

Matter of David Carniol
2010 NY Slip Op 31706(U)
June 30, 2010
Surrogate's Court, Nassau County
Docket Number: 337432/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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Accounting by Rhonda Carniol, as the Executor of the
Estate of

File No. 337432/C

DAVID CARNIOL,

Dec. No. 26300

Deceased.
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In this accounting proceeding, the court's prior decision (Dec. No. 895/2010) directed counsel to submit an affirmation of legal services so that the issue of attorney's fees could be submitted for decision. The original accounting showed unpaid legal fees of \$20,000.00 and previously paid fees of \$25,591.29.

Counsel has now submitted an affirmation of legal services and an updated accounting which shows that the total amount of fees and disbursements incurred on behalf of the estate through January 31, 2010 is actually \$90,964.14, of which \$69,356.88 has been paid and \$21,607.26 remains unpaid. In addition, counsel estimates an additional \$2,500.00 of legal services to finalize the estate administration. The accounting shows charges to the accounting party of \$403,970.74. The affirmation of legal services was served upon the interested parties, and no objection has been filed.

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 affirmation of legal services shows that attorneys and paralegals at counsel's firm rendered a total of 434 hours at hourly rates ranging from \$140.00 per hour to \$480.00 per hour. Annexed to the affirmation are contemporaneous time records. According to these records, counsel's firm performed the following services: (i) performed all necessary work to admit the will to probate, including drafting the petition and all accompanying documents; (ii) analyzed ambiguities in the decedent's will; (iii) marshaled assets; (iv) prepared an inventory of all Surrogate filings; (v) valued assets of the estate; (vi) prepared waivers of accounting, release and refunding bonds; (vii) attended to issues concerning the transfer of the decedent's co-op pursuant to the terms of the will, including an analysis of New York law, attempted to obtain the consents of the co-op board and the trust beneficiary to sell the co-op; (viii) prepared, filed and supplemented the executor's first and final account; (ix) represented the executor in connection with a motion to remove her; (x) advised the executor regarding commissions; (xi) prepared and filed an application to modify the terms of the Article FOURTH trust to obtain court permission to sell co-op; (xii) appeared at court conferences and hearings; (xiii) communicated with the guardian ad litem; (xiv) performed work in connection with issues concerning the Article FIFTH trust and (xv) attended to issues concerning the estate's maintenance of the co-op during pendency of the proceedings.

The contemporaneous time records indicate that the firm's fee includes disbursements. A review of those disbursements shows that the firm's fee includes \$4,369.12 in telephone, telefax, postage and photocopying charges, as well as a travel expense of \$69.00. These charges are not

compensable. In addition, a number of entries were for work that was secretarial or executorial in nature. The court recognizes that the estate was complicated by the issue of the co-op, however, the size of the estate operates as a limitation on the fee.

Accordingly, considering all of the factors used to determine the reasonableness of legal fees, the court fixes the fee and disbursements of counsel in the amount of \$75,000.00. Any sums paid in excess of this amount shall be refunded to the estate.

Settle decree.

Dated: June 30, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court