

Matter of Kampe

2007 NY Slip Op 30163(U)

March 8, 2007

Surrogate's Court, Nassau County

Docket Number: 0329724

Judge: John B. Riordan

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SURROGATE'S COURT: STATE OF NEW YORK
COUNTY OF NASSAU

----- X
In the Matter of the Judicial Settlement
of the Account of Proceedings of
Dennis J. Kampe, as Executor of
the Estate of

File No. 329724

Decision No. 103

VIOLET IRENE KAMPE,

Deceased.

----- X

Submitted for decision in this uncontested accounting proceeding are the issues of the fees of counsel for the executor, accountant's fees and reimbursements to the executor of sums advanced by him.

Violet Irene Kampe died on August 27, 2003 a resident of Massapequa, New York. She was survived by her son, petitioner Dennis J. Kampe, and her daughter, Kathleen R. Kampe. Her will of September 30, 1970 and a codicil thereto dated June 22, 1972 were admitted to probate on November 12, 2003 and letters testamentary issued to petitioner. The will provides that the residuary estate be divided equally between the two children but that Kathleen, if unmarried, be given a two year right to occupy the decedent's Massapequa home provided she pay real estate taxes. Kathleen Kampe resided in the premises until late August, 2005 and the estate sold the property on February 14, 2006.

As with any request for a fee, 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 fees rendered in the course of an estate regardless of a retainer agreement (*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 [3rd 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 [3rd Dept, 1978]); the amounts involved and the benefit resulting from the execution of such services (*Matter of Shalman*, 68 AD2d 940 [3rd 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 Co, 1924], *aff’d* 213 App Div 59 [1925], *aff’d* 241 NY 593 [4th Dept, 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 Co, 1924], *aff’d* 213 App Div 59 [4th Dept, 1925], *aff’d* 241 NY 593 [1925]), and as re-enunciated in *Matter of Freeman* (34 NY2d 1 [1974]) (see, *Matter of Berkman*, 93 Misc2d 423 [Sur Ct Bronx Co, 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], *aff’d* 23 NY2d 700 [1968]); *Martin v Phipps*, 21 AD2d 646 [1st Dept, 1964], *aff’d* 16 NY2d 594 [1965]). A sizeable estate permits adequate compensation, but nothing beyond that (*Martin v Phipps*, 21 AD2d 646

[1st Dept, 1964], *aff'd* 16 NY2d 594 [1965]; *Matter of Reede*, NYLJ, Oct. 28, 1991, at 37, col 2; *Matter of Yancey*, NYLJ, Feb. 18, 1993, at 28, col 1). Moreover, the size of the estate can operate as a limitation on the fees payable (*Matter of McCranor*, 176 AD2d 1026 [3rd 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*, 123 Misc 346 [Sur Ct Columbia Co, 1924], *aff'd* 213 App Div 59 [4th Dept, 1925], *aff'd* 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 accountant's fees, normally, accountant's services are not compensable out of estate assets unless there exist unusual circumstances that require the expertise of an accountant (*Matter of Meranus*, NYLJ, Mar. 31, 1994, at 37). The fee for such services is generally held to be included in the fee of the attorney for the fiduciary (*Matter of Musil*, 254 AD 765 [2d Dept, 1938]). "[T]he purpose of this rule is to avoid duplication (*Matter of Schoonhein*, 158 AD2d 183 [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)" (Warren's Heaton on Surrogate's Court Practice §93.08 [7th ed]).

In this estate the executor originally retained Paul Kast, Esq. at a fixed fee of \$12,000.00 for 40 hours of professional time with an understanding that provided for compensation for

additional unanticipated services. Mr. Kast billed and was paid for \$1,000.00 in additional services. Mr. Kast primarily handled the probate proceeding, negotiating with Kathleen Kampe's attorney regarding a possible purchase of the decedent's home by her and qualified Dennis Kampe as the appointed fiduciary. He obtained a waiver and renunciation from the drafting attorney nominated as a co-fiduciary, reminded Ms. Kampe of her duty to vacate the premises and handled the sale of the premises. He filed an inventory with the court and communicated with Munley, Meade, Nielsen & Re (hereinafter, "Munley, Meade"), of counsel, who handled the preparation and filing of this account.

