

**Matter of Scott**

2010 NY Slip Op 32385(U)

August 27, 2010

Surrogate's Court, Nassau County

Docket Number: 353001/A

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 Accounting by Bridget Maureen Scott  
Cariello as Executor of the Estate of

File No. 353001/A

ARTHUR D. SCOTT,

Dec No. 26542

Deceased,

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Submitted for review and approval is the accounting filed by Bridget Maureen Scott Cariello as executor in the estate of Arthur D. Scott, deceased. The executor seeks approval of her final accounting, approval of her claim for reimbursement of monies loaned to the estate, approval of distribution of the net estate, computation and payment of her commissions, the determination and allowance of the fees and expenses of her attorney and the discharge and release of the executor. A guardian ad litem was appointed to represent beneficiary Kelly Ann Scott Sorto. The guardian has filed his report but due to the size of the estate, has waived his fee.

The decedent died a resident of Nassau County, on July 24, 2008. The account as filed and amended shows total charges of \$78,015.31 and total credits of \$34,419.95, leaving a balance on hand as of December 23, 2009 of \$43,595.36. The charges include \$66,803.43 in proceeds from the sale of decedent’s cooperative residence.

As noted in the report of the guardian ad litem, there are numerous irregularities with the papers filed by Ms. Cariello. It appears that Ms. Cariello both borrowed money from the estate and loaned money to the estate without prior court authorization. Also, while the account filed is denominated an “interim” account it is plainly intended to be the “final” account. The “amount loaned” to the estate is set forth in an improvised Schedule A-3. The guardian also points out that

the \$1,310.41 balance from an HSBC checking account on July 24, 2008 does not appear on Schedule A. Ms. Cariello's counsel advised the guardian that these monies were used after the decedent's death by the fiduciary writing checks upon the personal funds of the decedent. A coin collection consisting of silver dollars appraised at \$1,456.00 is also not listed on Schedule A. The decedent's cooperative apartment was sold on November 12, 2009, but no income is attributed to the deposit of the net proceeds on Schedule A-2.

The guardian concludes that the Schedule C entries for expenses paid are also inaccurate or rather inconsistent with Schedule A. It indicates a total of \$1330.00 in items paid from "cash on hand" whereas Schedule A only indicates \$450.00 of cash on hand. Ms. Cariello's counsel indicated to the guardian that the difference consists of monies that were in the HSBC account that never passed into the fiduciary account. Payments against that account exceeded the balance resulting in an overdraft which was paid with Ms. Cariello's personal funds.

The guardian objects to a requested \$1,495.85 reimbursement to Ms. Cariello along with requested reimbursements listed on Schedule E as "Statement of Distributions Made". There are a number of routine and incidental expenses itemized there that are generally absorbed by statutory commissions (*Matter of Kern*, NYLJ, April 1, 2002, at 25, col. 4 [Sur Ct, Nassau County]).

The guardian's ward has agreed to accept 30% of the appraised value of the coin collection in lieu of a distribution in kind. The guardian reports that despite the discrepancies in the account, he is satisfied that all funds borrowed from the estate were returned and notes that no commission is being sought. He recommends approval of the account with the exceptions noted above and that no funds be held back for additional expenses. The court agrees with the guardian's recommendations and commends him for a thorough analysis of the accounting.

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]).

In the affirmation of legal services made by Kristin B. Church, counsel to the executor, sworn to on August 2, 2010, counsel details the legal services provided to the executor. The services include initial meeting with executrix to discuss estate; review of all documentation provided by the executrix; preparation of probate petition; service of the necessary forms; appearances in Surrogate's court; correspondence and telephone calls with court appointed

guardian ad litem; correspondence with life insurance companies re liquidation of insurance policies; discussions with Joan Robert, Esq. re creation of supplemental needs trust for Kelly Ann Scott Sorto; preparation of contract of sale re estate's cooperative apartment and representation of estate re sale and closing; discussions with mortgage holder to hold off foreclosure; meet with executrix re preparation of accounting and petition; preparation of final account and petition and appearance in court on return date; and draft of decree. Counsel advises that her normal billing rate is \$225.00 per hour and that she expended in excess of 15 hours on the representation. The services were normal and necessary and the request reasonable and below the time charges. Accordingly, counsel's fees are set at the requested amount of \$2,500.00, none of which has been paid.

The requested reimbursement of \$100 to Kelly Ann Scott Sorto is approved while the requested reimbursement of \$1,495.85 to Ms. Cariello is denied for the reasons set forth above. The entire residuary estate should be distributed with no hold back for future expenses, with the portion thereof payable to Kelly Ann Scott Sorto held until a suitable special needs trust has been set up to receive such funds.

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

Settle decree.

Dated: August 27, 2010

JOHN B. RIORDAN  
Judge of the  
Surrogate's Court

