

Matter of Rivera

2019 NY Slip Op 33290(U)

September 30, 2019

Surrogate's Court, Bronx County

Docket Number: 2016-1205/C

Judge: Nelida Malave-Gonzalez

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SURROGATE'S COURT, BRONX COUNTY

September 30, 2019

ESTATE OF PATRICK RIVERA, also
known as PATRICK S. RIVERA, Deceased
File No.: 2016-1205/C

Before the court is an interim accounting proceeding filed by the administrator d.b.n., an attorney who was appointed pursuant to the terms of two "so-ordered" stipulations that settled an underlying contested probate proceeding filed by the decedent's cousin who was the nominated executor and residuary beneficiary of an instrument dated March 21, 2007. Jurisdiction was obtained over the decedent's mother, who is the decedent's sole distributee and under a disability. The petitioner, an attorney for the mother and the guardian ad litem appointed for the mother all seek legal fees and disbursements. Consents were filed for the cousin, all of the other beneficiaries in the 2007 instrument, the attorney representing the mother in an Article 81 proceeding in the Supreme Court, Bronx County, and the Attorney General. The guardian ad litem appointed for the mother recommends approval of the application.

The decedent died on January 7, 2016 at the age of 57. He never married or had children. After his mother was appointed administrator of his estate, the cousin propounded the 2007 instrument. Pursuant to the

two "so-ordered" stipulations, inter alia: (1) the mother was to receive one-half of the gross estate and resigned as administrator; (2) the cousin's attorney was appointed administrator d.b.n.; (3) the cousin was to receive the balance of the estate assets after payment of all of the up-front bequests listed in the 2007 instrument, administration expenses, legal fees and taxes; (4) the mother's share was to continue to be held by the administrator d.b.n. until further order of the court. Thereafter, the mother, who is 99 years of age, was determined to be an incapacitated person by order of the Supreme Court, Bronx County (Johnson, J.), which appointed another cousin as guardian of her person and property subject to qualification. Thereupon, that cousin filed a renunciation and the Supreme Court issued an amended order appointing an attorney as guardian for the mother. That attorney has not yet qualified.

The attorney petitioner filed an affirmation of legal services detailing 117.4 hours spent at a reduced \$300 hourly rate. He waives commissions. In support of his request, he notes that he conducted extensive due diligence with the respect to the decedent's will and assets, was able to settle a very contentious probate proceeding, insured that all of the testamentary bequests were honored, arranged for the sale of the decedent's stocks and effectuated the sale of realty owned by the decedent as tenant in common at a substantially higher price than the appraised value. He also seeks reimbursement of \$3,379.52 in disbursements.

The attorney representing the mother in the administration and

contested probate proceedings, who participated in the supreme court Article 81 proceeding, seeks \$26,775 in fees for 76.5 hours services billed at a \$350 hourly rate and \$570 in reimbursement of filing fees. He notes the complexity of the probate contest, the fee request is substantially lower than the 25% fee in the mother's retainer agreement, the complexity of the probate contest, that his efforts resulted in the mother's receiving one-half of the gross estate and it was also necessary to engage in Medicaid planning for his 99-year-old client.

The guardian ad litem appointed for the mother seeks \$5,531.25 for services rendered in the accounting proceeding. She affirms that her usual hourly rate is \$375 and her services include discussions of the mother's attorney's financial plan which continued the eligibility of her ward for Medicaid and other governmental benefits. She waives reimbursement of expenses for photocopying and postage and does not bill for travel, all of which constitute office overhead.

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 (see *Matter of Stortecky v Mazzone*, 85 NY2d 518 [1995]); *Matter of Stellis*, 216 AD2d 473 [2d Dept 1995]; *Matter of Vitiole*, 215 AD2d 765 [2nd Dept 1995]; *Matter of Verplanck*, 151 AD2d 767 [2d Dept 1989]). There is no hard-and-fast rule to determine what is reasonable compensation in a particular case, and the court is not bound by counsel's summary of the hours expended (see *Matter of Vitole*, 215 AD2d