Munley, Meade was retained by Mr. Kast and the executor on or about July 22, 2005. Their fees include 24.51 hours of various partners time and 46.48 hours of paralegal time for a total of \$14,573 plus disbursements of \$747.18 for a total fee of \$15,320.18 which has been voluntarily discounted to \$13,172.50 of which \$3,677.75 has already been paid and \$9,494.75 remains outstanding.

Total charges in this estate are \$419,975.94 according to the summary statement of the account plus \$6,461.66 in interest income earned until January, 2007. Total legal fees are \$25,172.50 which amounts to approximately 6% of the estate.

Paul Kast, Esq. sheparded a probate proceeding through the court in circumstances where there was a possibility of a coexecutor-attorney claiming a right to serve and where Kathleen Kampe, through her counsel was considering objections to her brother's nomination based upon his qualifications. Animus between these siblings generated some of these additional fees. Mr. Kast also handled the closing on decedent's home and preparation of the inventory. To the extent Mr. Kast relies upon time expended by him, he has failed to produce contemporaneously-maintained time records of the amounts of time allegedly expended and describing with particularity the precise services rendered (*Matter of Kelly*, 187 AD2d 718 [2d Dept, 1992]);

Matter of Phelan, 173 AD2d 621 [2d Dept, 1991]). Therefore, it is difficult for the court to correlate the tasks performed to the alleged time in excess of forty (40) hours. However, no objection to the fee has been raised and the amount is not unconscionable. Therefore, the legal fee requested by Paul Kast, Esq. is allowed.

With respect to Munley, Meade, there was an apparent effort to minimize fees by the use of a paralegal. Nevertheless, an excessive amount of time appears to have been devoted to duplicative services of consultations between Munley, Meade partners and Mr. Kast, in telephone conferences with Mr. Kast and in reviewing Mr. Kast's emails and responding thereto (*Rahmey v Blum*, 95 AD2d 294, 301 [2d Dept, 1983]; *Matter of Gold*, NYLJ, March 24, 2004 at 26, col 1 [Kings Co Sur Ct]). Additionally, several hours in November and December of 2006, which are not precisely ascertainable, were expended in the preparation of both attorneys' affidavits of services (*Matter of Farrell*, NYLJ, April 12, 2000 at 36 col 1 [Sur Ct Nassau Co]; *see generally* 2 Harris 5th ed NY Estates § 18:114). Finally, disbursements for UPS, priority mail, postage and photocopying are disallowed (*Matter of Aitken*, 160 Misc 2d 587 [Sur Ct NY Co 1994]; *Matter of Corwith*, NYLJ, May 3, 1995 at 35, col 2 [Sur Ct Nassau Co]). However, as set forth above, Munley, Meade has already discounted its fees and therefore the reduced amount requested is reasonable and allowed as are the disbursements in the sum of \$625.00 through entry of a decree in this proceeding.

Accounting services of \$550.00 for preparation of Federal and state fiduciary income tax returns are allowed.

The executor also seeks reimbursement for \$3,324.81 plus an additional \$262.18 since the account was filed, for funeral expenses, travel related expenses and miscellaneous postage, film, landscaping and other costs. Of these expenses \$2,454.18 are for travel from the executor's home in Ohio to New York for food, gas and lodging. When it can be inferred that the testator

knew that travel by a representative she nominated, such as her son who resides in Ohio, would be required, reimbursement of such travel expenses in permissible (*Matter of Picker*, 103 Misc2d 594 [Sur Ct Bronx Co, 1980]; *Matter of Kern*, NYLJ, April 1, 2002 [Sur Ct Nassau Co]; 2 Harris 5th NY Estates § 18;185). Thus reimbursement of \$2,454.18 in travel expenses is approved. Reimbursement of \$100.00 paid to a landscaper and funeral expenses of \$810.00 for the minister, florist and funeral luncheon are also allowed. Other expenses for postage, film, bulbs, duct tape and signs are deemed to be costs of performing routine fiduciary duties and are deemed absorbed by commissions (in this case \$16,599.28) whether the fiduciary is a resident or non resident of this state (*Matter of Bozzi*, NYLJ, March 30, 1999 at 36, col 6 [Sur Ct Nassau Co]).

A decree should be submitted consistent with the foregoing.

Dated: March 8, 2007

JOHN B. RIORDAN
Judge of the
Surrogate's Court