

**Matter of Herman**

2013 NY Slip Op 32456(U)

September 30, 2013

Surr Ct, Nassau County

Docket Number: 2011-365199/D

Judge: Edward W. McCarty III

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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 Application of Dr. Jack Herman, by His  
Guardian ad Litem, C. Raymond Radigan ("Petitioner") For  
a Determination of His Right Under Section 5-1.1 of the  
Estates, Powers and Trusts Law to Elect to Take an Intestate  
Share Against the Provisions of The Last Will and  
Testament of

File No. 2011-365199/D

Dec. No. 28923

ROSALIE HERMAN,

Deceased.

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In this proceeding to determine the validity and effect of a notice of election, the court is fixing the fee of the guardian ad litem appointed to represent the interests of the surviving spouse. The guardian ad litem was originally appointed in the proceeding to probate the decedent's last will and testament. The guardian ad litem found no valid basis upon which to contest the will and it was admitted to probate by decree dated December 13, 2011. The guardian ad litem was awarded a fee of \$6,000.00 in the probate proceeding.

Although there was no basis upon which to object to the will's admission to probate, the guardian ad litem recommended that a Mental Hygiene Law Article 81 guardian be appointed for his ward to investigate whether a notice of election should be filed on behalf of the ward, there being some evidence that the ward was not competent at the time he executed a post-nuptial agreement in which he waived any rights in the decedent's estate, including any right of election. Thereafter, by decision dated November 14, 2011, the court found that under the circumstances as then extant, it would be in the best interests of the surviving spouse to exercise his right of election. Since the spouse was under a disability, the court authorized the guardian ad litem to file the notice of election on behalf of his ward (EPTL 5-1.1-A[c][3][D]).

By decision and order dated February 28, 2012, the court expanded the authority of the guardian ad litem and authorized him to commence or defend a proceeding pursuant to SCPA 1421 to determine the validity and effect of the surviving spouse's notice of election.

On March 2, 2012, the executors of the decedent's estate filed a petition pursuant to SCPA 1421 to determine the validity and effect of the surviving spouse's notice of election. Before jurisdiction was obtained in that proceeding, and evidently without knowledge of its commencement, the guardian ad litem commenced a separate proceeding for the same relief. By decision and order dated June 29, 2012, the court, on its own motion, consolidated the two proceedings.

By decision and order dated May 21, 2013, the court rescinded the appointment of the guardian ad litem after the ward's son had been appointed his Article 81 guardian and an attorney filed a notice of appearance on his behalf in this proceeding. In its May 21, 2013 decision and order, the court noted that the guardian ad litem had already expended significant effort on behalf of his ward and directed that he file an affirmation of legal services so the court could fix his fee. The court also gave opposing counsel an opportunity to respond to the final report of the guardian ad litem or his fee request. The papers filed thereafter by counsel for the executors and counsel for the ward's guardian do not object to the fee sought by the guardian ad litem, but the executors argue that the fee should be paid from the ward's personal assets while the Article 81 guardian argues that the fee should be paid from the estate.

With respect to the issue of attorney 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]).

Here, the contemporaneous time records maintained by the guardian ad litem indicate that

he spent 29.8 hours on this matter and that an associate under his direction and control spent another 59 hours. Based on their usual and customary hourly rates, the time charges would support a fee request of \$40,950.00, plus out-of-pocket disbursements of \$1,161.75 for the cost of a copy of the deposition transcripts. The guardian ad litem and/or his associate interviewed witnesses and prepared for and attended the depositions of the attorney who drafted the post-nuptial agreement and one of the ward's physicians regarding the ward's mental capacity at or about the time of the execution of the post-nuptial agreement. The guardian ad litem also negotiated with counsel in an effort to avoid litigation regarding the ward's last will and testament, executed at or about the same time as the post-nuptial agreement. There were several conferences with the court and a significant amount of communication with opposing counsel, the court examiner appointed in the Article 81 proceeding, preparation of document discovery demands, and other pretrial disclosure, among other services provided.

As indicated above, there is no objection to the fee for the services, only the source from which the fee should be paid. The court has carefully reviewed the affirmation of legal services and contemporaneous time records. Through no fault of the guardian ad litem, the court is unable to consider one of the more significant factors used in fixing attorneys' fees, that is, the results achieved, as the services of the guardian ad litem have been terminated and the litigation is ongoing. In light of all the foregoing, the court fixes the fee of the guardian ad litem, for all services rendered by him and his associate in this proceeding, in the sum of \$30,000.00, plus disbursements of \$1,161.75. Since the determination of the validity of the spouse's notice of election is clearly important to the administration of the estate, but is also of equal importance to the ward individually, the fee and disbursements shall be paid equally from the decedent's estate

and the personal assets of the ward. The court directs that the fee be paid within 30 days of the date hereof.

This decision constitutes the order of the court and no additional order need be submitted.

Dated: September 30, 2013

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