Matter of Cumma (Johnson)
2022 NY Slip Op 33526(U)
October 14, 2022
Surrogate's Court, New York County
Docket Number: File No. 2005-0417/A/B/C
Judge: Rita Mella
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New York County Surrogate's Court
DATA ENTRY
Date: October 14th 2022

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of the Application of Annie L. Cumma, as the Administrator of the Goods, Chattels, and Credits, which were of

EDWARD D. JOHNSON,

Deceased,

DECISION
File No.: 2005-0417/A/B/C

for Leave to Allocate and Distribute Proceeds of a Cause of Action for the Conscious Pain and Suffering of the Decedent, to Fix Attorneys' Fees and to Render and have Judicially Settled such Account of Proceedings as Such Administrator.

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M E L L A, S.:

This is a proceeding to account for $250,000 in proceeds from a 2016 jury verdict in Supreme Court, Kings County.[1] The action there was to recover for claims for decedent Edward Johnson's conscious pain and suffering and his wrongful death as a result of negligence on the part of a nursing home which caused decedent to develop bed sores. The verdict then had to be collected from an insurer being liquidated. Currently, the remaining proceeds are held by a third-party escrow agent, subject to the order of the court. Petitioner Annie Cumma is the Administrator of decedent's estate, and she seeks here, additionally, to allocate all the proceeds to the cause of action for decedent's conscious pain and suffering, and asks that her status as distributee, and that of other individuals, be determined. In the context of her accounting, Petitioner waives any entitlement to statutory commissions. A lengthy and vigorous battle regarding attorneys fees and disbursements is at the center of the parties' dispute.

Decedent died on November 30, 2004, at the age of 86. Although the jury rendered its

1 Although the original caption and request for relief in this proceeding sought court approval of a "compromise," this matter does not involve a compromise or settlement of the underlying tort action that decedent's Administrator brought on his behalf (*see generally* EPTL 5-4.6). The damages due decedent or his distributees were necessarily determined in the Supreme Court action by jury verdict and subsequent judgment, which was not appealed. The amount of damages is not reviewed for adequacy in this proceeding in this court.

verdict on March 22, 2016, and it was reduced to a judgment on June 1, 2016, various events prolonged the matter in Supreme Court. Eventually, Petitioner's instant petition to settle her account and for related relief was the subject of a two-day hearing in this court before a court attorney-referee ("the Hearing").

The lingering dispute involves the fees and expenses of two trial counsel in the underlying negligence action. Sheryl Menkes, Esq., originally represented Petitioner but in 2015, some 10 years into the course of that action, Menkes retained William Friedlander, Esq., to assist with certain trial witnesses and their cross-examination. She first agreed to compensate him at a rate of one-third of her own one-third contingency fee under a retainer agreement with Petitioner. Although disputed now by Menkes, and as will be discussed later, Friedlander, who resides in Ithaca, New York, claims that Menkes agreed to pay him his travel and overnight lodging expenses as a condition of his being retained. Later, Friedlander and Menkes agreed to increase Friedlander's share of her contingency portion from one-third to one-half, but Menkes claims her agreement to this was the product of the duress of Friedlander, who demanded the increase on the eve of trial under an alleged threat of abandoning the matter as co-counsel. In the context of the instant proceeding, Menkes filed with the court in January 2019, a notice indicating that she was asserting a charging lien against the damages awarded by the jury in the amount of 50 percent of "the net proceeds" in addition to $80,212.79 for the expenses she alleged to have incurred in the Supreme Court litigation.

