

Matter of Mabry

2010 NY Slip Op 33064(U)

October 14, 2010

Surrogate's Court, Nassau County

Docket Number: 331087/E

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 Account of Proceedings
of Eric P. Milgrim, Public Administrator of
Nassau County, as Administrator c.t.a. of the
Estate of

File No. 331087/E

Dec. No. 26693

NORA MABRY,

Deceased.

-----x

Before the court is the first and final account of the Public Administrator for the estate of Nora Mabry, who died intestate, a resident of Uniondale, on December 26, 1998. Decedent left a will dated June 15, 1979 which bequeathed her entire residuary estate to her nephew, Wyman Scott, who post-deceased the decedent. The Public Administrator was appointed temporary administrator of the estate on April 14, 2005. Decedent's will was admitted to probate by a decree of this court dated May 11, 2010 and letters of administration c.t.a. were issued to the Public Administrator on that date. The account of the Public Administrator was initially filed on July 6, 2010.

The account filed by the Public Administrator shows the receipt of \$87,102.28 of estate principal, which was supplemented by income collected totaling \$4,935.98. This resulted in total charges of \$92,038.26. This amount was reduced by administrative expenses through April 30, 2010 in the amount of \$68,155.17, leaving a balance of \$23,883.09 on hand. The Public Administrator seeks approval of the accounting, approval of commissions, the fixing of fees for the services of the attorney and accountant, and authorization to distribute the net estate to the

court appointed administrator of the estate of Wyman Scott. In addition, the court must 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 Public Administrator has petitioned the court for approval of the payment of \$13,410.50 to the attorney for the Public Administrator in connection with the administration of

the estate. 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 record shows that the attorney devoted more than 156 hours to this matter. The legal services required by this estate were unusually extensive, and the summary of the legal work provided by the attorney fills more than two full pages. The services include, but are not limited to, reviewing the administration citation received as a result of an administration proceeding filed by the Nassau County Department of Social Services; participating in multiple conferences concerning the claim for Medicaid reimbursement; preparing and filing the Public Administrator's oath and designation; obtaining the fiduciary bond; corresponding with and serving papers upon the occupants of decedent's home, including a petition to recover possession of real property and an order to show cause; negotiating and preparing a settlement agreement in connection with the eviction proceeding; preparing a judgment of possession, warrant of eviction and decree awarding possession of real property; preparing and filing the petition to extend temporary letters of administration; investigating the decedent's family relationships and alleged distributees; preparing and filing the petition for probate and all related documents; preparing and filing a petition to reduce the administrator's bond together with an interim account and proposed order; preparing and filing an affidavit of assets and liabilities; researching the heirs of decedent's post-deceased sole legatee and

preparing and filing affidavits of due diligence; preparing the final account and all related papers; reviewing the report of the guardian ad litem appointed in connection with the probate of decedent's will; and participating in multiple conferences with the Public Administrator and his staff. In addition, the firm expects that additional fees totaling approximately \$2,500.00 will be incurred through the closing and distribution of the estate. The attorney also represented the Public Administrator in the sale of decedent's real property, for which the firm was paid a flat fee of \$1,500.00.

As of June 24, 2010, the billable fees totaled \$30,633.63, exclusive of the real estate fee, of which \$13,402.50 has been paid and \$17,231.13 remains unpaid, and the firm expects that the estate will incur additional charges of \$2,500.00. In view of the modest size of the estate, the attorney has offered to accept as a total fee the amount paid to date, \$13,402.50, in addition to the real estate fee of \$1,500.00. The court commends the attorney for his skillful representation of the Public Administrator and the voluntary reduction of his fee. The fee is approved in the amount requested, all of which has been paid.

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*]).

The accountant has submitted an affidavit of services requesting a fee of \$1,950.00. The affidavit indicates that the accountant prepared the estate’s annual federal and state fiduciary income tax returns to date. The accountant further notes that a final return will be required. The work performed by the accountant was not duplicative of the services rendered by the estate attorney, and the requested amount for these services is reasonable. The court approves the fee in the amount of \$1,950.00, of which \$1,375.00 has been paid and \$575.00 remains unpaid.

The commission of the administrator c.t.a. is approved subject to audit.

The decree shall discharge the surety and shall authorize the Public Administrator to distribute the balance of the net estate to the court appointed administrator of the estate of Wyman Scott.

Settle decree.

Dated: October 14, 2010

JOHN B. RIORDAN
Judge of the
Surrogate’s Court