

Matter of Cusumano

2010 NY Slip Op 33070(U)

September 24, 2010

Surrogate's Court, Nassau County

Docket Number: 342984

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
 Charles Albers and Douglas Ferreiro, as Co-Executors
 of the Estate of

File No. 342984

ELEANOR CUSUMANO,

Dec. No. 26640

Deceased.

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Before the court is the first and final account of Charles Albers and Douglas Ferreiro, as co-executors of the estate of Eleanor Cusumano, who died a resident of Franklin Square, New York on March 30, 2006, leaving a will dated February 14, 2003. Letters testamentary were issued on July 16, 2008. The account was initially filed on May 29, 2009, and updated on June 12, 2010, at which time the co-executors brought the account down to date through May 9, 2010. A guardian ad litem was appointed by the court to represent the interest of a missing residuary legatee, Janie Carter.

The affidavit of due diligence and supporting documents filed with the court reflect that extensive efforts were undertaken to locate Janie Carter, including numerous interviews with neighbors and the attorney-draftsman and the retention of a private investigator, all to no avail. Jurisdiction over this legatee was obtained by publication pursuant to an order of this court dated October 20, 2009. All of the other residuary legatees filed waivers of citation and consents in accounting.

The account as updated shows the receipt of \$665,533.47 of estate principal, which was supplemented by income collected totaling \$17,213.36. This resulted in total charges of \$682,746.83. This amount was reduced by administrative expenses through the closing date in the amount of \$82,793.25, which included satisfaction of a claim filed by Nassau County Social

Services in the amount of \$37,20.07, leaving a balance of \$599,953.58 on hand. The executor seeks approval of the accounting. The court must also fix the fees for the services of the attorney and accountant, and authorize distribution of the net estate to the residuary legatees. In addition, the court must direct the distribution of the share of the missing residuary legatee, and set the fee for the guardian ad litem.

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 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]). 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 affirmation of services submitted by the attorney reflects that the attorney provided in excess of 80 hours of legal services to the estate over a period of almost four years, resulting in a legal fee of \$29,160.87. The probate petition required an unusually large amount of time, due to the fact that the will named 15 residuary beneficiaries, five of which are charitable institutions, and one of whom was missing and never located, despite extensive searches, as noted above. The attorney also worked with an accountant on income tax issues that arose in the course of the

estate administration, and prepared and filed the account and an updated account. The updated account reflects that \$3,300.00 of the legal fee remains unpaid. The guardian ad litem has not objected to the legal fee. The fee is approved in the amount requested.

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 [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]). "[T]he purpose of this rule is to avoid duplication (*Matter of Schoonhein*, 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 which indicates that he rendered services to the estate between August 6, 2006 and May 9, 2010. The accountant prepared the federal and New York State fiduciary income tax returns for 2008 and 2009, the federal and New York State fiduciary tax returns for 2007, and amended federal and New York State personal income tax returns for decedent. He participated in the preparation of the co-executors' account. In all, the accountant rendered more than 30 hours of services to the estate, for which he is seeking a fee in the total amount of \$6,060.00, of which \$2,100.00 remains unpaid. 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 requested.

With respect to the fee of the guardian ad litem, the court notes that the guardian ad litem's affirmation reflects in excess of 21 hours of services on behalf of decedent's missing residuary legatee, Janie Carter. In addition to the other services provided by the guardian ad litem, his report reflects that he requested from the co-executors the following additional monies, to be added to his ward's share of the residuary estate: \$154.15, which represents the ward's share of interest and penalties assessed in connection with interest earned on United States Savings Bonds owned by the decedent, and \$2,418.14, which represent's the ward's share of the commissions payable on that portion of decedent's estate which she inherited from her predeceased husband, Louis Cusumano, whose estate was administered by the same co-executors, for total additional monies of \$2,572.29 payable from the commissions of the co-executors to the guardian ad litem's ward. The court thanks the guardian ad litem for his exceptionally thorough and proficient representation of his ward, but in fixing his fee is constrained by the relatively small value of his ward's share of decedent's estate, which is just over \$40,000.00. The value of the assets 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 court sets the fee of the guardian ad litem in the amount of \$4,000.00, to be paid entirely out of the property of his ward (SCPA 405 [b]), within thirty days of the date of the entry of the decree.

The commissions of the co-executors are approved subject to audit.

The decree shall authorize the executor to distribute the balance of the net estate in accordance with the terms of the will, except that the share payable to Janie Carter, as adjusted in accordance with the agreement between the co-executors and the guardian ad litem as noted above, shall be paid to the New York State Comptroller.

Settle decree.

Dated: September 24, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court