

Matter of Funk

2012 NY Slip Op 32463(U)

September 4, 2012

Sur Ct, Nassau County

Docket Number: 2011-366179/B

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 Petition of Martha Theodos for a Reformation
 of the Will of

File No. 2011-366179/B

AGNES TRILL FUNK,

Dec. No. 28099

Deceased.
 -----X

In this miscellaneous proceeding, the court is asked to approve a stipulation of settlement and to fix the fees of the guardian ad litem.

The decedent, Agnes Trill Funk, died on June 28, 2011. Her last will and testament, dated May 3, 2003, was admitted to probate by this court on September 1, 2011. Letters testamentary issued to Martha Theodos and letters of trusteeship were issued to Gerald Chiariello and Gerald Chiariello II. The decedent's last will and testament devised her residuary estate to the trustees to be held in a trust to be designated "The Agnes & John Funk Foundation." The trustees were directed to apply income and principal, in their discretion, to provide for the health and welfare of Nicole Susan Guevara, until she reaches the age of 25; to provide a monthly stipend to William J. Funk in the sum of \$1,000.00; to provide an annual stipend to Luis Augustin Guevara and Maria Guevara until their daughter, Nicole Susan Guevara, reaches the age of 21, or until the trust assets are exhausted. The decedent then set forth a list of 27 charities and provided "[i]t is my wish, but not my command, that the trustee make donations to the...entities in the following amounts or ratably." Each charity was given an amount ranging from \$50,000.00 to \$1,000,000.00.

A guardian ad litem was appointed to represent Nicole Susan Guevara, an infant. The parties engaged in multiple conferences, which resulted in the attendant stipulation being submitted for approval. The stipulation provides for the following: the resignation of Gerald Chiarello and Gerald Chiariello II as trustees; the payment of \$140,000.00 to Luis Augustin Guevara and Maria Guevara; the funding of a trust for the benefit of Nicole Susan Guevara with \$1,000,000.00, with

BNY Mellon to act as corporate trustee; the purchase of an annuity to pay William J. Funk \$1,000.00 for the rest of his life; and the payment, outright, of bequests to the charities designated in the decedent's will in the amounts designated by the decedent.

The guardian ad litem has no objections to the stipulation. Since the stipulation is in the best interests of the ward, the court approves the stipulation (SCPA 2106).

Although the stipulation provides for the payment of a fee in the amount of \$15,000.00 to the guardian ad litem, the court must independently review the matter to determine if the agreed upon fee is reasonable. The guardian ad litem filed an affirmation of services in which she affirms that she spent over 47 hours on this matter. The guardian ad litem performed the following services: numerous phone calls with the attorneys for the petitioner, the Guevaras and other parties; reviewed the file; meetings with the Guevara family; prepared a settlement proposal; participated in court conferences; researched the legal issues; prepared and responded to multiple emails; prepared the guardian ad litem report; met with officials at the bank regarding acting as trustee; and reviewed the proposed stipulation of settlement.

In evaluating the cost of legal services and in determining the fee of the guardian ad litem, the court may consider a number of factors, including: 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], *aff'd* 213 App Div 59 [4th Dept 1925], *aff'd* 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 that 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]). 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]).

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]). With respect to a guardian ad litem's fee, 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 fees 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]). In the instant proceeding, the estate is valued at in excess of \$8,000,000.00. The matter was originally litigated and the issues were complex. The guardian ad litem negotiated an increase in the amount of money her ward would receive. The guardian ad litem is a partner in her law firm, a firm that specializes in the field of trusts and estates. She is an active member of the Surrogate's Court Estates and Trusts Law Committee of the Nassau County Bar Association and has served as vice chair and chair of the committee. She has also served as director of the Nassau County Bar Association. She has acted as a guardian ad litem on numerous occasions. In light of all of these factors, the court approves the fees as set forth in the stipulation in the amount of \$15,000.00, which shall be paid within thirty days of entry of the decree.

Settle decree.

Dated: September 4, 2012

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

