

**Matter of Brigham**

2009 NY Slip Op 32197(U)

September 3, 2009

Surrogate's Court, Nassau County

Docket Number: 326138/2009

Judge: John B. Riordan

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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  
Eric P. Milgrim, Public Administrator of Nassau County,  
as Administrator, c.t.a., of the Estate of

File No. 326138

Dec. No. 462

BARBARA BRIGHAM,

Deceased.

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Before the court is the first and final account of the Public Administrator for the estate of Barbara Brigham, who died a resident of Hicksville on February 22, 2004. In a will executed on November 6, 2002, just months after a guardian was appointed on her behalf under Mental Health Law Article 81, decedent left all of her property, other than a \$15,000.00 bequest to Bide-A-Wee Home Association, Inc., to Frank Hagen, to the exclusion of decedent’s family members.

The will named Vince Callaghan as executor. After Callaghan offered the will for probate it was revealed that he had a felony record, making him ineligible to serve as a fiduciary (SCPA 707 [1][d]). Callaghan renounced his appointment on May 2, 2005. The nominated successor to Callaghan had previously renounced her appointment. Hagen petitioned for letters of administration, c.t.a., on May 4, 2005. However, Hagen, too, had a felony record and was ineligible to serve pursuant to SCPA 707 (1) (d). The court appointed the Public Administrator of Nassau County as temporary administrator, c.t.a., on June 9, 2005. Decedent’s distributees appeared and filed objections to the probate of the will, and notices of appearance were filed on behalf of Hagen, the New York State Attorney General and Bide-A-Wee Home Association, Inc.

On November 22, 2005, all of the interested parties entered into a stipulation of settlement. The will, as reformed and restated by the settlement agreement, was admitted to

probate on February 1, 2006, and full letters of administration, c.t.a., were issued to the Public Administrator at that time. Under the terms of the stipulation, articles second and fifth of decedent's will were reformed so that decedent's distributees, *viz.*, Drue Schoepp, Daniel Brigham Jr., and Nancy Brigham Cyr, will share in 2/3 of decedent's real property and her residuary estate. The remaining 1/3 will pass to Hagen. It was further agreed that decedent's real property will pass to these parties in kind, so as not to be subject to a commission, and that the property would be sold and the proceeds held in an attorney's escrow account. Before any distributions are made to the interested parties from the escrow account, the sales proceeds will be used to pay the bequest to Bide-A-Wee Home Association, Inc., the commission of the Public Administrator, and all debts, fees and administration expenses of the estate.

The account of the Public Administrator was filed on March 6, 2007 and amended on April 14, 2009. The account shows the receipt of \$34,227.09 of estate principal, which was supplemented by income collected of \$232.93. This resulted in total charges of \$34,460.02. This amount was reduced by administrative expenses through the closing date of the account in the amount of \$28,866.48 and payment of creditors' claims in the amount of \$1,734.25, leaving a balance of \$3,859.29 on hand. Schedule J reflects that the decedent's real property was sold for \$450,000.00, with the proceeds being held in an escrow account, as stipulated by the parties. The Public Administrator seeks approval of the accounting and the commission. Petitioner also asks the court to fix the fees for the services of the attorneys and the accountant and to determine the validity of the claims filed against the estate. The Public Administrator further requests that the court direct payment of \$15,000.00 from the escrow account to Bide-A-Wee Home Association, Inc., and authorize distribution of the net estate in accordance with the provisions of the will as

reformed by the stipulation of settlement dated November 22, 2005.

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 (*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]). 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]).

The Public Administrator has asked the court to fix the fees of O'Connor & Mangan, P.C. and Steven M. Hochberg, Esq., two law firms which represented the nominated executor in that capacity before Callaghan renounced his appointment. O'Connor & Mangan, P.C. has requested a fee of \$4,449.20, all of which has been paid. Steven M. Hochberg, Esq. has requested a fee of \$5,978.23 and provided the court with detailed time records. 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]). Nevertheless, it is quite impossible for the court to approve legal fees totaling \$10,427.43 for the fugacious representation of a nominated fiduciary who was never appointed, particularly where the probate estate contains only \$34,460.02. The size of an 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 court fixes the fee of these law firms in the amount of \$2,500.00 each, and directs that any payment received in excess of this amount be refunded to the estate. To the extent that an attorney may not yet have been paid, such fee shall be paid from the escrow account.

