

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

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**Proceeding to Fix and Determine Attorney's Fees
for Services Rendered to the Estate of**

KENNETH R. BAGATELLE,

Deceased.

-----X
**Proceeding to Fix and Determine Attorney's Fees
for Services Rendered to the Estate of**

ROSE BAGATELLE,

Deceased.

-----X
PRESENT: HON. MARGARET C. REILLY

DECISION & ORDER

File No. 359532/J

Dec. No. 34201

File No. 350273/M

Dec. No. 34199

The following papers have been considered in the preparation of this decision:

For Estate of Kenneth Bagatelle - File No. 359532/J

Petition to Fix and Determine Attorney's Fees and Exhibits	1
Affidavit in Further Support of Petition, Frank T. Santoro, Esq.	2
Affidavit of Legal Services	3
Answer	4
Memorandum of Law in Response to Petition	5
Affirmation in Further Answer and Exhibits	6

For Estate of Rose Bagatelle - File No. 350273/M

Petition to Fix and Determine Attorney's Fees	1
Affidavit in Further Support of Petition, Frank T. Santoro, Esq.	2
Affidavit of Legal Services	3
Answer	4
Memorandum of Law in Response to Petition	5
Affirmation in Further Answer and Exhibits.	6

Before this court are two petitions, pursuant to SCPA §2110, for decrees (1) fixing and determining the legal fees of Farrell Fritz ("petitioner" counsel for Janice Waxman) in

the amount of \$20,420.50, and; (2) granting judgment in favor of Janice, personally, against David Bagatelle, personally, for those fees in the amount of \$20,420.50 or in the alternative; [ii] directing payment of those fees in the amount of \$20,420.50, be made by the estate of Kenneth Bagatelle to Janice as an administration expense upon final distribution of estate assets; (3) fixing and determining the legal fees of Farrell Fritz in the amount of \$9,617.50, and; (4) granting judgment in favor of Janice, personally, against David Bagatelle, personally, for those fees in the amount of \$9,617.50 or in the alternative; [ii] directing payment of those fees in the amount of \$9,617.50, be made by the estate of Rose Bagatelle to Janice as an administration expense upon final distribution of estate assets.

David Bagatelle ("respondent"), by his attorney filed answers to both of the amended petitions, asserting the following affirmative defenses in each proceeding (estates of Kenneth Bagatelle and Rose Bagatelle): failure to state a legally sufficient claims; that the respondent repaid to the estates all the money he took from them; that the petitioner did not manage the estates' assets competently and in good faith, but instead wasted them by her gross incompetence and failed to make a promised distribution and like [respondent] was removed for cause, and; that the petitioner comes into court with unclean hands. In addition to an answer, the respondent filed an affirmation in further answer seeking that the petitioner's legal fee award be reduced by an amount sufficient to avoid duplicative billing and to be set in an amount that is fair.

The instant proceeding is to fix and determine attorneys fees for counsel to Janice Waxman, a distributee of the estate of Rose Bagatelle and a distributee of the estate of

Kenneth Bagatelle. According to the Petitions, Janice Waxman by her attorney, was successful in suspending and removing David Bagatelle as administrator, d.b.n., of Rose Bagatelle's estate and as administrator of Kenneth's estate and compelled David to reimburse funds to the estates. Petitioner contends that Janice has spent, out of pocket, approximately \$160,000.00 on legal fees and seeks only reimbursement for the time her attorneys have spent on successfully removing the respondent as administrator in both proceedings.

Respondent argues that the attorneys' fees sought in the petitions are excessive and duplicative. In his affirmation in further answer, respondent posits that the attorneys fees are excessive because: the fees he was awarded in a separate removal proceeding to remove the original administrator were only \$6,517.75; that they represent the duplication of effort between two law firms; that because counsel for the petitioner in these proceedings charges more per hour than the attorney that represents a different petitioner (Tracy Bagatelle-Black) there should be a cost differential on services provided that both attorneys worked on, on behalf of their separate clients; that there are billing entries for the estate of Hedy Bagatelle (David's mother) and; that there are duplicated services relating to court appearances.