Petitioner, for her part, argues that Menkes is not entitled to any fees because she was discharged for cause. Alternatively, Petitioner argues that Menkes should not be allowed fees because, having undertaken to represent the administrator of this estate in a wrongful death action, she had an obligation, under EPTL 5-4.6 (a)(3), to represent Petitioner in the current

proceeding in this court but did not. It is Petitioner's contention that she was forced to retain counsel to represent her in this court as a result of Menkes's improperly incurred and excessive disbursements in the negligence action, her attempt, through fraud and misrepresentations, to get reimbursed by the estate for expenses she knows she did not incur, and her unethical behavior, an example of which is her failure to properly serve Petitinoer and Friedlander with process, an order to show cause, when she sought to have the fees and disbursements issue determined in Supreme Court. As a result, Petitioner claims that, to the extent Menkes is awarded fees here, the fees of Petitioner's counsel in the current proceeding should be a charge against Menkes's fees.

Menkes, in opposition, argues that all her claimed disbursements and the entire one-third contingency fee are payable to her, and that it is Friedlander who has forfeited his fee and claimed disbursements by having improperly convinced Petitioner to discharge her as counsel. Menkes also claims that there was no agreement with Friedlander to pay his travel and lodging expenses, and that the $5,000 payment she made to him on account of such expenses was the product of Friedlander's duress. Finally, Menkes opposes Petitioner's request to apportion the fees of Petitioner's current counsel against her fees on the ground that there is no basis for the imposition of such a sanction.

After the Hearing, with all parties having consented that the court can render a decision on the evidence there admitted,[2] the court now resolves all outstanding issues. These include: a) the identity of the distributees of the decedent; b) the entitlement of trial counsel to fees and to disbursements from the proceeds of the negligence action in Supreme Court; and c) the extent to which counsel for each of the parties are permitted to be paid their fees for services provided in

2 Hundreds of exhibits were admitted into evidence at the Hearing.

this proceeding from the decedent's estate. The New York County Public Administrator was cited pursuant to SCPA 1123 (2)(i)(1), because decedent had unknown distributees, and appeared in this proceeding. Also, a guardian ad litem (GAL) was appointed for Louis Johnson, alleged child of decedent and distributee under a disability, and for two alleged distributees whose whereabouts are unknown. The GAL has reported in favor of a kinship determination and has proposed that his disabled ward's share be placed in a pooled trust for his benefit. Petitioner has amended her petition to ask for authority to have the share of this individual, her brother, paid to a pooled trust in accordance with the GAL's proposal. All other counsel, including the attorney acting as escrow agent and the GAL, also seek to have their fees and disbursements (if any) fixed and determined.

In the context of the personal injury action, the disagreements between Menkes, on the one hand, and Petitioner and Friedlander, on the other, led to a stipulation of August 26, 2016 before Justice Gloria Dabiri of the Kings County Supreme Court, terminating the attorney-client relationship between Petitioner and Menkes. This was after the jury verdict was reduced to a judgment by Menkes. Petitioner then retained Friedlander, and it was he who was able to recover $250,000 of the $257,357 judgment, in light of the anticipated insolvency of the defendant nursing home's insurer. The amounts above $250,000 were interest and statutory costs included in the judgment when entered. Thereafter, the question of Menkes's disbursements was referred to a special referee, who resolved the issue at a hearing, notwithstanding Menkes's non-appearance as a witness, which later turned out to be due to her ill health.[3]

Upon a motion by Menkes, however, that special referee's resolution of the

3 Menkes appeared at such hearing via a per diem attorney retained by her for the limited purpose of requesting an adjournment.

disbursements issue without the benefit of Menkes's testimony was vacated in a later order of Justice Dabiri and the matter was referred to a different referee for a new hearing on the issue, but that hearing never occurred. Instead, the parties eventually stipulated to the matter being resolved in this court. The current petition, by seeking to resolve all disbursements and fees issues, does just that. Before turning to those issues, however, the court first resolves the question of the identity of decedent's distributees, an issue which is not contested.

