

Matter of O'Rourke

2009 NY Slip Op 32772(U)

November 10, 2009

Sur Ct, Nassau County

Docket Number: 294630

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 Settlement 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. 294630

Dec. No. 701

PETER D. O'ROURKE,
 a/k/a PETER DANIEL O'ROURKE,
 a/k/a PETER DANIEL ROURKE,
 a/k/a PETER O'ROURKE

Deceased.

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Submitted for decision in this accounting proceeding are the issues of (i) attorney's fees; (ii) accountant's fees; and (iii) commissions.

The decedent, Peter D. O'Rourke, died on February 26, 1996, a resident of Nassau County, leaving a will dated March 9, 1984. The will was admitted to probate by decree dated May 18, 2004, and letters of administration c.t.a. issued to the Public Administrator on the same date. The summary statement shows charges to the accounting party of \$289,650.33. This is the Public Administrator's first and final accounting. The decedent's will, after the payment of a \$2,000.00 bequest to Mercy Hospital, Rockville Centre, New York, directs that the decedent's residuary estate be paid to the Diabetes Association of New York, Inc. The Attorney General of the State of New York has appeared in this proceeding.

With respect to the issue of attorneys' fees, 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]). 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]).

With respect to accountants' fees, normally, an 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, 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 Schoonheim*, 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)" (Warren's Heaton on Surrogate's Court Practice §93.08 [7th ed]).

In this case, the Public Administrator's attorney has supplied the court with an affirmation of legal services, and it shows that the attorneys rendered more than 167 hours of legal services of a partner, associates and paralegal at various hourly rates. The services the firm

performed included: (a) preparation and filing of the petition for temporary letters of administration and the cross-petition for probate and letters of administration c.t.a., together with the accompanying affidavits and required ancillary documents; (b) preparation and filing of the renunciation of nominated executor and multiple waivers of process and consent to probate for numerous distributees and legatees; (c) obtaining the Public Administrator's fiduciary bond; (d) review of known family information and research as to whereabouts of alleged distributees, (e) preparation and filing of an affidavit of heirship; (f) arranging for service of process of probate citations and preparation and filing of an affidavit requesting substituted service; (g) preparation and filing of proposed probate decree; (h) attendance at the probate citation return date; (i) preparation of a receipt, release and refunding agreement for Mercy Medical Center a/k/a Mercy Hospital, a specific legatee under decedent's will and conversations with its administrative and legal personnel regarding same; (j) preparation and filing of the Public Administrator's final account and the petition for judicial settlement of account; (k) arranging for service of accounting citation and ensuring adequate service of same to secure jurisdiction over all interested parties; (l) multiple telephone conferences and correspondence with various attorneys and the Public Administrator of Nassau County and the employees of such office. The firm also handled the sale of the decedent's cooperative apartment and charged a flat fee of \$1,500.00 in connection with the sale.

The total fee of counsel to the Public Administrator amounts to \$26,937.00. Due to the modest size of the estate, counsel asks the court to approve a fee (exclusive of the real estate matter) in the reduced amount of \$17,323.75, of which \$12,823.75 has been paid and \$4,500.00 of which remains unpaid. A review of the time records shows some duplication on the part of the attorneys at the firm. Nevertheless, the reduction in fee more than covers this amount.

Considering all these factors, the court believes the proposed fee to be reasonable. Therefore, the court approves a total fee of counsel to the Public Administrator in the sum of \$18,823.75, inclusive of the fee for the co-op closing, as fair and proper compensation for the services rendered.

Concerning the accountant's fee, the accountant has submitted an affidavit of services requesting a fee of \$7,250.00, of which \$6,675.00 has been paid and \$575.00 remains unpaid. The affidavit indicates that the accountant prepared the federal and New York State fiduciary income tax returns for the years 1996 through 2008. 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. Thus, the court approves the accountant's fee in the amount of \$7,250.00, of which \$575.00 remains unpaid.

The commissions of the Public Administrator are approved subject to audit.

The net residuary estate, after the foregoing payments, shall be distributed to the American Diabetes Association (formerly known as the Diabetic Association of New York, Inc.), the sole residuary legatee under the will.

The decree shall discharge the surety.

Settle decree.

Dated: November 10, 2009

JOHN B. RIORDAN
Judge of the
Surrogate's Court