

Matter of Miller

2009 NY Slip Op 32775(U)

October 30, 2009

Sur Ct, Nassau County

Docket Number: 345991

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. 345991

DONALD MILLER,

Dec. No. 651

Deceased.
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Before the court is the first and final account of the Public Administrator for the estate of Donald Miller, who died intestate, a resident of Seaford, on January 30, 2007, leaving a daughter, Hayley Marcia Miller, and a son, Wayne Jay Miller. Letters of administration were issued to the Public Administrator on March 28, 2007. The account was initially filed on August 4, 2009, and each of decedent's children, along with the surety, filed a waiver of citation and consent in accounting.

The account filed by the Public Administrator shows the receipt of \$851,521.63 of estate principal, which was supplemented by realized increases of \$35,332.89 and income collected totaling \$22,208.30. This resulted in total charges of \$909,062.82. This amount was reduced by realized decreases of \$7,960.94, administrative expenses through April 30, 2009 in the amount of \$120,683.07, and payment of creditors' claims in the amount of \$173,900.07, leaving a balance of \$606,518.74 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 distribute the net estate to decedent's children, Hayley Marcia Miller and Wayne Jay Miller. In addition, the court must 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 has petitioned the court for approval of the payment of \$53,621.25 to the attorney for the Public Administrator in connection with the administration of the estate, of which \$37,621.25 has been paid and \$16,000.00 remains unpaid. In addition, counsel was paid a flat fee of \$1,500.00 for services rendered in connection with the sale of decedent's real estate. All of the interested parties have consented to the legal fee. 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 record shows that the attorney devoted more than 184 hours to the administration

proceeding, the accounting proceeding and the sale of decedent's real estate. The specific services included, but were not limited to, preparing and filing the petition for letters of administration and the affidavit and ancillary documentation in support of the petition; obtaining a bond; identifying and collecting the decedent's liquid assets, decedent's life insurance, and decedent's profit sharing account and deferred savings plan; appraising and selling decedent's car and jewelry; retaining a genealogical search firm; identifying and disposing of claims against the estate; and representing the Public Administrator in the sale of decedent's real estate. The court commends the attorney for his skillful representation of the Public Administrator. 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 \$2,800.00. The affidavit indicates that the accountant prepared the decedent's personal income tax returns for 2006 and 2007 and the estate's annual federal and state fiduciary income tax returns to date. The

accountant further notes that a final return will be required, and that the requested fee includes an additional \$575.00 for the preparation of the final return. 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 court approves the fee in the amount \$2,800.00, of which \$2,225.00 has been paid and \$575.00 remains unpaid.

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 to decedent's children, Hayley Marcia Miller and Wayne Jay Miller.

This constitutes the decision of the court.

Submit decree.

Dated: October 30, 2009

JOHN B. RIORDAN
Judge of the
Surrogate's Court