

Matter of Fishman

2015 NY Slip Op 32463(U)

November 24, 2015

Surrogate's Court, Nassau County

Docket Number: 2010-362864/B

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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 Accounting by Lesley Fishman Falvo, as the Executor of
 the Estate of

File No. 2010-362864/B

SELMA F. FISHMAN
 a/k/a SELMA MANNES FISHMAN,

Dec. No. 31252

Deceased.

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The court has before it the voluntary account of Lesley Fishman Falvo, as executor of the estate of her mother, Selma Mannes Fishman, who died on September 1, 2010, a resident of Mineola, New York, leaving a last will and testament dated May 6, 2002. Decedent was survived by a daughter, petitioner, and a son, Neil Fishman, an incapacitated person.

Letters of administration were issued to Lesley Fishman Falvo on April 28, 2011. The account was filed on May 13, 2015. The court appointed a guardian ad litem to represent the interests of Neil Fishman.

THE ACCOUNT

The amended account shows the receipt of \$814,222.91 of estate principal, which was supplemented by realized increases of \$1,723.45 and income collected totaling \$94,586.90. This resulted in total charges of \$910,533.26. This amount was reduced by decreases in principal in the amount of \$60,864.00, administrative expenses of \$56,693.96, distributions of principal of \$743,320.63, leaving a balance of \$49,654.67 on hand. The executor seeks approval of the accounting. In addition, the court must consider the recommendations made by the guardian ad litem and set his fee.

REPORT OF THE GUARDIAN AD LITEM

The guardian ad litem was appointed on July 2, 2015. He filed his report on September 28, 2015. After reviewing the account and supporting documents, the guardian recommends that the executor's account be judicially settled.

GUARDIAN AD LITEM 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 services rendered in the course of the administration of an estate (*Matter of Stortecky v Mazzone*, 85 NY2d 518 [1995]).

In evaluating the cost of legal services, the court may consider a number of factors.

These include:

1. the time spent (*Matter of Kelly*, 187 AD2d 718 [2d Dept 1992]);
2. the complexity of the questions involved (*Matter of Coughlin*, 221 AD2d 676 [3d Dept 1995]);
3. the nature of the services provided (*Matter of Von Hofe*, 145 AD2d 424 [2d Dept 1988]);
4. the amount and complexity of litigation required (*Matter of Sabatino*, 66 AD2d 937 [3d Dept 1978]);
5. the amounts involved and the benefit resulting from the execution of such services (*Matter of Shalman*, 68 AD2d 940 [3d Dept 1979]);
6. the lawyer's experience and reputation (*Matter of Brehm*, 37 AD2d 95 [4th Dept 1971]); and

7. the customary fee charged by the Bar for similar services (*Matter of Freeman*, 34 NY2d 1 [1974]; *Matter of Potts*, 241 NY 593 [1925]).

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* (241 NY 593 [1925]), 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 and to the interest of the ward of the guardian ad litem (*Matter of McCranor*, 176 AD2d 1026 [3d Dept 1991]; *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 N.Y.2d 594 [1965]; *Matter of Ault*, 164 Misc 2d 272 [Sur Ct, New York County 1995]). Moreover, it is well-settled that time spent is, in fact, the least important factor considered by a court in fixing reasonable compensation (see *Matter of Snell*, 17 AD2d 490, 494 [3rd Dept 1962]; *Matter of Potts*, 213 App Div 59, 62 [4th Dept 1925], *affd* 241 NY 593 [1925]; *Matter of Kentana*, 170 Misc 663 [Sur Ct, Kings County 1939]).

The guardian ad litem is entitled to a fee for his or her services rendered (SCPA 405). These factors apply equally to an attorney retained by a fiduciary or to the court-appointed guardian ad litem (*Matter of Graham*, 238 AD2d 682 [3d Dept 1997]; *Matter of Burk*, 6 AD2d 429 [1st Dept 1958]; *Matter of Ault*, 164 Misc 2d 272 [Sur Ct, New York County 1995], *Matter of Berkman*, 93 Misc 2d 423 [Sur Ct, Bronx County 1978]; *Matter of Burnett*, NYLJ, Aug. 31, 2006 at 31, col 5 [Sur Ct, Kings County]; *Matter of Reisman*, NYLJ, May 18, 2000, at 35, col 4

[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]). Normally, the fee of a guardian ad litem is an administration expense of an estate and is paid from estate assets.

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]; *Matter of Yancey*, NYLJ, Feb. 18, 1993, at 28, col 1 [Sur Ct, Westchester County]; *Matter of Reede*, NYLJ, Oct. 28, 1991, at 37, col 2 [Sur Ct, Nassau County]). A large estate does not, by itself, justify a large fee (*Matter of Young*, 52 Misc 2d 398 [Sur Ct, Suffolk County 1966]). 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], *aff'd* 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*, 241 NY 593 [1925]; *see Matter of Spatt*, 32 NY2d 778 [1973]). Contemporaneous records of legal time spent on estate matters are important to the court in the determining whether the amount of time spent was reasonable for the various tasks performed (*Matter of Phelan*, 173 AD2d 621 [2d Dept 1991]; *Matter of Von Hofe*, 145 AD2d 424 [2d Dept 1988]). In the absence of contemporaneous time records, little weight is given to estimates of time after the services have been performed (*Matter of Phelan*, 173 AD2d 621 [2d Dept 1991]). This applies to the fee of a guardian ad litem (*Matter of Carbone*, NYLJ, Oct. 26, 1995, at 36, col 3 [Sur Ct, Suffolk County]).

With respect to the fee of the guardian ad litem, the court notes that the guardian ad

litem's affirmation reflects 4 hours of services on behalf of decedent's incapacitated son.

Considering all the factors set forth above concerning attorneys' fees, the court fixes the fee of the guardian ad litem in the sum of \$1,250.00, to be paid within thirty days of the date of decree.

The court thanks the guardian ad litem for his thorough representation of his ward.

CONCLUSION

The account, as filed, is approved.

Settle decree.

Dated: November 24, 2015

EDWARD W. McCARTY
Judge of the
Surrogate's Court