

Matter of DeLuca

2010 NY Slip Op 31750(U)

June 30, 2010

Sur Ct, Nassau County

Docket Number: 348604

Judge: John B. Riordan

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

-----x
In the Matter of the Estate of

ELVIRA DeLUCA,

Deceased.

File No. 348604

Dec. No. 26606
-----x

Before the court is the estate of Elvira DeLuca, who died on September 26, 2007, survived by three sons, Peter, Gary and Michael. Decedent's will, executed only 20 days prior to her death, and admitted to probate by this court on November 2, 2007, named two of her sons, Peter and Gary, as co-executors. The administration of the estate was impeded by recurrent litigation between Peter and Gary; this court previously issued decision no. 283, dated June 30, 2008. Eventually, the areas of discord were seemingly resolved by the terms of two stipulations of settlement, dated September 18, 2008, and March 10, 2009. However, subsequent litigation followed, resulting in decision no. 538, dated September 25, 2009, which, in part, directed counsel for each co-executor to submit affirmations of services to enable the court to fix their legal fees. The affirmations were to include the actual time charges, the specific legal services performed and the necessity for such services. The requested affirmations have been submitted, along with omnifarious oppositional and supportive affidavits and documentation.

Regarding the fees of the attorneys for the co-executors of 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]). 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 court has punctiliously reviewed the affirmations of services and the time records

submitted, along with all of the other documents filed by, or on behalf of, Peter, Gary and Michael. 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]). Both attorneys submitted detailed and reasonably clear time records, each evidencing extensive effort on behalf of his or her respective client. However, in setting the fees of these attorneys, the court is constrained by the fact that the total legal fees paid by an estate 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]). It is well established that 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.

It has been the experience of this court that when multiple co-executors conflict and are represented by separate counsel, the legal fees requested may be cumulatively higher than would typically be charged against a comparably sized estate. Duplication of services is almost inevitable, and legal services may be rendered in opposition to co-fiduciaries rather than in furtherance of the estate administration. However, it remains the responsibility of the court to ensure that the amounts charged to the estate reflect the principles laid out in the cases noted

above, particularly *Matter of Von Hofe*, 145 AD2d 424 [2d Dept 1988], which directs the court to review the type of legal services provided, and *Matter of Shalman*, 68 AD2d 940 [3d Dept 1979], in which the court examined the benefit provided to the estate by the services rendered.

Generally, the total legal fees incurred by co-fiduciaries who engage separate counsel should not exceed the fee that would have been charged had one attorney represented all of the fiduciaries.

“While normally it has been said to be the right of co-fiduciaries to employ separate counsel, the practice tends to lead to excessive fees which the Surrogates have sought to discourage by limiting fees to those which would be deemed reasonable for the services of a single attorney representing all the fiduciaries” (*Matter of Deutsch*, NYLJ, Mar. 17, 1995, at 30, col 5 [Sur Ct, Nassau County] [internal citations omitted]).

As reflected in the affirmation submitted by Gary’s attorney and in the account filed on behalf of Peter, the gross estate is valued between \$1,350,000.00 and \$1,480,002.00. The total legal fees payable by the estate must be considered within this context. The court must also take into consideration the fact that additional legal fees were paid to the estate’s initial attorney and are payable to an attorney in Florida (for transfer of decedent’s condominium) and an attorney in Puerto Rico (for transfer of decedent’s timeshare).

The attorney who represents Peter has submitted an affirmation with supporting time records which reflect that between January 29, 2008 and December 1, 2009, a period of almost two years, he devoted approximately 126 hours to the estate administration and related litigation. Application of the attorney’s hourly rate of \$250.00 results in a fee of \$31,475.00, in addition to a nominal fee of \$75.00 paid by Peter personally for the initial document review. The court fixes the fee of Peter’s counsel in the amount of \$31,550.00, of which \$75.00 has been paid, and

\$31,475.00 remains to be paid.

The attorney who represents Gary has submitted an affirmation and time records reflecting that between January 13, 2008 and December 29, 2009, she devoted 273.50 hours to the estate administration and related litigation. This number represents 217% of the figure presented by Peter's attorney for essentially the same time period. This number of hours was reduced by the attorney for billing purposes to 180 hours. Even after this 34% voluntary reduction, the total time charged by Gary's attorney exceeds the time billed by Peter's attorney by 54 hours, or 43%. Further, while the retainer executed by Gary and his attorney indicates that legal services would be provided at the rate of \$250 per hour, it also provides that if the fees are not paid within 30 days of billing, the applicable rate would then increase to \$350.00 per hour. When all of these factors are combined, the result is a requested fee by Gary's attorney in the amount of \$63,000.00, of which Gary has already paid \$10,000.00. If the lower rate of \$250.00 per hour is applied, the fee requested by Gary's attorney amounts to \$45,000.00. Gary's attorney further notes that she expects to present an additional invoice for 2010. She has already expended five to seven hours of services this year, primarily in connection with the transfer of the time share in Puerto Rico, and she expects additional legal work to be required.

The time spent by an attorney who provides legal services to an estate is not the sole determinant of the fee (*see Matter of Mingoia*, NYLJ, Mar. 18, 1993, at 36, col 2 [Sur Ct, Suffolk County]). The difficulty of the work is a factor to be considered in setting a legal fee; in order to justify a fee of this size in connection with the estate administration, the attorney would have to show that the work was particularly complex or demanding (*id.*). Despite the adversarial nature of this administration, it has not presented issues that are uncommonly abstruse or knotty. "It is

well settled that Surrogate's Court is vested with discretion to authorize and determine reasonable compensation for an attorney who has rendered legal services to an estate” and a hearing is not required (*Matter of Guattery*, 278 AD2d 738, 739 [3d Dept 2000]). The court finds that while the legal services provided by both attorneys in this matter were excellent, the affirmation submitted by Gary’s attorney is insufficient to justify the fee she is seeking (*see Matter of Radin*, NYLJ, Feb. 28, 1991, at 29, col 4 [Sur Ct, Kings County]). Accordingly, after carefully reviewing the affirmation and time records submitted, the court finds the reasonable charge for the services provided by Gary’s attorney to be \$37,500.00, of which \$10,000.00 has been paid and \$27,500.00 remains to be paid.

The partial legal fee of \$75.00 which previously was personally paid by Peter, and the partial legal fee of \$10,000.00 which was personally paid by Gary, shall be returned to each of the co-executors, to the extent possible via an adjustment of the remaining distributions from the estate. Gary’s attorney avers that with the consent of Peter’s attorney, she will continue to work with both co-executors on the transfer of the timeshare in Puerto Rico, which is more than half completed, and on other estate administration matters on which there is agreement between the parties. She further states that two additional stipulations are being worked on to resolve the disputed mortgage pending a final resolution. The other remaining issues are a final resolution of the mortgage amount and an informal account by each party. It is expected that an amended final estate tax return will be filed by the estate’s accountant to reflect an anticipated tax refund

resulting from the increased legal fees.

This decision constitutes the order of the court and no additional order need be submitted.

Dated: June 30, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court