

Matter of Casaceli

2010 NY Slip Op 33601(U)

December 23, 2010

Surrogate's Court, Nassau County

Docket Number: 333169/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 Account by Gregory Casaceli, as the
Executor of the Estate of

File No. 333169/A

EMIL CASACELI,
a/k/a LARRY CASACELI,

Dec. No. 26869

Deceased.

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This is a decision after a bench trial of the accounting of Gregory Casaceli, the executor of the estate of Emil (a/k/a Larry) Casaceli. Prior to trial, the objectant, Gary Casaceli, by order to show cause, sought the revocation of letters testamentary under SCPA 711 and 719 issued to Gregory on the basis of self-dealing, conversion and breach of fiduciary duty. The application was held in abeyance pending the trial of the accounting.

Factual Background

The decedent, Emil Casaceli, died on May 1, 2004, leaving a will which was admitted to probate on July 7, 2004. The decedent was survived by his four children, Gregory Casaceli, Gary Casaceli, Steven Casaceli and Patricia Smith. The will makes pre-residuary cash bequests of \$45,000.00 to each of Gregory, Steven and Patricia. The will further provides that the decedent's residuary estate be divided equally among his four children. Letters testamentary issued to Gregory on July 7, 2004.

Gregory originally filed a First and Final Accounting of his proceedings covering the period May 1, 2004 through January 31, 2008. Thereafter, Gregory filed a document entitled "First Interim Account of the Estate of Emil Casaceli." This document covers the period from May 1, 2004 to January 31, 2008, the same period covered by the First and Final Accounting. The Interim Account was verified by Gregory on February 18, 2009, nearly one year after the

First and Final Account.

Gary filed objections to the accounting which raised the following issues:

1. Gregory took an advance payment of commissions in the amount of \$10,000.00 on September 15, 2005 without an order of the court. Gary seeks the return of the \$10,000.00 plus interest.

2. Gregory made distributions to his company, Cedar Pine Construction Corporation, on June 8, 2005 in the amount of \$100,000.00 and on January 9, 2006 in the amount of \$20,000.00. Gregory credited the \$100,000.00 payment as a distribution to himself. With respect to the \$20,000.00 distribution, Gregory repaid it to the estate without interest. Gary alleges that Gregory engaged in self-dealing by making an interest-free loan to his company.

3. Gary also objects to receiving \$66,285.00 less of his distributive share. According to Gary, Gregory took this money from Gary's distributive share and paid it to himself. The money was returned to the estate by Gregory, but he since has refused to distribute the funds to Gary.

4. The account shows an excess distribution of \$66,285.00 to Gregory.

The issues raised in the statement of issues adopted at trial were: (1) is the decedent's son, Gary Casaceli, indebted to the estate for monies loaned to said Gary Casaceli by the decedent during the decedent's lifetime? and (2) is the accounting proper?

The parties stipulated at trial that the estate had the burden of proof on the issue of whether the decedent make a loan to Gary. In addition, the parties acknowledged that Gregory took an advance payment of commissions in the amount of \$10,0000.00, without prior court order and repaid the sum of \$10,000.00 to the estate. The only witnesses to testify at the trial were Gregory Casaceli, Patricia Smith and Gary Casaceli.

The estate called two witnesses, Gregory Casaceli and Patricia Smith. Gregory testified at that some time after their father's death, the decedent's four children and Gary's wife, Linda, met at Gregory's house to go over amounts that were owed to their father. Patricia stated that she owed her father \$5,000.00 and Steven stated that he owed his father \$50,000.00. Both agreed that there would be an adjustment to each of their respective distributive shares for the outstanding loans. The question of whether Gary owed the estate any money was also the subject of the meeting. The basis of the discussion concerning monies owed by Gary was a sheet of paper in the decedent's handwriting found by Gregory. Gregory testified that Gary was with him when Gregory found the handwritten sheet. The sheet of paper was admitted into evidence as Exhibit 3 solely for the purpose of establishing the context of Gary's statements regarding the amounts he originally owed, the amounts he paid back, and the amount he still owes and not as direct evidence of the amount owed or for the truth of its contents.

