

Matter of Ahearn

2009 NY Slip Op 32209(U)

September 25, 2009

Surrogate's Court, Nassau County

Docket Number: 341755/2009

Judge: John B. Riordan

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

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Accounting Proceeding, Estate of

ALICE AHEARN,

Deceased.
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File No. 341755

Dec. No. 393

Submitted for decision in this accounting proceeding are the issues of attorney's fees and accountant fees. Also submitted for decision is the fee of the guardian ad litem.

The decedent, Alice Ahearn, died on January 17, 2006, a resident of Nassau County. Letters of administration issued to William J. Macy, Jr. on May 12, 2006. The petitioner William J. Macy, Jr. has filed his first and final accounting. The accounting originally covered the period February 10, 2006 through August 10, 2007, but was further supplemented by affirmations dated October 15, 2008 and May 12, 2009, bringing the account current through May 12, 2009. The summary statement shows charges to the accounting party of \$69,158.27. In addition, the estate consists of the net proceeds from the sale of two parcels of real property owned by the decedent in Florida in excess of \$220,000.00. The estate also includes one unsold parcel of real property in Florida.

A guardian ad litem was appointed in this proceeding to represent the interests of Jeffrey Lipscomb and Terry Lee Brady, persons alleged to be distributees of the decedent and whose whereabouts were unknown. The guardian ad litem has submitted his report wherein he reported that the original petition identified four distributees of the estate, all of whom were alleged to be children of the decedent's brother William Macy, Sr., who died a resident of Spain in 1991. The petitioner and his sister, Judith Baxter, were identified as distributees of the decedent. Terry Lee Macy and Jeffrey Macy were identified as possible distributees based upon correspondence found

in the decedent's brother's records. The guardian ad litem conducted an investigation, after which he confirmed the identity of and determined the whereabouts of his wards. He concluded that neither of his wards, one of whom post-deceased the decedent, is a child of the decedent's brother or otherwise is a distributee of the decedent. Accordingly, the petition was amended to reflect that the petitioner and Judith Baxter are the sole distributees of the decedent's estate.

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 services 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], *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 [3rd 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 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]).

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 [3rd 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, col 2 [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, col 6 [Sur Ct, New York County]). The court prohibited reimbursement for ordinary postage and telephone charges other than long distance.

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 [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) (Warren’s Heaton on Surrogate’s Court Practice §93.08 [7th ed]).

In this case, the attorney has supplied the court with an affirmation of legal services and it shows that the attorney rendered approximately ninety-six (96) hours on this matter. The attorney seeks approval of a fee in the amount of \$27,500.00, of which \$12,230.00 has been paid. The services the attorney provided included the following: consultations and meeting with the administrator, search for possible distributees, preparation of the administration petition and related papers, collection of funds from the New York State Comptroller’s Office, communications with Florida counsel, communications with the estate accountant, preparation of accounting petition and related papers, preparation of account and affirmations updating account, attendance at court conferences, legal research and communications with the guardian ad litem.

A review of counsel’s time records indicates that a significant amount of time was spent sending e-mails and on telephone communications. In addition, there are time entries for time spent by counsel preparing his affirmation of legal services. Such time is not compensable (*Matter of Gallagher*, NYLJ, Feb 2, 1993, at 22, col 4 [Sur Ct, Bronx County]). There are also entries for consultations with the Florida attorney, indicating duplication of services. Here, counsel submits that the requested fee is reasonable given the size of the estate, including the Florida property. The Florida property, however, was subject to ancillary administration.

Moreover, Florida counsel performed the services relating to the ancillary administration and sale of the Florida properties. In addition, the size of the estate can operate as a limitation on the attorney's fee without a reflection on the quality of the services rendered. Here, the size of the estate subject to New York administration was modest. Considering all these factors, the court believes a total fee in the amount of \$13,000.00 is fair and proper compensation for the services rendered.

With respect to the fee of Florida counsel, counsel seeks a fee of \$10,094.80 and disbursements of \$762.30. Services provided by Florida counsel included consultations with the petitioner, assistance with the sale of two Florida properties and with one of the tenants residing at one of the properties, and communications with New York counsel. Counsel annexes Florida Statute § 733.6171 which sets forth the manner by which to determine a reasonable probate attorney's fee. Counsel also annexes a retainer agreement. The retainer agreement, however, covers the estate of Alice Ahearn and a "summary proceeding" for the estate of Francis A. Ahearn. The retainer agreement recites that the fee for the estate of Francis A. Ahearn will be \$3,000.00. Thus, it is unclear whether the \$3,000.00 fee for the Francis A. Ahearn estate is being charged against this estate. In addition, the fee requested is significantly more than the amount calculated under the statute. Accordingly, Florida counsel is directed to submit an affirmation within twenty (20) days of the date of this decision setting forth the detailed calculation of his fee under the statute, an itemization of the disbursements for which he billed and an explanation of whether the fees associated with the estate of Francis A. Ahearn have been charged against this estate and, if so, why those fees should be so charged.

The accountant seeks a fee of \$750.00 for preparation of the estate's fiduciary income tax

returns for 2006, 2007 and 2008. In addition, the accountant seeks a fee of \$150.00 for preparation of the decedent's final income tax returns. Thus, the accountant seeks a total fee of \$900.00. The use of an accountant in this case is reasonable, and, therefore, the court approves the accountant's fee of \$900.00.

With respect to the guardian ad litem's fee, the guardian ad litem has submitted an affirmation of services which shows that he spent a total of 32.25 hours on this matter. The guardian ad litem's usual hourly rate is \$330.00. The guardian ad litem reviewed the administration file. He requested thirteen categories of documents from petitioner's counsel and reviewed those responsive documents. The guardian ad litem reviewed the accounting and prepared his report. He attended court conferences. The guardian ad litem conducted his own investigation into the whereabouts of his wards and was successful in locating his wards and determining their status. Although the guardian ad litem's services were of the utmost quality, the court is constrained by the size of the estate. Accordingly, the court fixes the fee of the guardian ad litem in the amount of \$6,000.00, which shall be paid within thirty (30) days of the date of the decree to be entered herein.

Proceed accordingly.

This constitutes the decision and order of the court.

Dated: September 25, 2009

JOHN B. RIORDAN
Judge of the
Surrogate's Court

