

Matter of Milgrim

2010 NY Slip Op 33638(U)

December 20, 2010

Surrogate's Court, Nassau County

Docket Number: 287640/J

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, the Public Administrator of
 Nassau County, as the Successor Trustee
 of the Trust f/b/o

File No. 287640/J

Kyle B. Martin,
 u/w/o

Dec. No. 26874

BOBBIE J. RUSSELL,

Deceased.

----- X

In the Matter of the Account of Proceedings of
 Eric P. Milgrim, the Public Administrator of
 Nassau County, as the Successor Trustee
 of the Trust f/b/o

File No. 287640/I

J. Christopher Martin,
 u/w/o

Dec. No. 26873

BOBBIE J. RUSSELL,

Deceased.

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In these two related accounting proceedings, the Public Administrator asks that the court release and discharge the petitioner, allow fiduciary commissions and statutory expenses, approve reimbursement of fiduciary bond premiums, and fix the attorneys' and accountants' fees. These are the first interim accounts filed by the Public Administrator since his appointment as successor trustee of both trusts following the resignation of Charlotte Vincent as executor of the estate of Bobbie J. Russell and trustee of the trusts created under the decedent's will. Pursuant to Article Seventh of the will, fiduciaries are permitted, but not required, to file periodic accounts. The accounts before the court cover the period from the date successor letters of trusteeship issued, July 13, 2007, at which time the Public Administrator took control of the

trusts' assets, through December 31, 2009. Neither trust is terminating at this time. The court notes that all interested parties have executed and filed knowledgeable waivers of citation and consents in accounting.

As noted in decision 881, issued by this court on March 8, 2007, the decedent, Bobbie J. Russell, died on June 19, 1994, survived by her son, Kyle Martin, and her grandson, J. Christopher Martin. The decedent left a will dated February 17, 1994, which was admitted to probate by decree of this court dated November 10, 1994. Letters testamentary issued to the decedent's sister, Charlotte Vincent, on the same date.

Article Third of the will provides that 50% of any funds payable to the decedent's estate from a tax deferred annuity be held in trust until age thirty for decedent's grandson, J. Christopher. The remaining 50% is bequeathed to the decedent's son, Kyle, subject, however, to a trust for his benefit. Article Fifth directs that the decedent's New York real property be sold and the proceeds be distributed outright to the decedent's son and grandson in equal shares. Article Fifth further provides that the decedent's residuary estate, after distribution of the proceeds from the sale of the decedent's North Carolina property to her parents and after payment of various bequests, is to be divided equally between the trust for the benefit of the decedent's son and the trust for the benefit of the decedent's grandson.

The trust for the benefit of the decedent's son Kyle terminates when he attains age 40. If Kyle dies prior to termination, the principal of his trust is payable to the decedent's grandson. The trust for J. Christopher terminates upon the earlier to occur of the beneficiary receiving his undergraduate degree or attaining the age of thirty (30) years. Letters of trusteeship with respect to both trusts issued to Charlotte Vincent by decree dated November 10, 1994.

The account filed in connection with the trust for the benefit of Kyle shows the receipt of \$99,557.41 of principal, which was supplemented by income collected totaling \$935.90. This resulted in total charges of \$100,493.31. This amount was reduced by administrative expenses in the amount of \$7,450.00 and distributions of \$43,900.00, leaving a balance of \$49,143.31 on hand.

The account filed in connection with the trust for the benefit of J. Christopher shows the receipt of \$158,532.28 of principal, which was supplemented by income collected totaling \$3,510.28. This resulted in total charges of \$162,042.56. This amount was reduced by administrative expenses in the amount of \$7,850.00 and distributions of \$23,500.00, leaving a balance of \$130,692.56 on hand.

Regarding the fee of the attorney for the trustee, the court bears the ultimate responsibility for approving legal fees that are charged to an estate or trust and has the discretion to determine what constitutes reasonable compensation for legal services rendered (*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]).

The Public Administrator has petitioned the court for approval of the payment of \$7,500.00 to the attorney for the Public Administrator in connection with the administration of each trust, for a total combined fee of \$15,000.00. This amount has not yet been paid. The parties have consented to the requested 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 in connection with the two trusts, the attorney devoted more than 97 hours to this matter. The services provided by the attorney included, but were not limited to, preparing and filing the Public Administrator's oath and designation; reviewing all of the court files in connection with the estate and the two trusts; reviewing the original and amended account filed by the previous trustee; reviewing the reports filed by the guardian ad litem and the reply affidavit of the trustee; reviewing the prior decisions issued by the Surrogate's Court; preparing and filing the proposed order of appointment; preparing for and appearing at the hearing for the removal or resignation of the prior fiduciary; collecting assets held by Charlotte Vincent; arranging for distributions to the two trust beneficiaries; preparing and filing objections to the accounts filed by the previous fiduciary; and preparing and filing the accounts for the years 2007 through 2009. As of August 23, 2010, the total time billable for all of these services amounted to \$20,707.96. Nevertheless, the attorney has offered to accept \$15,000.00 as a total fee, none of which has been paid. The court commends the attorney for his skillful representation of the Public Administrator and the voluntary reduction of his fee by more than 25%. The fee is approved in the amount requested.

The court has also been asked to review the accountant's fees. The petition filed in connection with the trust for the benefit of Kyle reflects that the fee requested is \$950.00, of which \$450.00 was paid and \$500.00 remained unpaid when the petition was filed. In connection with the trust for the benefit of J. Christopher, the fee requested for services rendered by the accountant is \$1,425.00, of which \$850.00 was paid and \$575.00 remained unpaid. All of these amounts reflect services provided prior to the filing of the accounts and are shown on each trust's respective Schedules C and C-1.

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 has now submitted an affidavit of services dated November 12, 2010, requesting a fee of \$1,525.00 for services rendered to the trust for the benefit of Kyle. The affidavit indicates that the accountant prepared the trust's annual federal and state fiduciary income tax returns for 2008 and 2009. The accountant further notes that tax returns for the year ending December 31, 2010 will be required, and the requested fee includes an additional \$575.00 for the preparation of these 2010 returns.

The accountant has also submitted an affidavit of services dated November 12, 2010, requesting a fee of \$2,000.00 for services rendered to the trust for the benefit of J. Christopher. The affidavit indicates that the accountant prepared the trust's annual federal and state fiduciary income tax returns for 2007, 2008 and 2009. The accountant further notes that tax returns for the year ending December 31, 2010 will be required, and the requested fee includes an additional \$575.00 for the preparation of these 2010 returns.

The work performed by the accountant was not duplicative of the services rendered by the estate attorney, and the requested amounts for the services performed to date are reasonable. In connection with the trust for the benefit of Kyle, the court approves a total fee in the amount \$1,525.00, of which \$950.00 has been paid and \$575.00, for the preparation of the 2010 returns, remains unpaid. In connection with the trust for the benefit of J. Christopher, the court approves a total fee in the amount \$2,000.00, of which \$1,425.00 has been paid and \$575.00, for the preparation of the 2010 returns, remains unpaid.

The commissions of the Public Administrator are approved subject to audit.

This constitutes the decision of the court.

Submit decree.

Dated: December 20, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court