

Matter of Laub

2009 NY Slip Op 32203(U)

August 27, 2009

Surrogate's Court, Nassau County

Docket Number: 336553/2009

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
 Herbert J. Laub, as Executor of the Estate of

File No. 336553

MINETTE LAUB,

Dec. No. 593

Deceased.
 -----X

Before the court is the first and final account of Herbert J. Laub, as executor of the estate of Minette Laub, who died a resident of Manhasset on August 5, 2004, leaving a will dated March 8, 1999. Letters Testamentary were issued to the executor on November 9, 2005. The account was initially filed on May 23, 2008, and a guardian ad litem was appointed by the court to represent the interests of decedent's daughter, Carol Laub, due to her incapacity.

The account shows the receipt of \$1,115,903.04 of estate principal, which was supplemented by realized increases of \$2,385.00. This resulted in total principal charges of \$1,118,288.04. This amount was reduced by realized decreases of \$28.62, administrative expenses in the amount of \$35,377.62, payment of creditors' claims in the amount of \$1,785.88, and distributions of principal which amounted to \$851,423.60, leaving a principal balance of \$229,672.26 on hand. In addition, the account reflects \$48,433.66 of income collected, which was reduced by administrative expenses chargeable to income of \$10,899.15 and distributions of income totaling \$1,250.00, leaving an income balance of \$36,284.51. The combined principal and income balance on hand as of October 31, 2007, the closing date of the account, is \$265,956.77.

The executor seeks approval of the accounting, approval of commissions, the fixing of fees for the services of the guardian ad litem, the attorney and the accountant, and authorization

to distribute the net estate to Herbert J. Laub as trustee of the supplemental needs trust created under the will of Minette Laub for the benefit of Carol Laub. In addition, the executor has asked the court to approve reimbursement of the executor for expenditures made on behalf of the estate.

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], *aff'd* 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]).

The executor has petitioned the court for approval of a legal fee in the amount of \$15,412.76 to the attorney for services rendered in connection with the administration of the estate, of which \$10,237.76 has been paid and \$5,175.00 remains unpaid. The attorney also seeks reimbursement of the court filing fee of \$1,250.00. There have been no objections to these payments. 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 (*Matter of Von Hofe*, 145 AD2d 424 [2d Dept 1988]; *Matter of Phelan*, 173 AD2d 621 [2d Dept 1991]). In this case, the attorney submitted a conspectus which consists of periodic detailed notations of the services provided. The summary indicates that the law firm rendered more than 65 hours of legal services in connection with the estate administration, including the accounting proceeding. The fee is approved in the amount requested, and the attorney may also be reimbursed for the expenditure shown.

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]). "[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 [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 requesting a fee of \$4,300.00. The affidavit indicates that the accountant prepared the decedent's federal and New York State estate tax returns and schedules A through O of the account. 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 guardian ad litem has no objection to the requested fee. The court approves the fee in the amount \$4,300.00, all of which has been paid.

With respect to the fee of the guardian ad litem, the court notes that the guardian ad litem's affirmation reflects 10 hours of services on behalf of decedent's daughter, Carol Laub. The court commends the guardian ad litem for his comprehensive review of the account and the detailed and thorough report which he filed on behalf of his ward. Bearing in mind all of the factors set forth above concerning attorneys' fees, the court fixes the fee of the guardian ad litem in the sum of \$3,655.00, to be paid within thirty days of the date of decree.

The commission of the executor is approved subject to audit.

The decree shall authorize the executor to distribute the balance of the net estate to Herbert J. Laub as trustee of the supplemental needs trust created under the will of Minette Laub for the benefit of Carol Laub.

This constitutes the decision of the court.

The executor is directed to bring the account down to date and settle a decree.

Dated: August 27, 2009

JOHN B. RIORDAN
Judge of the
Surrogate's Court