair and proper compensation for the services rendered by the guardian ad litem. The fee of the guardian ad litem shall be paid within thirty (30) days of the decree to be entered herein.

Commissions are approved subject to audit.

The decree shall discharge the surety.

Settle decree.

Dated: June 26, 2009

JOHN B. RIORDAN  
Judge of the  
Surrogate's Court