

**Matter of Berkowitz**

2010 NY Slip Op 33605(U)

December 16, 2010

Surrogate's Court, Nassau County

Docket Number: 349191/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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 In the Matter of the Account of Proceedings of  
 Robert P. Berkowitz and Bernetta Katz,  
 as Executors of the Estate of

File No. 349191/C

Dec. No. 26830

ARLYNE BERKOWITZ,  
 a/k/a ARLENE BERKOWITZ

Deceased.

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Before the court is the first and final account of Robert P. Berkowitz and Bernetta Katz as executors of the estate of Arlyne Berkowitz, who died a resident of Island Park, New York, on October 30, 2007, leaving a will dated November 18, 2003. The account was initially filed on February 18, 2009 in response to a petition to compel an account filed by Laura Murphy on January 20, 2008. The account was subsequently amended on February 26, 2009. A guardian ad litem was appointed by the court to represent the interests of decedent's incapacitated granddaughter, Megan Murphy, on June 8, 2009.

In Article Third of the will, decedent provided a bequest of \$50,000.00 to each of four grandchildren, *viz.*, (1) Tara Murphy Volz, (2) Steven Berkowitz, (3) Bridget Murphy, and (4) Megan Murphy (whose share was to be held by the co-executors in a discretionary trust for her benefit). In Article Fifth of the will, decedent bequeathed \$30,000.00 to Bernetta Katz. In Article Sixth the decedent bequeathed \$250,000.00 to Laura Murphy, to be held by the co-executors in a discretionary trust for life, after which the balance remaining was to be added to the Article Third trust for the benefit of Megan. The total of cash bequests under the will was \$480,000.00.

The account as amended shows the receipt of \$496,321.29 of estate principal, which was supplemented by income collected totaling \$4,714.88. This resulted in total charges of \$501,036.17. This amount was reduced by \$3,222.32 of realized decreases in principal and administrative expenses through January 20, 2009 in the amount of \$96,186.00. Although the summary statement which precedes the amended accounting reduces the balance on hand by the Schedule C-1 unpaid administrative expenses of \$2,475.00, the actual balance on hand as of the date of closing is \$401,627.85. In Schedule J of the account, the executors note that the estate lacks sufficient funds to pay all of the bequests contained in the will. The executors attempted to admeasure the parties' interests by providing the court with a proposed pro rata distribution of the estate assets, which would result in a reduction of the share of each interested party.

The executors seek approval of the following: (1) the accounting; (2) an additional fee of \$2,475.00 for the guardian ad litem appointed in connection with the probate proceeding; (3) the reimbursement of Robert Berkowitz in the amount of \$67,204.94 as reflected on Schedule C; (4) the reimbursement of Bernetta Katz by Robert Berkowitz in the amount of \$2,016.00, as reflected on Schedule C and included in the total amount reimbursed to Robert Berkowitz; (5) paid attorney's fees to Stuart Moscovitz in the amount of \$29,150.00; and (6) the distribution of the estate. In addition, the court must consider the stipulation of settlement subsequently entered into among all of the interested parties, as discussed below, and set the fee for the guardian ad litem appointed in connection with the present proceeding.

This court previously issued decision 100 on March 27, 2008 admitting decedent's will to probate, and decision 415 on August 19, 2008, in connection with the construction of the bequests in trust under Articles Third and Sixth of the will. In the latter decision, petitioners

were directed to file and serve a supplemental citation on the guardian ad litem. Following extensive negotiations and a court conference, all of the interested parties entered into a stipulation of settlement on May 10, 2010, which reflected that Robert P. Berkowitz and Bernetta Katz had each filed a renunciation to serve as a trustee of the trusts created under decedent's will, on September 25, 2009 and August 26, 2009, respectively. Relevant to the account, the parties further agreed that (1) the bequests to Laura, Megan, Tara and Bridget will not be pro rated but will be satisfied in the full amount set by the decedent; (2) the bequest for the benefit of Megan will be paid to a supplemental needs trust, and Tara and Bridget will serve as trustees; (3) the bequest for the benefit of Laura will be paid to a trust to be created pursuant to the terms of decedent's will, with Tara and Bridget serving as trustees; (4) the sum of \$20,247.00 plus interest collected by Laura from the single pay qualified annuity held by RiverSource Life Insurance of NY, less taxes paid or chargeable against this fund, was deposited into the trust for the benefit of Megan; (5) distributions for the benefit of Laura will be made by forwarding to the trustee a check of \$239,800.00 payable to the trustee, to be held in escrow pending general releases and the resolution or withdrawal of construction proceedings and the appointment of the trustees; (6) the construction proceeding pending in this court will be deemed withdrawn upon court approval of the stipulation; (7) Article Sixth of decedent's will is deemed to provide that Tara and Bridget, who will serve as trustees of the trust for Laura's benefit in place of petitioners, shall pay income and principal as they deem necessary for Laura's general welfare, and that upon Laura's death principal and undistributed income will be paid over to the trustee of the supplemental needs trust created for Megan's benefit; (8) the \$50,000.00 bequeathed for the benefit of Megan will be payable to the supplemental needs trust created for her, and held in escrow until general releases

