

Matter of Liles

2010 NY Slip Op 33541(U)

December 2, 2010

Sur Ct, Nassau County

Docket Number: 345879

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 Limited Administrator of the Estate of

File No. 345879

Dec. No. 26891

MARIA LILES,

Deceased.

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Before the court is the first and final account of the Public Administrator for the estate of Maria Liles, who died intestate, a resident of Freeport, on July 26, 2004, leaving her son, David A. Liles, as her sole distributee. Limited letters of administration were issued to the Public Administrator on April 18, 2007. The account of the Public Administrator was initially filed on March 26, 2009, along with an affidavit in support of the petition for judicial settlement of the account and a affidavit of due diligence from an international genealogical research company. A guardian ad litem was appointed by the court to represent the interests of David A. Liles, who is incarcerated in Sing Sing Correctional Facility in Ossining, New York; at David's insistence, and upon his advising the court that he is represented by an attorney in this matter, the appointment of the guardian ad litem was thereafter rescinded. The Public Administrator's account was brought down to date through September 30, 2010 by an affidavit filed with the court on November 22, 2010.

Prior to the appointment of the Public Administrator, the estate was represented from September 2004 through March 2006 by Campbell Holder, a former attorney who was subsequently indicted and convicted of multiple counts of grand larceny. A confession of judgment signed by Holder and annexed to the Public Administrator's affidavit reflects that Holder stole \$191,889.70

from decedent's estate. The Public Administrator filed a claim with The Lawyers' Fund for Client Protection and recovered \$191,000.00.

The account filed by the Public Administrator as brought down to date shows the receipt of \$191,900.00 of estate principal, which was supplemented by income collected totaling \$9,192.80. This resulted in total charges of \$201,092.80. This amount was reduced by funeral and administrative expenses in the amount of \$19,262.24, leaving a balance of \$181,830.56 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 David A. Liles, subject to the restrictions set forth in SCPA 222-a with respect to the New York State Office of Victim Services. In addition, the court must release the administrator from the surety bond.

On November 4, 2009, an order and judgment for preliminary injunction froze all inheritance from the decedent to satisfy judgments sought in lawsuits brought by crime victims or their representatives against David A. Liles for damages sustained as a result of statutorily specified crimes which he committed. As a result, the funds distributable from the decedent's estate have been frozen in the possession and control of the Public Administrator.

The attorney for David A. Liles, Charles C. Leichtung, filed a Stipulation of Settlement on October 27, 2010, between (1) himself and (2) the law firm of Rappaport, Glass, Greene and Levine, LLP for the representative of the crime victim and (3) the office of the New York State Attorney General. The stipulation was so ordered by Thomas J. McNamara, Justice of the Supreme Court. The stipulation provides that Helen Healy, as representative of the deceased crime victim, Harry Joseph Healy, has agreed to settle her claims against David A. Liles for the sum of

\$154,139.01, plus any and all accrued interest on the sum of \$169,139.01 (which represents the adjusted value of the total frozen funds as of May 31, 2010); that Charles C. Leichtung will be paid \$15,000.00 without interest from the frozen funds; that these payments shall be made by the Public Administrator immediately upon the issuance of a decree in this accounting proceeding.

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], *aff'd* 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 approximately \$11,825.00 to his attorney in connection with the administration of the estate. There were no objections to this fee. 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 61 hours to this matter prior to the filing of the account, between September 5, 2007 through December 31, 2008. The attorney indicates that as of January 31, 2009, fees of \$9,666.25 were paid. In a supplemental affirmation of services, the attorney reflected an additional \$8,400.00 in services rendered through November 8, 2010, for total billable services of \$18,066.25. The services provided by the attorney included, but were not limited to, identifying and locating decedent's distributee; petitioning for letters of administration; identifying and collecting decedent's assets; filing a claim with the Lawyer's Fund; notification to the New York Crime Victim's Assistance Board; conferences and correspondence with David's attorney; and preparing the final accounting. Due to the relatively modest size of the estate, the attorney for the Public Administrator has offered to accept a total fee of \$11,825.00, of which \$9,666.25 has been paid and \$2,158.75 remains unpaid. This represents a fee reduction of almost 35 percent. The court commends the attorney for his skillful representation of the Public Administrator in this complex matter and for the voluntary reduction of his 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, 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]; 7 Warren’s Heaton, Surrogate’s Court Practice § 93.08 [7th ed] [citing *Tortora*]).

The accountant submitted an affidavit of services and a supplemental affidavit in which she requests a fee of \$2,300.00, of which \$1,725.00 has been paid and \$575.00 remains unpaid. The affidavit indicates that the accountant prepared the estate’s annual federal and state fiduciary income tax returns for the years ended June 30, 2008, 2009 and 2010. The accountant further notes that a final return will be required and that the requested fee includes an additional \$575 for the preparation of the final return. 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 \$2,300.00, of which \$1,725.00 has been paid and \$575.00 remains unpaid.

The commission of the Public Administrator 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 in accordance with the terms of the stipulation of settlement.

This constitutes the decision of the court.

Settle decree.

Dated: December 2, 2010

JOHN B. RIORDAN
Judge of the
Surrogate’s Court