The allegations that fees are duplicative and excessive because two law firms made appearances and performed the same services and that there are duplicate billing entries for court appearances, are not supported by any statutory authority or case law.

Respondent's argument that petitioner's fees are excessive because they are higher than what he was awarded in a similar removal proceeding, is also not supported by any

statutory authority or case law.

Respondent argues that there are billing entries for the estate of Hedy Bagatelle (David's mother) included in the petitioner's counsel fee application, and that respondent argues these services should not be included as attorney's fees recoverable in the estates of Rose and Kenneth.

SCPA §2110 reads in relevant part as follows:

“[1] At any time during the administration of an estate and irrespective of the pendency of a particular proceeding, the court is authorized to fix and determine the compensation of an attorney for services rendered to a fiduciary or to a devisee, legatee, distributee or any person interested or of an attorney who has rendered legal services in connection with the performance of his duties as a fiduciary or in proceedings to compel the delivery of papers or funds in the hands of an attorney.”

Pursuant to SCPA § 2110, a trial court has the discretion “to allocate responsibility for payment of a fiduciary's attorney's fees for which the estate is obligated to pay--either from the estate as a whole or from shares of individual estate beneficiaries” (*Matter of Hyde*, 15 NY3d 179, 182 [2010]). In determining the allocation of legal fees, “the Surrogate's Court should undertake a multi-factored assessment of the sources from which the fees are to be paid” (*id.* at 186). The factors mentioned by the court in *Matter of Hyde* that are pertinent to the present proceedings include: whether the party acted in the common interest of the estate or exclusively in her own interest; the potential resulting benefits to other parties as a result of the actions taken; and the party's good or bad faith (*id.* at 186-7). In *Matter of Greatsinger* (67 NY2d 177 [1986]), the court addressed the allocation of fees in the context

of a construction proceeding, and identified, among other factors to be considered, “whether there was benefit from the attorney’s services to the entire estate or only to the share of the party [represented by the attorney]” (*id.* at 184). Further, in allocating fees, a court may consider whether a fiduciary’s conduct resulted in “obstructing and prolonging an otherwise uncomplicated proceeding” and whether “with the exception of the ordinary administration of decedent’s estate, the proceedings . . . were necessitated by and attributable to the improper conduct of [the fiduciary]” (*Matter of Rose BB.*, 35 AD3d 1044, 1045 [3rd Dept 2006] [citations omitted]). Finally, “[t]he general rule is that, where legal services have been rendered for the benefit of the estate as a whole, resulting in the enlargement of all the shares of all the estate beneficiaries, reasonable compensation should be granted from the funds of the estate” (*Matter of Kinzler*, 195AD2d 464, 465 [2d Dept 1993][citations omitted]). “However, where the legal services rendered did not benefit the estate but benefitted only the individuals whom the attorney represented, the attorney must seek compensation from the clients individually” (*Matter of Baxter [Gaynor]*, 196 AD2d 186, 190 [4th Dept 1994], *lv denied sub nom.* 84 NY2d 808[1994]).

In determining attorney’s fees the court will not compare the fees that the respondent was awarded in a totally separate proceeding to the amount that the petitioner is seeking in this proceeding. Respondent argues that the fees requested represents the duplication of effort between two law firms.

In the instant proceedings two distributees, Tracy Bagatelle-Black¹ (represented by S. Timothy Ball, Esq.) and Janice Waxman retained their own counsel. Petitioner has submitted an affirmation of legal services and an itemized invoice that includes services for work done relating to the removal of the respondent in the proceedings for the estate of Kenneth and Rose Bagatelle. Counsel in conjunction with counsel for Tracy Bagatelle-Balck were successful in removing the respondent as administrator of both estates and for the reimbursement of thousands of dollars to the estates of Rose Bagatelle and Kenneth Bagatelle, by the respondent, funds that were improperly disbursed by the respondent.

