

Matter of Belfiore

2010 NY Slip Op 32797(U)

September 30, 2010

Surrogate's Court, Nassau County

Docket Number: 343257

Judge: John B. Riordan

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

-----x
 Accounting by Dennis Belfiore, as Trustee of the
 RENEE M. BELFIORE Revocable Trust

File No. 343257

Dec. No. 26665

under Agreement dated September 27, 2005.
 -----x

In this accounting proceeding, the only issues before the court are attorneys' fees, the accountant's fee and the fee of the guardian ad litem.

The trustee's accounting covers the period September 27, 2005 through June 30, 2007 and shows charges to the accounting party of \$271,279.93. The court is not requiring the accounting party to bring the account current at the present time.

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]).

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 Misc2d 423 [Sur Ct, Bronx County 1978]; *Matter of Reisman*, NYLJ, May 18, 2000, at 34 [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 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.

With respect to accountants' fees, normally, an accountant's services are not compensable out of estate assets unless there exist unusual circumstances that require the expertise of an

accountant (*Matter of Meranus*, NYLJ, Mar. 31, 1994, at 37 [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 AD 765 [1938]). “[T]he purpose of this rule is to avoid duplication (*Matter of Schoonhein*, 158 AD2d 183 [1st 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)” (Warren’s Heaton on Surrogate’s Court Practice §93.08 [7th ed]).

The attorney has submitted an affirmation of legal services which shows that the attorneys and paralegals at the firm rendered approximately 381 hours on this matter at hourly rates ranging from \$125.00 per hour to \$400.00 per hour. The services the firm performed included the following: (1) drafted estate planning documents for the decedent, including a revocable trust, pourover will, health care proxy and durable power of attorney; (ii) prepared beneficiary designation forms; (iii) corresponded with insurance companies; (iv) responded to inquiries made by attorneys for Stephen Scott (the decedent’s estranged husband); (v) assisted the trustee with the administration of the trust and the estate; (vi) appeared in the Family Court support proceeding commenced by Stephen against the estate; (vii) appeared in the Family Court proceeding to vacate a prior order against Stephen for child support; (viii) appeared in the proceeding to compel production of the will; (ix) conducted research regarding possible right of election by Stephen; (x) pursued settlement discussions with Stephen and prepared draft stipulations of settlement; (xi) commenced accounting proceeding and prepared related court papers; (xii) advised the trustee regarding miscellaneous trust issues; (xiii) appeared on return date of citation; (xiv) attended court conferences; (xv) communicated with guardian ad litem; and (xvi) drafted settlement agreement. As of April 24, 2009, the firm incurred \$96,759.00 of time,

of which \$19,180.35 has already been paid, and \$1,007.76 of disbursements. The firm has agreed to accept a total of \$50,000 for all fees and disbursements, inclusive of the \$19,180.35 previously paid and the \$3,600.00 representing the accountant's fee for preparation of the accounting. This represents a reduction of \$47,000.00 from the fee requested and does not include the additional services performed by the firm after April 24, 2009. The guardian ad litem has filed a second supplemental report in which he states that he has no objection to a total fee of \$50,000.00, inclusive of the accountant's fee and the previously paid amount. Accordingly, the court approves a total fee of \$50,000.00 to counsel for the trustee as reasonable compensation.

With respect to the guardian ad litem's fee, the court notes that the guardian ad litem states that he spent a total of 83.10 hours on this matter. The services he performed were (i) meeting with his ward and her father; (ii) reviewing the accounting; (iii) attending court conferences; (iv) participating in settlement discussions and reviewing proposed settlement agreements; and (v) preparing his report, a first supplemental report and a second supplemental report. The services performed by the guardian ad litem were, characteristically, of the utmost quality. The court approves a fee of \$17,000 as reasonable compensation for the services performed by the guardian ad litem. Said fee shall be paid within thirty (30) days of the date of the decree to be entered herein.

Settle decree.

Dated: September 30, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court

