Matter of Drab
2010 NY Slip Op 33644(U)
December 23, 2010
Surrogate's Court, Nassau County
Docket Number: 352928
Judge: John B. Riordan
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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU
--x
In the Matter of the Probate of the Last Will and Testament
of File No. 352928

JOSEPH R. DRAB, Dec. No. 26923

Deceased.
--x

In this probate proceeding, the decedent was survived by his wife, an adult son Richard, who is the petitioner herein, and four adult grandchildren, the issue of a predeceased child. The decedent's wife is a person under disability and her interests are being represented by a guardian ad litem appointed for that purpose by this court. Although SCPA 1404 examinations were demanded by the respondents, the examinations were never conducted, the parties having promptly entered into settlement negotiations. The propounded instrument bequeaths the entire estate to the decedent's lifetime trust, which in turn leaves the entire estate to petitioner, Richard Drab, to the exclusion of the surviving spouse and grandchildren. The parties have entered into a stipulation of settlement, subject to the court's approval, which permits the will's admission to probate, effectively guarantees the surviving spouse her elective share, and distributes the net estate after payment of debts, administration expenses, and the elective share, into two parts, one part to be distributed to the petitioner and the other to be divided equally among the grandchildren.

The court is satisfied that the proposed stipulation is in the best interests of all parties concerned and the stipulation is accordingly approved (SCPA 2106).

The court must now determine an appropriate fee for the guardian ad litem.

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 the administration 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 [2d Dept 1991]). This remains true even in the event that the parties have consented to the requested fee (*Matter of Stortecky v Mazzone*, 85 NY2d 518, 525 [1995]; *Matter of Phelan*, 173 AD2d 621, 622 [2d Dept 1991]). The Surrogate is obligated to limit the attorney's fees to reasonable amounts regardless of any agreement made by the attorney with the interested party (*Stern & Greenberg v. Doris Duke Charitable Foundation*, 297 AD2d 469 [1st Dept 2002], *affg* NYLJ, May 3, 2000 at 28, col 6 [Sur Ct, New York County] [Surrogate Preminger thorough analysis]; *Matter of Cook*, 41 AD2d 907 [1st Dept 1973], *affd* 33 NY2d 919 [1973]) or the existence of a retainer agreement (*Matter of Gluck*, 279 AD2d 575 [2d Dept 2001]; *Matter of Driscoll*, 273 AD2d 381 [2d Dept 2000]; *Matter of Pekofsky v Estate of Cohen*, 259 AD2d 702 [2d Dept 1999]; *Matter of Stern*, 227 AD2d 636 [2d Dept 1996]; *Matter of Bobeck*, 196 AD2d 496 [2d Dept 1993]). The retainer agreement is merely some evidence of the reasonable value of legal services (*Matter of Lerner*, 52 Misc 2d 967 [Sur Ct, Kings County 1967]). 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]). Moreover, when multiple attorneys are employed by the fiduciary of

a decedent's estate, the aggregate fee should approximate what one attorney would charge (*Matter of Leopold*, 244 AD2d 411 [2d Dept 1997]; *Matter of Mattis*, 55 Misc 2d 511 [Sur Ct, New York County 1967]). Some overlap in services may necessarily occur (*Matter of Patchin*, 106 AD2d 730 [3d Dept 1984]), and should be a factor when considering the aggregate fee (*see Matter of Mergentime*, 155 Misc 2d 502 [Sur Ct, Westchester County 1992], *affd*, 207 AD2d 453 [2d Dept 1994]). There can be some exceptions or stretching of this rule, for example, where the separate counsel does separate work, where counsel are under time pressures, or where there are complex or exceptional circumstances (*Matter of Duke*, NYLJ, May 3, 2000, at 28, col 6 [Sur Ct, New York County]).

