

Matter of Bolz

2017 NY Slip Op 30549(U)

March 9, 2017

Surrogate's Court, Nassau County

Docket Number: 2010-361229/C

Judge: Margaret C. Reilly

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

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**Accounting by Teresa Bolz,
as the Administrator of the Estate of**

**DECISION
File No. 2010-361229/C
Dec. No. 32542**

**JOHN HENRY BOLZ,
a/k/a JOHN H. BOLZ,**

Deceased.

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PRESENT: HON. MARGARET C. REILLY

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

Petition.	1
Accounting.	2
Report of the First Guardian ad Litem, filed October 23, 2015.....	3
Report of the Second Guardian ad Litem, filed December 29, 2016.....	4
Affirmation of Legal Services.	5
Proposed Decree.	6

Before the court is the judicial account of Teresa Bolz, as the administrator of the estate of her brother, John Henry Bolz.

BACKGROUND

John Henry Bolz (the decedent) died on May 10, 2010, survived by three minor children: (1) Connor and (2) Derek, the children of the decedent’s former marriage to Jessica Bolz; and (3) Gianna, a posthumous child born to Anna Saladino.¹

The accounting covers the period from May 5, 2010 to September 30, 2013. Waivers were filed by the surety and by Jessica Bolz and Anna Saladino, the mothers of

¹The decedent’s daughter, Gianna, was not listed as a distributee on the original petition for letters of administration, but was added to an amended petition following DNA testing and this court’s issuance of Dec. No. 27192 on April 22, 2011.

the decedent's children. A claim was filed against the estate by Jessica Bolz, based upon the decedent's failure to maintain a \$400,000.00 life insurance policy for the benefit of Connor and Derek until their emancipation, pursuant to a Separation Agreement and Stipulation, dated October 21, 2008 (the 2008 Separation Agreement), that resolved the divorce action between the decedent and Jessica Bolz in the Nassau County Supreme Court.

RELIEF REQUESTED

The administrator asks the court to judicially settle her account and to dispense with the requirement of a bond. In addition, the court must fix the fees of the two guardians ad litem appointed to represent the interests of the decedent's minor children and approve legal fees and disbursements of the administrator's counsel.

THE ACCOUNT

The account shows total charges of \$297,529.83. These charges were reduced by funeral and administration expenses of \$85,248.10 and creditors claims paid in the amount of \$182,822.19 (\$2,822.19 to third party creditors and \$180,000.00 to trusts for the benefit of Connor and Derek, pursuant to the claim filed by Jessica Bolz), leaving a balance on hand as of September 30, 2013 in the amount of \$29,459.54. On Schedule D of the account, under "claims presented and allowed but not paid," the administrator lists additional unpaid claims totaling \$235,063.22, all of which relate to the decedent's failure to maintain life insurance pursuant to his obligation under the 2008 Separation Agreement.

REPORT OF THE FIRST GUARDIAN AD LITEM

On September 9, 2015, a guardian ad litem was appointed to represent the interests of the three minor children; he filed his report on October 23, 2015. In the report, the guardian ad litem acknowledges the validity of the claim made by Jessica Bolz on behalf of his wards, Connor and Derek, against the estate. He further advises the court that since the claim exceeds the total assets of the estate, his third ward, Gianna, will not inherit anything from the decedent.

The report includes a review of each schedule of the account. The guardian ad litem notes that the second amended Schedule C-1 lists debts of \$5,000.00 to Jessica Bolz, which were previously shown as paid. He reports that counsel to the petitioner advised him that the amounts shown on the second amended Schedule C-1 are estimates, but the guardian ad litem suggests that the court may require additional documentation of unpaid expenses. The guardian ad litem states that he has no objections to the schedules on the administrator's account.

REPORT OF THE SECOND GUARDIAN AD LITEM

The court appointed a second guardian ad litem to represent the interests of Gianna after it was determined that the interests of Gianna conflicted with the interests of the decedent's marital children, who were claimants against the decedent's estate. The second guardian ad litem was appointed on September 7, 2016 and he filed his report on December 29, 2016. In his report, the second guardian ad litem confirms that since the claim filed by Jessica Bolz exceeds the assets of the decedent's estate, his ward will not

inherit, and he also notes that his ward's mother, Anna Saladino, filed a waiver. Once he concluded that his ward would not inherit from the decedent, the second guardian ad litem chose not to conduct a review of the accounting schedules, although he agreed to do so if directed by the court.