Kinship Determination

The proof offered at the Hearing established that decedent was survived by three children: Petitioner; Louis Johnson, who is under a disability and who lives in a residential facility and for whom the GAL was appointed; and Patricia Scott, Petitioner's half-sibling (EPTL 4-1.1[b]), who died after decedent. Petitioner also sought relief under SCPA 2225(b), given that more than three years had elapsed since decedent's death, and the GAL has reported that relief under the statute may be appropriately granted here. The Public Administrator did not oppose such relief. The court thus concludes —based on the evidence of unsuccessful, diligent, and exhaustive searches from all available sources to find other distributees— that no other distributees exist except those whose status is established in this record.

Attorneys Fees and Disbursements

The determination of the reasonable value of an attorney's services payable from a decedent's estate is committed to the court's "extraordinary discretion" (*Matter of Graham*, 238 AD2d 682, 687 [3d Dept 1997]; *see Matter of Hofmann*, 38 AD3d 366, 367 [1st Dept 2007]; *see generally Matter of Stortecky v Mazzone*, 85 NY2d 518 [1995]). This is so regardless of the existence of a retainer agreement (*Matter of Haag*, 55 Misc 3d 324, 328 [Sur Ct, Broome County 2016]).

However, as a general principle, when there is a dispute between a discharged attorney and her successor, the discharged attorney may elect compensation based on quantum meruit, or she may elect to be paid "a contingent percentage fee based on her proportionate share of the work performed on the whole case" (*Lai Ling Cheng v Modansky Leasing Co.*, 73 NY2d 454, 458 [1989]). Here no claim for fees by Menkes is made on a quantum meruit basis. Instead, she claims that, as the fair value of her services, she is entitled to one-third of the net recovery as set forth in the retainer. Under that retainer, her expenses—referred to by her as disbursements— must first be deducted prior to calculating her one-third contingency fee. The court, however, is required to address a preliminary issue: an application made by Menkes in connection with the Hearing to permit the filing of the retainer agreement with Petitioner nunc pro tunc with the Office of Court Administration (OCA).

Application to File Retainer Nunc Pro Tunc

The underlying negligence action was prosecuted in Kings County, and the Appellate Division, Second Department, by rule (*see* 22 NYCRR 691.20), requires that an attorney retainer agreement be filed with OCA within 30 days of the date of such agreement. Notwithstanding the execution of a retainer agreement with Petitioner in 2004, Menkes only filed it with OCA after retaining Friedlander as co-counsel in 2015. She claims law office failure (she is a solo practitioner with inconsistent paralegal support) as the reason for the late filing (*see* CPLR 2004, 2005). Leave of court, however, is technically needed to make such a late filing.

Although Menkes's request for leave here was not made until the time she provided exhibits for the Hearing, the court will grant the application and permit the late filing nunc pro tunc.[4] The circumstances here are analogous to those in *Matter of Abreu* (168 Misc 2d 229 [Sur

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4 In resolving this motion, the court considered the following papers: Notice of Motion for nunc pro tunc filing

Ct, Bronx County 1996]), where late filing nunc pro tunc was permitted. Additionally, CPLR 2005 provides that law office failure may excuse delay. The facts here are not similar to those in *Giano v Ioannou*, (78 AD3d 768, 771 [2d Dept 2010]), as Petitioner attempts to argue, and Menkes provided services over a period of 12 years including serving as co-counsel at trial through a jury verdict that was entered as a judgment before she was discharged by Petitioner.

Menkes's Fees

Petitioner claims that she discharged Menkes for cause. As noted above, Menkes and Petitioner stipulated that Menkes would no longer act as Petitioner's counsel in the underlying personal injury action. The Stipulation of August 26, 2016 states that, "upon the request of the plaintiff Annie Cumma and with the consent of Sheryl R. Menkes, Esq., . . . Menkes . . . is relieved as counsel for plaintiff, effective immediately." There is no mention of any grounds for relieving Menkes. The court thus concludes that this Stipulation was a mutually agreed-upon termination of their relationship, and that, as such, it does not provide a basis for the loss of Menkes's requested charging lien for her fees (*Klein v Eubank*, 87 NY2d 459 [1996]). Indeed, in this very Stipulation, the parties, including Petitioner, agreed that Menkes and Friedlander would share the legal fees set forth in the retainer agreement "equally, fifty percent to each." Such a provision conclusively excludes Petitioner's argument now that Menkes forfeited her fee for having been discharged by Petitioner for cause.[5]

