

Matter of Giannattasio
2011 NY Slip Op 30578(U)
March 7, 2011
Sur Ct, Nassau County
Docket Number: 345151
Judge: III., Edward W. McCarty
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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 Application of Rivkin Radler LLP to Fix
 Attorneys' Fees Under SCPA 2110 in the Estate of

File No. 345151

PATRICK GIANNATTASIO, a/k/a
 PAT GIANNATTASIO,

Dec. No. 27022

Deceased.

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Before the court in this miscellaneous proceeding (SCPA 2110), is a petition to determine the fee of Rivkin Radler LLP, the former attorneys for Diana Giannattasio, one of the co-executors, and the current attorneys for Nathan Mandel, the other co-executor. The application is opposed by Diana Giannattasio.

The decedent, Patrick Giannattasio, died on November 19, 2006. His will dated January 24, 2004 was admitted to probate on September 4, 2007. Letters testamentary issued to Diana Giannattasio and Nathan Mandel as co-executors.

On November 21, 2006, the firm of Rivkin Radler LLP was retained by the co-executors. According to the petition of Jeffrey S. Greener, Esq., a partner at Rivkin Radler LLP, the value of the services performed by the firm amount to \$50,179.75. In addition, the firm incurred disbursements of \$2,853.91. Accordingly, the firm's total bill amounts to \$53,033.66. The co-executors made a payment on account of \$17,500.00 leaving a balance due of \$35,533.66. The co-executors have refused to pay the balance and Diana Giannattasio has retained another attorney to represent her and oppose the application.

According to Mr. Greener, there was a "huge amount of paperwork involved" in the estate administration. He also claims that there were complications encountered as well which resulted in a higher fee. Moreover, Mr. Greener asserts that the fee is not extraordinary when

viewed in light of the size of the estate which is \$1,090,329.90. Mr. Greener further states that he has not billed the estate for services rendered after October 31, 2008 to date, which includes the following: preparation of the petition to fix attorneys' fees; preparation of his affirmation of legal services and amended affirmation of legal services; service of the affirmations on Diana Giannattasio's current attorney; attempts to serve documents on Gregory Giannattasio; preparation of responses to affirmation in opposition and supplemental affirmation; and attendance at court conferences.

Diana Giannattasio's current attorney, referred to herein as Diana's counsel, has submitted an affidavit in opposition to the fee application and a supplemental affirmation in opposition. Mr. Greener argues that the court should not even consider the supplemental affirmation because it is an improper submission. Mr. Greener asserts that if the court does consider the supplemental affirmation, the court should be aware that the allegations are "gross misrepresentations and mischaracterizations." The court has considered all of the papers submitted, including Diana's counsel's supplemental affirmation in opposition, which is essentially a restatement of the same assertions made in the affirmation in opposition.

Diana's counsel argues that the firm of Rivkin Radler LLP performed unnecessary services. He argues that the co-executors were not required to file a United States Estate Tax Return (Form 706) because the value of the estate was less than the taxable threshold in 2006. Nevertheless, the firm charged to prepare the federal Form 706 and New York estate tax return (ET-706). Counsel also claims that co-executor Nathan Mandel, who was the accountant for the decedent, was to have prepared the estate tax returns and be compensated by commissions for performing such services. Mr. Mandel did not do so and, as a result, the estate has the expense

of both his commission and legal fees for those services. Counsel argues that since these services were the responsibility of Nathan Mandel, any legal fees relating to preparation of the estate tax returns should be billed to Nathan Mandel, individually, and not the estate. Moreover, Diana's counsel claims that the ET-706 was prepared "incompetently" because in valuing the decedent's interest in a tavern business, the firm used actual proceeds creating a greater taxable estate. In addition, counsel argues that the firm should have applied administration expenses as an income tax deduction on the fiduciary income tax return (Form 1041) rather than as a deduction on the estate tax returns since no estate tax was due. Counsel further asserts that the firm cannot claim compensation for work concerning the real property because "all of the real property devised by the will passed by operation of law without preparation of deeds and accompanying transfer tax returns or other incidental documentation." Diana's counsel has provided a breakdown of the alleged excessive charges or improper billing as follows:

Preparation of federal and New York estate tax returns	\$17,527.50
Charges which are office overhead (Charges and paralegal time charges)	3,216.78
Inter-office conferences	3,401.00
Charges for reviewing the co-executor's preparation of the fiduciary returns which were charged by the co-executor and paid by the estate	4,993.50
Income tax matters which should have been performed by Nathan Mandel	2,416.00
Real estate matters	<u>6,883.00</u>
	\$38,437.78

Based upon the foregoing, counsel asks that the fee for Rivkin Radler LLP be set at

\$5,000.00 and that the firm be directed to repay any amount in excess thereof.

