

Matter of Page (Coudert)
2011 NY Slip Op 30109(U)
January 18, 2011
Sur Ct, Nassau County
Docket Number: 26922
Judge: Edward W. McCarty
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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 Judicial Settlement of the Final Account of
 Proceedings of Kenneth R. Page, as trustee and as executor of
 the estate of Frederic R. Coudert, III, deceased trustee,
 and Emilio A. Dominianni, as trustee, of the "Second Share"
 Trust under Article NINTH of the Last Will and Testament of

File No. 239417

Dec. No. 26922

PAULA MURRAY COUDERT,

Deceased.

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In this uncontested accounting proceeding, the only issues before the court are attorneys' fees, the fee of the guardian ad litem, commissions and the settlement of the account.

This is a proceeding by Kenneth R. Page and Emilio A. Dominianni to settle their account as trustees of the "Second Share" trust under Article NINTH of the will of Paula Murray Coudert. The account covers the period March 31, 1986 through December 31, 2008. The trustees also filed a supplemental account covering the period January 1, 2009 through September 30, 2010. This is the trustees' first and final account. The summary statement shows principal charges to the accounting party of \$25,950,272.00. A guardian ad litem was appointed to represent the interests of the minor grandchildren of Frederic R. Coudert, III, Hailey Marie Coudert Morris, Caroline Coudert Morris and Bennett Coudert Morris.

The decedent, Paula Murray Coudert, died on September 28, 1985, a resident of Nassau County, leaving a will dated September 13, 1984, which was admitted to probate by decree of this court dated November 12, 1985. In Article NINTH of her will, the decedent directed that her residuary estate be divided into two equal shares, and she directed that the second such share be held in trust for the primary benefit of her son, Frederic R. Coudert, III, and his issue. Pursuant

to the terms of the trust, during Frederic's lifetime, the trustees had the discretion to pay the net income to any one or more of Frederic and his issue. The trustees also had the discretion to distribute to the same class of persons such amount from principal as they deemed "wise and proper to provide for ... comfort, support, maintenance, education or general welfare." The will provides that the trust shall terminate upon Frederic's death. In addition, the decedent's will gives Frederic a limited testamentary power of appointment over the remainder of the trust which he may exercise in favor of any of his lawful issue or lawful issue of the decedent.

In Article FOURTEENTH of her will, the decedent named Paula C. Rand, Eugene D. Wadsworth and Emilio A. Dominianni as trustees of the trust for Frederic and authorized each to name his or her successor. Eugene Wadsworth renounced his nomination to act as trustee. Letters of trusteeship issued to Paula C. Rand and Emilio A. Dominianni on November 12, 1985. Eugene Wadsworth designated Robert N. Hornick to act in his place. Paula C. Rand designated Frederic R. Coudert, III to act as successor trustee in her place, and she resigned, effective upon Frederic's appointment. On July 23, 1986, this court issued letters of successor trusteeship to Robert N. Hornick, Frederic R. Coudert, III and Emilio A. Dominianni. Robert N. Hornick then designated Andrew S. Hedden to act as his successor and resigned effective upon Andrew S. Hedden's appointment. Thereafter, Andrew S. Hedden designated Kenneth R. Page to act as his successor. By order dated April 13, 2007, letters of trusteeship issued to Kenneth R. Page to act as successor co-trustee. The surviving trustees of the trust are petitioners Kenneth R. Page and Emilio A. Dominianni.

Frederic died on December 5, 2008, leaving a will dated May 1, 2008, which was admitted to probate by decree of this court dated May 22, 2009. Letters testamentary issued to

Kenneth R. Page. In his will, Frederic exercised his power of appointment and appointed all of the property of the trust to the Frederic R. Coudert III Appointive Trust, created under an agreement dated January 30, 2007, between Frederic, as grantor, and Kenneth R. Page, as trustee.

By election dated December 30, 2002, the then acting trustees, with the consent of Frederic and his daughters, who constituted all of the permissible income beneficiaries, opted to convert the trust to a unitrust under EPTL 11-2.4, effective as of January 1, 2003.

The guardian ad litem has submitted his report. He recommends approval of the account. In addition, the guardian ad litem states that he believes a fee of \$90,000.00 for the trustees' counsel is reasonable in view of the size of the trust, the length of the period accounted for, the standing of counsel and the issues and responsibilities involved.

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 nature (*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 for the trustees has submitted an affidavit in support of her firm's application for approval of a fee of \$90,000.00 for services rendered in connection with the administration and settlement of the trust and the accounting proceeding, together with disbursements. According to counsel, during the accounting period, her firm was responsible for matters of trust administration, including: (i) preparing the federal and New York State annual fiduciary income tax returns and annual statements for the trust, as well as the trust's quarterly estimated tax payments; (ii) verifying the cost basis of the trust assets where necessary; and (iii) petitioning the court for the appointment of a successor trustee.

According to counsel, the firm's fiduciary accountants conducted an extensive review of records and transactions in order to prepare the account. In addition, attorneys at the firm reviewed the first draft of the accounting, which covers a period of over 32 years, and made revisions and additions to the draft. Attorneys at the firm also prepared the petition and related court papers, arranged for execution of the documents and filed them with the court. The services provided also included appearing at the return date of citation, communicating with the guardian ad litem, reviewing the guardian ad litem's report and preparing the supplemental accounting for the period January 1, 2009 through and including September 30, 2010. According to counsel, attorneys at the firm expended in excess of 110 hours on this matter at hourly rates ranging from \$435.00 per hour to \$800.00 per hour and fiduciary accountants rendered more than 96 hours of time at hourly rates of \$230.00 per hour and \$255.00 per hour. The total time charges amount to \$89,404.00. In addition, the following disbursements totaling \$2,975.27 were

incurred: (i) photocopying charges of \$906.20; (ii) word processing charges of \$106.10; (iii) professional service charges of \$217.34; (iv) filing fees of \$1,265.00; (v) search service charges of \$337.00; (vi) express delivery and postage charges of \$137.66; and (vii) telephone charges of \$5.97. The court notes that most of the disbursements other than the filing fees would be disallowed as office overhead without further substantiation. Nevertheless, the time charges plus allowable disbursements exceed the \$90,000.00 fee for which counsel seeks approval. Accordingly, considering all of the factors used to determine the reasonableness of fees, the court approves a total fee, including disbursements, of \$90,000.00 as fair and proper compensation for the services rendered.

The guardian ad litem has submitted an affidavit of legal services which shows that the guardian ad litem rendered 19.70 hours at the rates of \$610.00 per hour and \$625.00 per hour for a total of \$12,311.00. The guardian ad litem reviewed the accounting, had conversations with counsel for the trustees and prepared his report. The services performed by the guardian ad litem were of the utmost quality given the length of the period covered by the account. Accordingly, the court approves a fee of \$12,311.00 for the guardian ad litem, which fee shall be paid within thirty (30) days of the date of the decree to be entered herein.

Commissions are approved subject to audit. In all other respects, the account is approved as filed.

Settle decree.

Dated: January 18, 2011

EDWARD W. McCARTY III
Judge of the
Surrogate's Court