In any event, to the extent that Petitioner points to the amount of expenses Menkes incurred as a basis for her discharge, it appears that Menkes's decision to incur those expenses

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with affirmation of Sheryl Menkes, Esq.; Affirmation in Opposition to Respondent's Motion by Daniel J. Reiter, Esq.; Affidavit in Reply of Sheryl Menkes, Esq., with Exhibits.

5 The fact that in the subsequent Stipulation by which the parties agreed that issues regarding disbursements be determined in this court, Petitioner handwrote that discharge was "with cause" and Menkes wrote in that it was "without cause" does not change this analysis.

was premised on her overly optimistic view of the possible damages to be awarded by the jury, and thus presents something in the nature of a disagreement about strategic choices that does not provide a basis for an assertion of discharge for cause (*Morrison Cohen Singer & Weinstein v Zuker*, 203 AD2d 119 [1st Dept 1994]). Moreover, to the extent that the order to show cause regarding Menkes's disbursements and fees was not properly served on Petitioner in the Supreme Court action, the proof at the Hearing failed to establish that this was not due to actions of the process server, rather than those of Menkes personally. To be sure, there are shortcomings in Menkes's itemization and back-up documentation regarding claimed expenses but those are more properly addressed when determining whether the expenses should be allowed, as will be discussed below.

As an alternative basis for a denial of fees to Menkes, Petitioner points to the text of EPTL 5-4.6 (a)(3), which requires that an attorney who undertakes a wrongful death matter must continue to represent the fiduciary of the estate in this court until the entry of a final decree. In opposition, Menkes notes correctly that a client has an absolute right to discharge her attorney (*Teichner v W & J Holsteins, Inc.*, 64 NY2d 977, 979 [1985]), and consequently, as a technical matter, Menkes could not have continued to serve after Petitioner discharged her.

On this record, Petitioner has failed to establish a basis for forfeiture of Menkes's fees.

Apportionment of the Fees of Petitioner's Current Counsel Against Menkes's Fees

Petitioner further requests that, if Menkes is allowed fees, the compensation of Daniel Reiter, Esq., her attorney in this proceeding, be charged against Menkes's fees. Petitioner bases her request, again, on EPTL 5-4.6's continued representation requirement. However, as just noted, Menkes was discharged and could not have served as Petitioner's counsel in this court. Petitioner has provided no other basis for shifting the fees that the estate incurred in resisting

Menkes's claim, and the request is denied.

Friedlander's Alleged Duress in the 50%-50% Fee Agreement and Claim for Travel Expenses

As previously discussed, the parties' Stipulation of August 2016 relieving Menkes as Petitioner's counsel confirmed the 50%-50% split of the one-third contingency fee amount under Menkes's retainer with Petitioner. Even if that were not sufficient to resolve this issue, the parties reconfirmed this 50%-50% fee-split accord in their stipulation agreeing to resolve all remaining issues in this court. Notably, Menkes does not argue that either of these stipulations was the product of duress. In any event, Menkes's failure to disavow such agreement immediately upon the waning of the circumstances giving rise to the alleged duress —here the need for Friedlander to conduct the trial— dooms her claims of duress as a matter of law (*see Matter of Guttenplan*, 222 AD2d 255 [1st Dept 1995] [party who failed to repudiate agreement promptly after duress ceased deemed to have ratified agreement]). Consequently, she cannot now challenge the agreed-to split of fees between her and Friedlander.

