

**Matter of Behrens**

2013 NY Slip Op 30718(U)

March 7, 2013

Surrogate's Court, Nassau County

Docket Number: 2010-363146/C

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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Accounting by Rita Eredics, as Executor of the Estate of

MARJORIE L. BEHRENS,

Deceased.  
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File No. 2010-363146/C

Dec. No. 28471

In this accounting proceeding, the issues before the court are: (i) attorneys' fees; (ii) accountant's fees; (iii) approval of commissions; and (iv) the settlement of the account.

The decedent, Marjorie L. Behrens, died on October 29, 2010, a resident of Nassau County, leaving a will dated October 10, 2008. Letters testamentary issued to the attorney-draftsman on June 13, 2011. The decedent's will provides for the distribution of her residuary estate to three individuals and three charitable beneficiaries in varying percentages. The executor has filed her first and final account covering the period October 29, 2010 through July 31, 2012. The summary statement shows charges to the accounting party of \$90,184.47 and credits of \$54,390.03, leaving a balance on hand of \$35,794.44. The bulk of the decedent's assets were previously transferred to an inter vivos trust, of which petitioner is the trustee. The non-testamentary assets are valued at approximately \$109,000.00. The accounting shows legal fees requested of \$14,276.00, in addition to \$4,000.00 in legal fees already paid.

The Attorney General appeared in the proceeding on behalf of the charitable beneficiaries and has filed objections to the legal fees shown in the account. The Attorney General objects on the basis that the legal fees are "excessive, unwarranted and unreasonable for the legal services that were required to be rendered to this relatively modest and uncomplicated estate."

The individual beneficiaries and two of the three charitable beneficiaries filed waivers and consents to the accounting. The remaining charitable beneficiary failed to appear on the

return date of the citation.

With respect to the issue of attorneys' 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 (*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 (*Matter of Kelly*, 187 AD2d 718 [2d Dept 1992]); the complexity of the questions involved (*Matter of Coughlin*, 221 AD2d 676 [3d Dept 1995]); the nature of the services provided (*Matter of Von Hofe*, 145 AD2d 424 [2d Dept 1988]); the amount of litigation required (*Matter of Sabatino*, 66 AD2d 937 [3d Dept 1978]); the amounts involved and the benefit resulting from the execution of such services (*Matter of Shalman*, 68 AD2d 940 [3d Dept 1979]); the lawyer's experience and reputation (*Matter of Brehm*, 37 AD2d 95 [4th Dept 1971]); and the customary fee charged by the Bar for similar 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]; *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 (*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 (*Martin v Phipps*, 21 AD2d 646 [1st Dept 1964], *affd* 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 (*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 (*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]). 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 Von Hofe*, 145 AD2d 424 [2d Dept 1988]; *Matter of Phelan*, 173 AD2d 621 [2d Dept 1991]).

With respect to disbursements, the tradition in Surrogate's Court practice is that the attorney may not be reimbursed for expenses that the court normally considers to be part of overhead, such as photocopying, postage, telephone calls, and other items of the same matter

(*Matter of Graham*, 238 AD2d 682 [3d Dept 1997]; *Matter of Diamond*, 219 AD2d 717 [2d Dept 1995]; Warren's Heaton on Surrogate's Court Practice §106.02 [2] [a] [7th ed]). In *Matter of Corwith* (NYLJ, May 3, 1995, at 35, col 2 [Sur Ct, Nassau County]), this court discussed the allowance of charges for photocopies, telephone calls, postage, messengers and couriers, express deliveries and computer-assisted legal research. The court concluded that it would permit reimbursement for such disbursements only if they involved payment to an outside supplier of goods and services, adopting the standards set forth in *Matter of Herlinger* (NYLJ, Apr. 28, 1994, at 28, col 6 [Sur Ct, New York County]). The court prohibited reimbursement for ordinary postage and telephone charges other than long distance.

In support of her fee, counsel has submitted (i) a "Petition for Payment of Final Legal Fees," which, pursuant to stipulation, the Attorney General and the petitioner agreed to treat as petitioner's affidavit of legal services, (ii) petitioner's affidavit dated August 12, 2012, and (iii) petitioner's affirmation, dated December 21, 2012, in response to the Attorney General's objections. By decision dated January 27, 2012 (Dec. No. 27621), petitioner was awarded an interim fee of \$4,000.00 for the period from October 29, 2010 through June 30, 2011, although she requested approval of the sum of \$30,000.00. The court concluded that some of the services were executorial in nature and some of the services billed pertained to the clean up and sale of the decedent's residence, which is an asset of the trust, not the estate.

The petitioner now seeks a fee of \$14,276.00 plus disbursements of \$474.00. According to the time records submitted, petitioner or employees at her firm spent a total of 76.25 hours at hourly rates ranging from \$325.00 per hour to \$90.00 per hour. The services rendered by counsel's firm include preparation of the accounting, resolution of a beneficiary interest in a

BNY Mellon IRA which led to an income tax refund for the estate in the amount of \$11,246.99, investigation of whether the decedent had an interest in Terra Nitrogen Company, LLP, making of partial distributions to the residuary beneficiaries and preparation of receipts and releases.

In addition to the objections, the Attorney General submitted an affidavit dated January 16, 2013 in which he states that the time spent by Jane Viola, Esq. of approximately 59.50 hours was disproportionate to the size of the estate. The Attorney General states that Ms. Viola spent time preparing a list of estate accounts with date of death values, which is executorial in nature, and providing instructions to staff on certified mail receipts, which is secretarial in nature. In addition, Ms. Viola spent time organizing a file, which is also secretarial in nature. The Attorney General also points out that Ms. Viola spent a considerable amount of time investigating whether the decedent had an interest in Terra Nitrogen Company, when, in fact, the decedent apparently sold her interest 13 years prior to her death. The Attorney General also states that some of the time billed related to The Marjorie L. Behrens Revocable Trust dated September 21, 1999, which fees are more properly payable out of the trust.

Considering all of the factors used to determine the reasonableness of fees, the court fixes the fee of counsel in the total amount of \$9,000.00, of which \$4,000.00 has already been paid, without prejudice to petitioner seeking payment from the trust for services rendered to the trust. Disbursements in the amount of \$474.00 for court fees are approved representing the probate filing fee and fee for certificates of letters testamentary.

The court has also been asked to review the accountant's fees. Typically, an accountant's services are not compensable from estate assets unless there exist unusual circumstances that require the expertise of an accountant (*Matter of Meranus*, NYLJ, Mar. 31, 1994, at 37, col 2

[Sur Ct, Suffolk County]). The fee for such services is generally held to be included in the fee of the attorney for the fiduciary (*Matter of Musil*, 254 App Div 765 [2d Dept 1938]). The purpose of this rule is to avoid duplication (*Matter of Schoonheim*, 158 AD2d 183 [1st Dept 1990]).

“Where the legal fees do not include compensation for services rendered by the accountant, there is no duplication and the legal fee is not automatically reduced by the accounting fee” (*Matter of Tortora*, NYLJ, July 19, 1995, at 26, col 2 [Sur Ct, New York County] [internal citation omitted]; Warren’s Heaton on Surrogate’s Court Practice § 93.08 [7th ed] [citing *Tortora*]).

With respect to the accountant’s fee, the accountant seeks a fee of \$475.00. The accountant prepared the decedent’s final income tax return and an amended income tax return. The accountant’s fee is not duplicative and appears reasonable. Accordingly, the court approves the accountant’s fee in the amount of \$475.00.

Commissions are approved subject to audit.

In all other respects, the accounting is approved.

Settle decree.

Dated: March 7, 2013

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