

**Matter of Perry L.B.**

2015 NY Slip Op 30643(U)

March 17, 2015

Sur Ct, Nassau County

Docket Number: 2014-379963

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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Administration Proceeding, Estate of

PERRY L.B.,

Deceased.

File No. 2014-379963

Dec. No. 30789

-----x  
Probate Proceeding, Will of

PERRY L.B.,

Deceased.

File No. 2014-379963/B

Dec. No. 30790

-----x  
Probate Proceeding, Will of

PERRY L.B.,

Deceased.

File No. 2014-379963/D

Dec. No. 30524

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In this probate proceeding, the precise value of the estate is unknown at this point but may be as much as \$15 million. On the return date of citation, the matter was marked to settle a decree admitting to probate an instrument dated October 22, 2013. By this decision, the court is determining the reasonableness of the fee sought by the guardian ad litem appointed representing the interests of the decedent's non-marital child, J.L., the decedent's sole distributee. Although the matter was uncontested, it did not appear that would be the case at the outset of the proceeding.

Prior to the filing of the proceeding to probate the instrument dated October 22, 2013, a petition for the issuance of letters of administration was filed by the decedent's brother, G.L. and a petition to probate an instrument dated July 9, 2013 was filed by attorney L.K., who, along with K.G., a friend of the decedent, was nominated as executor and trustee. The guardian ad litem

was appointed to represent J.L.'s interests in all three proceedings and the fee to be fixed here is for all of her services in all three proceedings.

In the administration proceeding, an affidavit of heirship was executed and filed by V.L., wife of decedent's brother G.L. The affidavit indicates that the decedent was never married and had no issue. The affidavit recites the deponent's belief that there was then pending a proceeding by the Nassau County Department of Social Services seeking a posthumous order of filiation that the decedent was the father of J.L. The deponent indicates that to her knowledge J.L. was not the son of the decedent. Thus the question of whether J.L. was, in fact, the child of the decedent was an issue in the case and because J.L. is an infant, the appointment of a guardian ad litem was necessary to protect his interests (SCPA 402[2]).

As indicated above, there was also a probate proceeding filed for the probate of an earlier instrument which was somewhat more favorable to the decedent's brother. J.L. was identified on the petition as an alleged child of the decedent. Because J.L.'s status was in issue and he would not be receiving his intestate share if he was, in fact, the decedent's child, the appointment of a guardian ad litem was also necessary in this proceeding (SCPA 402[2]).

Finally, the proceeding for the probate of the decedent's last will was filed. Because J.L. would not be receiving his intestate share the appointment of a guardian ad litem was also necessary in this proceeding (SCPA 402[2]).

It appeared that the decedent's brother would challenge or was at least contemplating J.L.'s status as the decedent's child. The guardian ad litem appointed to represent J.L.'s interests in these proceedings had previously been appointed to represent J.L.'s interests in certain Family Court proceedings. Her familiarity with the family dynamic and the issues at play in the Family

Court proceeding were indispensable to her services in this court on J.L.'s behalf. The guardian ad litem avers that she spent 54 hours on this proceeding and that her usual hourly rate is \$300, which is not uncommon in this part of the state. Her services included, among other things: correspondence with and/or personal interviews with persons identified as the attesting witnesses on the two wills offered for probate; travel to Hudson County New Jersey Correctional Facility where J.L.'s mother was incarcerated; telephone calls relevant to and the preparation of a subpoena for the production of any and all wills executed by the decedent; meetings with decedent's former attorney who represented the decedent in the contested probate proceedings regarding the decedent's father; communications with decedent's sister H.L.; correspondence with all attorneys appearing in the three proceedings; communication with the nominated executor and alternate executor named in the decedent's final will as it appeared that first one then neither was willing to serve as executor; and several court appearances. The court notes that no objection was raised by the nominated executor to the guardian ad litem's hourly rate nor to her claimed number of hours.

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]).

Considering all of the foregoing, the court fixes the fee of the guardian ad litem in the sum sought of \$14,700.00, payable by the executor within 30 days of entry of the decree herein. For reporting purposes, the fee will be allocated equally among the three proceedings. The decree submitted will be signed if found to be in proper order.

Proceed accordingly.

Dated: March 17, 2015

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

