

Matter of Germain

2009 NY Slip Op 32776(U)

October 23, 2009

Sur Ct, Nassau County

Docket Number: 348814

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 Account of Proceedings of
 Maureen Germain, as Temporary Administrator of
 the Estate of

File No. 348814

BERNADETTE GERMAIN,

Dec. No. 676

Deceased.

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Before the court is the first and final account of Maureen Germain, as temporary administrator of the estate of her mother, Bernadette Germain, who died intestate, a resident of Bellmore, on April 19, 2007. Decedent was survived by her daughter, Maureen; her son, Antonio Germain; and Benjamin Dubuche, the infant son of decedent's predeceased daughter, Tamara Germain. Temporary letters of administration were issued to Maureen on February 1, 2008. The account was initially filed on March 17, 2009 and a guardian ad litem was appointed on May 20, 2009 to represent the interests of Benjamin. Petitioner amended the account on August 24, 2009, bringing the account down to August 5, 2009.

The administrator seeks approval of the accounting, approval of reimbursements previously made to the temporary administrator, approval of payment of an unpaid claim filed against the estate by the Nassau County Department of Social Services, the fixing of fees for the services of the attorney, and authorization to distribute Benjamin's share of the net estate to the attorney's escrow account, until such time as the court lifts the restraints on the letters of guardianship issued to Benjamin's father as the guardian of Benjamin's property. In addition, the court must set the fee for the guardian ad litem.

Regarding the fee of the attorney for the estate, 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], *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]). 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]).

The temporary administrator has petitioned the court for approval of the payment of attorney's fees in the sum of \$30,242.00, of which \$20,000.00 has been paid and \$10,242.00 remains unpaid. The amended account schedules reflect that the unpaid portion of the fee subsequently increased to \$13,787.00, which brings the total fee up to \$33,787.00, plus disbursements of \$1,904.35, of which \$1,614.35 has been paid. The requested fee amounts to more than eight percent of the gross estate and more than 22% of the net estate, as calculated without a deduction for legal fees paid or unpaid but after the deduction of the creditor's claim and a fee for the guardian ad litem. In her report, the guardian ad litem representing the infant distributee objects to this fee as "unreasonably high" and "bear[ing] no reasonable relationship to the size of the estate or the complexity of the questions involved ...". The guardian ad litem recommends that the fee be set in accordance with the terms of the retainer agreement. The agreement provides that the fee shall equal one fiduciary's commission, provided that there is no litigation or adversarial proceeding. The amended account reflects that the commission amounts

to \$11,303.55. The guardian ad litem further proposes that counsel return to the estate any fee she received in excess of that amount. Neither of the adult distributees objected to counsel's requested legal fee.

Petitioner's counsel filed an affirmation in response to the report of the guardian ad litem, and the affirmation has been carefully reviewed by the court, along with the retainer agreement entered into between petitioner and her attorney, the affirmation of legal services and the time records submitted to the court. 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]).

The record shows that the attorney and members and staff of her firm devoted many hours to this matter, and counsel notes in her responsive affirmation that the estate was forced to bring proceedings for an eviction order and for the appointment of a guardian of the property of the infant. Additionally, because petitioner was granted temporary letters of administration, rather than full letters, counsel had to seek court approval at multiple points during the course of the administration. Petitioner's counsel was required to file and appear on an application to enter into a real estate contract for the sale of decedent's home and had to obtain approval to sell the premises. The affirmation reflects that other services provided by counsel included hiring a private investigator to determine the status of a potential distributee; petitioning for letters of administration; applying for a bond; successfully negotiating a reduction of the decedent's medical debts; and preparing the final accounting.

The court commends the attorney for her skillful representation of the temporary

administrator. The retainer agreement annexed to the attorney's justificatory affirmation states that absent estate litigation, counsel's fee "shall be the lesser of the rate set in the 'Schedule for Commissions of Fiduciaries'" found in SCPA 2307, "or a sum equal to the hourly charge of this firm ..."(\$350.00 for partners and \$250.00 for associates). If the administration requires litigation or an adversarial proceeding, the fee shall be calculated in accordance with the hourly services rendered. The agreement further provides that ancillary services, including those connected with real estate transactions, are to be billed separately.

It appears that counsel has characterized as adversarial both the eviction proceeding and the petition for guardianship, thus entitling the firm to bill for all of its legal services on the basis of hourly charges. In contrast, the guardian ad litem maintains that these proceedings were unopposed, and therefore cannot be described as litigious or adversarial. She argues that counsel's fee should therefore be limited to an amount equivalent to one fiduciary's commission.

The court agrees with neither position, and finds that while the administration of this estate did not involve adversarial proceedings, counsel is entitled to a fee in excess of the amount of a single commission, based upon the language contained in the retainer agreement which provides that the client will be billed separately for ancillary matters, including, but not limited to, real estate transactions. Thus, counsel is entitled to a flat fee equal to a statutory commission, or \$11,303.55. In the event that the commission of the temporary administrator is adjusted pursuant to audit, this fee shall not be adjusted. Counsel is also entitled to payment based upon hourly rates for services provided in connection with the sale of the real estate, the eviction proceeding, and the proceeding for appointment of a guardian of the infant's property. Counsel's contemporaneous time records indicate that a substantial portion of the legal services rendered

were necessitated by these proceedings. In fixing counsel's fee for these ancillary services, the court must also consider the size of the estate, which 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. Accordingly, in addition to the flat fee of \$11,303.55, the court grants counsel an ancillary fee of \$8,450.00, plus disbursements of \$1,904.35, for a total of \$21,657.90 in fees and disbursements. Of this amount, \$20,000.00 in fees and \$1,614.35 in disbursements have been paid, and \$43.55 remains unpaid.

With respect to the fee of the guardian ad litem, the court notes that the guardian ad litem's affirmation reflects eight and three-quarters hours of services rendered on behalf of decedent's minor grandchild. Considering all the factors set forth above concerning attorneys' fees, the court fixes the fee of the guardian ad litem in the sum of \$2,500.00, to be paid within thirty days of the date of decree. The court thanks the guardian ad litem for her proficient services and perspicuous report.

The court approves payment of \$2,744.39 to the Nassau County Department of Social Services and approves the reimbursements previously made to the administrator, as reflected on schedules C and C(b) of the account.

The prayer for relief that the court authorize distribution of Benjamin's share of the net estate to the attorney's escrow account is denied, as the guardian of Benjamin's property was granted full letters on August 13, 2009, subject to joint control with Citibank.

The commission of the temporary administrator is approved subject to audit.

The decree shall discharge the surety and shall authorize the temporary administrator to distribute the balance of the net estate, after all of the above payments have been made, in equal shares, to Maureen Germain, Antonio Germain, and Jude Dubuche as guardian of the property of Benjamin Dubuche, subject to joint control with Citibank.

This constitutes the decision of the court.

A decree was submitted but it does not reflect the amendments to the account. Settle a revised decree.

Dated: October 23, 2009

JOHN B. RIORDAN
Judge of the
Surrogate's Court