While there may be some duplication of effort, it was respondent's misconduct that precipitated the actions taken by counsel and, as the fiduciary, he should not be surprised that more than one beneficiary sought to protect her individual interest in the estates nor, under the circumstances presented, should he be spared from the full consequences of his conduct merely because the beneficiaries did not coordinate their efforts to minimize his exposure.

The petitioner was instrumental in getting the respondent to refund thousands of dollars back into the estates. The refunds substantially enlarged the shares of the estates for all the beneficiaries. Accordingly, reasonable compensation is warranted (*Matter of Kinzler*, 195AD2d 464, 465 [2d Dept 1993]). The court is permitted to fix fees to multiple attorneys that have rendered services to an estate (*Matter of Bernardini*, NYLJ, June 21, 2006, at 33

¹ Tracy Bagatelle-Black Waxman by her counsel has also filed a petition to fix and determine legal fees and the court will issue a decision on those proceedings simultaneously with the instant decision.

col 5[Sur Ct, Bronx County]). The court is unable to distinguish the efforts between the petitioner's counsel and counsel for Tracy Bagatelle-Black, in obtaining the refunded money to the estate, therefore both are entitled to reasonable compensation.

Respondent argues in paragraphs 17-19 of his affirmation in further answer, that there are entries related to the estate of Hedy Bagatelle, the respondent's mother, in the billing invoices of S. Timonty Ball, Esq. This Petitioner's (Farrell Fritz PC) affidavit of legal services does not contain a single entry in either proceeding related to Hedy Bagatelle's estate.

The court has reviewed the retainer agreements provided by counsel, the affirmation of legal services and the itemized invoice of counsel. Counsel's usual hourly rate ranged from \$465.00 to \$480 from 2013 through the end of the billing on these proceedings and counsel affirms he spent 40.2 hours on the estate of Kenneth Bagatelle and at least 16.65 hours on the estate of Rose Bagatelle in these removal proceedings. Therefore counsel fees already paid by Janice Waxman are \$20,420.50 in Kenneth's estate and \$9,617.50 in Rose's estate for a total of \$30,038.00.

The value of the assets of the estate of Rose Bagatelle were approximately \$950,000.00 in January of 2017. The value of the assets of the estate of Kenneth Bagatelle were approximately \$1,500,000.00. "Generally, an attorney's fee must be charged to the interest in the estate of the person represented, rather than to the general estate" (*Matter of Bianculli*, 288 AD2d 214, 215 [2d Dept 2001]). Further SCPA § 2110 [2] provides that

“[t]he court may direct payment ... from the estate generally or from the funds in the hands of the fiduciary belonging to any legatee, devisee, distributee, or person” (*see also Matter of Hyde*, 15 NY3d 179 [2010]). Counsel fees in these proceedings will not be charged to the estate generally, as the respondent’s inappropriate management of the estate assets not only caused his removal but depleted the estates’ assets.

Accordingly, the petition to fix and determine counsels fees of the petitioner is **GRANTED**. Janice Waxman is awarded \$30,038.00. It is **ORDERED** that all of the awarded fees are to be paid directly to Janice Waxman from the respondent’s interest as a distributee of the estate of Kenneth Bagatelle, and if his interest is less than the awarded fees then the remaining fees and disbursements are to be paid from the respondent’s interest as a distributee in the estate of Rose Bagatelle.

Settle decree.

Dated: June 25, 2018
Mineola, New York

ENTER:


HON. MARGARET C. REILLY
Judge of the Surrogate’s Court

cc: Frank T. Santoro, Esq.
Farrell Fritz, P.C.
1320 RXR Plaza
Uniondale, New York 11556

S. Timothy Ball, Esq.
380 Lexington Avenue, 17th Floor
New York, New York 10168