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

----------x

In the Matter of the Account of Proceedings of
Laura Campbell and Arthur Brauer,
as Co-Executors of the Estate of

HERBERT J. BRAUER,

Deceased.

File No. 339513

Dec. No. 935

----------x

Before the court is the first and final account of Laura Campbell and Arthur Brauer, as two of the three co-executors of the estate of Herbert J. Brauer. The account was filed in response to a petition to compel an account brought by Jean Brauer, the third co-executor and decedent's surviving spouse.

Decedent was a resident of Sands Point who died on October 2, 2005, survived by his wife, Jean, his children, Laura Campbell, James C. Brauer and Christopher S. Brauer, and his granddaughter, Katrina Brauer, the infant daughter of decedent's predeceased son, Herbert J. Brauer, Jr. Decedent's will was dated June 6, 1996. Letters Testamentary issued on September 21, 2006 to Jean, Laura, and decedent's brother, Arthur. Laura and Arthur filed their account on April 23, 2008, and it was subsequently amended and supplemented. A guardian ad litem was appointed by the court to represent the interests of Katrina.

The administration and the account reflect ongoing discord between Jean and decedent's other fiduciaries, Laura and Arthur, dominated by conflict over the computation of Jean's elective share pursuant to EPTL 5-1.1-A. Ultimately, the parties executed a stipulation, receipt, release and refunding agreement which resolves all of the disputed issues other than the legal fee paid from estate assets to an attorney who provided legal services to Laura and Arthur at the

onset of the administration but whom they later replaced. The parties agree that fees of their current attorneys will be fixed by the court. The court must also set a fee for the guardian ad litem.

The stipulation provides that for purposes of calculating Jean's elective share, the gross estate is valued at $2,115,942.00. Expenses paid to date, plus the amount reimbursable to Jean for administration expenses which she incurred, total $438,817.00.

Regarding the fee of attorneys 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 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 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]). 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]).

It has been the experience of this court that when multiple co-executors conflict and are represented by separate counsel, the legal fees requested may be cumulatively higher than would

typically be charged against a comparably sized estate. Duplication of services is almost inevitable, and legal services may be rendered in opposition to co-fiduciaries rather than in furtherance of the estate administration. However, it remains the responsibility of the court to ensure that the amounts charged to the estate reflect the principles laid out in the cases noted above, particularly *Matter of Von Hofe*, 145 AD2d 424 [2d Dept 1988], which directs the court to review the type of legal services provided, and *Matter of Shalman*, 68 AD2d 940 [3d Dept 1979], in which the court examined the benefit provided to the estate by the services rendered. Generally, the total legal fees incurred by co-fiduciaries who engage separate counsel should not exceed the fee that would have been charged had one attorney represented all of the fiduciaries. "While normally it has been said to be the right of co-fiduciaries to employ separate counsel, the practice tends to lead to excessive fees which the Surrogates have sought to discourage by limiting fees to those which would be deemed reasonable for the services of a single attorney representing all the fiduciaries" (*Matter of Deutsch*, , NYLJ, Mar. 17, 1995 at 30, col 5 [Sur Ct, Nassau County] [internal citations omitted]). Courts have made an exception to this "single fee" rule where the adversarial positions taken by the co-fiduciaries necessitate separate counsel and additional fees (*see Matter of Pollack*, NYLJ, Jan. 5, 1993 [Sur Ct, Bronx County]).

