

Matter of Phillips

2016 NY Slip Op 32017(U)

June 28, 2016

Surrogate's Court, Nassau County

Docket Number: 298171E

Judge: Margaret C. Reilly

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

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**In the Matter of the Account of Proceedings of the
Public Administrator of Nassau County,
as Administrator of the Estate of**

**DECISION
File No. 298171E
Dec. No. 31526**

**IVY PHILLIPS,
a/k/a IVY D. PHILLIPS,**

Deceased.

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PRESENT: HON. MARGARET C. REILLY

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

Petition for Judicial Settlement of Account	1
Accounting by Administrator	2
Affirmation to Amend Account	3
Affirmation of Legal Services by Brosnan & Hegler, LLP	4
Affirmation of Legal Services by Mahon, Mahon, Kerins & O’Brien, LLC	5
Affirmation of Tax Services	6

I. PROCEDURAL HISTORY

Before the court is the first and final account of the Public Administrator for the estate of Ivy Phillips. Temporary letters of administration issued to the Public Administrator on January 7, 2005, and full letters were issued on February 5, 2010. The account of the Public Administrator was initially filed on July 27, 2015, and was amended on November 23, 2015.

II. BACKGROUND

As reviewed in this court’s Dec. No. 236, issued on June 14, 2006, the decedent, Ivy D. Phillips, died on September 14, 2004 at the age of 96. The decedent’s Last Will and Testament, dated September 2, 1968, provided that her entire estate be left to her husband, John Phillips. John Phillips did not survive the decedent. The Will then provided that the

decedent's estate be divided into three equal shares with one-third to her sister, Gladys Turner, one-third to her sister, Hilda Watkins and one-third to her brother, Major Edwin Watkins. If any of the three predeceased, his or her share was devised to the survivor. All three siblings predeceased.

On January 6, 2005, the Public Administrator filed a petition for probate. After an extensive investigation, it was determined that all of the bequests in the decedent's will had lapsed. An application was filed to withdraw the petition for probate. On June 14, 2006, the court issued Dec. No. 236, which noted that whether or not the will was admitted to probate, the estate would be distributed to the same people. Accordingly, the court granted the application to withdraw the probate petition.

The accounting petition reflects that the decedent was survived by nine distributees. These included a niece, Edwina Sandler, who post-deceased; and a nephew, Edward Watkins; and seven grandnieces and grandnephews: Denise Turner; Karen Turner Carpenter; Wayne Turner; Rosemarie Messiniger; Janet Sims; David Craig Stinson; and Terri Beth Stinson.

III. THE ACCOUNT

The account as amended by the Public Administrator shows the receipt of \$64,023.45 of estate principal, which was supplemented by income collected totaling \$3,074.24. This resulted in total charges of \$67,097.69. This amount was reduced by realized decreases of principal in the amount of \$1,044.79, administrative expenses through June 30, 2015 in the amount of \$32,985.63 and payment of creditors' claims in the amount of \$12,825.80, leaving a balance of \$20,241.47 on hand. The Public Administrator seeks approval of the accounting, approval of commissions, the fixing of fees for the services of the attorneys and the accountant, and authorization to distribute the net estate to the decedent's distributees. In addition, the court must release the administrator from the surety bond.

IV. COMMISSIONS

The commission of the administrator is approved, pursuant to SCPA §2307 (1). In addition, the Public Administrator is allowed, pursuant to SCPA §1207 (4), the reasonable and necessary expenses of the office.

V. FEES

A. Legal Fees for the Administrator's Attorneys

Regarding the fee of the attorney for the estate, 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” (*see 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 (*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-nounced 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]; *see 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]). 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]).

In the course of this estate administration, the Public Administrator was represented by two different law firms in succession. From the inception of the administration until December 31, 2011, representation was provided by Brosnan & Hegler, LLP. Since January 1, 2012, representation of the Public Administrator has been provided by Mahon, Mahon, Kerins & O'Brien, LLC. The court must admeasure the fees to be paid to each of these firms.

When multiple attorneys are employed by the fiduciary of a decedent's estate, the aggregate fee should approximate what one attorney would charge (*see Matter of Leopold*, 244 AD2d 411 [2d Dept 1997]; *Matter of Mattis*, 55 Misc 2d 511 [Sur Ct, New York County 1967]). Some overlap in services may necessarily occur (*see Matter of Patchin*, 106 AD2d 730 [3d Dept 1984]), and should be a factor when considering the aggregate fee (*see, e.g. Matter of Mergentime*, 155 Misc 2d 502 [Sur Ct, Westchester County 1992], *affd* 207 AD2d 453 [2d Dept 1994]). In determining the division of one aggregate fee among multiple firms, the court will take into account each firm's proportionate rendering of services to the estate.

