

Matter of Golden

2017 NY Slip Op 30700(U)

April 4, 2017

Surrogate's Court, Nassau County

Docket Number: 2015-383439/B

Judge: Margaret C. Reilly

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**SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

In the Matter of

IVY GOLDEN,

Deceased.

DECISION & ORDER

**File No. 2015-383439/B
Dec. No. 32629**

PRESENT: HON. MARGARET C. REILLY

The following papers were considered in the preparation of this decision:

Verified Petition..	1
Amendment to Verified Petition.	2
2d Amendment to Verified Petition..	3
Verified Answer..	4
Reply Affirmation in Support.	5

In this probate proceeding the court has before it a contested petition for the fixing of attorney’s fees. The attorney has waived her right to a hearing regarding her fee. The attorney’s services were limited to having the will admitted to probate and do not include any services regarding administration of the estate. The co-executor for the estate opposes and seeks to arbitrate the issue through the Nassau County Bar Association.

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 (*see 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]).

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 (see *Matter of Von Hofe*, 145 AD2d 424 [2d Dept 1988]; *Matter of Phelan*, 173 AD2d 621 [2d Dept 1991]).

In evaluating the cost of legal services, the court may consider a number of factors. These include: the time spent (see *Matter of Kelly*, 187 AD2d 718 [2d Dept 1992]); the complexity of the questions involved (see *Matter of Coughlin*, 221 AD2d 676 [3d Dept 1995]); the nature of the services provided (see *Matter of Von Hofe*, 145 AD2d 424 [2d Dept 1988]); the amount of litigation required (see *Matter of Sabatino*, 66 AD2d 937 [3d Dept 1978]); the amounts involved and the benefit resulting from the execution of such services (see *Matter of Shalman*, 68 AD2d 940 [3d Dept 1979]); the lawyer's experience and reputation (see *Matter of Brehm*, 37 AD2d 95 [4th Dept 1971]); and the customary fee charged by the Bar for similar services (see *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 (see *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 (see *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 (see *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.

Here, counsel avers that she spent 21.7 hours on this matter, and, as an accommodation to the client, billed for her services at \$300.00 per hour rather than the \$350.00 per hour set forth in the retainer agreement. A retainer fee of \$2,310.00 was paid and the current fee sought is \$5,592.80.

The opposition suggests the invoice was excessive and requested an explanation concerning 3.1 hours for correspondence on August 20, 2015; 5.6 hours at the clerk's office

on July 7 and August 14, 2015; and 11.2 hours for preparing the probate petition on July 9 and 15, 2015. Arbitration was attempted, but the case was denied by the Part 137 panel because it was a Surrogate's Court case.

Counsel's reply affirmation in response to the administrators' written objections avers that the probate proceeding was more complex than originally anticipated. Counsel's reply does not answer the specific questions raised by the co-executor. The co-executor's challenges to the invoice can likely be explained with a more detailed invoice. For example, "went to court" implies travel time which is not compensable (*see Matter of Efsthaniou*, 41 Misc 3d 1219 [A] [Sur Ct, Nassau County 2013]). Further, \$52.80 was deducted from the retainer fee for postage. No reimbursement is allowed for ordinary postage charges (*Matter of Wilder*, 49 Misc 3d 144 [Sur Ct, Nassau County 2015]).

The court has reviewed all of the documents that were filed in the probate proceeding as well as the papers submitted by counsel in this proceeding and the objections filed by her former clients. Appellate authority recognizes that "[t]he Surrogate is in the best position to assess the factors essential to fix an attorney's fee, such as the reasonable value of the time, effort, and skill required and actually expended" (*Matter of Gluck*, 279 AD2d 575 [2d Dept 2001]).

Considering all of the foregoing, the court concludes that a fee of \$4,610.00 is reasonable (\$5,592.80 - \$52.80 [postage] and \$930.00 [3.1 x \$300.00 "went to court"]). Against this total of \$4,610.00, counsel received \$2,310.00, leaving a balance due of

\$2,300.00. The estate is directed to pay that sum to Kingsley & Kingsley within 30 days of the date hereof.

This constitutes the decision and order of the court.

Settle order.

Dated: April 4, 2017
Mineola, New York

E N T E R:

HON. MARGARET C. REILLY
Judge of the Surrogate's Court

cc: Joan S. Kingsley, Esq.
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