

Matter of Milgrim (Puterbaugh)

2010 NY Slip Op 33689(U)

December 14, 2010

Sur Ct, Nassau County

Docket Number: 26797

Judge: John B. Riordan

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SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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Annual Account of Eric P. Milgrim, the Public Administrator
of Nassau County, as the Successor Trustee of the

File No. 333580/B

TAMMY PUTERBAUGH

Dec. No. 26797

Supplemental Needs Trust.

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This is an accounting by the Public Administrator as successor trustee of the Tammy Puterbaugh Supplemental Needs Trust.

Tammy Puterbaugh is the life beneficiary of the supplemental needs trust. She is an adult person under a disability. Pursuant to an order of this court dated January 27, 2006, the prior trustee, James Judice, was permitted to resign as trustee and the Public Administrator was appointed successor trustee. The Public Administrator received principal, pursuant to a stipulation of settlement with the prior trustee, of \$6,000.00. This is the Public Administrator’s first and final account. A guardian ad litem was appointed to represent Tammy’s interests in the proceeding.

The guardian ad litem has filed his report. He notes that the principal and income of the supplemental needs trust have been used to pay ordinary expenses and to make distributions to Tammy. The balance on hand in the trust is \$959.18, which makes it impracticable to continue the administration of the trust. The guardian ad litem has no objection to the accounting and recommends that the balance on hand, after payment of expenses, be distributed to or on behalf of Tammy.

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 attorney has submitted an affirmation of legal services in this matter which shows that his firm rendered approximately thirteen and one-half hours in connection with the administration of the trust, which at counsel's usual hourly rate would amount to \$2,815.00. Recognizing the modest size of the trust, counsel asks the court to approve a reduced fee of \$550.00. The work performed by counsel includes miscellaneous work in connection with the trust administration and preparation of the accounting and related court papers. Considering all of the factors used to determine the reasonableness of fees, the court fixes the fee of counsel for the Public Administrator in the reduced amount of \$550.00, none of which has been paid.

Concerning the guardian ad litem's fee, the court notes that the guardian ad litem has

graciously waived his fee in view of the size of the trust. The court commends the guardian ad litem for the services he performed and for waiving his fee.

In all other respects, the accounting is approved, including the reimbursement of disbursements to Judith Ellen Stone in the amount of \$575.90, all of which has already been paid.

The commission of the Public Administrator is approved subject to audit.

After payment of the foregoing expenses, the balance remaining on hand in the trust shall be paid to or on behalf of the life beneficiary.

The decree shall discharge the surety.

Settle decree.

Dated: December 14, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court