(A) Fee of Counsel From Inception Through December 31, 2011

The Public Administrator has petitioned the court for approval of the payment of \$4,360.00 to Brosnan & Hegler, LLP, all of which has been paid. The affirmation of legal services filed by Brosnan & Hegler, LLP reflects \$23,564.25 in fees incurred for more than 148 hours of services rendered, of which \$4,130.00 was paid and \$19,434.25 remains unpaid. Counsel requests that the fee be fixed in the reduced amount of \$4,130.00, all of which has been paid. Additionally, Brosnan & Hegler, LLP is seeking approval of, and reimbursement of, its actual disbursements in this matter, in the amount of \$249.12, of which \$46.73 has been paid and \$202.39 remains unpaid, bringing the total of fee and disbursements to \$4,379.12.

The court has carefully reviewed the affirmation of services and the time records submitted to the court. 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 (*see Matter of Von Hofe*, 145 AD2d 424 [2d Dept 1988]; *Matter of Phelan*, 173 AD2d 621 [2d Dept 1991]). The time records attached to counsel's affirmation indicate that the estate administration was somewhat complex, starting with the fact that all of the named beneficiaries under the will had predeceased, requiring a genealogical search to locate distributees, both within and outside of the United States. In addition, the decedent had varied assets, which included real property in Pennsylvania, on which taxes were owed. Among other services, counsel prepared the petition for probate, the application for its withdrawal, and the petition for letters of administration and all supporting documents; made arrangements for the surety bond; engaged in a search for assets; evaluated claims against the estate; and conducted multiple status conferences.

At the same time, 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. In view of all of the factors cited above, the fee is approved in the

amount of \$4,360.00, inclusive of disbursements, all of which has been paid.

(B) Fee of Counsel From January 1, 2012 to Closing of Estate

The court has also received an affirmation of services from the law firm of Mahon, Mahon, Kerins & O'Brien, LLC, which took over this file as counsel to the Public Administrator effective January 1, 2012. The affirmation reflects fees totaling \$6,075.00 for 19 hours of services rendered to date. The billing records reflect disbursements of \$138.00. The Public Administrator has petitioned the court for approval of the payment of \$5,000.00, none of which has been paid.

The time records annexed to the affirmation cover the period between January 26, 2012 and January 3, 2016. During this four-year period, counsel prepared the account and supporting documents, sent and received correspondence, and appeared in court.

Present counsel's affirmation of services includes a number of entries for services performed by a paralegal. While counsel may bill for the services of a paralegal who performs those services under the supervision of counsel, the paralegal's time may be billed only for legal services which the attorney himself could have been compensated for (SCPA § 2110 [4]). Here, some of the time billed for the paralegal are for services which are secretarial in nature and are considered part of office overhead and not compensable (*see Matter of Estathiou*, 41 Misc3d 1219A [Sur Ct, Nassau County 2013]; *Matter of Brannen*, 14 Misc 3d 1222A [Sur Ct, Dutchess County 2007]; *Matter of Gliosca*, NYLJ Jan. 5, 2006 [Sur Ct, Suffolk County]), such as trips to the post office to mail citations by registered mail.

Counsel further advises the court that six hours of paralegal services at \$225.00 per hour and six hours of the services of a law partner at \$425.00 per hour will be required to complete the administration of this estate, resulting in an additional fee of \$3,900.00 for future services. The services are described as: review of decisions; compliance with court correspondence and requests; conduct conferences with the Public Administrator, creditors and unrepresented distributees; review file and ledgers and preparation of affidavit bringing account current; properly close the estate; and report to court that the decree has been

complied with.

Considering all of the foregoing criteria, the court fixes the fee of current counsel to the Public Administrator for services provided through January 3, 2016 in the amount of \$6,075.00, plus \$3,900.00 for future services, plus disbursements of \$138.00, for total payment of \$10,113.00, all of which remains unpaid.

(C) Fee of the Administrator's Accountant

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 28, 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]; 7 Warren's Heaton, Surrogate's Court Practice § 93.08 [7th ed] [citing *Tortora*]).

The citation reflects the Public Administrator's request that fees in the amount of \$3,475.00 be approved. The accountant has submitted an affidavit of services requesting a total fee of \$3,875.00. The affidavit indicates that the accountant prepared the decedent's personal income tax returns for 2004 and the estate's annual federal and state fiduciary income tax returns for 2005, 2006, 2007, and 2010. The accountant further notes that a return for 2015 and a final return will be required, and that the requested fee includes an additional \$1,200.00 for the preparation of these returns.

The work performed by the accountant was not duplicative of the services rendered by the estate attorney, and the requested amount for these services is reasonable. Again, in fixing fees, the court is constrained by the size of the estate. The court approves the fee in

the amount \$3,475.00, of which \$2,625.00 has been paid and \$850.00 remains unpaid.

VI. DISTRIBUTION AND DISCHARGE OF SURETY

The decree shall discharge the surety and shall authorize the Public Administrator to distribute the balance of the net estate, after payment of outstanding legal and accounting fees noted above, in accordance with EPTL § 4-1.1 (a) (6), which governs distribution of an estate where decedent is survived by one or more grandparents or the issue of grandparents.

This constitutes the decision of the court.

Settle decree.

Dated: June 28, 2016
Mineola, New York

E N T E R:

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