

**Matter of Michael S. Cohen**

2010 NY Slip Op 31703(U)

June 3, 2010

Surrogate's Court, Nassau County

Docket Number: 322866/C

Judge: John B. Riordan

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

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Petition of Steven Zanon,  
as Trustee Under the Will of

File No. 322866/C

MICHAEL S. COHEN,

Dec. No. 26456

Deceased,

for an Order Directing the Sale of Real Property.

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This is a petition by Steven Zanon as sole trustee of the trust created under paragraph fourth of the will of Michael S. Cohen, who died on March 18, 2002, survived by his only child, Kevin Cohen. Petitioner seeks a court order (a) authorizing him to market and sell residential property owned by the trust and (b) prohibiting Kevin or his wife, Candace R. Cohen, from interfering with the marketing or sale of the residential property. The relief requested is denied on the grounds that the trust does not require petitioner to obtain court authorization, Kevin lacks the power to interfere with a sale, and Candace has entered into a stipulation in which she agrees to cooperate with the trustee.

According to the petition, the trust owns (1) a \$330,000.00 Prudential annuity contract, which issues a monthly payment of \$2,400; (2) residential property in East Hills, New York (the “house”), valued at \$2,000,000.00 as of two years ago, but with an original mortgage of \$750,000.00 and mortgage arrears of \$43,000,00; and (3) a checking account containing approximately \$8,000.00. Kevin, together with his wife, Candace, their two children, Jolie M. Cohen and Lindsay P. Cohen, and Kevin’s stepson, Andrew, resided together in the house until Kevin’s recent incarceration. Candace and the three children continue to reside in the house, but the petition indicates that the mortgage is at imminent risk of foreclosure. The trust does not

have sufficient income to maintain the mortgage payments, taxes and insurance on the house, nor does Kevin or Candace. The trustee indicates that he intends to use the proceeds from the sale of the house, after payment of the outstanding mortgage and arrears, to purchase a more affordable residence for the use of Kevin's family, which will then be maintained by the application of the monthly annuity contract payments.

In relevant part, the Article Fourth trust provides that the trustee shall

“pay over and distribute from time to time to or for the benefit of my son, KEVIN COHEN, if living, so much of the net income thereof and such portion of the principal of the trust even to the point of completely exhausting the same, as in the sole and absolute discretion of my Trustees may be required to provide for his health, support, maintenance and general welfare.”

The trust will terminate ten years after decedent's death, on March 18, 2012, at which time principal and accrued income will be payable to Kevin. In the event that Kevin dies prior to the date of termination, the trust will be paid over to decedent's then living issue.

The court appointed a guardian ad litem to represent the interests of Jolie and Lindsay, who are minors, and a second guardian ad litem to represent the interest of Kevin, who remains incarcerated. Both guardians requested information and documents from the trustee, none of which was provided, other than a tax form for the annuity contract and an unsigned one-page list dated March 11, 2010, which was distributed at a court conference by petitioner's counsel, which list did not address the vast majority of data requested. The tax form raises a question concerning legal title of the annuity contract, and the list indicates that substantive information in the original petition concerning trust assets was erroneous. Despite this, petitioner has not filed an amended petition to correct the misinformation submitted, nor has he cooperated with the

guardians ad litem. Both guardians have raised extremely serious concerns about the conduct of the trustee in his management of the trust and the annuity.

On April 21, 2010, the trustee, the guardians ad litem and Candace entered into a stipulation concerning the marketing and sale of the house, in which they all agreed that the trustee would list the house with a multiple listing service, with an asking price of \$1,300,000.00 or higher. The agreement further provides that Candace will cooperate in showing the house, and that the trustee will notify the guardian ad litem of all offers received. The parties also agreed that before the trustee may sign a binder or a contract for the sale of the house, he will need a subsequent stipulation among the parties to be so ordered by the Surrogate, or a court order. Kevin refused to sign the stipulation, however, the trustee does not need the consent of Kevin in order to sell the house, or the consent of this court, except insofar as agreed to by the parties in the referent stipulation. By prolix correspondence with the court, Kevin has further expressed his belief that the trustee is not acting in the best interests of Kevin and his family. As indicated below, the court is directing the trustee to account.

The court approves the stipulation and its execution by the guardians ad litem; the trustee may proceed accordingly.