The court further concludes that such a division of fees is appropriate in light of the proportionate contributions by Menkes and Friedlander to gaining the verdict in Petitioner's favor. After discharge of a lawyer and retention of a successor, courts look to various factors to determine each attorney's share of fees. These include factors such as "the time and labor spent by each, the actual work performed, the difficulty of the questions involved, the skill required to handle the matter, the attorney's skills and experience, and the effectiveness of counsel in bringing the matter to resolution" (*see Buchta v Union-Endicott Cent. School Dist.*, 296 AD2d 688, 689-90 [3d Dept 2002] [internal quotations and citations omitted]). Here, Menkes conducted most of the pretrial discovery and motion practice, including a successful opposition to defendants' motion for summary judgment. Friedlander took the role of lead counsel at trial

(by Menkes's own admission in her counter-statement of issues). This distribution of the work performed is consistent with the parties agreed-to 50%-50% division of fees.

The remaining question is whether Menkes agreed to pay Friedlander's travel expenses (mileage, meals, and local hotel charges) from Ithaca, to conduct the trial in New York City. Although an agreement was contemplated by Friedlander as an addendum to the retainer agreement, no signed agreement on this issue was provided; however, no party has argued that this agreement must necessarily come within the statute of frauds and be in writing to be enforceable (*see First Choice Staffing of NY, Inc. v Geller & Siegel, LLP*, 24 Misc 3d 140[A], 2009 NY Slip Op 51637[U] [App Term, 1st Dept 2009]). Moreover, Menkes made a payment to Friedlander of $5,000 in response to his itemized claim for such expenses. This payment was unmistakably referable to an agreement regarding expenses. Menkes also ignores that, after the $5,000 payment, Friedlander continued to work on the matter (and was paid an additional $599 by Menkes for expenses), acting as lead counsel at the trial, and necessarily incurring additional travel expenses ($3,976) for which he seeks reimbursement pursuant to this agreement (*see Menche v CDx Diagnostics, Inc.*, 199 AD3d 678, 682 [2d Dept 2021], *citing Messner Vetere Berger McNamee Schmetterer Euro RSCG Inc. v Aegis Group*, 93 NY2d 229, 235 [1999] [an oral agreement partially performed by one who detrimentally relies on agreement's terms may be enforced if performance is unequivocally referable to agreement]).

To the extent Menkes claims duress in relation to the expense agreement, those claims are unavailing. Generally, "[r]epudiation of an agreement on the ground that it was procured under duress requires the showing of a wrongful threat and the preclusion of the exercise of free will" (*Wujin Nanxiashu Secant Factory v Ti-Well Intl. Corp.*, 14 AD3d 352, 352 [1st Dept 2005]), a showing that Menkes has not made here. As a factual matter, despite the volume of

evidence admitted at the Hearing, including her own testimony, Menkes failed to meet her burden of establishing that the expense agreement was the product of Friedlander's coercion or wrongful threat. Indeed, at the Hearing, Friedlander credibly testified that their agreement concerning expenses was not forced onto Menkes on the "eve of trial" but instead was a necessary pre-condition to Friedlander's agreeing to serve as co-counsel in the first place. Menkes does not deny that it was she who reached out to Friedlander, based on their many years of acquaintance and his expertise, to assist with the trial as co-counsel, and not the other way around.

As a result, $3,976 in unpaid expenses of Friedlander's travel and lodging[6] are properly a charge, and they are offset against Menkes's fees as attorney, pursuant to her agreement with Friedlander.

Menkes's Disbursements

By far, the main source of friction among the parties in this proceeding were the "disbursements" claimed by Menkes. Here the term "disbursements" is used to mean out-of-pocket expenses necessary to prosecute the underlying action (*see* EPTL 5-4-4 [b]; SCPA 2301[3]). Shortly before the Hearing, Menkes confirmed that the precise amount of disbursements she was seeking to recoup was $63,317.90. As noted above, however, in her notice asserting a lien submitted to the court in 2019, she had claimed that the amount was $80,212.79.

