

Matter of Hughes (Clark)
2010 NY Slip Op 33688(U)
December 21, 2010
Sur Ct, Nassau County
Docket Number: 26833
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 Judicial Settlement of the Intermediate
 Account of Proceedings of James E. Hughes, Jr. and John
 Sheldon Clark, as Trustees of the Trust under Article
 TWELFTH for the Benefit of Anna Valer C. Austin
 under the Last Will and Testament of

Dec. No. 26833

CHARLES MARTIN CLARK,

Deceased,

and the Application to permit the Resignation of James E.
 Hughes, Jr. As Co-Trustee of Said Trust and the Appointment of
 Raymond J. Termini as a Successor Co-Trustee of Said Trust.

-----x
 File No. 238153

In the Matter of the Judicial Settlement of the Intermediate
 Account of Proceedings of James E. Hughes, Jr. and John
 Sheldon Clark, as Trustees of the Trust under Article
 TWELFTH for the Benefit of John Sheldon Clark
 under the Last Will and Testament of

Dec. No. 26832

CHARLES MARTIN CLARK,

Deceased,

and the Application to permit the Resignation of James E.
 Hughes, Jr. As Co-Trustee of Said Trust and the Appointment of
 Raymond J. Termini as a Successor Co-Trustee of Said Trust.

-----x
 Submitted for decision in each of these accounting proceedings is the fee of the guardian
 ad litem.

The petitioner commenced two proceedings seeking the following relief: 1) the judicial
 settlement of the intermediate account of trustees of a testamentary trust for the benefit of John
 Sheldon Clark for the period ending December 31, 2005, and to permit the resignation of one of
 the co-trustees (James E. Hughes, Jr.) and to appoint a successor, and 2) the judicial settlement
 of the intermediate account of trustees of a testamentary trust for the benefit of Anna Valer C.

Austin for the period ending December 31, 2005, and to permit the resignation of one of the co-trustees (James E. Hughes, Jr.) and to appoint a successor.

By decision dated August 19, 2010 (Dec. No. 26688), the court permitted the guardian ad litem to sign a stipulation whereby the parties agreed to resolve these proceedings with a withdrawal of both without prejudice. The guardian ad litem was instructed to file an affidavit of legal services.

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.

The guardian ad litem has filed an affidavit of legal services for each of the trusts. With respect to the trust for the benefit of Anna Valer C. Austin, the guardian ad litem performed the following services. She reviewed the petition, the accounting, the decedent's will, affidavits supplementing the account and the reports of the previous guardian ad litem appointed in connection with the executor's account. The guardian ad litem identified the salient issues in the

account and discussed them with the trustees' counsel. The guardian ad litem rendered approximately 39.5 hours of services at hourly rates ranging from \$420.00 per hour to \$490.00 per hour for a total value of \$16,827.00. The summary statement shows charges to the accounting party for Anna's trust of \$21,759,584.41. Considering all of the factors used to determine the reasonableness of fees, the court fixes the fee of the guardian ad litem for services rendered to Anna's trust in the amount of \$16,827.00.

Similarly, the guardian ad litem has submitted an affidavit of legal services in connection with the services she rendered on behalf of the trust for the benefit of John Sheldon Clark. The guardian ad litem performed the following services. She reviewed the petition, the accounting, the decedent's will, affidavits supplementing the account and the reports of the previous guardian ad litem appointed in connection with the executor's account. She identified the salient issues in the account and discussed them with counsel for the trustees. The guardian ad litem rendered approximately 34.5 hours of services at hourly rates ranging from \$420.00 per hour to \$490.00 per hour for a total of \$14,797.00. The summary statement for John's trust shows charges to the accounting party of \$18,341,519.10. Considering all of the factors used to determine the reasonableness of fees, the court fixes the fee of the guardian ad litem with respect to services rendered to John's trust in the amount of \$14,979.00.

Such fees shall be paid within thirty (30) days of the date of this decision.

This constitutes the decision and order of the court.

Dated: December 21, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court