at 765). In determining reasonable compensation, the court may consider a number of factors, including the time spent, the difficulties involved in the matters in which the services were rendered, the nature of the services and the amount of the fee sought, the professional standing of the counsel, the size of the estate, the amount of litigation required and the benefit to the estate from the services provided (see *Matter of Freeman*, 34 NY2d 1 [1974]; *Matter of Potts*, 213 App Div 59 [4th Dept 1925], *affd* 241 NY 593 [1925], *Matter of Coughlin*, 221 AD2d 676 [3rd Dept 1995] [also see *Matter of Sabatino*, 66 AD2d 937 [3rd Dept 1978]). In awarding fees, the court not only considers the results achieved but the bitter nature of the contest which necessitated many of the services (see *Matter of Tobias*, 232 AD2d 341 [1st Dept. 1996]). Time spent is, in fact, the least important factor considered by a court in fixing reasonable compensation (see *Matter of Snell*, 17 AD2d 490 [3d Dept 1962]). When multiple attorneys are employed by the fiduciary, overlap in legal services should be a factor when considering the aggregate fee (see *Matter of Mergentine*, 155 Misc 2d 502 [Sur Ct, Westchester, County 1992], *affd* 207 AD2d 453 [2nd Dept 1994]). Where, as here, there are multiple parties represented by separate and/or more than one counsel, the court must determine which legal services performed benefitted the estate, and which benefitted only the beneficiary's individual interests (see *Matter of Hyde*, 15 NY3d 179 [2010]; *Matter of Luckenbach*, 280 AD 994 [2nd Dept 1952], *affd* 307 NY 795 [1954]; *Matter of Tobias*, NYLJ, June 5, 1995, at 28, col 3]). To the extent that counsel's services benefitted only the

individual and not the estate, the Surrogate may direct that party to personally pay a reasonable fee (see *Matter of Driscoll*, 273 AD2d 381 [2nd Dept 2000]; *Matter of Steinberg*, 262 AD2d 80 [1st Dept 1999]). Fees for duties performed by an attorney which are executorial in nature and capable of being performed by a lay person may not be recovered (see *Matter of Passuello*, 184 AD2d 108 [3d Dept 1992]). Certain disbursements, inter alia, for telephone calls, postage, copying, overnight delivery, and travel are considered to constitute law office overhead and will not be allowed (see *Matter of Aitken*, 160 Misc 2d 587 [Sur Ct., NY County 1994]; *Matter of Diamond*, NYLJ, July 14, 1993, at 30, col 1 [Sur Ct, Westchester County 1993], affd 219 AD2d 717 [2d Dept 1995]). Services related to counsel's fee application are not compensable (see *Matter of Giannattasio*, 2011 NY Misc LEXIS 989, 2011 NY Slip Op 30589 [U] [Sur Ct, Nassau County 2011]; *Matter of Gallagher*, NYLJ, Feb. 2, 1993 at 22, col 4 [Sur Ct, Bronx County 1993]).

In fixing reasonable compensation for the petitioner, counsel for the mother and the guardian ad litem, the court notes that the administrator d.b.n. reduced his hourly fee for legal services, declined statutory commissions and his services resulted in successfully marshaling the decedent's estate, including negotiating a contract price for realty owned by the decedent as tenant in common at a much higher price than the appraisal. He located all of the beneficiaries named in the will to insure payment of the stipulated bequests and obtained consents from them and

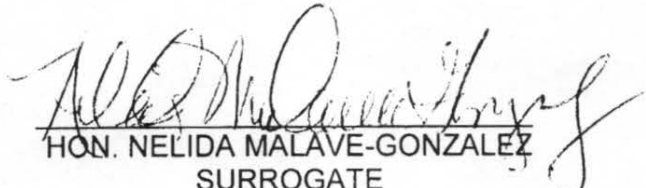
the Attorney General. Accordingly, the fee request of Robert G. Goodman, Esq. is allowed in the sum of \$ 24,525 reflecting the elimination of time billed for travel. Disbursements are allowed in the reduced sum of \$ 2,635.30 reflecting the elimination of certain items normally considered office overhead.

On this state of the record, the sum of \$ 21,770 is awarded to Maldonado and Cruz, PLLC, to be paid from the mother's share, for legal services, inter alia, reflecting the disallowance of travel time and preparation of an affirmation of services and \$2,800 for services rendered in the supreme court Article 81 proceeding, without prejudice to counsel seeking same in an appropriate proceeding in that court. Disbursements are allowed in the sum requested.

The guardian ad litem, Ellen M. Hoffer, Esq., is awarded the sum of \$ 4,500.00 for services rendered on behalf of the mother in this proceeding.

The administrator d.b.n. shall amend his account accordingly and settle an interim decree pursuant to the terms of the two "so-ordered" stipulations, inter alia, providing for the aforesaid payments and retention of the mother's remaining share pending further order of this court or a court of competent jurisdiction.

Settle decree.


HON. NELIDA MALAVE-GONZALEZ
SURROGATE