

Matter of Hall

2010 NY Slip Op 31746(U)

June 22, 2010

Sur Ct, Nassau County

Docket Number: 335442/B

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 Administration
Proceeding of the Estate of

File No. 335442/B

IDA HALL,

Dec. No. 26509

Deceased,

-----X

Submitted for review and approval is the accounting filed by the Public Administrator in the estate of Ida Hall, deceased. The Public Administrator seeks approval of his final accounting, approval of distribution of the net estate to creditor North Shore Hospital Center for Extended Care & Rehabilitation in partial satisfaction of its claim, computation and payment of his commissions and statutory expenses, the determination and allowance of the fees and expenses of his attorney and accountant and the discharge and release of the Administrator and his surety. A guardian ad litem was appointed to represent missing persons and unknown heirs and has filed his report.

The decedent died intestate, a resident of Nassau County, on August 30, 2004, while resident at the North Shore Hospital for Extended Care. The account as filed shows total charges of \$186,988.10 and total credits of \$36,724.69, leaving a balance on hand as of September 30, 2007 of \$150,263.41. The credits include \$184,547.45 in proceeds from the sale of decedent’s cooperative residence plus interest earned thereon.

The Administrator’s affidavit sets forth his efforts to determine decedent’s next of kin. At the time of her death, decedent was 98 years of age. Her husband predeceased her and she had no children either natural or adopted. Decedent’s parents had six children. Significant time and effort

was spent on determining the identity, location and entitlement of their descendants. The results will not be recited here as the estate is insolvent, the claim of North Shore Hospital Center for Extended Care & Rehabilitation being in the amount of \$436,127.92. The guardian ad litem concurs with the Public Administrator's conclusion as does the court. There are accordingly no assets available for distribution to heirs. The court accordingly turns to the issue of fees and commissions.

As described in the affirmation of legal services made by Kevin J. Wimmer of the firm of Brosnan & Hegler, LLP, counsel to the Public Administrator, sworn to on May 7, 2010, counsel expended in excess of 150 hours on this estate, with a billable value of \$28,406.25, of which \$7,911.25 has been paid on account. Counsel expects to expend a further \$2,000.00 in legal time with respect to the preparation of the decree and facilitating the distribution of the estate's assets.

With respect to the issue of attorney's 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 fees 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 Freeman*, 34 NY2d 1 [1974]; *Matter of Potts*, 123 Misc 346 [Sur Ct, Columbia County 1924], *affd* 213 App Div 59 [4th Dept 1925], *affd* 241 NY 593 [1925]). 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 [3rd 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]).

The counsel's affirmation, together with the billing reports annexed thereto, detail the legal services provided to the Public Administrator. The services include review of the petition filed by North Shore Hospital Center for Extended Care and Rehabilitation, preparing for and attending the hearing in response to such petition; preparing and filing all necessary documentation for letters of administration, identifying and collecting the decedent's assets, dealing with kinship issues, court appearances, telephone conferences, and preparing and filing the accounting and petition for the judicial settlement thereof. Based upon the size of the estate, the firm has agreed to limit its fees to \$12,733.75, thereby taking a significant discount from its hourly charges. The court thanks counsel for its diligent work and its agreement to reduce its fees. The guardian ad litem recommends approval of the fees as requested. Accordingly, counsel's fees are set at the requested reduced amount of \$12,733.75, of which \$7,911.25 has been paid and \$4,822.50 remains unpaid.

The guardian ad litem has filed an affidavit of services wherein he states that he spent a total of 18.8 hours on the matter. The services included review of the court file in this decedent's

estate; review of the claim of North Shore Hospital Center for Extended Care & Rehabilitation; review and analysis of the accounting; and an investigation into the decedent's next of kin.

In consideration of these factors, and following the criteria established in *Matter of Freeman*, (34 NY2d 1 [1974]) and *Matter of Potts*, (213 App Div 59 [4th Dept 1925], *affd* 241 NY 593 [1925]), the court awards a fee in the amount of \$4,700.00. The guardian ad litem fee shall be paid within 30 days of the entry of the decree to be entered herein.

With respect to the accountant's 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 AD 765 [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 Practice § 93.08 [7th ed.]).

Here, the accounting firm of Rispoli & Curti, CPAs, PC, has submitted an affidavit requesting fees totaling \$3,300.00 of which \$2,150.00 has been paid and \$1,150.00 remains unpaid. The affidavit and attached invoices show that Rispoli & Curti, CPAs, PC prepared the federal and NYS personal income tax returns for 2004, 2007, 2008 and 2009 for which they have been paid \$2,150.00. The estate has a fiscal year which ends on July 31, 2010. An additional \$1,150.00 is requested for preparation of the 2010 income tax and a final fiduciary return in the event the estate is not closed out by July 31, 2010. The work performed was not duplicative of the

legal services rendered by the Public Administrator's legal counsel and the requested amount is reasonable. The court approves the fees of Rispoli & Curti, CPAs, PC in the amount of \$3,300.00, \$2,150.00 of which has been paid and \$1,150.00 of which is unpaid.

The accounting is approved subject to audit. The decree shall provide for release of the administrator and his surety

Settle decree.

Dated: June 22, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court