are exchanged among all parties and the resolution or withdrawal of the construction proceeding; (9) a supplemental needs trust has been created in Connecticut, where Megan resides, with Tara and Bridget serving as co-trustees; (10) the construction proceeding concerning Article Third of decedent's will is deemed withdrawn upon court approval of the stipulation; (11) after all payments are made pursuant to the stipulation, each of the signators except the court-appointed guardian ad litem for Megan releases the co-executors; (12) the parties shall, on demand, pay over to the executors necessary sums for the payment of proper taxes, expenses or charges; and (13) Laura, Tara and Bridget will each assume a pro rata share of the legal fee of \$15,000.00 payable to Jaspan Schlesinger, LLP.

The guardian ad litem filed her report on May 11, 2010, in which she requests that the court approve the stipulation of settlement and permit her to consent to its terms. The court has carefully reviewed the terms of the stipulation and approves its provisions, including the paragraph under which the bequest of \$50,000.00 for the benefit of Megan will be paid into the supplemental needs trust created for her benefit in Connecticut. The court also approves the resignation of Laura and David W. Murphy as trustees of said trust and the appointment of Tara and Bridget as successor trustees pursuant to Articles VII and IX of the trust and the supplemental documents filed with the court.

Regarding the fee of the attorney for the estate, 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], *aff'd* 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], *aff'd* 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], *aff'd* 213 App Div 59 [4th Dept 1925], *aff'd* 241 NY 593 [1925]; *see e.g. Matter of Spatt*, 32 NY2d 778 [1973]).

The executors have petitioned the court for approval of the payment of \$29,150.00 to the attorney for legal services and \$1,850.00 for accounting services which he rendered in connection with the administration of the estate. These amounts have all been paid. The guardian ad litem has not objected to these payments. The court has carefully reviewed the affirmation of services and the time records submitted to the court. 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]). The attorney devoted more than 304 hours to this matter prior to June 3, 2010 and the record indicates that he devoted additional time since that date. The services provided by the attorney included petitioning for probate; identifying and collecting decedent's assets; preparing the final accounting; and addressing the above-mentioned construction proceedings and settlement agreement as well as the many underlying and related

issues. The court commends the attorney for his skillful representation of the estate. The fees are approved in the amounts requested.

The petitioners have also asked the court to approve an additional fee of \$2,475.00 to the guardian ad litem appointed by the court in connection with the probate of decedent's will. Although the guardian ad litem was awarded and paid \$3,450.00, he was subsequently required to provide additional legal services following the admission of the will to probate, as a construction proceeding affecting his ward was commenced. The resulting report filed by the guardian ad litem reflects that he devoted an additional 8.25 hours to this matter. The court sets the guardian ad litem's additional fee at \$2,000.00.

With respect to the fee of the guardian ad litem appointed in connection with the present proceeding, the court notes that the guardian ad litem's affirmation reflects in excess of 25 hours of services on behalf of decedent's incapacitated granddaughter, Megan. As a result of the efforts of the guardian ad litem, Megan received her full interest in the estate, rather than a pro rata share, and she is also insulated from responsibility for taxes, charges and other expenses. Considering all the factors set forth above concerning attorneys' fees, and the relatively small size of Megan's interest, the court fixes the fee of the guardian ad litem in the sum of \$6,500.00, to be paid within thirty days of the date of decree. The court thanks the guardian ad litem for her outstanding and proficient representation of her ward.

The reimbursement of the co-executors as reflected in Schedule C of the account is approved.

Robert P. Berkowitz has submitted a waiver of executor's commissions dated July 20, 2010. The executor's commission of Bernetta Katz is approved subject to audit.

The decree shall authorize the executor to distribute the balance of the net estate in accordance with the will as modified by the stipulation of settlement.

This constitutes the decision of the court.

Settle decree together with an affidavit bringing the account down to date.

Dated: December 16, 2010

JOHN B. RIORDAN  
Judge of the  
Surrogate's Court