

Matter of Hecker

2010 NY Slip Op 32577(U)

August 27, 2010

Sur Ct, Nassau County

Docket Number: 340930/D

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 Final Accounting by
William A. Hecker, as executor of the Estate
of

File No. 340930/D

GEORGINA HECKER,

Dec. No. 26626

Deceased.

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Submitted for review and approval is the amended final accounting filed by William A. Hecker as executor of the estate of Georgina Hecker, deceased. The executor seeks approval of his final accounting, the fixing of commissions, approval of attorney’s fees, and the appointment of Christopher Hecker as a custodian of the jewelry bequeathed to Colleen Hecker, a minor, and approval of the distribution of the estate.

The decedent died a resident of Nassau County on January 10, 2006. She left a last will and testament dated January 9, 2006 (the “Will”) which was admitted to probate on June 2, 2006. Preliminary letter testamentary were issued to petitioner on February 22, 2006 and full letters testamentary were issued to petitioner on June 2, 2006. Decedent was survived by her son William A. Hecker, the executor and petitioner herein, and three children of her pre-deceased son, Robert Hecker, whose names are Christopher, Colleen and Julian Hecker. Colleen, born on July 7, 1994, and Julian, born on December 9, 2000, are minors. Petitioner is also the trustee of three inter vivos trusts created by decedent for the benefit of her three grandchildren by her predeceased son. Terence E. Smolev was appointed as guardian ad litem to act on behalf of Colleen and Julian and has filed his report with the court. The report analyzes the account and finds it proper in form and substance. No objections are raised by the guardian ad litem.

Decedent's Will provides for the distribution of her residuary estate 40% to William Hecker and 20% each to the three inter vivos trusts established for the benefit of Christopher, Colleen and Julian.

The account as filed and amended shows total credits of \$50,573,330.61 and total charges of \$33,865,178.81, leaving a balance on hand as of June 30, 2009 of \$16,708,151.80.

With respect to the issue of 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. 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 Freeman*, 34 NY2d 1

[1974]; *Matter of Potts*, 123 Misc 346 [Sur Ct, Columbia County 1924], *affd* 213 App Div 59 [4th Dept 1925], *affd* 241 NY 593 [1925]). 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 [3rd 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 [3rd 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 petition requests, among other things, approval of additional attorney's fees for Bruce M. DiCicco in the sum of \$37,238.88. Counsel's amended affidavit of legal services seeks total fees and disbursement of \$167,161.16 of which \$17,161.16 remains unpaid. The services were ably performed, of a complex nature and performed over an extensive period of time. No objections have been filed and the guardian recommends approval of the fees as requested. Counsel's application is accordingly granted for the amount requested.

The guardian ad litem has filed an affidavit of services wherein he states that he spent in excess of 61.4 hours on the matter at a regular billing rate of \$500.00 per hour or \$30,700.00.

The services included review of the court file in this decedent's estate as well as the estate of decedent's predeceased spouse, from which a portion of the estate corpus was obtained, and review and analysis of the accounting and the amendment thereto.

In consideration of these factors, and following the criteria established in *Matter of Freeman*, (34 NY2d 1 [1974]) and *Matter of Potts*, (213 App Div 59 [4th Dept 1925], *affd* 241 NY 593 [1925]), the court awards a fee in the amount of \$30,700.00. The guardian ad litem fee shall be paid within 30 days of the entry of the decree to be entered herein.

The appointment of Christopher Hecker as guardian or custodian of the jewelry bequeathed to Colleen Hecker, a minor, requires a separate petition and the request for his appointment is, therefore, denied without prejudice. The decree shall provide that the executor shall be discharged.

The accounting and commissions are approved subject to audit.

Settle decree.

Dated: August 27, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court