According to Gregory, Gary looked at the document and commented that the decedent was "crazy" and that he did not owe that amount. Gary told his siblings that he had paid his father a portion of the amount shown and had receipts confirming such repayment which he would produce. Gregory testified that Gary did not deny that at some point in time he owed the amount indicated on the handwritten document. Gregory testified that Gary stated he owed \$3,400.00 and had receipts for everything else. According to Gregory, Gary said that the receipts were in his attic, but despite his assertion, Gary never produced any such receipts. Gregory further testified that Gary did in fact pay the \$3,400.00 he admitted that he still owed. Gregory admitted that he reduced Gary's share by \$80,627.00, the amount he believes Gary still owes the estate.

In addition, Gregory acknowledged that he did not include the loan in the First and Final Accounting he filed because Gary “swore up and down that he had receipts and that he was going to show it to us.” Gregory further testified that he also personally lent Gary money. According to Gregory, he took out a personal loan so he could make a loan to Gary. That loan has never been repaid and Gregory instituted an action in the Supreme Court, Nassau County, to collect the indebtedness from Gary.

On cross-examination, Gregory testified that 212 Maple Realty Corp. was formed by the four siblings to manage the property located at 212 Maple Avenue, Rockville Centre. Admitted into evidence was a document (Exhibit 4) signed by Gary in which he acknowledged that the sum of \$26,917.86 was owed by his wife, Linda, to 212 Maple Realty Corp. In that document, Gary states that the balance may be deducted from his portion of the sales proceeds of 212 Maple Avenue.

Gregory also testified that he prepared the handwritten breakdown of money Gary owed which was admitted into evidence as Exhibit 6 and which reflected money owed for rent by Equity Billing. According to Gregory, 212 Maple Avenue rented space to Linda’s company Equity Building. Gregory admitted that a large portion of the amount shown on the breakdown was for rent owed by Equity Billing. In addition, Gary indicated on that handwritten sheet that the sum of \$3,400.00 was owed to Maple Avenue Realty. Gregory stated that notation was inaccurate. Another document was also admitted into evidence (Exhibit 5) which indicated that \$3,400.00 was an “amount owed in debt to Estate of Emil Casaceli.” Regarding the repayment of \$3,400.00, Gregory testified that Gary did not write a check to the estate. Instead, said sum was taken out of Gary’s share of the sales proceeds from one parcel of realty, but Gregory could

not remember if it was 212 Maple Avenue.

Gregory admitted on cross-examination that he took \$66,000.00 from Gary's distributive share as payment for the loan he had personally made to Gary. He did so because he felt Gary was not being honest. Gregory testified that he ultimately returned the \$66,000.00 to the estate. Gregory also testified that he knew Gary did not pay the decedent rent for years because his business, Cameo Mica, was in financial difficulty. Gregory also acknowledged that an a document entitled "Analysis of Distributions" admitted into evidence as Exhibit 7 was prepared by the accountant for the estate. Gregory admitted that although the accountant recorded the loans due from Steven and Patricia, there was an entry of zero for Gary in the loan column of the document.

The next witness to testify was Patricia Smith, the decedent's daughter. On direct examination, Patricia Smith testified as follows. Patricia testified that she was present at the meeting at Gregory's house to discuss monies owed to the estate by the siblings. According to Patricia, before their father's death, Gary mentioned to her that their father said Gary owed him almost \$100,000.00. Gary said their father was "crazy" and he had paid all that back. Patricia suggested that Gary bring the documentation showing repayment with him to the meeting, but he did not. At the meeting among the siblings, Gary said he did not owe the money shown on the handwritten sheet, that he had paid it back and that he had receipts to prove it. Gary was adamant that he had the receipts.

On cross-examination, Patricia testified that there was, in fact whiteout on the handwritten document admitted into evidence as Exhibit 3. She did not know who put the whiteout on the document, but assumed it was her father. She acknowledged that she did not

have personal knowledge of any of the alleged transactions recorded in Exhibit 3.

Gary testified that at the time of the decedent's death, he did not owe him any money; and that, in fact, he had never borrowed money from his father. When he borrowed money, he borrowed it from his mother and he would pay her back. Gary never exchanged any receipts with his mother, either when she gave him money or when he paid her back.

On cross-examination, Gary denied that he ever admitted owing a balance of \$3,400.00. Gary could not recall what the \$3,400.00 that he paid was for. According to Gary, he only agreed to have \$3,400.00 deducted from the proceeds due him from 212 Maple Avenue because he could not account for that money. When asked if he did this out of the goodness of his heart, he replied "yes."