1. The fee of David Lewis

Letters testamentary were granted to all three of the nominated co-executors, two of whom, Laura and Arthur, initially were represented by David Lewis for a period of eleven months ending September 15, 2006. At the court's request, Mr. Lewis submitted an affirmation of legal services rendered to the estate, and it reflects that he devoted 107.75 hours to the estate administration, at a rate of $350.00 an hour, resulting in a total fee of $37,712.50, all of which

has been paid. Jean's attorney, Mr. Petraglia, filed an affirmation in opposition to payment of Mr. Lewis' fee from estate assets. He argues that the fee is unreasonable insofar as the services rendered by Mr. Lewis provided minimal, if any, benefit to decedent's estate. Mr. Petraglia notes, for example, that Mr. Lewis billed the estate $1,750.00 for preparation of a probate petition, despite the fact that the probate petition actually filed with the court was prepared and filed by Mr. Petraglia. Mr. Lewis also charged the estate for four and one-half hours of legal services for communication with a real estate broker and an additional three and one-quarter hours to review a contract of sale for a condominium, resulting in a charge of $2,800.00, even though the record reflects that Mr. Lewis did not participate in the condominium transaction. Further, it is noted, Mr. Lewis' time records indicate that he devoted a substantial amount of time to two meetings to review decedent's tax returns, for which he billed the estate $2,275.00, but never prepared or filed any individual or fiduciary tax returns on behalf of decedent or the estate. The attorney billed an additional three hours ($1,050.00) to prepare extension requests for the estate tax returns. In connection with other tasks performed by Mr. Lewis, Mr. Petraglia avers that the records submitted to the court reflect unreasonable amounts of time for the actual services performed. For example, Mr. Petraglia cites as an example a charge of $875.00 (for two and one-half hours of work) to obtain certificates of letters testamentary, a simple clerical task.

Assuming that Mr. Lewis' affirmation accurately reflects the amount of time devoted to this estate, the time spent is not the sole determinant of the fee (*see Matter of Mingoia*, NYLJ, Mar. 18, 1993 at 36, col 2 [Sur Ct, Suffolk County]). The difficulty of the work is a factor to be considered in setting a legal fee, so in order to justify a fee of this size in connection with the initial months of an administration, the attorney would have to show that the work was

particularly complex or demanding (*id.*). Despite the adversarial nature of this administration, its most complex and contentious issue, that of calculating the elective share, was not addressed substantively during the time frame of Mr. Lewis' representation of Laura and Arthur. "It is well settled that Surrogate's Court is vested with discretion to authorize and determine reasonable compensation for an attorney who has rendered legal services to an estate" and a hearing is not required (*Matter of Guattery*, 278 AD2d 738, 739 [3rd Dept 2000]). The court finds that the affirmation submitted by Mr. Lewis is insufficient to justify the amount of legal services charged to the estate (*see Matter of Radin*, NYLJ, Feb. 28, 1991 at 29, col. 4 [Sur Ct, Kings County]). Accordingly, after carefully reviewing the affirmation and time records submitted by Mr. Lewis, the court finds the reasonable charge for his services to be $12,500.00.

Laura and Arthur did not object to the fee charged by Mr. Lewis; they paid it out of estate assets, and are therefore not entitled to a refund of the excess portion of this fee (*Matter of La Grove*, 31 AD2d 928, 929 [2nd Dept 1969]). The court therefore disallows only that portion of Mr. Lewis' fee allocable to the residuary shares of Jean and Katrina. On this basis, Mr. Lewis need only return one-half of the excess fee, or $12,606.25, of which $6,303.12 shall be credited to Jean and $6,303.13 shall be credited to the trust for the benefit of Katrina Brauer.

2. The fee of Black & Black

Laura and Arthur subsequently engaged the services of the law firm of Black & Black. This firm provided the two co-executors with 165.67 hours of legal services between September 2006 and September 2009, a period of three years. The firm seeks a fee of $41,417.50 plus disbursements of $2,136.64, of which $5,000.00 has been paid and $38,554.64 remains unpaid. Mr. Petraglia opposes two portions of this fee, as set forth in his affirmation in further support of

his application for award of attorney fees from the estate. Mr. Petraglia argues that the positions taken by Mr. Black on behalf of his client in connection with the computation of Jean's elective share were meritless, with the result that the administration was needlessly dragged out. Consequently, it is argued, all related legal fees are unnecessary and are not payable by the estate. Second, it is averred that some of the services provided by Mr. Black, such as time shown on the billing records for the collation of documents, are clerical rather than legal, and are not compensable by the estate.

