

Matter of Sauer

2010 NY Slip Op 33073(U)

October 19, 2010

Surrogate's Court, Nassau County

Docket Number: 353456/D

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

File No. 353456/D

Dec. No. 26766

VIRGINIA SAUER,

Deceased.

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Submitted for review and approval is the accounting filed by the Public Administrator in the estate of Virginia Sauer, deceased. The Public Administrator seeks approval of the of his final accounting, approval of distribution of the net estate to the North Shore Animal League, the sole residuary beneficiary under decedent’s last will and testament, computation and payment of his commissions and statutory expenses, the determination and allowance of the fees and expenses of his attorney and accountant and the discharge and release of the Administrator and his surety.

The decedent died a resident of Nassau County, on September 30, 2008. The account as filed shows total charges of \$376,752.97 and total credits of \$70,298.73, leaving a balance on hand as of March 31, 2010 of \$306,454.24.

As described in the affirmation of legal services made by Christian P. Staples of the firm of Brosnan & Hegler, LLP, counsel to the Public Administrator, sworn to on May 26, 2010, counsel expended and billed for in excess of 125 hours on this estate through May 21, 2010, with disbursements totaling \$312.97, a total billable value of \$25,666.00, \$21,062.50 of which has been paid. Counsel expects to expend a further \$2,500.00 in legal time through the issuance of the

decree and distribution of the estate's assets. Counsel is requesting fees and disbursements in the reduced amount of \$23,045.00 of which \$21,062.50 had been paid and \$1,982.50 remains unpaid.

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]).

The counsel's affirmation, together with the billing reports annexed thereto, detail the legal services provided to the Public Administrator. The services include preparing and filing all necessary documentation for letters of administration, identifying and collecting the decedent's assets, sale of decedent's residence, court appearances, telephone conferences, and preparing and filing the accounting and petition for the judicial settlement thereof. Counsel's fees are set at the requested reduced amount of \$23,045.00, of which \$21,062.50 has been paid and \$1,982.50 remains unpaid.

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, the accounting firm of Rispoli & Curti, CPAs, PC, has submitted an affidavit requesting fees totaling \$2,175.00 of which \$1,025.00 has been paid and \$1,150.00 remains unpaid. The affidavit and attached invoices show that Rispoli & Curti, CPAs, PC prepared the federal and NYS personal income tax returns for 2008 and estate tax returns for 2009 for which they have been paid \$1,025.00. An additional \$1,150.00 is requested for preparation of two

additional fiduciary returns. The work performed was not duplicative of the legal services rendered by the Public Administrator's legal counsel and the requested amount is reasonable. The court approves the fees of Rispoli & Curti, CPAs, PC in the amount of \$2,175.00, \$1,025.00 of which has been paid and \$1,150.00 of which is unpaid.

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

Settle decree.

Dated: October 19, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court