

Matter of Max

2009 NY Slip Op 32201(U)

September 24, 2009

Surrogate's Court, Nassau County

Docket Number: 334118/2009

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 by J. Philip Max,
 as Executor of the Estate of

File No. 334118

ESTHER MAX,

Dec. No. 422

Deceased.

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This is an accounting proceeding. The decedent died testate on June 4, 2004, survived by five children, J. Philip Max, Jonathan Max, Israel Max, Yael Max and Jerome Max. The decedent's last will and testament dated February 2, 2000 was admitted to probate by decree dated October 1, 2004, and letters testamentary were issued to Philip and Israel.

Philip, as the executor of the estate of Esther Max, filed his account for the period from June 9, 2004 to December 31, 2006. The account shows total charges of \$793,444.00, total credits of \$733,942.00 and a balance on hand of \$59,502.00. Yael, Israel and Jerome consented to the submission of a decree settling the account as filed and adjusted without further notice. Jonathan filed objections to the accounting. The objections have been withdrawn as part of the stipulation of settlement executed by Jonathan and Philip. Before the court are approval of the (1) account; (2) attorneys' fees; (3) accountant's fees; (4) commissions and (5) stipulation of settlement.

In evaluating the cost of legal services, the court may consider a number of factors, including: 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 that 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]). 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]).

According to the terms of the stipulation of settlement, the legal fees paid to Philip's current attorneys amount to \$25,010.43, with \$10,000.00 having been paid and \$15,010.43 remaining unpaid. The stipulation reflects that the attorneys have agreed to reduce their fees by \$3,000.00, leaving a balance due of \$12,101.43.

The executor's attorneys, Newman & Cahn, LLP, have submitted an affidavit of legal services and two supplemental affidavits. The attorney who handled this matter bills his time at \$300.00 per hour. He is experienced in the area of trusts and estates, has practiced as an attorney for more than 50 years and is a certified public accountant. The invoices submitted show that the attorney reviewed the account prepared by the executor's prior attorneys, amended the account and prepared the necessary amendments to the accounting petition, attended court conferences, communicated with the objectant's attorneys, prepared and obtained waivers and consents from three beneficiaries, responded to discovery demands, prepared for the executor's SCPA 2211 examination, attended the SCPA 2211 examination, reviewed the transcript from that examination and prepared a proposed decree. Some of the services performed, such as filing documents with the court and telephone calls to adjourn the SCPA 2211 examination, are

secretarial in nature, and are not chargeable to the client. However, the \$3,000.00 voluntary reduction in legal fees more than covers those services, and one invoice shows that the attorney performed certain services at no charge. The court notes that this proceeding was protracted due, in part, to animus between the parties and that, procedurally, was difficult since one of the beneficiaries now resides in Israel. Based on the factors set forth in the cases cited above, the court approves the requested amount of legal fees of \$22,101.43.

According to the attorney's affidavit, sworn to on March 3, 2009, Philip's prior attorneys billed \$2,640.00 for services rendered in this proceeding. This is reflected on an invoice filed with the court. Of that amount, a charge of \$480.00 for coming to the court to obtain a "package of forms to be filed" is not properly billable. In any event, according to Philip's present attorney, the prior attorneys are not seeking payment of any of the \$2,640.00, so the issue is moot.

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 attorney seeks approval of \$650.43 in disbursements, \$475.00 of which was for use of Certified Lawyers Service, and the remainder was for Federal Express charges and for registered letters. Payment of these disbursements is approved.

With respect to accountant's fees, normally, 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 [2nd Dept 1938]). "[T]he 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])" (Warren's Heaton on Surrogate's Court Practice §93.08 [7th ed]).

Philip is seeking approval of \$750.00 in accounting fees, but has not provided any documentation in support of these fees. Philip is directed to provide the bill or bills for this amount, along with an affidavit from the accountant, within 30 days of the date of this decision.

The executor's commissions are approved subject to audit.

The court cannot approve the stipulation of settlement at this time. The stipulation shows that, after payment of all expenses, there will be a deficiency of \$21,367.53, which, according to the stipulation, will be borne in equal shares by the five beneficiaries. The stipulation also contains language "directing each of [the beneficiaries] to pay to the Executor of the Estate the

sum of \$4,273.50.” As stated, only Philip and Jonathan executed the stipulation of settlement. The consents executed by the other beneficiaries show lesser deficiency amounts. Therefore, citation is required to issue to them to show cause why the account should not be approved in accordance with the terms of the stipulation of settlement, or Philip must obtain from them waivers and consents to that effect.

The court has scheduled a conference with counsel and a member of the law department for October 21, 2009, at 2:30 p.m.

This is the decision and order of the court.

Dated: September 24, 2009

JOHN B. RIORDAN
Judge of the
Surrogate's Court