

Matter of D'Amico

2010 NY Slip Op 33072(U)

September 30, 2010

Surrogate's Court, Nassau County

Docket Number: 351198/E

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
Daniel D’Amico as Executor of the Estate of

File No. 351198/E

ANDREW PETER D’AMICO,

Dec. No. 26774

Deceased.

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Submitted for review and approval is the accounting filed by Daniel D’Amico as executor in the estate of Andrew Peter D’Amico, deceased. The executor seeks approval of his final accounting, computation and payment of his commissions as executor and the commissions of Andrew D’Amico as trustee, the determination and allowance of the fees and expenses of his attorney and accountant, approval of repayment of a loan from Gloria Maria D’Amico and the discharge and release of the executor.

The decedent died a resident of Nassau County, on February 2, 2008. The account as filed shows total charges of \$421,603.87 and total credits of \$41,258.94, leaving a balance on hand as of February 1, 2010 of \$382,121.44.

Waivers of citation and consent to accounting forms have been filed on behalf of all necessary parties, to wit, Andrew D’Amico, Gloria D’Amico, Eben D’Amico, Gabel D’Amico, Nathaniel D’Amico, Richard D’Amico, and Daniel D’Amico [the father] on behalf of infants Madeline D’Amico [DOB 05-01-2000], and Gillian D’Amico [DOB 07-07-2003], and Richard D’Amico [the father] on behalf of infant Daniel D’Amico [DOB 12-05-1992]. Each of the grandchildren, including the three infants, is to receive a specific bequest of \$10,000.00 and it appears that there are sufficient funds in the estate to pay these bequests in full (SCPA §

403[3][b]).

The last will and testament provides that the specific bequests to the infant grandchildren be held in trust with Andrew D'Amico as trustee. As there is no trust accounting before the court, no commissions can be awarded to the trustee in this proceeding. The request to pay such commissions is accordingly denied.

Respecting counsel fees, as described in the affirmation of legal services made by Kim Goldstein of the firm of Gates & Goldstein, LLP, counsel to the executor, sworn to on September 14, 2010, counsel expended and billed for approximately 40 hours on this estate, with a billable value of \$12,000.00, none of which has been paid and has incurred \$350.00 in out of pocket expenses. Counsel expects to expend a further \$1,000.00 in legal time through the issuance of the decree and distribution of the estate's assets. Counsel has, however, agreed to accept the sum of \$4,000.00 on account of such fees and expenses.

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]).

Counsel's affirmation, together with the billing reports annexed thereto, detail the legal services provided to the executor. The services include reviewing the will and decedent's files and documents, preparing and filing all necessary documentation for probate, identifying and collecting the decedent's assets, court appearances, telephone conferences, and preparing and filing the accounting and petition for the judicial settlement thereof. Based on the submissions and counsel's agreement to substantially reduce their fees, fees are set at the requested reduced amount of \$4,000.00, none of which has been paid.

With respect to the accountant's 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 Practice § 93.08 [7th ed.]).

Here, CPA Howard Leibowitz has submitted an affidavit requesting fees totaling \$875.00, none of which has been paid. The supporting affidavit avers the preparation of various state and federal income and estate tax forms. The work performed was requested by counsel and is not duplicative of the legal services rendered by legal counsel and the requested amount is reasonable. The court accordingly approves the fees in the amount requested.

Repayment of the personal loan from Gloria Maria D'Amico in the sum of \$50,000.00 is approved. The accounting is approved subject to audit. The decree shall provide for release of the executor.

The decree previously submitted will be signed if found to be in suitable form.

Dated: September 30, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court