The positions taken by Mr. Black in connection with the computation of the elective share were apparently without precedent, yet that does not dictate a finding that the positions were meritless. At the same time, the court cannot approve a legal fee for collating documents or preparing affirmations in support of one's own fees. The fee of Black & Black is fixed in the amount of $37,900.00 plus disbursements of $2,136.64, of which $5,000.00 has been paid and $35,036.64 remains unpaid.

3. The fee of Rivkin Radler

Jean is represented by Albert W. Petraglia, a partner at the firm of Rivkin Radler. The firm has received payment of $35,000.00 to date for legal services rendered between October 2005 through September 2009, a period of almost four years. While the firm's actual outstanding balance of fees is $70,753.18, including disbursements, the firm has agreed to accept the lower amount of $55,000.00, for a total fee of $90,000.00. This represents a discount of approximately 15%. On behalf of Laura and Arthur, Mr. Black objects to payment of $40,039.00 of the fee by the estate, on the basis that the services underlying this charge were spent advocating maximization of Jean's elective share.

If Jean had not been a co-executor of the estate, it would be difficult to argue that her attorney's efforts to block attempts by the co-executors to decrease her elective share benefitted the estate, rather than his client. However, Jean is a co-executor, as are Laura and Arthur, making it harder to argue that her attorney's efforts in connection with the correct calculation of set-offs against an elective share are any less related to her fiduciary responsibilities than were the efforts of Laura and Arthur's attorney with respect to this calculation, albeit that the attorneys were in total disagreement about what the set-offs should include. While it is true that Jean would benefit were her attorney to successfully argue for the minimization of set-offs, it is equally true that Laura and Arthur, as beneficiaries of the estate, would personally benefit from the maximization of set-offs against the surviving spouse's elective share.

At the same time, it does appear, upon a review of the affirmation of services filed by Mr. Petraglia, that at least a portion of the legal services accrued to the benefit of Jean alone and not to the benefit of the estate. Legal services rendered to a fiduciary in her capacity as a beneficiary of the estate are to be paid by the fiduciary out of her personal funds, and not from estate assets (*Matter of Rosenzweig*, 237 NYS2d 438 [Sur Ct, New York County 1963]). On the other hand, where it can be shown that the services rendered on behalf of a beneficiary also served to benefit the estate, the fee may be payable from estate assets (*Matter of Bollinger*, 55 AD2d 448 [4th Dept 1977]). The court fixes the fee of Rivkin Radler in the amount requested, and directs that 80% of the fee shall be paid from the estate ($72,000.00 less $35,000.00 already paid) and 20% ($18,000.00) shall be paid by Jean personally.

4. The fee of the guardian ad litem

The court must also set a fee for the guardian ad litem. With respect to the fee of the

guardian ad litem, the court notes that the guardian ad litem's affirmation reflects 16.25 hours of services on behalf of decedent's granddaughter Katrina. His services included examination of the files, participation in settlement conferences, attendance at the examination of Laura, correspondence, research and extensive involvement in the preparation of the stipulation of settlement. The efforts of the guardian ad litem assisted the court and the other attorneys in reaching the agreement which ultimately brought resolution to this contested administration. Considering this, and all the factors set forth above concerning attorneys' fees, the court fixes the fee of the guardian ad litem in the sum of $5,600.00, to be paid within thirty days of the date of decree.

In the course of multiple court appearances and conferences, the court witnessed firsthand the diligent efforts of Messrs Black, Petraglia and Turett to resolve the complex issues raised in the context of this administration. The court wishes to acknowledge their outstanding work, which led to the just settlement before this court.

The court approves the stipulation of settlement. In accordance with paragraph eleventh, Laura and Arthur shall (1) amend their account in accordance with the terms of the stipulation and the decision of this court in fixing the legal fees and (2) submit a decree settling the account on notice.

Dated: January 27, 2009

JOHN B. RIORDAN
Judge of the
Surrogate's Court