

Matter of Hoffenberg
2014 NY Slip Op 30242(U)
January 23, 2014
Surrogate's Court, Nassau County
Docket Number: 2010-362502
Judge: Edward W. McCarty III
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SURROGATE'S COURT OF THE STATE OF NEW YORK
 COUNTY OF NASSAU

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 Probate Proceeding, Will of

BERNICE HOFFENBERG ,

File No. 2010-362502

Dec. No. 29519

Deceased.

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Before the court is the final report and recommendation of a guardian ad litem, filed January 2, 2014. The court must also fix the fee of the guardian ad litem.

BACKGROUND

Bernice Hoffenberg died on September 25, 2010, survived by her sons, Martin and Steven. Martin filed an instrument dated August 17, 2010 for probate. The accompanying probate petition indicates that decedent left no personalty but owned real estate with a value of \$600,000.00. Preliminary letters issued to Martin and have been repeatedly extended.

The court appointed a guardian ad litem to represent the interests of Steven, who was incarcerated. At Steven's direction, the guardian ad litem conducted discovery and filed objections to the probate of the propounded document.

The guardian ad litem has now filed his final report in which he reviews the grounds for Steven's objections to probate and advises the court that his ward was released from prison in October 2013. Accordingly, he asks the court for an order discharging him as guardian ad litem.

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]).

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 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*, 241 NY 593 [1925]).

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* (241 NY 593 [1925]), 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 and to the interest of the ward of the guardian ad litem (*Matter of McCranor*, 176 AD2d 1026 [3d Dept 1991]; *Matter of Kaufmann*, 26 AD2d 818 [1st Dept 1966], *aff'd* 23 NY2d 700 [1968]; *Martin v Phipps*, 21 AD2d 646 [1st Dept 1964], *aff'd*, 16 N.Y.2d 594 [1965]; *Matter of Ault*, 164 Misc 2d 272 [Sur Ct, New York County 1995]). Moreover, it is well-settled that time spent is, in fact, the least important factor considered by a court in fixing reasonable compensation (*see Matter of Snell*, 17 AD2d 490, 494 [3rd Dept 1962]; *Matter of Potts*, 213 App Div 59, 62 [4th Dept 1925], *aff'd* 241 NY 593 [1925]; *Matter of Kentana*, 170 Misc 663 [Sur Ct, Kings County 1939]).

These factors 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 35, col 4 [Sur Ct, Nassau County]). The guardian ad litem is entitled to a fee for his or her services rendered (SCPA 405). 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.

A sizeable estate permits adequate compensation, but nothing beyond that (*Matter of Martin v Phipps*, 21 AD2d 646 [1st Dept. 1964], *aff'd* 16 NY2d 594 [1965]; *Matter of Yancey*, NYLJ, Feb. 18, 1993, at 28, col 1 [Sur Ct, Westchester County]; *Matter of Reede*, NYLJ, Oct. 28, 1991, at 37, col 2 [Sur Ct, Nassau County]). A large estate does not, by itself, justify a

large fee (*Matter of Young*, 52 Misc 2d 398 [Sur Ct, Suffolk County 1966]). 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], *aff'd* 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*, 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 the 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]). In the absence of contemporaneous time records, little weight is given to estimates of time after the services have been performed (*Matter of Phelan*, 173 AD2d 621 [2d Dept 1991]). This applies to the fee of a guardian ad litem (*Matter of Carbone*, NYLJ, Oct. 26, 1995, at 36, col 3 [Sur Ct, Suffolk County]).

The guardian ad litem submitted a first interim report, a second interim report, and a final report. The time records affixed to his affirmation of legal services reflect almost 45 hours of services rendered from August 25, 2011 through September 25, 2013, a period in excess of two years. On December 16, 2013, the guardian ad litem prepared his extremely thorough final report to the court.

The time records reflect that among the many services provided, the guardian ad litem participated in many telephone conferences; made many court appearances; prepared for and conducted examinations pursuant to SCPA 1404; reviewed the file; reviewed the propounded will and the related documents; obtained and served a subpoena for medical records and

reviewed decedent's medical records; reviewed correspondence; consulted with his ward and his ward's wife; prepared, filed and served objections to probate; and requested and reviewed discovery materials. The guardian ad litem states that his current billable rate is \$400.00 per hour.

The guardian ad litem is discharged; the court fixes the fee of the guardian ad litem in the amount of \$14,500.00, to be paid within 30 days hereof.

A conference is required in this matter. In order to allow Steven sufficient time to retain counsel if he chooses, the conference has been scheduled for February 25, 2014, at 3:45 p.m.

This constitutes the decision and order of the court.

Dated: January 23, 2014

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