

**Matter of Dippel**

2010 NY Slip Op 30098(U)

January 12, 2010

Surrogate's Court, Nassau County

Docket Number: 340688

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 of Proceedings of  
 Albert Dippel, as Executor of the Estate of

File No. 340688

ROBERT DIPPEL  
 a/k/a ROBERT C. DIPPEL,

Dec. No. 927

Deceased.

-----x

Before the court is the first and final account of Albert Dippel as executor of the estate of his uncle, Robert Dippel, who died a resident of New Hyde Park, on January 13, 2006, leaving a will dated January 10, 2006. Letters Testamentary were issued to the executor on April 10, 2006. The account was initially filed on September 3, 2008, and a guardian ad litem was appointed by the court to represent the interests of decedent's great-nephew, an infant named in decedent's will as a residuary legatee.

The account reflects total charges of \$390,648.29. The balance on hand as shown in schedule G is \$329,827.06. The executor seeks approval of the accounting, approval of commissions, and the fixing of a fee for the services of the attorney. 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]). 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], *aff'd* 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], *aff'd* 213 App Div 59 [4th Dept 1925], *aff'd* 241 NY 593 [1925]; *see e.g. Matter of Spatt*, 32 NY2d 778 [1973]).

The executor has petitioned the court for approval of the payment of \$15,533.59 to the attorney for services rendered in connection with the administration of the estate, of which \$7,500.00 has been paid and \$8,033.59 remains unpaid. The guardian ad litem has not objected to this fee, which represents less than four percent of the gross estate. The court has carefully reviewed the affirmation of 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 time value of the attorney's services was \$15,805.00, but that the attorney had agreed to limit his total fee to \$15,533.59, which is the equivalent of one executor's commission. This agreement reduces the fee by approximately two percent. The fee is approved in the amount requested, of which \$8,033.59 remains to be paid.

The time sheets also reflect disbursements in the amount of \$484.38, which includes ordinary postage expenses. 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 similar items (*Matter of Graham*, 238 AD2d 682 [3d Dept 1997]; *Matter of Diamond*, 219 AD2d 717 [2d Dept 1995]; Warren's Heaton on Surrogate's Court Practice §106.02 [2][a][7<sup>th</sup> 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. Accordingly, the court is disallowing the charges for ordinary postage, and limiting repayment of expenses to \$324.00.

With respect to the fee of the guardian ad litem, the court notes that the guardian ad litem's affirmation reflects approximately 11 hours of services on behalf of decedent's infant legatee. The court thanks the guardian ad litem for her proficient representation of her ward and the perspicuous report filed, and fixes the fee of the guardian ad litem in the sum of \$3,400.00, to be paid within thirty days of the date of decree.

The commission of the executor is approved subject to audit.

The decree shall authorize the executor to distribute the balance of the net estate in accordance with decedent's will.

Settle decree.

Dated: January 12, 2010

JOHN B. RIORDAN  
Judge of the  
Surrogate's Court