

Matter of Tims

2010 NY Slip Op 31751(U)

June 9, 2010

Sur Ct, Nassau County

Docket Number: 353214

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

File No. 353214

MARY C. TIMS,
a/k/a MARY CATHERINE TIMS,

Deceased.
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In this uncontested accounting proceeding before the court is the first and final account of John Tims, Jr., executor of the estate of Mary Catherine Tims who died on June 3, 2008. The relief requested is for the judicial settlement of the account, approval of legal fees and the request that “distributions not be made to the Trustee of the Irrevocable Trust as directed by the Last Will and Testament of Marty Catherine Sims” and that the distributions instead be made to the Mary Catherine Tims Revocable Living Trust.

The account filed by the executor shows the receipt of \$303,890.60 of principal and income. This amount was reduced by administrative expenses, realized decreases and creditors' claims in the amount of \$34,259.60, leaving a balance of \$269,631.00 on hand. The attorney seeks approval of legal fees in the amount of \$3,000 as set forth in the amended affirmation of legal services dated March 10, 2010.

The decedent, Mary Catherine Tims, had two children, the petitioner and Eileen Green. Eileen Green predeceased the decedent and was survived by four children; Joan Green, Catherine Zackas, Richard Green and John Green.

The decedent's last will and testament dated November 28, 2001 provides in Article Two the following: “I give, devise, bequeath and dispose of all the rest, residue and remainder of my estate...to my Trustee as named in an Irrevocable Trust Indenture dated the 28th day of November, 2001, and any amendments thereto, heretofore made between myself, as the Settlor

and said Trustee. Said property is to be held by said Trustee and is to be administered by said Trustee under the provisions of said Trust Agreement". The decedent also executed two trust agreements on the 28th day of November, 2001; the Mary Catherine Tims Irrevocable Trust and the Mary Catherine Tims Revocable Living Trust. The Irrevocable Trust provides for the following disposition upon the death of the settlor: three specific bequests totaling \$7,000 and one third of remainder to the decedent's son, John R. Tims, Jr.; one-third to the decedent's daughter, Eileen Green, per stirpes; and one-third to be distributed equally to the decedent's grandchildren, Erin Tims, Elizabeth Tims, Brendan Tims, Catherine Zackas, Richard Green, Joan Green and John Green. Thus, as Eileen Green died before the decedent, her one-third share would be divided equally between her four children.

Pursuant to the original terms of the Revocable Trust, upon the death of the decedent the property is to be distributed as follows: one third to John R. Tims, Jr.; one-third to Eileen Green; and one-third to Erin Tims, Elizabeth Tims, Brendan Tims, Catherine Zackas Richard Green, Joan Green and John Green. The Revocable Trust was amended twice. The last amendment dated May 8, 2008 provides for a different disposition and sets forth the following: one-third to John R. Tims, Jr.; and two-thirds to Erin Tims, Elizabeth Tims, Brendan Tims, Catherine Zackas and Joan Green

In support of his request to distribute the residuary estate to the Revocable Trust, the petitioner submits an "affirmation regarding will construction" prepared by his attorney. In it, the attorney for the petitioner, who is not the attorney-draftsman, avers that Article Two of the decedent's will contained a typographical error in that the residuary should have been paid to the Revocable Trust as opposed to the Irrevocable Trust. There is no evidence, however, showing that any error was made.

Although courts will rarely reform a will to correct mistakes (*Matter of Snide*, 52 NY2d 193 [1981]), reformation to reflect the testator's intent is allowed upon "clear proof" of mistake (*Matter of Shapiro*, 10 Misc 3d 1071(A) [Sur Ct, Nassau County 2006]), citing *Matter of Gottfried*, NYLJ, Apr. 11, 1997, at 25, col 6 [Sur Ct, New York County]). Here, there is no clear proof that a mistake was made and the will has no ambiguity regarding the disposition of the residuary. Therefore, the application is denied.

With respect to the issue of attorney 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 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]). 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 filed an affirmation of legal services wherein he details the work he and members of his firm performed for the petitioner which included: multiple meetings with the clients; numerous telephone conferences; and preparation of the probate and accounting proceedings. In light of all of the factors as set forth previously, the attorney's fee is set in the amount requested.

Settle decree.

Dated: June 9, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court