

Matter of Milgrim

2010 NY Slip Op 33639(U)

December 8, 2010

Surrogate's Court, Nassau County

Docket Number: 298598/C

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 d.b.n. of the Estate of

File No. 298598/C

Dec. No. 26808

VINCENT J. POMPONIO
a/k/a VINCENT S. POMPONIO,

Deceased.

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Submitted for review is an accounting filed by the Public Administrator in the estate of Vincent Pomponio. The Public Administrator also seeks approval of commissions, attorneys' fees, accountant's fees and payment of the balance to the decedent's wife and children.

The decedent, Vincent Pomponio, died a resident of Nassau County on February 25, 1995. Letters of administration de bonis non issued to the Public Administrator on September 12, 2008 and this accounting is the first and final accounting. The summary statement shows charges to the accounting party of \$919,351.31 and credits in the amount of \$460,266.55. The decedent's children signed waivers in which they agreed to the relief requested. A citation was served on the decedent's wife, who is incapacitated, and upon the wife's temporary guardian appointed pursuant to Article 81 of the Mental Hygiene Law; no objections have been interposed.

With respect to the issue of attorney 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 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]). 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]).

These factors apply equally to an attorney retained by a fiduciary or to a court-appointed guardian ad litem (*Matter of Burk*, 6 AD2d 429 [1st Dept 1958]; *Matter of Berkman*, 93 Misc2d 423 [Sur Ct, Bronx County 1978]; *Matter of Reisman*, NYLJ, May 18, 2000, at 34 [Sur Ct, Nassau County]). Moreover, the nature of the role played by the guardian ad litem is an additional consideration in determining his or her fee (*Matter of Ziegler*, 184 AD2d 201 [1st Dept 1992]).

With respect to disbursements, the tradition in Surrogate's Court practice is that the attorney may not be reimbursed for expenses that the court normally considers to be part of

overhead, such as photocopying, postage, telephone calls, and other items of the same matter (*Matter of Graham*, 238 AD2d 682 [3d Dept 1997]; *Matter of Diamond*, 219 AD2d 717 [2d Dept 1995]; Warren's Heaton on Surrogate's Court Practice §106.02 [2][a][7th ed.]). In *Matter of Corwith* (NYLJ, May 3, 1995, at 35 [Sur Ct, Nassau County]), this court discussed the allowance of charges for photocopies, telephone calls, postage, messengers and couriers, express deliveries and computer-assisted legal research. The court concluded that it would permit reimbursement for such disbursements only if they involved payment to an outside supplier of goods and services, adopting the standards set forth in *Matter of Herlinger* (NYLJ, Apr. 28, 1994, at 28 [Sur Ct, New York County]). The court prohibited reimbursement for ordinary postage and telephone charges other than long distance.

In this case, the attorney has supplied the court with an affidavit of legal services and it shows that the attorney rendered more than one hundred and eighty-eight (188) hours of legal services of a partner, associate and paralegal at various hourly rates. The attorney requests that the court set the fee in the amount of \$50,000.00 of which \$42,161.25 has been paid and \$7,838.75 remains unpaid. The firm rendered the following assistance: reviewed file and decisions of the court; multiple conversations with the decedent's children; conversations with the attorneys who represented some of the children; conversations and correspondence with the court appointed temporary guardian of the decedent's spouse; conversations and correspondence with the decedent's accountant regarding corporate taxes for the corporation owned by the decedent; arranging for commercial and residential appraisals of the decedent's commercial as well as residential property; preparing contract for sale of real property and thirty day notice to quit; preparing deed; arranging for advance distributions; conversations with the accountant

regarding winding up the decedent's corporation; and preparation and filing of the account as well as attendant documents. Under the circumstances, the court fixes the total fee of counsel for the Public Administrator in the requested amount of \$50,000.00.

The accountant seeks fees in the amount of \$2,250.00 of which \$675.00 has been paid and \$1,575.00 remains unpaid. She prepared the Federal and New York State fiduciary income tax returns as well as worked on winding up the decedent's corporation and filing the appropriate tax forms. The use of an accountant was appropriate. The court approves the fee in the amount requested.

The commission of the Public Administrator is approved subject to audit.

The additional relief requested is granted.

Settle decree.

Dated: December 8, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court