Gary also admitted that he rented space for his business, Cameo Mica, from his parents. He paid them rent, but did not know how far back he had receipts for the rent. Gary denied owing \$73,400.00 in rent as recorded on Exhibit 3. Gary admitted that he did not have any receipts for any payments made to either his mother or his father but, he stated he would look for them at home. Gary claimed that he never dealt with his father and always paid the rent to his mother. According to Gary, his mother, not his father, handled all financial matters and kept the records.

Gary further testified that it was his brothers and sister who came up with the number of \$3,400.00. In addition, Gary argued that Exhibit 3 was a fabrication. Also admitted into evidence was a document signed by Gary which stated "I, Gary Casaceli, has [sic] borrowed 2,700 in cash on March 6, 2002 from dad for painting Linda's new office." Gary stated that even though he signed this document he did not borrow the money, but rather his wife did.

On redirect, Gary testified that, in 2002, the decedent lent money to Gary's wife as a favor for painting her office. Gary testified that even though it was his wife who borrowed the money, he paid it back. Gary also testified that the \$3,400.00 he paid back was to Maple Avenue Realty, not the estate.

After the trial, each party submitted a post-trial memorandum of law.

The petitioner argues that the testimony at trial confirmed that Gary admitted to his siblings at the meeting that he at one time owed his father the sum reflected on Exhibit 3. Gary did not dispute that he had owed the amount shown, but rather claimed that the money had been repaid, with the exception of \$3,400.00. Thus, by claiming to have repaid these funds (other than the \$3,400.00), Gary acknowledged the existence of the debt at one point in time. Although Gary claimed to have receipts evidencing the repayment, he has never produced a single receipt.

Gregory further argues that Gary should be equitably estopped from asserting a statute of limitations defense because: (1) Gary knowingly and intentionally made a misrepresentation as to his possession of the receipts; (2) Gary made this misrepresentation with the intention that his siblings would refrain from bringing suit to recover the debt; and (3) Gary knew that he had never repaid the debts and did not have receipts. In any event, Gregory claims that the partial payment of \$3,400.00 revived the running of the statute of limitations. Gregory further argues that the \$3,400.00 was never deemed to be in full repayment of the outstanding debt. Rather, it was a partial payment subject to the production of receipts. Those receipts, Gregory argues, were never produced.

Gary argues that Gregory has failed to carry his burden of proof on the issue of the debt by establishing by a preponderance of the credible evidence that Gary owed any monies to the

estate. Gary argues that the original account, verified by Gregory, did not include the loan. Gary argues that the “entire sum and substance of support for the alleged ‘loan’ due from ... [him] was a single page of hand-scrawled figures and notations, suffused with ‘whiteout’ material covering portions of it.” Neither Gregory nor Patricia had any first-hand knowledge of the document or who applied the whiteout. Gary disputes Gregory and Patricia’s testimony that he acknowledged the loan. Gary claims that he did not owe his father any money and that he told his siblings this at the meeting. Gary also believes the handwritten sheet is a fabrication. Gary argues that Gregory fabricated the loan because he “had been caught stealing ... from the Estate, and he had been confronted with that theft in the context of his SCPA 2103 examination.”

Gary also argues that the “Analysis of Distributions” prepared by the estate accountant and admitted into evidence as Exhibit 7 supports his position because it did not reflect any loans owed by Gary to the estate. Gary contends that the only monies he agreed to repay were monies owed by his wife’s company to 212 Maple Avenue Corporation, not to his father’s estate. Moreover, the one time Gary did borrow \$2,700.00 from his father for painting his wife’s office, he put it in writing.

In addition, Gary contends that Gregory should be removed as executor because (i) he paid himself a \$10,000.00 commission in 2005, without prior court order; (ii) he commingled funds with his company Cedar Pine in the amounts of \$100,000.00 and \$20,000.00; crediting the \$100,000.00 to himself as a distribution and returning the \$20,000.000 without interest; and (iii) underpaid Gary’s share by \$66,285.00 and overpaid his own share.