Rivkin Radler LLP has submitted two separate reply affirmations from two attorneys at the firm. The reply affirmation of Albert W. Petraglia is submitted in response to the affirmation in opposition of Diana's counsel and the reply affirmation of Jeffrey S. Greener is submitted in response to the supplemental affirmation of Diana's counsel. Essentially, Rivkin Radler LLP maintains that administration expenses were properly deducted on the estate tax returns to ensure that the taxable estate fell below the unified credit so that no estate tax would be due. In addition, the firm asserts that deducting administration expenses on the income tax returns was not appropriate since there was negative income. Moreover, the firm disputes the allegation that Mr. Mandel should be personally liable for that portion of the legal fee attributable to preparation of the estate tax returns and points out that an executor has the right to hire counsel which is a charge to the estate and not the individual executor.

In his reply affirmation, Mr. Greener affirms that the firm took the proper steps on the estate tax returns. According to Mr. Greener, "almost the entire value of the decedent's estate came from three assets: his two houses and his interest in Pagi, Inc., a closely held business." Mr. Greener states that the administration expenses were intentionally taken on the estate tax return to reduce the taxable estate to below the \$1,000,000.00 threshold and to provide some cushion against an increase in values in the event of an audit. In addition, he contends that "because the estate had no major income producing assets, the assertion that the attorneys fees and the executor commissions should have been deducted on the fiduciary income tax returns is unfounded." Mr. Greener further claims that counsel's grouping of improper or excessive charges improperly categorizes the services provided by his firm.

With respect to the issue of attorneys' 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 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], *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]).

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, col 2 [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, col 6 [Sur Ct, New York County]). The court prohibited reimbursement for ordinary postage and telephone charges other than long distance.

A review of the Mr. Greener's affirmation of legal services and supplemental affirmation of legal services indicates that the firm spent approximately 183 hours on this matter at hourly rates ranging from \$65/hour to \$ 350/hour. A review of the contemporaneous time records annexed to the affirmation and supplemental affirmation of legal services indicates that the firm charged for time spent faxing, preparing check requests, mailing documents, discussing payment of its bills, arranging for copies and preparing errand requests. Such services are secretarial in nature and are part of office overhead. There is also a charge for travel time, which is not compensable (*Matter of Trotman*, NYLJ, May 13, 1998, at 32, col 2 [Sur Ct, Nassau County]). The court also notes that it finds Mr. Greener's assertion that he did not bill for time after October 31, 2008 to the present of no significance since such services related to counsel's fee application and are not compensable (*Matter of Gallagher*, NYLJ, Feb. 2, 1993, at 22, col 4 [Sur Ct, Bronx County]).

In addition, a review of the time records indicates that there was some duplication of service amongst the attorneys at the firm. Moreover, the estate appears less complicated than

counsel attempts to portray. Mr. Greener states in his response to the supplemental affirmation of Diana's counsel that the estate consisted of only three assets: two items of real property and a closely-held business, none of which produced significant income. By counsel's own admission, other than the sale of the business, the estate seems rather routine. The time entries indicate that a significant amount of time was spent on the preparation of, revision to and review of a spreadsheet, which is somewhat puzzling given counsel's statement regarding the nature of the assets and the income produced therefrom.

Concerning Diana Giannastasio's argument that the co-executor Nathan Mandel was required to prepare the estate tax returns because he is a certified public accountant, the court disagrees. There is no language in the will that requires Mr. Mandel to perform accounting services or prepare the estate tax returns. His commissions are not conditioned upon his performance of accounting services. This court previously discussed the complications which may result where the fiduciary, who is also an accountant, renders accounting services to the trust and seeks a commission plus compensation for the services rendered (*Matter of Van Rennselaer*, 2009 NY Slip Op 30562U [Sur Ct, Nassau County 2009]). Here, Mr. Mandel, absent any direction in the will, was free, as a co-executor, to retain counsel to perform such services. In addition, with respect to Diana's argument that a federal estate tax return was not necessary, the court notes that the same work - i.e. valuation - was necessary to prepare the New York return, which admittedly was required. The argument concerning the real property passing by operation of law is equally unavailing. The preparation of executors' deeds is not out of the ordinary even though the property passed by operation of law.

It is evident that Rivkin Radler LLP did perform services which were necessary and

compensable. Accordingly, the court fixes the fee of counsel for the co-executors in the amount of \$30,000.00, of which \$17,500.00 has been paid. With respect to disbursements, disbursements for photocopies, faxing, regular mail and velobinding in the amount of \$709.78 are disallowed. Accordingly, disbursements in the amount of \$2,144.13 are approved.

This constitutes the decision and order of the court.

Settle decree.

Dated: March 7, 2011

EDWARD W. McCARTY III
Judge of the
Surrogate's Court