

Matter of Erdman

2009 NY Slip Op 32774(U)

November 4, 2009

Sur Ct, Nassau County

Docket Number: 345654

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 of the Estate of

File No. 345654

Dec. No. 660

BETH ELLEN ERDMAN,

Deceased.

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Before the court is the first and final account of the Public Administrator for the estate of Beth Ellen Erdman, who died intestate, a resident of Long Beach, on December 27, 2006. Letters of administration were issued to the Public Administrator on March 6, 2007. The account of the Public Administrator was initially filed on August 22, 2008 and an affidavit bringing the account current through June 25, 2009 was filed on August 17, 2009. A guardian ad litem was appointed by the court to represent the interests of decedent's missing and unknown distributees.

The account filed by the Public Administrator, as brought down to date, shows the receipt of \$502,582.07 of estate principal, which was supplemented by realized increases of \$1,101.39 and income collected totaling \$73,856.76. This resulted in total charges of \$577,540.22. This amount was reduced by realized decreases of \$561.29 and administrative expenses through June 25, 2009 in the amount of \$55,518.93, leaving a balance of \$521,460.00 on hand. The Public Administrator seeks approval of the accounting, approval of commissions, the fixing of fees for the services of the attorney and accountant, and authorization to reject medical claims. The petition originally asked the court to authorize the Public Administrator to distribute the net estate to the New York State Comptroller for the benefit of decedent's unknown distributees, but objections to the requested relief were filed by the two alleged distributees. A stipulation filed with the court on August 18, 2009 provides that the net distributable estate, after payment of fees,

expenses and commissions, will be paid in equal shares to the decedent's maternal first cousins, Jane Bloom and Mark Bakalenek, who are decedent's only distributees. The stipulation was executed by counsel for the Public Administrator, counsel for the two named distributees, and the guardian ad litem. In addition, the court must set the fee for the guardian ad litem and release the administrator from the surety bond.

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 Public Administrator originally petitioned the court on August 22, 2008 for approval of the payment of \$33,020.09 to the attorney for the Public Administrator in connection with the administration of the estate, of which \$22,867.50 had been paid and \$10,152.59 remained

unpaid. The affidavit bringing the account current through June 25, 2009 reflects that additional payments totaling \$13,908.75 were paid to counsel. The guardian ad litem and the distributees have not objected to these payments. In support of the legal fees paid, the attorney for the Public Administrator submitted an affirmation of legal services on August 22, 2008, covering the period between March 2007 and May 31, 2008, and a supplemental affirmation of legal services rendered through August 14, 2009. These affirmations indicate that the total time expended by counsel on this matter exceeded 107 hours. 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]). The full amount of legal fees exceeds \$48,000.00, but the attorney has offered to accept as a total fee the amount paid to date, \$36,776.25. The court commends the attorney for his skillful representation of the Public Administrator and the voluntary reduction of his fee. The fee is approved in the amount requested.

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 \$1,950.00. The affidavit indicates that the accountant prepared the estate’s annual federal and state fiduciary income tax returns for 2007 and 2008, for which she billed \$1,350.00 to date. The accountant further notes that a final return will be required, and that the requested fee includes an additional \$600 for the preparation of the final return. The work performed by the accountant was not duplicative of the services rendered by the estate attorney. The court approves the fee in the amount of \$1,800.00, of which \$1,350.00 has been paid and \$450.00 remains unpaid.

With respect to the fee of the guardian ad litem, the court notes that the guardian ad litem’s affirmation reflects almost 14 hours of services on behalf of decedent’s missing and unknown distributees. Considering all the factors set forth above concerning attorneys’ fees, the court fixes the fee of the guardian ad litem in the sum of \$5,000.00, to be paid within thirty days of the date of decree. The court thanks the guardian ad litem for her efficient and proficient representation of her wards.

The petition for judicial settlement of account reflects the Public Administrator’s rejection of five medical claims against the estate. Each claimant was served with a rejection of claim on August 21, 2008 and a citation on September 22, 2008, and none appeared in connection with the account filed. The court approves the rejection of these claims.

The commission of the administrator is approved subject to audit.

The decree shall discharge the surety and shall authorize the Public Administrator to distribute the balance of the net estate, after payment of fees, expenses and commissions, in equal shares to the decedent's maternal first cousins, Jane Bloom and Mark Bakalenek.

Settle decree.

Dated: November 4, 2009

JOHN B. RIORDAN
Judge of the
Surrogate's Court