

Matter of Ehlers
2012 NY Slip Op 32985(U)
November 15, 2012
Surrogate's Court, Nassau County
Docket Number: 345831/2012
Judge: III., Edward W. McCarty
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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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Probate Proceeding
Will of

File No. 345831

EDNA A. EHLERS,

Dec. No. 28173

Deceased.

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In connection with this probate proceeding, the sole issue before the court is a determination of the fee payable to the guardian ad litem.

BACKGROUND

The decedent, Edna A. Ehlers, died a resident of Nassau County on March 2, 2007, leaving a last will and testament dated June 4, 1993. A petition for probate was filed by Joan Ehlers, a legatee under the will who was related to the decedent by marriage. By order dated February 1, 2010, the court appointed a guardian ad litem to represent the interests of decedent's missing and unknown distributees. On February 3, 2012, the guardian ad litem filed his report recommending that the will be admitted to probate. At that time, he also filed an affirmation of services. At the request of the court, the guardian ad litem filed a supplemental affirmation on July 24, 2012.

LEGAL 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]). 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]).

A guardian ad litem is entitled to a fee for his or her services rendered (SCPA 405). The factors considered by the court in determining the fee 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 34, col 5 [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.

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 the 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*, 123 Misc 346 [Sur Ct,

Columbia County 1924], *affd* 213 App Div 59 [4th Dept 1925], *affd* 241 NY 593 [1925]).

PETITIONER'S AFFIRMATION OF SERVICES

The petitioner originally submitted an affirmation of legal services which, while detailed, did not include any time records. This report reflected that the guardian ad litem provided a total of 71.15 hours of services. At a billable rate of \$275.00 per hour, the fee totaled \$19,566.25, which was then discounted by \$8,566.25, bringing the requested fee down to \$11,000.00. The affirmation indicates that none of the hours of services which were billed reflect time spent preparing the affirmation.

The burden with respect to establishing the reasonable value of legal services performed rests on the attorney performing those services (*Matter of Potts*, 123 Misc 346 [Sur Ct, Columbia County 1924], *affd* 213 App Div 59 [4th Dept 1925], *affd* 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 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]).

The court requested additional information concerning the time spent by the guardian ad litem in providing services. In response, the guardian ad litem submitted a supplemental affirmation, but this, too, did not contain contemporaneous time records. Instead, it consisted of a one-page summary of the 71.15 hours devoted to accomplishing various tasks, which may be further summarized as follows:

-Review and photocopy documents and telephone calls with the investigator	15.90 hours
-Telephone calls with two individuals and a letter draft	1.90 hours

-Interview petitioner, attorney-draftsperson and attesting witness	2.40 hours
-Searches for missing and unknown distributees	4.60 hours
-Review and compare reports from the investigator and the genealogist;	
Speak with genealogist and draft affirmation of services and letters to the court	3.15 hours
-Prepare and file report and research due diligence searches	43.20 hours

ANALYSIS AND CONCLUSION

The petition for probate reflects an estate consisting of personal property of \$166,000.00 and improved real property valued at \$355,000.00, for a total estimated value of \$521,000.00. In his report, the guardian ad litem provides an updated estate value of \$505,695.00. The fee requested by the guardian ad litem, even after the substantial voluntary discount of 43%, would constitute a fee in excess of two percent of the gross estate.

Although due diligence was required in searching for the decedent's missing and unknown distributees, the probate proceeding was otherwise fairly standard, and it involved no litigation. The guardian ad litem, however, spent more than 70 hours in fulfilling his responsibilities, including approximately 40 hours preparing his 14-page report.

It is well established that the size of the estate 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. While the court appreciates the excellent and thorough services provided by the guardian ad litem, in setting his fee, the court is limited by the nature of the proceeding and the size of the estate.

Accordingly, the fee of the guardian ad litem is fixed in the amount of \$6,975.00, which

shall be paid within 30 days of the issuance of a probate decree.

This decision constitutes the order of the court and no additional order need be submitted.

Dated: November 15, 2012

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