

**Matter of Campo**

2010 NY Slip Op 30097(U)

January 12, 2010

Surrogate's Court, Nassau County

Docket Number: 307621

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  
Joseph Campo, as Administrator of the Estate of

File No. 307621

Dec. No. 892

DOMINICK CAMPO,

Deceased.  
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Before the court is the first and final account of Joseph Campo as administrator of the estate of his father, Dominick Campo, who died intestate, a resident of Massapequa, on October 7, 1998, leaving three adult sons, Joseph, Dominick F., and Daniel, and one minor daughter, Jacquelyn. Letters of administration were issued to Joseph on April 5, 1999. The court appointed a guardian ad litem to represent the interests of decedent's daughter. The guardian ad litem's report was filed on July 8, 2009, and she raised no objections to the account. The guardian ad litem did raise a question regarding personal jurisdiction, but that issue was settled by decision 535 issued by this court on August 6, 2009, which directed the parties to conclude their settlement and submit a decree. A decree was submitted and settled; the only issues presently before the court are the fixing of fees for the services of two attorneys, setting a fee for the guardian ad litem and releasing the administrator from the surety bond.

The updated account shows the receipt of \$1,131,769.72 of estate principal, which was supplemented by income collected totaling \$108,059.32. This resulted in total charges of \$1,239,829.04. This amount was reduced by decreases in principal of \$167,792.07, administrative expenses in the amount of \$305,292.29, payment of creditors' claims in the amount of \$3,492.49, and distributions of \$563,959.00, leaving a balance of \$199,293.19 on

hand.

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 fees rendered in the course of an estate (*Matter of Stortecky v Mazzone*, 85 NY2d 518 [1995]). 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]).

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]).

The legal fee must also bear a reasonable relationship to the size of the estate (*Matter of Kaufmann*, 26 AD2d 818 [1st Dept 1966], *affd* 23 NY2d 700 [1968]). 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]). Moreover, the size of the estate can operate as a limitation on the fees payable (*Matter of McCranor*, 176 AD2d 1026 [3d Dept 1991]), 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]).

The administrator has petitioned the court for approval of the payment of \$79,375.75 to the attorney for services rendered in connection with petitioner's administration of the estate. In addition, petitioner is asking that the attorney be reimbursed for expenditures in the total amount of \$15,270.36. Of these combined amounts, a total of \$21,146.00 remains unpaid. The guardian ad litem has not objected to these payments. The court has carefully reviewed the affirmation of services and the actual 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]). The record shows that the attorney devoted more than 411 hours to this matter between 1998 and 2008. The court record indicates that additional time has been devoted to this estate administration and the account in the past months as well. The guardian ad litem noted in her report that the services provided by the attorney were more complex and extensive than are typically required in an administration proceeding, and the court agrees. The services are set

forth in a reportorial affidavit as well as in a 49 page printout setting forth each item billed. The court commends the attorney for his skillful representation of the administrator and approves the fee for services in the amount requested of \$79,375.75.

The court has reviewed the disbursements of \$15,270.36 and finds that they include charges totaling \$1,894.36 for telephone calls, postage and facsimiles. With respect to disbursements, the tradition in Surrogate's Court practice is that the attorney may not be reimbursed for expenses that the court normally considers to be part of overhead, such as photocopying, postage, telephone calls, and other items of the same matter (*Matter of Graham*, 238 AD2d 682 [3d Dept 1997]; *Matter of Diamond*, 219 AD2d 717 [2d Dept 1995]; Warren's Heaton on Surrogate's Court Practice §106.02 [2][a][7<sup>th</sup> ed.]). In *Matter of Corwith* (NYLJ, May 3, 1995, at 35, col 2 [Sur Ct, Nassau County]), this court discussed the allowance of charges for photocopies, telephone calls, postage, messengers and couriers, express deliveries and computer-assisted legal research. The court concluded that it would permit reimbursement for such disbursements only if they involved payment to an outside supplier of goods and services, adopting the standards set forth in *Matter of Herlinger* (NYLJ, Apr. 28, 1994, at 28, col 6 [Sur Ct, New York County]). The court prohibited reimbursement for ordinary postage and telephone charges other than long distance. Accordingly, the court is allowing the charges for couriers, express deliveries and computer-assisted legal research, but must deduct \$1,894.36 from the total reimbursement amount and limit repayment of expenses to \$13,376.00. The combined total amount of outstanding fees and disbursements payable to the attorney is thus \$19,251.64.

The court has also been asked to approve payment, from estate assets, of a \$3,500.00 fee charged by a second attorney, who represented Dominick F. in this matter. After the attorney for

Dominick F. conducted an examination of the administrator and demanded and received discovery documents, the parties reached an understanding. No objections were filed, and the guardian ad litem did not object to payment of this fee out of the estate. However, the attorney did not file an affidavit of services, rendering it impossible for the court to review the fee or make a determination as to whether this fee is properly payable out of the estate. With respect to the question of whether the fee charged by the attorney for Dominick F. should be paid by him personally, or paid out of the estate, the court notes that fees for services rendered to a beneficiary are generally not payable from an estate unless it is shown that the services provided a benefit to the estate, such as bringing assets back into the estate or reducing the amount of a claim against the estate (*Matter of Kinzler*, 195 AD2d 464 [2d Dept 1993]; *Matter of Grupe*, 30 AD2d 701 [2d Dept 1968]). Although the circumstances surrounding this nearly complete estate administration imply that the parties reached an agreement concerning the payment of this fee from estate assets, there is no written stipulation on file to confirm that possibility. If the attorney submits his affidavit of services within fifteen days of the date of this decision, and if in support of the payment of this fee out of estate assets he includes (a) a conspectus indicating the way in which his legal services benefitted the estate overall, or (b) the written consent of all parties, then the court may set the attorney's fee at the foot of the decree.

With respect to the fee of the guardian ad litem, the court notes that the guardian ad litem's affirmation reflects almost 44 hours of services on behalf of decedent's minor daughter. Considering all the factors set forth above concerning attorneys' fees, the court fixes the fee of the guardian ad litem in the sum of \$13,000.00, to be paid within thirty days of the date of decree.

This constitutes the decision of the court.

A decree has already been submitted and settled and will be signed no sooner than 15 days after the date of this decision if it is found to be in order. The decree shall discharge the surety and shall authorize the administrator to distribute the balance of the net estate in accordance with schedule L of his account as amended.

Dated: January 12, 2010

JOHN B. RIORDAN  
Judge of the  
Surrogate's Court