The court must also fix the fee of counsel for the Public Administrator. The affirmation submitted by counsel reflects \$38,925.50 in attorneys' fees incurred through January 3, 2007, of which \$21,536.25 has been paid and \$17,389.25 remains unpaid. Among the many services provided in the course of this administration, counsel contacted each of decedent's distributees, prepared subpoenas duces tecum for five non-party witnesses including decedent's former Article 81 guardian, reviewed all of the papers and pleadings comprising the Article 81 proceeding, prepared for and conducted examinations of all of the non-party witnesses, obtained documentation from each witness, prepared for and conducted examinations of two attesting witnesses, reviewed objections to probate, participated in negotiating a settlement agreement which led to the reform and restatement of the will, prepared an order for the appointment of the Public Administrator, addressed claims against the estate and prepared the accounting proceeding. In the course of the administration, matters were protracted by the death of Hagen on February 16, 2007; it was not until December 10, 2008, almost two years later, that a personal representative was appointed in his estate.

Counsel for the Public Administrator has provided the court with extensive records in support of the fee requested. The services rendered in this matter were significantly greater than those necessitated by a typical administration, and the attorney performed punctiliously, leaving

no stone unturned. Without the efforts of counsel for the Public Administrator, decedent's family would have received nothing. Instead, decedent's distributees received a net amount of \$300,000.00, subject to their proportionate shares of the charitable bequest, the commission, and the fees and expenses. The court approves the fee of counsel for the Public Administrator in the amount of \$38,925.50. Any portion of this fee as yet unpaid shall be paid from the escrow account. The court thanks counsel for the Public Administrator for their adept assistance in the settlement of this contested and complex estate.

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

The accountant has submitted an affidavit of services dated May 18, 2009. Although schedule C-1 and petitioner's request for relief indicate that the accountant's fee would be approximately \$1,000.00, of which \$550.00 remains unpaid, the affidavit actually reflects a total fee request of \$450.00. The affidavit indicates that the accountant prepared the decedent's personal federal and state income tax returns for 2003. 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. The court approves the fee in the amount \$450.00, all of which has been paid.

Petitioner has also requested that the court direct payment of \$15,000.00 from the escrow account to Bide-A-Wee Home Association, Inc., in accordance with article third of decedent's will, and the court so directs.

The court has been asked to determine the validity of claims filed against the estate. Schedule D-2 of the account reflects claims presented and allowed but not paid in the following amounts: Hicksville Water District \$35.94, Windsor Fuel Co., Inc., \$694.69, and LIPA \$1,231.83, for a total of \$1,962.46 in allowed but unpaid claims. However, following the service by mail of an amended first supplemental citation with summary of account on all of the creditors on April 21, 2009, Hicksville Water District filed a verified claim, on May 8, 2009, against decedent's estate in the amount of \$971.62 (an increase of \$935.68 since the original claim was noted). The claim was filed in connection with account number 12-1005-80, for services to decedent's real property, per a statement dated May 6, 2009.

This additional claim from Hicksville Water District was filed many years after decedent's death, making it unlikely that these additional fees were incurred during decedent's lifetime. The record reflects that Hagen occupied decedent's property subsequent to her demise (see decision 453 issued by this court on May 26, 2005). "[W]here ... a co-tenant is in exclusive possession of the property ... equity dictates that he or she bear those expenses incurred for his or her sole convenience, such as for utilities or optional repairs" (*Matter of Davi*, NYLJ, Nov. 29, 1994, at 35, col 2 [Sur Ct, Kings County] [internal citation omitted]). The court directs payment of all

three claims, now totaling \$2,898.14, from the escrow account. The court further directs that Hagen's share of the escrow account be charged \$935.68 to reflect Hagen's exclusive use of decedent's property after her death unless, within thirty days of this decision, documentation is provided to the court indicating that the additional Hicksville Water District charges were not incurred during Hagen's occupation of decedent's real property after her death.

The commission of the administrator is approved subject to audit.

The court directs counsel for the Public Administrator to file an affirmation bringing the account down to date.

The decree shall discharge the surety and shall authorize the Public Administrator to distribute the balance of the net estate, including the net real estate sale proceeds remaining in the escrow account after all of the above payments and adjustments have been made, in accordance with the terms of the will, as reformed by the stipulation of settlement.

This constitutes the decision of the court.

Settle decree.

Dated: September 3, 2009

JOHN B. RIORDAN  
Judge of the  
Surrogate's Court