Within 45 days of the date of this decision, petitioner is directed to file an account as fiduciary of the Article Fourth trust and an account for his actions in connection with the annuity contract for the benefit of Kevin, assuming that the annuity is not held in the trust. Petitioner is directed to serve account citations upon all of the parties to the present matter; upon completion of jurisdiction, the court will appoint the current guardians ad litem to serve in connection with the accounting proceedings. On the return date of the citations, the court will hold a conference

to schedule the examination and document discovery requested by the guardians ad litem, as well as any other discovery requested by the parties at that time. Until the accounts are filed and discovery has been completed, it would be premature for the court to address the charges made against the trustee by the guardians.

The guardians ad litem are entitled to a fee for their services rendered (SCPA 405). 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 the administration 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 [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: (1) the time spent (*Matter of Kelly*, 187 AD2d 718 [2d Dept 1992]); (2) the complexity of the questions involved (*Matter of Coughlin*, 221 AD2d 676 [3d Dept 1995]) ; (3) the nature of the services provided (*Matter of Von Hofe*, 145 AD2d 424 [2d Dept 1988]); (4) the amount and complexity of litigation required (*Matter of Sabatino*, 66 AD2d 937 [3d Dept 1978]); (5) the amounts involved and the benefit resulting from the execution of such services (*Matter of Shalman*, 68 AD2d 940 [3d Dept 1979]); (6) the lawyer's experience and reputation (*Matter of Brehm*, 37 AD2d 95 [4th Dept 1971]); and (7) the customary fee charged by the Bar

for similar services (*Matter of Freeman*, 34 NY2d 1 [1974]; *Matter of Potts*, 241 NY 593 [1925]).

These factors apply equally to an attorney retained by a fiduciary or to the court-appointed guardian ad litem (*Matter of Graham*, 238 AD2d 682 [3d Dept 1997]; *Matter of Burk*, 6 AD2d 429 [1st Dept 1958]; *Matter of Ault*, 164 Misc 2d 272 [Sur Ct, New York County 1995], *Matter of Berkman*, 93 Misc 2d 423 [Sur Ct, Bronx County 1978]; *Matter of Burnett*, NYLJ, Aug. 31, 2006 at 31, col 5 [Sur Ct, Kings County]; *Matter of Reisman*, NYLJ, May 18, 2000, at 34, col 5 [Sur Ct, Nassau County]). Moreover, the nature of the role played by the guardian ad litem is an additional consideration in determining his or her fee (*Matter of Ziegler*, 184 AD2d 201 [1st Dept 1992]). Typically, the fee of a guardian ad litem is an administration expense payable from estate or trust assets, but the court has the discretion to direct that the fee be paid by any of the parties, including the party under disability (SCPA 405).

The burden with respect to establishing the reasonable value of legal services performed rests on the attorney performing those services (*Matter of Potts*, 241 NY 593 [1925]; see *Matter of Spatt*, 32 NY2d 778 [1973]). Contemporaneous records of legal time spent on estate matters are important to the court in the determining whether the amount of time spent was reasonable for the various tasks performed (*Matter of Phelan*, 173 AD2d 621 [2d Dept 1991]; *Matter of Von Hofe*, 145 AD2d 424 [2d Dept 1988]). In the absence of contemporaneous time records, little weight is given to estimates of time after the services have been performed (*Matter of Phelan*, 173 AD2d 621 [2d Dept 1991]). This applies to the fee of a guardian ad litem (*Matter of Carbone*, NYLJ, Oct. 26, 1995, at 36, col 3 [Sur Ct, Suffolk County]).

Each of the guardians ad litem filed a preliminary report and a final report, which together provide the court with a comprehensive review and perspicacious analysis of the petition and the interests of the incapacitated wards. Wendy H. Sheinberg, who represents the interests of the minors, submitted an affirmation of services and contemporaneous time sheets reflecting that she provided 14.4 hours of legal services in connection with the representation of her two wards. H. William Hodges, III, who represents the interest of Kevin, indicated in his final report that he devoted 62.75 hours to this matter, but the court has not yet received his affirmation of services and time records; he is directed to file these within 30 days of the date of this decision. Moreover, until such time as the judicial accounts are filed by the trustee, it is impossible to ascertain whether the size of the trust corpus can bear the full cost of the fees warranted by the excellent services of the guardians ad litem in this matter. It is well established that the size of the estate or trust 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. Accordingly, the court will defer fixing the fees of the guardians ad litem in connection with the present petition until the filing of the affirmation of services and time sheets and petitioner's accounts.

This constitutes the decision and order of the court.

Dated: June 3, 2010

JOHN B. RIORDAN  
Judge of the  
Surrogate's Court