In evaluating the cost of legal services, the court may consider a number of factors. These include:

1. the time spent (*Matter of Kelly*, 187 AD2d 718 [2d Dept 1992]);

2. the complexity of the questions involved (*Matter of Coughlin*, 221 AD2d 676 [3d Dept 1995]) ;

3. the nature of the services provided (*Matter of Von Hofe*, 145 AD2d 424 [2d Dept 1988]);

4. the amount and complexity of litigation required (*Matter of Sabatino*, 66 AD2d 937 [3d Dept 1978]);

5. the amounts involved and the benefit resulting from the execution of such services (*Matter of Shalman*, 68 AD2d 940 [3d Dept 1979]);

6. the lawyer's experience and reputation (*Matter of Brehm*, 37 AD2d 95 [4th Dept 1971]); and

7. the customary fee charged by the Bar for similar services (*Matter of Freeman*, 34 NY2d 1 [1974]; *Matter of Potts*, 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* (241 NY 593 [1925]), 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 and to the interest of the ward of the guardian ad litem (*Matter of McCranor*, 176 AD2d 1026 [3d Dept 1991]; *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 N.Y.2d 594 [1965]; *Matter of Ault*, 164 Misc 2d 272 [Sur Ct, New York County 1995]). Moreover, it is well-settled that time spent is, in fact, the least important factor considered by a court in fixing reasonable compensation (*see Matter of Snell*, 17 AD2d 490, 494 [3rd Dept 1962]; *Matter of Potts*, 213 App Div 59, 62 [4th Dept 1925], *affd* 241 NY 593 [1925]; *Matter of Kentana*, 170 Misc 663 [Sur Ct, Kings County 1939]).

The guardian ad litem is entitled to a fee for his or her services rendered (SCPA 405). These factors apply equally to an attorney retained by a fiduciary or to the court-appointed guardian ad litem (*Matter of Graham*, 238 AD2d 682 [3d Dept 1997]; *Matter of Burk*, 6 AD2d 429 [1st Dept 1958]; *Matter of Ault*, 164 Misc 2d 272 [Sur Ct, New York County 1995], *Matter of Berkman*, 93 Misc 2d 423 [Sur Ct, Bronx County 1978]; *Matter of Burnett*, NYLJ, Aug. 31, 2006 at 31, col 5 [Sur Ct, Kings County]; *Matter of Reisman*, NYLJ, May 18, 2000, at 34, col 5 [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]). Normally, the fee of a guardian ad litem is an administration expense of an estate and is paid from estate assets.

A sizeable estate permits adequate compensation, but nothing beyond that (*Matter of Martin v Phipps*, 21 AD2d 646 [1st Dept. 1964], *affd* 16 NY2d 594 [1965]; *Matter of Yancey*, NYLJ, Feb. 18, 1993, at 28, col 1 [Sur Ct, Westchester County]; *Matter of Reede*, NYLJ, Oct. 28, 1991, at 37, col 2 [Sur Ct, Nassau County]). A large estate does not, by itself, justify a large fee (*Matter of Young*, 52 Misc 2d 398 [Sur Ct, Suffolk County 1966]). 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*, 241 NY 593 [1925]; *see Matter of Spatt*, 32 NY2d 778 [1973]). Contemporaneous records of legal time spent on estate matters are important to the court in the determining whether the amount of time spent was reasonable for the various tasks performed (*Matter of Phelan*, 173 AD2d 621 [2d Dept 1991]; *Matter of Von Hofe*, 145 AD2d 424 [2d Dept 1988]). In the absence of contemporaneous time records, little weight is given to estimates of time after the services have been performed (*Matter of Phelan*, 173 AD2d 621 [2d Dept 1991]). This applies to the fee of a guardian ad litem (*Matter of Carbone*, NYLJ, Oct. 26, 1995, at 36, col 3 [Sur Ct, Suffolk County]).

Here, the value of the decedent's estate at death was approximately $506,000.00. Debts and administration expenses total approximately $44,400.00, leaving a net estate of

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approximately $461,600.00 against which to calculate the elective share. The stipulation of settlement provides that the spouse will receive the sum of $154,000.00, which is greater than her one-third elective share. In his affirmation of legal services, the guardian ad litem avers that he spent approximately 31 hours on this matter. His services included: interviewing the attesting witnesses to the will, one of whom was the attorney who drafted the instrument; visiting his ward; ascertaining the value of the estate and determining the value of his ward's elective share; participating in settlement negotiations among counsel for the petitioner and the grandchildren as well as three court conferences; and preparing and filing his interim and final reports.

Considering the foregoing, the court fixes the fee of the guardian ad litem in the sum of $7,500.00 to be paid from the spouse's elective share.

Settle decree.

Dated: December 23, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court