Analysis

Generally, in determining whether a valid loan exists, a court will consider such things as, “whether notes or other written acknowledgments of indebtedness were executed, collateral was given, a method or time for repayment was fixed by agreement and if there exists any evidence of a systematic repayment” (*Matter of Palma*, 17 AD3d 817, 818 [3d Dept 2005]). In the absence of an instrument evidencing the transaction, a factual determination must be made as to whether a loan was made (*Walther v O’Connell*, 72 Misc 2d 316 [Civ Ct, Queens County 1972]; 3B-38 Debtor-Creditor Law §38.05 [2007]). There is no presumption that money, which has been advanced, was advanced as a loan (*Matter of McNally*, 54 AD2d 1103 [4th Dept 1976]). In fact, it is presumed that the delivery of a check arises from an antecedent debt and is not a loan (*Matter of McNally*, 54 AD2d 1103 [4th Dept 1976]). The person alleging that a loan was made has the burden of proof (*Matter of McNally*, 54 AD2d 1103 [4th Dept 1976]).

With respect to the issue of the statute of limitations, “[t]here are two ways in which the statute of limitations may be tolled. One involves part payment and the other a signed acknowledgment” (*Erdheim v Gelfman*, 303 AD2d 714, 715 [2d Dept 2003]). It is well-settled that an acknowledgment of a debt may be sufficient to toll the statute of limitations (*Scheper v Briggs*, 28 AD 115 [1st Dept 1898]). As to an acknowledgment, “it must be a signed written acknowledgment of an existing debt which contains nothing inconsistent with an intention on the part of the debtor to pay it” (*Erdheim v Gelfman*, 303 AD2d 714, 715 [2d Dept 2003]; General Obligations Law §17-101; *Lew Morris Demolition Co. v Board of Educ. of City of N.Y.*, 40 NY2d 516, 521 [1976]). As to part payment, the statute will be tolled if it is demonstrated that it was “payment of a portion of an admitted debt, made and accepted as such, accompanied by

circumstances amounting to an absolute and unqualified acknowledgment by the debtor of more being due, from which a promise may be inferred to pay the remainder” (*Lew Morris Demolition Co. v Board of Educ. of City of N.Y.*, 40 NY2d 516, 521 [1976]). Thus, the circumstances of the part payment must be sufficient from which to infer a promise to pay the remainder (*Matter of Birnbaum*, 177 AD2d 170 [4th Dept 1992]).

The parties agree that the burden is on Gregory, as the fiduciary of the estate, to establish that the loan existed. Here, there was no evidence of a written note setting forth collateral or a method or time for repayment. Accordingly, in the absence of an instrument evidencing the transaction, a factual determination must be made as to whether a loan was made.

It is well settled that a trier of fact in an evidentiary hearing has the unique ability to make credibility assessments based upon its opportunity to view the witnesses, hear the testimony and observe their demeanor (*Matter of Piterniak*, 16 AD3d 513 [2d Dept 2005]; *Jacoby M.D., P.C. v Loper Assocs.*, 249 AD2d 277 [2d Dept 1998]).

In the instant case, the court is presented with two drastically different versions. Gregory and Patricia argue that their father’s handwritten notes evince a debt which Gary acknowledged having owed at one point in time but which he now claims to have repaid a significant portion and has receipts proving such repayment. Gary disputed their testimony in its entirety. He claims that he has never borrowed money from his father. When confronted with a document signed by him acknowledging that he owed his father \$2,700.00, Gary stated that he did not owe that amount but, rather, his wife did. Gary stated that he only borrowed from his mother and he repaid all amounts he owed to her. Gary further claimed that his siblings came up with the \$3,400.00 figure which he repaid to Maple Avenue.

The court finds that Gary's testimony was contrived. Gary testified in generalities and displayed selective memory and forgetfulness. The court finds the testimony of Gregory and Patricia to be more credible. Accordingly, the court finds that Gregory has met his burden of proof that the decedent loaned Gary funds in the amount of \$80,627.00 reflected on Exhibit 3. Although Gary and Patricia's testimony reflects that there was a mathematical error in Exhibit 3, Exhibit 3 was not admitted as evidence of the amount of the debt, but rather only as to possible admissions by Gary regarding the amount owed and repaid. The court has accepted the testimony that Gary was confronted with the document and did not dispute that he once owed the amount reflected therein, but rather claimed that he repaid the amount owed less than \$3,400.00, which he could prove by the production of receipts. In fact, the court notes that even at the trial Gary incredulously stated that he had to go home and look for proof of rental payments. Gary is to be credited with a repayment of \$3,400.00.

As to Gary's statute of limitations defense, the court finds that the partial payment of \$3,400.00 was a payment of an admitted debt, subject to upwards adjustment by Gary for the failure to provide receipts. Accordingly, the statute of limitations does not act as a bar to the collection of the debt.

