

Matter of Christopher J. A.
2020 NY Slip Op 34495(U)
March 16, 2020
Surrogate's Court, Bronx County
Docket Number: 81G1998/K
Judge: Nelida Malave-Gonzalez
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FILED

MAR 16 2020

ACCOUNTING DEPT.
SURROGATE'S COURT
COUNTY OF BRONX

SURROGATE'S COURT, BRONX COUNTY

March 16, 2020

IN THE MATTER OF THE FUNDING OF
A SUPPLEMENTAL NEEDS TRUST
FOR THE BENEFIT OFCHRISTOPHER J. A., a
File No.: 81G1998/K

In this uncontested application, the petitioner, an attorney, the successor guardian of the person and property of the respondent, seeks to establish a supplemental needs trust (SNT) for the benefit of the respondent.

The proposed trustees are the property guardian, his spouse, a retired Guardian Clerk of a Surrogate's Court of a different jurisdiction, and his son who is also an attorney. The SNT is to be funded with guardianship assets from the settlement of a medical malpractice action on the respondent's behalf. There is approximately \$1,675,000 in guardianship checking and wealth management accounts and realty located in Suffolk County purchased in the name of the successor guardian and the former guardian ad litem pursuant to order of this court dated June 2, 2016. Citation

was served upon the guardianship depository and the mother of the respondent's infant son, who appeared, consulted with counsel and did not file objections to the relief sought. The respondent's former guardian ad litem, who previously joined in the application and thereafter was granted leave to resign, consents to the relief requested.

In support of the application, the petitioner states that the respondent, who is now 34 years old, previously resided with the infant son and the infant's mother at the Suffolk County home and now lives alone. Although the respondent was determined to be intellectually disabled pursuant to decree dated August 18, 1998, he is relatively high functioning, works full time in construction and drives, but requires supervision in managing many personal and all financial affairs. He wants the Suffolk County home to be sold so that he can move closer to New York City.

Although attorney for the petitioner entered into a retainer agreement with the petitioner and the former guardian ad litem providing for a flat \$6,000 fee for legal services for negotiating a prenuptial agreement with counsel for the infant's mother, of which \$3,000 has been paid, counsel seeks an award of the \$3,000 retainer balance and an additional \$18,300 for sixty-one hours of additional services billed at a \$300 hourly rate. His time sheets show that 81 hours billed at a \$300 hourly rate were actually expended, totaling \$24,300. In his affirmation of services, counsel details futile negotiations and drafting of documents for a prenuptial agreement, as well as a self-settled inter vivos trust document that was extensively revised

to comport with the court's requirements for a supplemental needs trust. He engaged in discussions with providers of life insurance and added certain trust provisions concerning the respondent's infant son and counseled the respondent and the guardians concerning the propriety of trust ownership of a motor vehicle.

The court bears the ultimate responsibility for approving legal fees that are charged to guardianship funds and has the discretion to determine what constitutes reasonable compensation (see SCPA 2110; *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]) (also see *Matter of Pekorsky v Estate of Cohen*, 259 AD2d 702 [2nd Dept 1999]; *Matter of Cook*, 41 AD2d 907 [1st Dept 1973], *affd* 33 NY2d 919 [1973]; *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, 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]). 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 Kaufmann*, 26 AD2d 818 [1st Dept 1966]; *Matter of Snell*, 17 AD2d 490 (3d Dept 1962); *Matter of Haber*, NYLJ, Sept. 11, 2014, at 22, col 4 [Sur Ct, Bronx County 2014]). 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]).

After considering the necessary factors, *inter alia*, the protracted prenuptial negotiations and the extensive revisions to two different types of trust documents, weighed against the usual fee requests submitted by counsel in similar proceedings involving SNTs and the amount of the guardianship assets, the court awards legal fees to Leo G. Callaghan, Esq. in the sum of \$ 15,300 for all services rendered and to be rendered through the entry of the decree to be settled hereon.

In the absence of any opposition, and that the respondent was previously determined to be a person with severe and chronic disabilities, and these disabilities are expected to, and do, give rise to a long-term need for specialized health, mental health, developmental disabilities, social or other related services, and may need to rely on government benefits or assistance (EPTL 7-1.12), this application for leave to establish and fund the

SNT is granted (EPTL 7-1.12). The SNT instrument is to be modified and amended as follows: (1) The letters of trusteeship shall be subject to SCPA 805 (3) restrictions with respect to the realty; (2) Article SEVENTH shall provide that the SNT trustees shall file and maintain a bond in the penal sum of \$1,675,000. Schedule A is to be appended to the trust document detailing the amounts and sources of assets that are to fund the SNT; and (3) Article NINETEENTH shall be added providing that the three trustees shall seek only two commissions, and no fees are to be paid to them without further order of the court. A fully executed SNT document and memorandum of trust containing those revisions is to be annexed to the decree to be settled hereon.

On this state of the record, this decision constitutes the order of the court authorizing the successor property guardian, as grantor, and the three SNT trustees to execute the revised Declaration of Trust and memorandum of trust, and directing the sum of \$12,300.00 to be paid by the successor property guardian to Leo G. Callaghan, Esq., for all services rendered and to be rendered through entry of the decree. The award for services rendered by the guardian ad litem, temporary guardian of the person and guardian of the person and property has been determined in a separate order entered herewith. The remaining guardianship funds and title to the Suffolk realty are to be transferred to the SNT trustees.

Notwithstanding the lack of any opposition, the proposed decree and revised trust documents shall be settled upon the respondent,

the proposed SNT trustees, the infant's mother and her attorney, and the former guardian ad litem.

Settle decree and proceed accordingly.


HON. NELIDA MALAVE-GONZALEZ
SURROGATE