

Matter of Menitskiy

2011 NY Slip Op 33232(U)

September 28, 2011

Sur Ct, Nassau County

Docket Number: 351064

Judge: III., 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 Probate Proceeding, Will of

VALERY MENITSKIY,
a/k/a VALERY EVGENYEVICH MENITSKIY,

Deceased.

File No. 351064

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In the Matter of the Application of Yulia Malakhova,

Dec. No. 27429

Petitioner,

To Stay a Special Joint Meeting of Directors and Shareholders
and for the Issuance of Limited Letters of Administration in
the Estate of

VALERY MENITSKIY,

Deceased.

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In related probate and miscellaneous proceedings regarding the estate of Valery Menitskiy, before the court is a proposed stipulation of settlement resolving the issues in both proceedings. Because the interests of the decedent’s infant son may be affected by the settlement, the approval of the court is required (SCPA 2106). The guardian ad litem appointed to represent the interests of the decedent’s infant son has filed his final report wherein he recommends that the court approve the settlement and authorize him to enter into it on behalf of his ward.

The probate proceeding has been pending in this court for over three years and the miscellaneous proceeding, a discovery proceeding pursuant to SCPA 2103, has been pending nearly three years. The proposed settlement will end both disputes and provides for the infant son to receive a 10% interest in the decedent’s Roslyn home, valued at approximately \$1.5

million. The other 90% interest will be held by the child's mother. The stipulation of settlement is approved, the court being satisfied that the interests of the infant beneficiary and the other interested parties will be promoted by an end to the current litigation. The decedent's will shall be admitted to probate in accordance with the terms of the stipulation of settlement.

The court must also fix a reasonable fee for the services of the guardian ad litem. The court notes that the stipulation of settlement provides that the fee of the guardian ad litem will be a charge against the general estate. 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 Misc 2d 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]). A sizeable estate permits adequate compensation, but nothing beyond that (*Matter of Martin v Phipps*, 21 AD2d 646 [1st Dept 1964], *aff'd* 16 NY2d 594 [1965], *supra*; *Matter of Yancey*, NYLJ, Feb. 18, 1993, at 28, col 1; *Matter of Reede*, NYLJ, Oct. 28, 1991, at 37, col 2).

The court notes that the guardian ad litem has already received the sum of \$23,447.20 for his services from the date of his appointment on July 17, 2008 through December 10, 2009. This current and final application seeks an award for his services from December 11, 2009 through June 29, 2011. The guardian ad litem avers that he spent over 90 hours on these proceedings during that period, which required his attendance at eight depositions as well as numerous court conferences and settlement negotiations. The guardian ad litem also reviewed, among other things, the transcripts of the depositions; subpoenaed records; tax returns; and correspondence from counsel for the various parties involved. The court recognizes the excellent reputation which the guardian ad litem has earned in the legal community and that his presence and participation in these proceedings were instrumental in reaching the final settlement. However, the request by the guardian ad litem of an additional fee of \$32,203.50 would bring his total compensation to a sum \$55,650.70, which the court finds somewhat disproportionate to the result

achieved for the ward. Accordingly, the court awards the guardian ad litem an additional fee of \$20,000.00, which shall be paid within 30 days of entry of the decree herein.

Settle separate decrees in the probate and miscellaneous proceedings.

Dated: September 28, 2011

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