

**Matter of Waelder**

2010 NY Slip Op 30716(U)

February 11, 2010

Surrogate's Court, Nassau County

Docket Number: 335678

Judge: John B. Riordan

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

-----X  
 Accounting by Catherine M. Waelder, as Executor of the  
 Estate of

HOWARD C. WAELDER,

Deceased.

-----X

File No. 335678

Dec. No. 915

In this accounting proceeding, the only issues before the court are the approval of attorneys' fees and accounting fees.

The decedent, Howard C. Waelder, died on November 25, 2004, a resident of Nassau County leaving a will dated October 12, 2004, which was admitted to probate by decree of this court dated July 12, 2005. Letters testamentary issued to the decedent's daughter, Catherine M. Waelder, on July 12, 2005. The decedent was survived by seven children. The will divides the decedent's residuary estate equally among his seven children.

This is the executor's first and final accounting covering the period November 25, 2004 through May 30, 2008. The summary statement shows charges to the accounting party of \$955,030.92. Objections to the account were filed by Steaphany Waelder, Luke Waelder and Christian Waelder. A stipulation of settlement settling the objections was entered into on September 23, 2009. Pursuant to the terms of the stipulation, the executor agreed to reduce her claim for executor's commissions from \$32,414.40 to \$22,414.40 and use the reduction to fund a \$10,000 payment to the objectants. The agreement also provides for the distribution of certain items of tangible property.

With respect to the issue of attorneys' 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 [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]).

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 [3d 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.

The court is in receipt of an affirmation of services from the attorney who previously represented the executor in connection with the probate of the decedent's will and the administration of the estate. According to the attorney, he expended 65.05 hours on this matter at an hourly rate of \$300.00 for a total of \$19,515.00. He also advanced disbursements in the amount of \$1,350.00 and received a flat fee of \$200.00 for preparation of the decedent's will. Counsel has received payments totaling \$3,750.00. A review of counsel's time records shows entries for some work that is secretarial in nature (i.e. mailing citations and faxing documents). In addition, it appears that some work related to counsel's preparation of his affirmation of legal services, which is not compensable. Considering all of the factors used in determining the reasonableness of fees, the court fixes the fee of the executor's former counsel in the total amount of \$17,750.00, of which \$3,750.00 has been paid and \$14,000.00 remains unpaid. In addition, disbursements in the amount of \$1,350.00, representing the probate filing fee, the fee for service of the citation and the fee for filing the executor's bond are approved.

The executor's current counsel has submitted an affirmation of legal services, which shows that attorneys at his firm spent a total of 71.75 hours on this matter at hourly rates of \$350.00 and \$300.00, for a total of \$24,352.50. Disbursements in the amount of \$1,628.25 were incurred. Counsel has received payments totaling \$4,250.00. According to counsel, his firm obtained the file in May 2008 from the executor's prior attorney. The services performed by the attorney consisted of appearing in court on the return date of the citation in the compulsory accounting proceeding, working with the accountant to prepare the accounting, reviewing the records of prior counsel, filing the voluntary account and preparing the related court papers, conducting discovery, participation in the executor's SCPA 2211 examination and appearance at court conferences. Considering all of the factors used in

determining the reasonableness of fees, the court fixes the fee of the executor's current counsel in the requested amount of \$24,352.50. Disbursements in the amount of \$1,417.00 are approved. Thus, the total amount approved for fee and disbursements is \$25,769.50, of which \$4,250.00 has been paid and \$21,519.50 remains unpaid.

The accountant has submitted an affidavit of accounting services. According to the accountant, he spent 79 hours preparing the accounting at his normal hourly rate of \$150.00 for a total of \$11,850.00. In addition, the accountant's assistant rendered services which amounted to \$1,968.75. The accountant claims that the number of hours spent on this matter appears somewhat higher than usual because he had to analyze "over 139 expense items and over 70 income items." The accountant is seeking approval of a reduced fee in the amount of \$5,000.00. The accountant also prepared a schedule valuing the decedent's model train collection. Under the circumstances here, accounting fees in the amount of \$5,000.00 are approved.

Settle decree.

Dated: February 11, 2010

JOHN B. RIORDAN  
Judge of the  
Surrogate's Court