

Matter of Scott C. Levy
2010 NY Slip Op 31704(U)
June 30, 2010
Surrogate's Court, Nassau County
Docket Number: 330923/A
Judge: John B. Riordan
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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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Accounting by Meryl Levy as the Administrator of the
Estate of

SCOTT C. LEVY
a/k/a SCOTT LEVY,

File No. 330923/A

Dec. No. 26429

Deceased.
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Submitted for decision in this accounting proceeding are the issues of the attorney's fee and the guardian ad litem's fee.

The decedent, Scott C. Levy, died on December 12, 2003, a resident of Nassau County. The decedent was a personal injury attorney who died unexpectedly at the age of 44 as a result of an automobile accident. He was survived by his wife, Meryl Levy, and two children, Taylor Isabel Levy, an infant over the age of fourteen years, and another daughter, Alexandra Reiner-Levy. Letters of administration issued to the decedent's wife, Meryl Levy. A guardian ad litem was appointed for the decedent's minor child. The guardian ad litem has now submitted her report.

The decedent was a solo practitioner with a personal injury practice in New York City. At the time of his death, he maintained approximately 300 active cases. The only assets of his estate are the legal fees recovered after his death in these cases which totaled \$160,729.00. In the course of reviewing these files, it was determined by petitioners's counsel that the decedent had wrongfully misappropriated settlement payments due numerous clients. As a result, the Lawyers' Fund for Client Protection was contacted. The decedent's IOLA account, in the amount of \$12,887.09, was turned over to the fund. Out of 208 cited persons and entities, only two

appeared in the proceeding, the Lawyers' Fund for Client Protection and the law firm of Parker & Waichman.

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]).

These factors apply equally to an attorney retained by a fiduciary or to a court-appointed guardian ad litem (*Matter of Burk*, 6 AD2d 429 [1st Dept 1958]; *Matter of Berkman*, 93 Misc2d

423 [Sur Ct, Bronx County 1978]; *Matter of Reisman*, NYLJ, May 18, 2000, at 34 [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]).

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.

The guardian ad litem reports that petitioner's counsel is seeking a fee of \$100,000.00 which accounts for more than 58% of the value of the estate. According to the guardian ad litem, this estate required extensive legal services. Counsel had to review the status of roughly 300 active case files. All clients were contacted. Those who responded were assisted with the transition to new counsel. Petitioner's counsel took over twenty-one cases. The guardian ad litem concludes that, without petitioner's counsel's services, there might be no estate to

administer since the entire gross estate consists solely of legal fees recovered after death from these personal injury cases.

Petitioner's counsel also assisted the decedent's clients with verification of their claims with the Lawyers' Fund for Client Protection. The number of creditors and former clients which petitioner's counsel identified and served amounted to over 200 parties. In addition, petitioner's counsel handled litigation involving two motions which successfully defeated a creditor's claim filed by the law firm of Parker & Waichman for \$39,946.00 relating to referral fees for personal injury cases. Petitioner's counsel opposed the claim and it was eventually dismissed.

The guardian ad litem contends that the only aspect of the estate administration which petitioner's counsel should have handled differently concerns the filing of the federal and state fiduciary income tax returns for the estate's first four years. All of the returns were filed late, generating a significant liability for penalties and interest. The fiduciary income tax returns for 2004, 2005, 2006, and 2007 were not timely filed, which resulted in penalties and interest of \$13,838.00. Moreover, the guardian ad litem points out that \$8,000.00 was paid to the accountant for preparation of the fiduciary income tax returns. The guardian ad litem recommends that the \$8,000.00 fee paid to the accountant be considered in fixing the legal fee and that the interest and late payment penalties of \$13,838.00 be offset against the legal fees requested. She also recommends that disbursements in the amount of \$751.80 be disallowed as office overhead (fax \$75.00, photocopies \$273.04, and ordinary postage \$403.76).

The guardian ad litem recognizes that counsel's firm devoted a tremendous amount of time to these legal services. Counsel's affirmation of legal services recites that the firm spent 973.45 hours on this matter from December 23, 2003 through April 17, 2008. The time charges

amount to \$173,295.00. In addition, disbursements in the amount of \$4,007.88 were incurred for a total of \$177,302.88. If the \$177,302.88 in fees and disbursements are offset by the accountant's fee of \$8,000.00, the disbursements for facsimile, postage and photocopies in the amount of \$751.80 and the \$13,838.00 in late filing and late penalty payments, there would be an adjusted total charge of \$154,712.08. The guardian ad litem believes that a reduced fee of \$100,000.00 is reasonable considering the complexity of the issues, the benefits obtained for the estate, the time spent and counsel's experience and reputation.

The guardian ad litem also points out that Schedule C-1 fails to reflect that the surviving spouse is owed her widow's exempt property cash amount of \$15,000.00 in accordance with EPTL 5-3.1. The guardian ad litem recommends that Schedule C-1 be amended to clarify that the surviving spouse is to be paid \$15,000.00 pursuant to EPTL 5-3.1, prior to any further payment for administration expenses. Since the guardian ad litem's ward is still residing with her mother, the decedent's surviving spouse, she will presumably benefit indirectly from a distribution of the exempt property to her mother.

With respect to the calculation of commissions, the guardian ad litem reports that the commissions computation is incorrect. Schedule C-1 reports commissions due in the amount of \$7,635.53. The guardian ad litem calculates the commissions at \$6,829.00.

The balance remaining on hand in the estate is \$19,330.47. Of this amount, \$15,000.00 should be distributed to the surviving spouse as her exempt property. This will leave the sum of \$4,330.47 to cover all remaining administration expenses, including counsel fees, the guardian ad litem's fee and administrator commissions.

The court agrees with the guardian ad litem's recommendations and conclusions regarding the computation of commissions and the payment of exempt property to the widow. Accordingly, commissions are approved in the reduced amount of \$6,829.00. Schedule C-1 shall be amended to reflect that the widow is owed exempt property under EPTL 5-3.1.

As to legal fees, the court recognizes the substantial services performed by counsel's firm with respect to this complicated estate. The identification of approximately 205 interested parties was an extraordinary task. The court further recognizes that it was only through counsel's efforts that any funds were recovered to generate an estate. Accordingly, the court approves the reduced fee of \$100,000.00 to counsel's firm, of which \$89,274.14 has been paid and \$10,725.86 remains unpaid, as fair and reasonable compensation for the services rendered.

The guardian ad litem has submitted an affirmation of services which shows that she spent 36.50 hours on this matter, which at her hourly rate of \$400.00 resulted in time charges in the amount of \$14,512.50. With respect to the guardian ad litem's fee, the court's notes that the services performed by the guardian ad litem were of the utmost quality. The guardian ad litem reviewed the accounting, discovered that the exempt property had not been paid to the surviving spouse, corrected the computation of commissions and advised the court of the late payment of fiduciary income taxes. While the court recognizes the guardian ad litem's exemplary work, the court is constrained by the size of the fund. Accordingly, the court approves a fee for the guardian ad litem in the amount of \$4,000.00.

The court recognizes that the fees approved above exceed the amount on hand. Accordingly, after payment of the exempt property to the surviving spouse, the fee of the

guardian ad litem shall be satisfied. Any additional funds received shall be used to satisfy counsel's fee.

This constitutes the decision and order of the court.

Settle decree.

Dated: June 30, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court