

**Matter of Mitchell**

2010 NY Slip Op 33606(U)

December 20, 2010

Surrogate's Court, Nassau County

Docket Number: 357541/A

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  
In the Matter of the Application of Thomas Vise, Executor  
of the Estate of

EILEEN MITCHELL,

File No. 357541/A

Deceased,

Dec. No. 26694

for a determination pursuant to SCPA 2110 of Attorney’s  
Fees Payable to Robert W. Seiffert, Esq.

-----X

This is an SCPA 2110 proceeding by Thomas Vise, the executor of the estate of Eileen Mitchell, to fix and determine the amount of attorney’s fees paid to Robert W. Sieffert, the attorney the petitioner retained to represent him in connection with administering the estate. The petitioner also requests that the respondent be directed to refund to the petitioner any amount paid in excess of the amount allowed.

The decedent died on July 4, 2009. The petitioner engaged the respondent’s services on July 16, 2009. There is a document attached as an exhibit to the respondent’s affirmation in opposition to the relief requested in the petition that is entitled, “ Retainer Agreement.” It is dated August 13, 2009 and is signed by both the petitioner and the respondent. The text states in full, “ The undersigned hereby agrees to pay Robert W. Seiffert 5% (Five Percent) of the Gross Estate as and for Attorneys (sic) Fees for the Probate of the Last Will and Testament of Eileen M. Mitchell.” The petitioner has paid the respondent a total of \$35,375.00 for services rendered.

The petitioner alleges that the decedent’s testamentary estate is worth between \$366,000.00 and \$400,000.00 and consists of only her two-thirds interest in real property located in Rockville Centre, New York, although the decedent had other assets that passed outside her will. He alleges that the respondent misrepresented the value of the testamentary assets in the

probate petition where he listed the testamentary assets at \$1,100,000.00 and, in doing so, paid a filing fee of \$1,250.00 rather than \$625.00. The petitioner asserts that the respondent told him that New York State mandates a legal fee based on the total assets, which fee would be \$46,000.00. The petitioner also blames the respondent for certain estate-planning decisions made by the decedent when the respondent prepared the decedent's will. In terms of the instant proceeding, the petitioner alleges that this resulted in additional issues during the administration of the estate that had to be resolved in order to negotiate a settlement with the decedent's daughters from her first marriage.

The respondent filed an answer in which he denies the allegations against him and an affirmation in opposition to the petition. He admits that he was paid \$35,375.00, of which \$1,250.00 was for the filing fee and \$250.00 was for disbursements including process server fees, postage and telephone calls. The respondent asserts that the decedent's gross estate was \$878,346.24 and that he filled out the probate petition accordingly since his understanding was that all assets, including those owned jointly, should be listed in the petition. The respondent's billing record, which is dated June 30, 2010, after the SCPA 2110 proceeding was commenced, and on which the words, "Quantum Meruit" appear, shows that he rendered 95.30 hours of services, which at his billable hourly rate equals \$33,355.00 in attorney's fees, less than the \$42,000.00 to which he claims he would have been entitled under the retainer agreement.

The attorney representing the petitioner in this proceeding has submitted a reply affirmation in which he points out that the petitioner is 83-years-old and has a fourth-grade education. He alleges that the respondent has not turned over the entire file, despite repeated requests to do so. He asserts that the estate was a fairly simple one to administer since the sole

asset was the decedent's two-thirds interest in the Rockville Centre real property. The petitioner's current attorney estimates that the work performed by the respondent should have taken no more than 10 to 14 hours. He asserts that several of respondents' billing entries demonstrate the respondent's lack of competence and credibility, *e.g.*, more than 6.4 hours billed to discuss with the petitioner what would happen if the decedent's heirs objected to the will being probated and spent more than 20 hours reviewing and discussing the stipulation of settlement with the decedent's children's attorney.

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 retainer agreement is unclear at best. It states a fee of five percent of the gross estate for the "probate" of the decedent's will. The administration of the estate is not addressed. Here, the billing records submitted to the court were prepared after the petitioner commenced this proceeding; they were not prepared contemporaneously. The bill includes entries of 2.3 hours for a "trip to Surrogate's Court filed petition, paid filing fee," .45 hours for "trip to Post Office, mailed out notices certificates mail return receipt" and for other services that are not properly billable as attorney's fees, such as faxing. Additionally, the time spent on many items exceed

that which would be expected for the tasks listed; for example, the respondent billed 1.75 hours of time on a meeting with a process server to “review and discuss[ ] service.” There is no delineation of disbursements.

Nevertheless, the respondent did perform certain services that resulted in the will being probated and the estate being administered, at least in part. Based on the criteria set forth above, the court fixes the respondent’s legal fee at \$18,000.00, inclusive of disbursements. The respondent is directed to refund to the petitioner, as executor of the estate, the amount of \$17,375.00, which is the difference between the amount paid and the amount allowed, within 30 days of the date of the decree herein (SCPA 2110 [3]).

Settle decree.

Dated: December 20, 2010

JOHN B. RIORDAN  
Judge of the  
Surrogate's Court