

Matter of Schwartz

2009 NY Slip Op 32193(U)

September 14, 2009

Surrogate's Court, Nassau County

Docket Number: 154345/2009

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 the Trust Under Article TENTH, Paragraph E, of the
Will of

File No. 154345

Dec. No. 423

ROBERT B. SCHWARTZ,

Deceased.

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In this contested accounting proceeding, a stipulation of settlement has been submitted for approval to the court (SCPA 2106). The decedent, Robert B. Schwartz, died on November 21, 1971. His last will and testament provided for various pre-residuary bequests and established trusts for the benefit of his spouse and children.

The decedent had three children, Samuel R. Schwartz, Leonard H. Schwartz and Carole S. Kamlet. The decedent's residuary estate was left to the three children in separate trusts. The decedent originally appointed his brothers as the trustees and the three children were additional trustees. When the last of the decedent's brothers died, the three remaining trustees petitioned this court for the appointment of Citibank as successor trustee. Leonard Schwartz died in 2003, thus the accounting trustees are Citibank, Carole Kamlet and Samuel R. Schwartz. The trust that is the subject of this proceeding is the trust for the benefit of Samuel R. Schwartz and his descendants.

In 2007, Melissa Steinhauser and Robert Schwartz, the children of Samuel Schwartz, commenced a proceeding to compel an accounting of the trust for the benefit of Samuel Schwartz. As Melissa Steinhauser and Robert Schwartz have children who are infants and are beneficiaries of the trust, a guardian ad litem was appointed. The guardian ad litem wrote two reports and recommends the approval of the stipulation.

The trust provides the following in pertinent part: the trustees are to pay all or part of the net income for the use of such member of a class composed of the beneficiary and his living descendants as the trustees shall determine in their discretion; all distributions of income or principal shall be at such times and in such amounts or proportions as the trustees shall determine in their discretion.

The trust had an initial balance of \$612,716.02 and the account shows principal invasions in the amount of \$599,721.30 distributed to Samuel R. Schwartz and income distributions to Samuel R. Schwartz in the amount of \$314,505.00. No distributions were ever made to any descendants of Samuel Schwartz. Samuel Schwartz' children filed objections to the account on the grounds that the trustees abused their discretion in making the distributions and that the trustees never considered any of the needs of beneficiaries other than Samuel R. Schwartz. The guardian ad litem, in his report, concurs that the trustees "rubber stamped" any request by Samuel R. Schwartz regarding requests for distributions and "flagrantly violated their fiduciary duties".

The parties entered into a stipulation of settlement whereby Samuel R. Schwartz agreed to repay a total of \$600,000 to the trust. The guardian ad litem objected to the first proposed stipulation of settlement and revisions were thereafter made in accordance with his objections. The revised stipulation of settlement provides that the trustees will resign and Melissa Steinhauser and Robert Schwartz will be the successor trustees. Two trusts will be formed and shall consist of \$300,000 each which is to be supplied by Samuel R. Schwartz. All attorneys' fees, commissions and expenses shall be paid from the trust with any shortfall to be paid by Samuel R. Schwartz. As the guardian ad litem notes in his report, as Samuel R. Schwartz is

obligated to restore \$300,000 to each trust, he will essentially be obligated to pay all of the expenses.

The court hereby adopts the guardian ad litem's recommendation, approves the settlement agreement and approves the guardian ad litem's execution of the settlement agreement.

With respect to the guardian ad litem's fees, 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], *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 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], *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]). 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, 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]).

In his report and recommendation, the guardian ad litem avers that he expended 20.3 hours on this matter reviewing the court's file, communicating with the attorneys for the parties, reviewing the settlement agreement, and preparing his reports. He informs the court that his usual billing rate is \$400 per hour and asks the court to set a reasonable fee for his services. The guardian ad litem is not seeking reimbursement for disbursements. In light of all of the factors set forth above and considering the very favorable result obtained because of his efforts, the court sets the fee for the guardian ad litem in the amount of \$8,000.

Settle decree.

Dated: September 14, 2009

JOHN B. RIORDAN
Judge of the
Surrogate's Court