According to Petitioner, at various points, Menkes provided her or her counsel six different figures for the expenses she allegedly incurred. That the amount of expenses that

6 Although Menkes at the Hearing sought to portray such expenses as "dry cleaning" charges by Friedlander, that is not accurate. The invoice of charges sought by Friedlander includes listings for mileage, travel meals, and hotel charges.

Menkes sought was a "moving target" delayed and complicated the resolution of her claims, and was a source of much frustration on Petitioner's part. Although Menkes complained at the Hearing that it was Friedlander who maligned her to Petitioner, a review of her records after her discharge, confirmed some of Petitioner's concerns. Menkes transferred the record of her disbursements to Friedlander's firm after she was discharged and a paralegal at that firm, who testified at the Hearing, was tasked with reconciling them. The paralegal confirmed various discrepancies in the record-keeping, such as, on one occasion, a misplaced decimal point ($675 vs $6.75), some possible duplication, lack of receipts, and some attempted charging for per diem attorneys employed by Menkes that are not properly sought as disbursements.

At the Hearing, Menkes offered evidence to substantiate $63,317.90 in disbursements. Petitioner did not object to all of these expenses; she only objected to those for which there was no canceled check or other proof of payment, such as a paid invoice or receipt, and those that were incurred for experts who were not called to testify, or whose evidence was not used, at the trial of the underlying personal injury action.

In general, expenses claimed to be paid as disbursements incident to the assertion of claims for a decedent's wrongful death or personal injuries must be reasonable and necessary and must have been paid or be due and owing (*see Matter of Phillips*, 143 Misc 824 [Sur Ct, Queens County 1932]; *see also* EPTL 5-4.4 [b]). Here, the amounts sought by Menkes are for out-of-pocket expenses incurred in prosecuting the underlying action for which, again, reasonableness is the touchstone (EPTL 5-4.4[b]).

On that question, contrary to Petitioner's and the GAL's arguments, the evidence presented at the Hearing failed to substantiate any fraudulent behavior on the part of Menkes. Instead, the proof demonstrated that Menkes had an over-inflated view of the possible recovery

related to the cause of action, leading her to incur substantial expenses related to medical and forensic experts. The proof also established Menkes's inattentiveness and sloppiness regarding recordkeeping. In the end, Menkes was able to provide documentation substantiating most of her payments, out-of-pocket, and the reasons for those expenses. As to items for which she presented copies of checks (even if they were not shown to have been canceled) or invoices (even if they are not marked as paid), the court credits Menkes's testimony that she paid those expenses.

However, any objected-to claimed disbursement by Menkes for which there is no check indicating payment or no receipt or invoice from a vendor or payee confirming payment is disallowed. Although, as noted in *Matter of Phillips* (143 Misc at 826, *supra*), oral proof may in some instances suffice, in this matter, and in the exercise of discretion, the court will not allow reimbursement for those from the proceeds of the personal injury cause of action (*see Matter of Turco*, NYLJ, Oct. 27, 1994, at 29, col 6 [Sur Ct, Nassau County]). There are 13 disbursements in this category and they total $11,715.92.[7]

Petitioner also objects to 15 expenses that Menkes claims to have incurred in paying experts or consultants in the medical field to review records and provide strategy.[8] Those items total $9,921.31 and none of these payments was made to an expert who testified at trial. Petitioner posits that Menkes has not established the need for those services or that the services were actually provided and that the amounts she paid for some of them was exorbitant. The court agrees with Petitioner that as to these expenses, Menkes did not substantiate their

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7 On Menkes's list of disbursements, these are line numbers 10, 57, 65, 119, 120, 123, 130, 131, 134, 139, 141, 143 and 159, to which Petitioner specifically objected at the Hearing. Each indicates "no check" or "cash." No other tangible proof of payment was provided by Menkes for these entries.

8 These are line numbers 4, 9, 14, 16, 20, 30, 33, 34, 35, 37, 38, 67, 71, 82, and 129 on Menkes's disbursements list. Petitioner does not object to other expenses paid to medical consultants.

reasonableness, and, under all the circumstances here, the court disallows them in part. Reimbursement to Menkes in the amount of $5,000 is allowed for this category of expenses.