The second guardian ad litem addressed the seeming discrepancy found on the second amended Schedule C-1 concerning an unpaid debt to Jessica Bolz, as noted in the report filed by the first guardian ad litem. He reported that he spoke with counsel for the petitioner and was advised that all outstanding debts had been paid and that there are no outstanding debts at this time.

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]).

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], *aff'd* 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. The burden with respect to establishing the reasonable value of legal services performed rests on the attorney performing those 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]; *see e.g. Matter of Spatt*, 32 NY2d 778 [1973]).

Fee Of Counsel to the Administrator

Counsel for the administrator submitted an affirmation of legal services that reflects total fees of \$43,538.60,² which includes disbursements of \$3,636.60. The services were provided during the five-year period between May 2010 and July 2015. The affirmation references counsel's interactions with the successive attorneys who represented Jessica Bolz, and the complex issues resulting from the discovery that the decedent had fathered a non-marital child born posthumously. Counsel further notes that in addition to being an attorney, she is a Certified Public Accountant, in which capacity she prepared all of the federal and New York State fiduciary tax returns and the administrator's account. Annexed to the affirmation are the retainer agreement between counsel and the petitioner as well as the actual time records generated by counsel.

²The First Supplemental Citation, issued on July 29, 2015, reflects paid fees and disbursements totaling \$41,681.60 and unpaid fees and disbursements of \$6,800.00.

The fee requested, exclusive of disbursements, represents 13% of the gross estate. The time sheets reflect that counsel provided extensive services that were necessitated by the discovery of a third child and the resulting petition, DNA testing and the amendment of the original petition; multiple settlement negotiations with different attorneys representing the decedent's former spouse in connection with the terms of the 2008 Separation Agreement; and complex retirement assets and issues. In addition, counsel provided all of the necessary tax preparation services. Based upon all of the factors listed above, the court approves the fee in the amount requested, \$43,538.60.³

Fees of the Two Guardians ad Litem

With respect to the fee of the guardian ad litem, the court notes that the first guardian ad litem submitted a letter to the Surrogate listing the dates on which he provided services, the type of services provided and the number of hours. This list reflects that the first guardian ad litem spent 12.5 hours between September 9, 2015 and October 19, 2015 in the representation of his wards. At his stated rate of \$280.00 per hour, the requested fee is \$3,500.00. In consideration of all of the factors listed above, including the size of the estate, the fee of the first guardian ad litem is fixed in the amount of \$2,750.00.

The report of the second guardian ad litem included a statement of fees which reflects that he spent approximately five hours on behalf of his ward, and that his usual

³Amended Schedule C reflects that \$38,246.60 has been paid, leaving a balance of \$5,292.00, while the First Supplemental Citation shows paid fees and disbursements of \$41,681.60.

rate is \$350.00 per hour. The fee of the second guardian ad litem is fixed in the amount of \$1,050.00.

CONCLUSION

Schedule I of the account reflects that the administrator waived her commissions.

Legal fees are approved in the total amount of \$43,538.60, inclusive of disbursements. The administrator is authorized to pay any outstanding balance, after which no additional fees will be paid.

The fee of the first guardian ad litem is approved in the amount of \$2,750.00; the fee of the second guardian ad litem is approved in the amount of \$1,050.00.

Within 60 days of the date of this decision, the administrator shall file an affidavit bringing her account down to date, along with an amended decree. The decree shall discharge the surety and, pursuant to the agreement of the parties, shall authorize the administrator to distribute one-half of the balance of the net estate to the Connor Bolz Special Needs Trust and one-half of the balance of the net estate to the Derek J. Bolz Settlement Trust.

Dated: March 9, 2017
Mineola, New York

E N T E R:

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Judge of the Surrogate's Court

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