

**Matter of Kempf**

2010 NY Slip Op 31009(U)

April 26, 2010

Sur Ct, Nassau County

Docket Number: 337283

Judge: John B. Riordan

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

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 Proceeding by Joseph D. Meares, Esq., in the Estate of

CHRISTIAN KEMPF,

File No. 337283

Deceased,

to Determine Attorney's Fees.  
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In this miscellaneous proceeding brought pursuant to SCPA 2110, the petitioner, Joseph D. Meares, seeks a decree fixing his fee for legal services rendered to the estate of Christian Kempf in the amount of \$6,000, plus disbursements in the amount of \$659.42, for a total of \$6,659.42.

Unless otherwise prescribed by law, a "petition . . . filed in a proceeding, unless denied by answer, objection or other proof, is due proof of the facts stated therein" (SCPA 509). June A. Loesch, the executor of the estate, did not appear in this proceeding, nor did she answer the petition or otherwise object to the relief sought by the petitioner. Accordingly, the court will treat the allegations contained in the petition as true.

The executor signed a retainer agreement on September 12, 2005 in which she retained the petitioner to "perform such legal services as are necessary to effectuate the full settlement of the estate" with the agreed-upon fee to be computed by multiplying the gross estate by an amount not to exceed 3 percent, plus reasonable disbursements.<sup>1</sup> According to the petition, the probate estate was \$400,000. In the agreement, the petitioner acknowledges the receipt of \$700 as a retainer, but he asserts that no part of his fee was ever paid, including the retainer. The petition

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<sup>1</sup>According to the retainer agreement, in the event of litigation, an addendum to the agreement would be prepared for those services. No litigation was commenced against the estate, other than the instant proceeding.

alleges that, by the terms of the agreement, he is owed \$12,000, plus disbursements. However, he is asking the court to fix and determine his fee in the amount of \$6,000 for the reasonable value of his services, plus disbursements of \$659.42. The petitioner demanded payment of \$6,659.42 in September 2008 and, again, in November 2009, as shown by a letter dated November 25, 2009 from the petitioner to the executor, with which the petitioner enclosed an invoice for \$6,659.42. The petitioner alleges that the executor never responded.

When reviewing attorney's 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 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, including: 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 the duty to review fees, the court cannot apply a selected few factors that 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]). 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][7<sup>th</sup> ed]). In *Matter of Corwith* (NYLJ, May 3, 1995, at 35, col 1 [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 billing invoice dated September 29, 2008 shows that the petitioner performed 24 hours of services at an hourly rate of \$250 for a total of \$6,000. The services shown are with respect to the probate of the will and the appointment of the executor. They include preparing the probate petition, 10 waivers and consents, an affidavit of comparison, a family tree affidavit and the notice of probate; obtaining a tax identification number for the estate; and communications with the executor and the court.

The petitioner also seeks payment for disbursements totaling \$659.42, broken down as follows: \$625 for the filing fee for the probate petition; \$30 for 5 certificates of letters

testamentary; and \$4.42 for mailing the probate citation to an individual by certified mail, return receipt requested. The requested amount is approved.

In light of all the factors to be considered (*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]), the court approves the petitioner's request for \$6,000 in attorney's fees, plus \$659.42 in disbursements, for a total of \$6,659.42, to be paid to the petitioner by the executor within 30 days of the date the decree to be entered herein is served upon the executor.

Submit decree.

Dated: April 26, 2010

JOHN B. RIORDAN  
Judge of the  
Surrogate's Court