

<b>Matter of Legrow</b>
2015 NY Slip Op 32466(U)
November 19, 2015
Surrogate's Court, Nassau County
Docket Number: 2015-383474
Judge: Edward W. McCarty III
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SURROGATE'S COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

-----X  
Probate Proceeding, Will of

File No. 2015-383474

MARYANN LEGROW, a/k/a  
MARYANN JUDITH LEGROW,

Dec. No. 31170

Deceased.  
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In connection with a petition for probate filed by Nancy Legrow, the court will review the report of the guardian ad litem and a stipulation of settlement executed by all interested parties.

The court must also fix the fee of the guardian ad litem.

#### BACKGROUND

Maryann Legrow (the decedent) died on July 31, 2014, leaving a last will dated July 9, 2014. The decedent was survived by her daughter, Nancy Legrow (Nancy), her son, Edward Rodney Legrow (Edward), and by two minor grandchildren, William Edward Parkinson and Joseph Michael Parkinson (William and Joseph), the children of decedent's predeceased daughter. Under the terms of the will, the decedent left jewelry, household furniture and clothing to her daughter-in-law, Dawn Legrow. In addition, the decedent left each grandson \$15,000.00 in trust until age 25, with the funds to be paid out of the proceeds of the sale of decedent's home, following a life estate in the premises given to Nancy. The residuary estate is to be divided evenly between Edward and Nancy, and the decedent nominated Nancy to serve as executor.

The court appointed a guardian ad litem to represent the interests of decedent's grandsons, and the guardian ad litem filed an interim report on July 9, 2015. The guardian ad litem advised the court that the only probate asset is decedent's home, which has a large mortgage, and which Nancy intended to sell. The guardian ad litem was concerned that the sales proceeds might not yield sufficient funds to pay the two legacies of \$15,000.00 to fund the trusts

for decedent's grandsons. The guardian ad litem also described her review of the proffered will and her interviews with the draftsman and two of the three witnesses.

To avoid litigation, the parties entered into a stipulation of settlement on August 3, 2015.

The agreement provides the following:

1. The will shall be admitted to probate, and letters testamentary shall issue to Nancy.
2. The decedent's home will be sold, and a trust for the benefit of each of Joseph and William shall be established, with Nancy as Trustee.
3. Net proceeds from decedent's joint bank accounts will be deposited into an estate account upon the issuance of letters testamentary.
4. \$15,000.00 shall be placed in trust for each of Joseph and William. If the sale proceeds from decedent's home are insufficient to fund the trusts, and the estate's net proceeds equal or exceed \$90,000.00, then estate proceeds will be used to make up any deficiency. If the net proceeds are less than \$90,000.00, then the trusts will be funded with an amount equivalent to each grandson's 1/3 intestate share.

#### ANALYSIS

The court has reviewed the stipulation of settlement. Finding it to be in the best interests of the minor grandchildren, the court approves the stipulation of settlement and the guardian ad litem's execution of the agreement.

#### 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 the administration 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 [2d Dept 1991]). This remains true even in the event that the parties have consented to the requested fee (*Matter of Stortecky v Mazzone*, 85 NY2d 518, 525 [1995]; *Matter of Phelan*, 173 AD2d 621, 622 [2d Dept 1991]). The Surrogate is obligated to limit the attorney's fees to reasonable amounts regardless of any agreement made by the attorney with the interested party (*Stern & Greenberg v. Doris Duke Charitable Foundation*, 297 AD2d 469 [1st Dept 2002], *aff'g* NYLJ, May 3, 2000 at 28, col 6 [Sur Ct, New York County] [Surrogate Preminger thorough analysis]; *Matter of Cook*, 41 AD2d 907 [1st Dept 1973], *aff'd* 33 NY2d 919 [1973]) or the existence of a retainer agreement (*Matter of Gluck*, 279 AD2d 575 [2d Dept 2001]; *Matter of Driscoll*, 273 AD2d 381 [2d Dept 2000]; *Matter of Pekofsky v Estate of Cohen*, 259 AD2d 702 [2d Dept 1999]; *Matter of Stern*, 227 AD2d 636 [2d Dept 1996]; *Matter of Bobeck*, 196 AD2d 496 [2d Dept 1993]). The retainer agreement is merely some evidence of the reasonable value of legal services (*Matter of Lerner*, 52 Misc 2d 967 [Sur Ct, Kings County 1967]). 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:

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]). However, 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]).

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]).

The guardian ad litem has submitted an affirmation of legal services which reflects that she devoted six and one-half hours to the representation of her wards, and that her usual rate of

billing is \$375.00 per hour. Time sheets were annexed. Unfortunately, despite the excellent service provided by the guardian ad litem, the court is limited in the amount that it can award, due to the size of the estate and the size of the wards' interests, which 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. It is well established that the legal fee must bear a reasonable relationship to the size of the estate and to the interests of the wards of the guardian ad litem (*Matter of McCranor*, 176 AD2d 1026 [3d Dept 1991]; *Matter of Kaufmann*, 26 AD2d 818 [1st Dept 1966], *aff'd* 23 NY2d 700 [1968]; *Martin v Phipps*, 21 AD2d 646 [1st Dept 1964], *aff'd*, 16 N.Y.2d 594 [1965]; *Matter of Ault*, 164 Misc 2d 272 [Sur Ct, New York County 1995]).

Based upon all of the above considerations, the court awards the guardian ad litem a fee of \$1,200.00, to be paid out of estate assets within 30 days of entry of the decree.

#### CONCLUSION

The stipulation is approved.

The propounded instrument shall be admitted to probate, and letters testamentary shall issue to Nancy Legrow upon her qualification.

Settle decree.

Dated: November 19, 2015

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