

Matter of Milgrim (Lovegreen)
2010 NY Slip Op 33690(U)
December 20, 2010
Sur Ct, Nassau County
Docket Number: 26735
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. 338818/B

HAROLD NICHOLAS LOVEGREEN,

Dec. No. 26735

Deceased.

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Submitted for review and approval is the accounting filed by the Public Administrator in the estate of Harold Nicholas Lovegreen, deceased. The Public Administrator seeks approval of his final accounting, approval of distribution of the net estate to Eric P. Milgrim, the Public Administrator of Nassau County as Administrator of the estate of Harold Kohlwey pursuant to Article First of 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 Public Administrator and his surety.

The decedent’s will devised and bequeathed his entire estate to his nephew, Harold Roy Kohlwey, who post-deceased the decedent leaving a will without any known heirs. The Public Administrator was appointed to administer the estate of Howard Kohlwey. Since the Public Administrator cannot account to himself (SCPA 2210[10]), a guardian ad litem was appointed for the benefit of Mr. Kohlwey’s missing or unknown heirs. The court must accordingly also address the fees of the guardian ad litem.

The decedent died a resident of Nassau County, on May 16, 1970. The account as filed shows total charges of \$193,509.83 and total credits of \$72,154.24, leaving a balance on hand as

of August 31, 2008 of \$121,355.59. Thereafter the account was brought current through June 30, 2010, showing additional income of \$3,178.41 and \$2,587.20 in additional expenses paid.

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 November 14, 2008, counsel expended and billed for in excess of 117 hours on this estate through August 31, 2008. As of August 7, 2008, the billable value was \$17,820.75, all of which has been paid. Counsel expected to expend further legal time subsequent to issuance of a kinship decision and through the issuance of the decree and distribution of the estate's assets.

In a supplemental affirmation of legal services sworn to by Christian P. Staples on November 8, 2010, the firm showed additional legal charges of \$12,885.00, of which \$197.50 had been paid and \$12,687.50 remained unpaid. Thus counsel's fees total \$30,705.75, of which \$12,687.50 remained unpaid. Due, however, to the relatively modest size of the estate counsel requests that the court fix its attorney's fees at \$18,018.25, all of which has been paid.

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 affirmations, 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, 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 and substantially reduced amount of \$18,018.25, all 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, the accounting firm of Rispoli & Co., CPAs, PC, has submitted an affidavit sworn to on October 19, 2010 requesting fees totaling \$3,450.00, of which \$2,875.00 has been paid and \$575.00 remains unpaid. The affidavit and attached invoices show that the accountants prepared and filed the federal and NYS personal income tax returns for the year ending April 30, 2007, and federal and state fiduciary tax returns for the years ended April 30, 2008, April 30, 2009 and February 28, 2010 for which they have been paid \$2,875.00. An additional \$575.00 is requested for preparation of the final 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 & Co., CPAs, PC in the amount of \$3,450.00, \$2,875.00 of which has been paid and \$575.00 of which is unpaid.

The fees of a guardian ad litem are determined on the same basis as those of counsel. With respect to 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]).

The guardian ad litem has filed an affirmation of services wherein he states that he spent a total of 19.5 hours on the matter. There is no request for a specific amount and the guardian asks the court to fix an appropriate fee.

The services included review of the court file in the decedent's estate, review of the documentation and facts as to heirship of this estate and the related estate of Harold Kohlwey, assisting the court respecting a jurisdictional defect, review of the accounting which included review of the appraisal, notice of sale, memorandum and terms of sale, title report and closing statement, review of bank statement, savings bank redemption tables, fiduciary tax returns, review of Schedule C items and back up, review of counsel's affirmation of services, review of records at the office of the Public Administrator and preparation of his report.

In consideration of the factors set forth above, and following the criteria established in *Matter of Freeman*, 34 NY2d 1 [1974] and *Matter of Potts*, 213 App Div 59 [4th Dept 1925], *aff'd* 241 NY 593 [1925], the court awards a fee in the amount of \$5,000.00. The guardian ad litem fee shall be paid within 30 days of the entry of the decree to be entered herein.

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

Settle decree.

Dated: December 20, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court