Also disallowed is the claimed disbursement by Menkes for $5,000 for Friedlander's travel expenses, which, as discussed above, are properly charged to Menkes under her agreement with Friedlander. Consequently, $21,637.23 must be deducted from Menkes's total claimed disbursements of $63,317.90, which difference is $41,680.67.

That is not the whole picture, however, because the medical doctor who testified at the trial of the underlying matter was not paid in full by Menkes. He was paid only $3,500 of his requested $8,600 claim for fees, including for reviewing records, providing an affirmation on the summary judgment motion, and preparing for and testifying at trial. The doctor acknowledges in email correspondence that he received $3,500 in payment and Menkes states that, in addition, a $45 witness fee has been paid to him. Thus, the remaining $5,055 is appropriately considered an allowable disbursement here. Adding this sum to the $41,680.67 allowed for Menkes's expenses results in total allowable disbursements in connection with the Supreme Court action of $46,735.67.

When deducted from the $250,000 actually recovered,[9] this results in a net amount of $203,264.33 ($250,000 - $46,735.67= $203,264.33). One-third of $203,264.33 is $67,754.78, and this would be the legal fee under the retainer. One-half of that amount is $33,877.39 and, under their agreement, Friedlander and Menkes would each be entitled to this sum, but Menkes's fees are reduced by the $3,976 that the court has allowed here for Friedlander's unpaid expenses.

9 Although Menkes argued that the full amount of the judgment (plus interest and costs) should have been recovered, she provided no proof that the full amount was able to be obtained from the liquidating insurer. The decision not to expend additional resources to obtain interest and costs under the judgment was made deliberatively, according to the proof at the Hearing, because a positive recovery of amounts above $250,000 may not have been possible or would take as much in attorneys fees to recover.

Fees and Disbursements of Petitioner's Counsel, the Public Administrator's Counsel, the Guardian Ad Litem, and the Attorney Escrow Agent

Four other attorneys or their firms properly seek to have their compensation fixed and determined in this matter.

As noted previously, in this court, Petitioner retained Reiter to settle her account. He seeks payment for 152.66 hours of time at an hourly rate of $300 per hour or $45,798.00 in fees, plus $1,515.48 in disbursements, plus an additional $625 provided by Petitioner personally for the filing fee.

The firm representing the Public Administrator seeks payment for 13.5 hours of time at the rate of $525 per hour or $7,000.50 and seeks no disbursements.

The escrow agent, the Doolan Platt & Setareh, LLP law firm, seeks payment of $4,243.75, which is the amount it sought in 2019 in a filing prior to the Hearing and has confirmed it has agreed to cap its fee request at that amount, despite having to spend additional, but unspecified time, on this matter since that filing. Its prior affirmation substantiated that 13.2 hours of time have been spent on this matter, leading to an effective hourly rate of approximately $321 per hour. The escrow agent attorney does not seek payment for disbursements either.

The GAL, Jerry Judin, Esq., seeks payment for 29.5 hours of work on this matter on behalf of his wards, at his usual rate of $600 per hour or $17,700.00, and seeks no amounts for disbursements.

The familiar, well-established, non-exclusive factors used in analyzing the reasonableness of fees under *Matter of Freeman* (40 AD2d 397 [4th Dept 1973], *affd* 34 NY2d 1 [1974]) and *Matter of Potts* (213 App Div 59 [4th Dept 1925], *affd* 241 NY 593 [1925]) include: the amounts involved; the difficulty of the issues presented; the professional standing of counsel;

the results obtained; and the time spent. The court reviews each attorney's fee request under such factors in turn.

