

Matter of Sadowski

2010 NY Slip Op 33069(U)

September 24, 2010

Surrogate's Court, Nassau County

Docket Number: 342397/A

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 of the Estate of

File No. 342397/A

Dec. No. 26543

ALLAN PAUL SADOWSKI
 a/k/a ALLAN P. SADOWSKI,

Deceased.

-----x

Before the court is the first and final account of the Public Administrator for the estate of Allan Paul Sadowski, who died intestate, a resident of Bethpage, on March 15, 2006. Letters of administration issued to the Public Administrator on June 13, 2006. The decedent was survived by a sister, Cathy, and three brothers, Paul, Raymond and Robert. Robert Sadowski's whereabouts are unknown. A guardian ad litem was appointed to represent missing and unknown persons, including Robert Sadowski. No objections to the account have been filed.

The accounting filed by the Public Administrator shows the receipt of \$697,688.64 of estate principal, which was supplemented by realized increases of \$46,727.33 plus \$43,988.65 of income collected. This resulted in total charges of \$788,404.62. This amount was reduced by administration expenses through May 31, 2009 in the amount of \$212,646.19, leaving a balance of \$575,758.43 on hand. The Public Administrator seeks approval of the accounting, approval of commissions, the fixing of fees for the services of the attorney, the accountant and the guardian ad litem, and the authority to distribute Robert's share to the New York State Comptroller's office. In addition, the court must release the administrator from the surety's bond. The guardian ad litem has submitted his report.

With respect to the issue of attorneys' 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 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]). 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]).

These factors apply equally to an attorney retained by a fiduciary or to a court-appointed guardian ad litem (*Matter of Burk*, 6 AD2d 429 [1st Dept 1958]; *Matter of Berkman*, 93 Misc 2d 423 [Sur Ct, Bronx County 1978]; *Matter of Reisman*, NYLJ, May 18, 2000, at 34, col 5 [Sur Ct, Nassau County]). Moreover, the nature of the role played by the guardian ad litem is an

additional consideration in determining his or her fee (*Matter of Ziegler*, 184 AD2d 201 [1st Dept 1992]).

The Public Administrator has petitioned the court for approval of the payment of \$42,022.25 in connection with the administration of the estate, exclusive of the \$1,500.00 fee for the sale of the estate real estate, of which \$35,522.25 has been paid and \$6,500.00 remains unpaid. Originally, the Public Administrator petitioned for approval of attorney's fees in the amount of \$47,000.00 (exclusive of the real estate fee), but now asks for the reduced amount of \$42,022.50. The court has carefully reviewed the affirmation of services, supplemental affirmation of legal services and contemporaneous records of legal time spent submitted to the court. The record shows that the attorney's firm devoted more than ninety-nine (99) hours through April 30, 2009 and an additional eighty-five (85) hours from May 1, 2009 through March 31, 2010. The services provided by the attorney included preparation of the petition for letters of administration and accompanying documents; review of known family information, including extensive investigation into the identity and location of the decedent's distributees; preparation of the inventory of assets; identification and determination of disposition of creditors' claims; participation in conversations with the decedent's relatives; preparation of the accounting and related papers; appearance at return date of citation; and participation in conversations with the guardian ad litem. The court approves the fee requested in the amount of \$42,022.25 (exclusive of the \$1,500.00 fee for the sale of the decedent's residence), of which \$35,522.25 has been paid and \$6,500.00 remains unpaid.

The court has also been asked to review the accountant's fee. With respect to accountants' 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 Court Practice §93.08 [7th ed]).

The accountant has submitted an affidavit of services requesting a fee of \$2,375.00, of which \$1,225.00 has been paid and \$1,150.00 remains unpaid. The work performed by the accountant includes preparation of the fiduciary income tax returns for the estate. The work performed by the accountant is 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 \$2,375.00, of which \$1,225.00 has been paid and \$1,150.00 remains unpaid.

The guardian ad litem has supplied the court with an affidavit of services, and it shows that he rendered approximately 5.8 hours of legal services, which would result in a fee of \$2,397.50 at his normal hourly rate. Considering all these factors, the court believes the sum of \$2,397.50 is fair and proper compensation for the services rendered by the guardian ad litem. The fee of the guardian ad litem shall be paid within thirty (30) days of entry of the decree herein.

The commission of the Public Administrator is approved subject to audit.

The Public Administrator is directed to pay the share of Robert Sadowski to the
New York State Comptroller.

The decree shall discharge the surety.

Settle decree.

Dated: September 24, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court