

Matter of Schottke

2010 NY Slip Op 31383(U)

May 3, 2010

Sur Ct, Nassau County

Docket Number: 349820

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. 349820

JANE K. SCHOTTKE
a/k/a JANE SCHOTTKE,

Deceased.

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Before the court is the first and final account of the Public Administrator for the estate of Jane K. Schottke, who died intestate on July 12, 2007. Letters of administration were issued to the Public Administrator on February 5, 2008. The account of the Public Administrator was initially filed in April of 2009 and an affidavit bringing the account current through December 31, 2009 was filed. A guardian ad litem was appointed by the court to represent the interests of decedent's missing and unknown distributees. She has no objections to the account.

The account filed by the Public Administrator, as brought down to date, shows the receipt of \$249,042.45 of principal and income. This amount was reduced by administrative expenses, realized decreases and creditors' claims in the amount of \$53,994.01, leaving a balance of \$195,048.44 on hand. The Public Administrator seeks approval of the accounting, approval of commissions and the fixing of fees for the services of the attorney and accountant. 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], *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]).

The attorney for the Public Administrator asks for approval of fees in the amount of \$14,500.00 of which \$12,822.50 has been paid. In support of the legal fees paid, the attorney for the Public Administrator submitted an affirmation of legal services which indicates that the total time expended by counsel on this matter exceeded 39 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 attorney avers that his firm performed the following services: preparation of the accounting and the petition for accounting; affidavit bringing the accounting down to date; conversations with the guardian ad litem; multiple court conferences regarding the accounting and closing out the estate when the proceeding is completed. The fee is approved in the amount requested of \$14,500.00.

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 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, col 2 [Sur Ct, New York County] [internal citation omitted]; Warren’s Heaton on Surrogate’s Court Practice § 93.08 [7th ed] [citing *Tortora*]).

Although the citation issued in this matter requests fees for the accountant in the amount of \$1,700.00, the affidavit filed by the accountant shows the payment of fees in the amount of \$1,650.00 and that \$575.00 remains outstanding. As the additional amount was not requested in the citation and was not on notice, the request for additional fees is denied. The affidavit indicates that the accountant prepared the estate’s annual federal and state fiduciary income tax returns for 2007. 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 \$1,700.00, of which \$1,650.00 has been paid.

With respect to the fee of the guardian ad litem, the court notes that the guardian ad litem’s affirmation reflects 12.5 hours of services on behalf of decedent’s missing and unknown distributees. The guardian ad litem reviewed the petition; had multiple phone conversations with the attorneys for the Public Administrator, reviewed documents and filed her report. Considering all the factors set forth above concerning attorneys’ fees, the court fixes the fee of the guardian ad litem in the sum of \$3,600.00, to be paid within thirty days of the date of decree

The commission of the administrator is approved subject to audit.

The decree shall discharge the surety.

Settle decree.

Dated: May 3, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court