As to the issue of commissions, commissions are not ordinarily payable until the entry of a decree settling a fiduciary's account (SCPA 2307 [1]; 2308 [1] and 2309 [1]; *Matter of Worthington*, 141 NY 9 [1894]; *Beard v Beard*, 140 NY 260, 264 [1893]; *Matter of Stalbe*, 130 Misc 2d 725 [Sur Ct, Queens County 1985]; 7 Warren's Heaton on Surrogate's Court Practice §103.06). Taking a commission prior to the settlement of an account without securing court approval pursuant to SCPA 2310 or SCPA 2311 exposes the fiduciary to the potential of being

surcharged (*Matter of Hildreth*, 274 AD 611 [2d Dept 1949], *affd* 301 NY 705 [1950]; *Matter of Crippen*, 32 Misc 2d 1019 [Sur Ct, New York County 1961]; Turano, McKinney's Practice Commentaries to SCPA 2310, at 487-488). Ordinarily, the court will allow the commissions but will surcharge the fiduciary the amount of interest the estate lost because of payment, most commonly at the statutory interest rate under CPLR 5004, from the date the unauthorized commissions were taken until the entry of the decree settling the account (*Matter of Dubin*, 166 Misc 2d 971, 972 [Sur Ct, Bronx County 1995]; *Matter of Mattes*, 12 Misc 2d 502 [Sur Ct, New York County 1958]; *Matter of McKee*, 147 Misc 889 [Sur Ct, New York County 1933]; *Matter of Bosch*, 201 Misc 890 [Sur Ct, Kings County 1952]; *Matter of Arkinson*, NYLJ, Sept. 6, 2002, at 25, col 1 [Sur Ct, Westchester County]; *Matter of Dickman*, NYLJ, Aug. 8, 2000, at 28, col 3 [Sur Ct, Nassau County]; *see generally* 7 Warren's Heaton on Surrogate's Court Practice 103.06 at footnote 5).

This court has generally taken the position the taking of advance commissions without prior court approval is grounds for "automatic surcharge at the statutory rate of interest of 9%" (*see e.g. Matter of Kiminas*, Dec. No. 981, Jan. 13, 2006).

Considering all the circumstances in this case and the above principles, the court surcharges the executor 9% statutory interest on the amount paid of \$10,000.00 from the date taken until the date of repayment.

The account also shows that Gregory took \$100,000.00 and \$20,000.00 from the estate and paid it to his company, Cedar Pines. Gary credited himself with the \$100,000.00 as a distribution and ultimately repaid the \$20,000.00. Nevertheless, the court surcharges Gregory 9% statutory interest on the amount of \$20,000.00 from the date taken until repayment and on the

\$100,000.00 advance from the date taken until the date of this decision.

The accounting and Gregory's testimony also shows that Gregory took \$66,000.000 from Gary's share as repayment for a personal loan he made to Gary. The court finds that Gregory acted in bad faith, motivated solely out of his own self-interest in insuring that the amount be repaid.

Thus, Gregory's testimony and account show that Gregory (i) withdrew \$10,000.00 in commissions without prior court order; (ii) made a \$20,000.00 distribution to his company, which he ultimately repaid; and (iii) withdrew \$66,000.00 of Gary's share as repayment for an alleged loan Gregory made to Gary and paid it to himself. The record confirms that Gregory engaged in misconduct with respect to the administration of the estate. Accordingly, the court denies him commissions, but declines to revoke his letters.

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 attorney has submitted an affirmation of legal services and a supplemental affirmation of legal services which shows that the attorney rendered approximately 110 hours at the hourly rate of \$350.00 per hour for a total of \$36,000.00 plus a flat fee of \$10,000.00 for preparation of the accounting. The services performed by counsel included services in connection with the probate of the will; services with respect to the sale of two properties owned

by the decedent; review of the antenuptial agreement between decedent and his spouse; review of appraisals; drafting federal estate tax return; appearances at court conferences; preparation of the accounting, work in connection with the Supreme Court proceeding; preparation for trial and conducting of trial. In addition, disbursements incurred amount to \$1,911.15 consisting of filing fees, certified mailings, process serving fees and fees for certificates of letters.

Considering all of the factors used to determine the reasonableness of fees, the court fixes the fee of counsel for the executor in the amount of \$35,000.00, plus disbursements in the amount of \$1,911.15.

Settle decree.

Dated: December 23, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court