

<b>Matter of Anna E. Sito</b>
2010 NY Slip Op 31710(U)
June 30, 2010
Surrogate's Court, Nassau County
Docket Number: 346734/A
Judge: John B. Riordan
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SURROGATE'S COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

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In the Matter of the Accounting of Patricia Purvis, as  
the Executor of the Estate of

ANNA E. SITO  
a/k/a ANNA SITO,

File No. 346734/A

Dec. No. 26598

Deceased.

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Submitted for review and approval is the account of Patricia Purvis as executor of the estate of Anna Sito. The executor seeks to settle her account and also seeks (1) approval of attorney's fees; (2) approval of accounting fees; (3) approval of administration expenses and (4) approval of certain claims. The New York State Attorney General appeared in the proceeding, but did not file objections to the account. On October 30, 2009, the court appointed a guardian ad litem for 5 infants: Jillian Carbone, (identified as Joann Carbone in the decedent's last will and testament dated February 20, 2007); Nicholas Carbone, Lindsay Carbone, Kevin Carbone, and Michael F. Carbone. The guardian ad litem has filed her report dated January 6, 2010, as well as an affirmation of services in which she asks the court to fix her fee. The guardian ad litem recommends that the account be accepted, except with respect to certain accountant's and attorney's fees as set forth in detail below.

The decedent died testate on March 15, 2007. The account is for the period March 15, 2007 to July 22, 2009. The account shows total charges of \$359,464.66, total credits of \$9,830.45 and a balance on hand of \$349,634.21.

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 this 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]). 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]). 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]).

These factors apply equally to an attorney retained by a fiduciary or to a court-appointed guardian ad litem (*Matter of Burk*, 6 AD2d 429 [1st Dept 1958]; *Matter of Berkman*, 93 Misc 2d 423 [Sur Ct, Bronx County 1978]; *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]). With respect to a guardian ad litem’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]).

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, and telephone calls (*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.

Schedule C-1 of the account shows unpaid attorney's fees for legal services and disbursements rendered to the executor of \$12,000.00. The affirmation of legal services and invoices provided in support of these fees shows that the attorneys expended 58.85 hours of services. The total requested amount of \$12,000.00 is a result of a courtesy discount of several thousand dollars by counsel. A review of the invoices provided shows that certain items billed to the estate were in the nature of executorial duties and that certain disbursements are not compensable; however, the discounted amount more than compensates for these charges, and the court hereby approves in full the requested amount of \$12,000.00 for services and disbursements provided to the estate.

The firm representing the estate is also seeking approval of its claim for legal services provided to the decedent prior to her death, of which \$3,200.000 is shown on schedule C-1 of the account and \$2,875.00 was paid by the decedent during her life. The decedent was not provided with a retainer agreement, as a result of an oversight by counsel. The attorney has submitted an

affirmation in support of the claim. However, the amount of the claim and the amount paid by the decedent do not total the amount as shown in the billing statement. Moreover, the guardian ad litem has objected to the \$3,200.00 claim being paid. For these reasons, the court will require clarification in the form of an affirmation by the attorney requesting payment. The affirmation shall include the services actually rendered, the amount of those services, the amount actually requested, the amount already paid and whether any of the services were with respect to the sale of the decedent's house for which the firm was paid a separate fee and any other fees requested that were not addressed herein. Said affirmation is to be served and filed within 30 days of the date of this decision or the claim in question may be disallowed by the court.

The guardian ad litem has submitted an affirmation of legal services in which she avers that she expended 8.41 hours on this matter at an hourly rate of \$375.00 (totaling \$3,153.25)<sup>1</sup> and an associate at the firm billed 1.75 hours at \$300.00 per hour (totaling \$525.00) for a total fee of \$3,678.25. The services provided were reviewing the account, the petition in support, the closing statement, tax returns and the will, preparing correspondence, communicating with the executor's attorney with respect to specific items in the account. Based upon the criteria established by *Matter of Freeman* (34 NY2d 1 [1974]) and *Matter of Potts* (123 Misc 346 [Sur Ct, Columbia County 1924], *affd* 213 App Div 59 [4<sup>th</sup> Dept 1925], *affd* 241 NY 593 [1925]) as applied to guardians ad litem (*Matter of Burk*, 6 AD2d 429 [1<sup>st</sup> Dept 1958]; *Matter of Reisman*, NYLJ, May 18, 2000, at 34, col 5 [Sur Ct, Nassau County], the court awards the guardian ad litem a fee of

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<sup>1</sup>The affirmation gives a total of \$3,156.25.

\$3,678.25. The guardian ad litem's fee shall be paid within thirty (30) days from the date of the decree to be entered.

With respect to accountant's fees, normally, an accountant's services are not compensable from estate assets unless there exist unusual circumstances that require the expertise of an accountant (*Matter of Meranus*, NYLJ, Mar. 31, 1994, at 37, col 2 [Sur Ct, Suffolk County]). The fee for such services is generally held to be included in the fee of the attorney for the fiduciary (*Matter of Musil*, 254 App Div 765 [2<sup>nd</sup> Dept 1938]). "[T]he purpose of this rule is to avoid duplication (*Matter of Schoonheim*, 158 AD2d 183 [1<sup>st</sup> Dept 1990]). Where the legal fees do not include compensation for services rendered by the accountant, there is no duplication and the legal fee is not automatically reduced by the accounting fee (*Matter of Tortora*, NYLJ, July 19, 1995, at 26 [, col 2])" (Warren's Heaton on Surrogate's Court Practice §93.08 [7th ed]).

The accounting firm of Jay A. Lieberman, C.P.A., P.C., has submitted an affidavit of services requesting fees totaling \$5,475.00, all of which appear on schedule C-1 of the account. The affidavit and attached invoice shows that the firm prepared the decedent's personal income federal and state income tax returns for 2007, prepared the estate's federal and state fiduciary income tax returns for 2007, 2008, 2009 and 2010, prepared the account and performed other services connected to these tasks, for a total of 21.9 hours at \$250.00 per hour. The guardian ad litem states that the hourly rate seems excessive and asks the court to set a reasonable fee for the accounting services performed. However, the court does not find the hourly rate or the total amount requested excessive. Further, the work the firm performed was not duplicative of the

services rendered by the attorney for the executor, and the court approves and approves accounting fees in the requested amount of \$5,475.00.

Reimbursements are approved as follows: Veronica Kovaluskie (\$258.36); Valerie Kovaluskie (\$258.36); Joseph Kovaluskie, III (\$258.36); Michael F. Carbone (\$105.92); Jillian Carbone (\$105.92); Lindsay Carbone (\$105.92); Nicholas Carbone (\$105.92); Kevin Carbone (\$105.93); and Kelly Carbone (\$105.93).

Commissions are approved subject to audit.

This is the decision and order of the court.

Dated: June 30, 2010

JOHN B. RIORDAN  
Judge of the  
Surrogate's Court