Petitioner retained Reiter to file and prosecute the instant petition to settle her account as Administrator. His services were not limited to the dispute between Menkes and Friedlander over fees and disbursements. He also provided services related to the kinship determination and how to distribute the share of the distributee Louis Johnson, because he is under a disability and receiving government benefits. The court acknowledges the vigor with which this seemingly straightforward matter was litigated and that the Hearing did require Reiter's active preparation and involvement. However, there was no significant motion practice, other than Menkes's application regarding the late filing of the retainer, nor any significant discovery, apart from documents Menkes provided regarding her disbursements. After review of Reiter's time records, the court concludes that the time spent by him in drafting and preparing documents for filing in this court and for review of those documents after filing was somewhat excessive. Also slightly excessive was the time spent by Reiter in preparing for the Hearing. Overall, the court reduces the number of hours for which Reiter will be compensated to 130.5. The court acknowledges, however, that additional time will be needed to be spent by Reiter to prepare the decree in this matter, and allots 1.5 hours of time for the completion of this task. The court thus fixes the compensation of Reiter at $39,600 (132 hours at his requested rate of $300 per hour). Regarding disbursements, Reiter's affirmations and attached invoices and receipts substantiate that the $1,515.48 and $625 sought are for proper out-of-pocket disbursements, not properly included as part of office overhead (*Matter of Herlinger*, NYLJ, April 28, 1994, at 28, col 6 [Sur Ct, NY County]).

With respect to the services of counsel for the Public Administrator, they were necessary

to ensure that any potential distributee of the decedent could be found, and the hours spent appears commensurate with the necessity of reviewing the kinship proof and the proof of diligent searches and attending the Hearing. However, the requested hourly rate will be reduced to $250 per hour under all the circumstances presented here and in line with the complexity of the work necessarily required. Consequently, the court fixes the compensation of Schram Graber & Opell P.C. in this matter at $3,375, representing 13.5 hours of work at the rate of $250 per hour.

As to the "capped" fee request of $4,243.75 by the escrow agent, Doolan, Platt & Setareh, LLP, the court determines this request to be reasonable under the circumstances, which the court acknowledges involved additional disputes over, among other things, payments allowable for the transcripts of the Hearing from the escrowed funds.

Regarding the compensation sought by the GAL, significant work was required on behalf of his ward under a disability to ensure his government benefits would not be affected by receipt of his share of the proceeds, which was apart from the work involving the kinship evidence, the Hearing, and searches for his alleged missing wards. The court considers the 29.5 hours spent by him as reasonable, but under all the circumstances present, and while acknowledging his years of experience, will compensate the GAL at the rate of $350 per hour. Accordingly, the court fixes the compensation of the GAL in the amount of $10,325 (29.5 hours x $350 per hour).

CONCLUSION

The restrictions of the Letters of Administration are modified in accordance with this decision to permit all distributions. The Administrator is authorized to execute and deliver any papers or electronic authorizations necessary to effectuate the settlement of the account and distribution. In response to the citation served on the New York City Human Resources Administration/Department of Social Services, directing the agency to show cause why any

claims should not be rejected, the agency made no appearance and presented no claims or liens, and none is allowed.

Accordingly, the proceeds should be allocated to the cause of action for conscious pain and suffering. The fees and disbursements are fixed, determined, and apportioned as set forth in this decision, and the net estate shall be distributed in three equal shares in intestacy, one to Petitioner, one to the pooled trust for the benefit of Louis Johnson to be applied for by Petitioner, in accordance with the GAL's report, and one to the fiduciary of the estate of Patricia Scott, who post-deceased, but if no such fiduciary is appointed or appears within sixty days of the entry of the decree in this matter, this share shall be paid to the New York City Commissioner of Finance for the benefit of the estate of Patricia Scott; the account as modified by this decision should be settled. Petitioner shall update the court after sixty days from the entry of the decree in this matter, confirming payment to the pooled trust on behalf of Louis Johnson and payment to the estate fiduciary of Patricia Scott or the deposit for her estate's benefit.

Settle accounting decree directing distributions from escrow.

Dated: October 14, 2022

SURROGATE