

Matter of Berger

2009 NY Slip Op 32212(U)

September 15, 2009

Surrogate's Court, Nassau County

Docket Number: 349622/2009

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
 Jeanine Berger, as Executor of the Estate of

File No. 349622

PHILMORE BERGER,

Dec. No. 509

Deceased.
 -----X

Before the court is the first and final account of the executor for the estate of Philmore Berger, who died a resident of Oceanside, on November 1, 2007, leaving a will dated October 25, 2000. The will provides for a bequest of \$300,00.00 to decedent's wife, Jeanine Berger, in addition to any gifts decedent made to his wife pursuant to a prenuptial agreement entered into between them on August 14, 1995. Additionally, decedent bequeathed to Jeanine all of the household goods and personal effects contained in his residences located in Oceanside and Florida. Decedent's will divides his residuary estate equally among his four children, Debra Lerner; Daniel Marc Berger; David Jonathan Berger; and Diane Judith Lieberman. Letters testamentary were issued to Jeanine on February 29, 2008.

On November 20, 2008, Debra brought a petition to compel Jeanine to account, supported by waivers of process and consents executed by Daniel, David and Diane. Jeanine filed an answer to the petition on December 15, 2008. The court issued a decision (Dec. No. 1) and an order for compulsory accounting on February 19, 2009. The petition presently before the court was then filed by petitioner on March 3, 2009, and the matter appeared on the court's calendar on April 8, 2009. No objections to the account were filed.

The account shows the receipt of \$430,187.14 of estate principal, which was supplemented by realized increases of \$4,566.09, income collected totaling \$21,356.14, and

unrealized increases of \$324.00. This resulted in total charges of \$456,433.37. This amount was reduced by administrative expenses through January 31, 2009 in the amount of \$63,896.09, payment of creditors' claims in the amount of \$11,555.91, distributions of \$20,000.00, and unrealized decreases of \$99,987.32, leaving a balance of \$260,994.05 on hand. The executor seeks approval of the accounting, approval of commissions, and the fixing of fees for the services of the attorney and accountant.

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 the payment of \$51,803.27 to the attorney for services rendered in connection with the administration of the estate, and the

affirmation submitted by the attorney requests a fee of \$53,022.75. The court has carefully reviewed the affirmation of services submitted to the court along with the firm's actual invoices. The attorney avers that he devoted more than 264 hours to this matter from November 2007 through June 25, 2009, resulting in a billable amount of \$53,022.75, of which \$38,600.88 has been paid. The firm's updated invoices reflect total billed time in the amount of \$47,054.10. The firm's representative clarified the total amount requested by explaining that the balance of \$53,022.75 includes the firm's estimated future billable time of \$5,968.65. The services provided by the attorney included preparation and filing of the petition for probate; identification and collection of decedent's assets; date of death valuation of decedent's holdings; settlement of a claim filed against the estate; collection of residual payments from the Screen Actors Guild, Inc.; preparation and filing of the New York State Estate Tax Return; and legal services required in response to the petition to compel an accounting, including preparation of the final accounting.

The court notes that no objections have been filed to the attorney's fee. However, the fee request of \$53,022.75 contained in the affirmation of services exceeds the fee request of \$51,803.27 contained in the petition by \$1,219.48. The interested parties were not given notice of this additional amount. Even the lower amount reflected in the petition exceeds the amount actually billed to date, which is \$47,054.10. Of this, \$44,714.93 was charged for services rendered and \$2,339.17 reflects disbursements. The court notes that these amounts include a discount given to the executor in connection with six of the 15 statements, which reduced the total charges by \$6,650.57.

Counsel's billing statements dated June 8, 2009 and July 7, 2009 include charges for time spent preparing the affirmation of services and assisting the accountant with his preparation of an affidavit of services. Time spent on a fee application is not compensable (*Matter of Gallagher*, NYLJ, Feb. 2, 1993 at 22, col 4 [Sur Ct, Bronx County]). Consequently, the court must disallow billing for charges related to this work. This disallowance is not intended to reflect poorly upon the services rendered by counsel, which were exemplary, but rather on precedent case law governing the types of charges allowed and disallowed. At the same time, the court will take into consideration the discount already granted by the attorney, which represents almost 15% of the actual time billed on this matter.

Accordingly, the fee for services rendered to date is approved in the amount of \$40,714.93; disbursements are allowed in the amount of \$2,339.17; and \$5,000.00 is allowed for future services to bring the estate administration to conclusion, for a total of \$48,054.10.

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 requesting a fee of \$5,090.00. The affidavit indicates that the accountant prepared the decedent's 2007 federal and New York State income tax returns, and the estate's penultimate fiduciary income tax returns, which were filed for the year ending October 31, 2008. The accountant will also prepare the fiduciary income tax return which must be filed for the year ending October 31, 2009. The work performed by the accountant was not duplicative of the services rendered by the estate attorney, and no objections to the fee have been filed. The court approves the fee in the amount \$5,090.00, of which \$3,890.00 has been paid and \$1,200.00 remains unpaid.

The commission of the executor is approved subject to audit.

The decree shall authorize the executor to distribute the balance of the net estate in accordance with the terms of decedent's will.

This constitutes the decision of the court.

Settle decree.

Dated: September 15, 2009

JOHN B. RIORDAN
Judge of the
Surrogate's Court