

Matter of DeLuca

2011 NY Slip Op 31117(U)

April 19, 2011

Surrogate's Court, Nassau County

Docket Number: 349975/C

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 Settlement of the Account of Proceedings of
Jeffrey E. DeLuca, Public Administrator of Nassau County,
as Administrator, c.t.a. of the Estate of

File No. 349975/C

Dec. No. 27114

ELLEN NIKKELS,

Deceased.

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Before the court is the first and final account of the Public Administrator for the estate of Ellen Nikkels. Submitted for decision are the issues of the attorney's fee and accountant's fee. The Public Administrator also seeks approval of commissions.

The decedent, Ellen Nikkels, died on December 22, 2007, a resident of Nassau County. Letters of administration issued to the Public Administrator on February 8, 2008. Thereafter, during the course of reviewing the contents of the decedent's residence, the Public Administrator discovered that the decedent died leaving a will dated August 10, 1979. The decedent's sister and only distributee, Marney L. Woodfill, consented to the appointment of the Public Administrator as administrator, c.t.a. The will was admitted to probate and letters of administration, c.t.a. issued to the Public Administrator on April 29, 2008. Pursuant to the terms of the decedent's will, her nephew, Adam Woodfill, is the sole beneficiary.

The Public Administrator has filed a first and final account of his proceedings covering the period December 22, 2007 to June 30, 2010. The summary statement shows charges to the accounting party of \$223,623.44. The sole beneficiary of the decedent's estate, Adam Woodfill, has consented to the accounting.

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.

With respect to accountants' 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. 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" (Warren's Heaton on Surrogate's Court Practice §93.08 [7th ed], citing *Matter of Schoonheim*, 158 AD2d 183 [1st Dept 1990] and *Matter of Tortora*, NYLJ, July 19, 1995, at 26, col 2 [Sur Ct, New York County]).

The attorney has submitted an affirmation of legal services and a supplemental affirmation of legal services which show that employees at his firm rendered more than one hundred and fifty (150) hours of services through October 2010 at hourly rates ranging from \$150.00 to \$350.00 per hour for a total fee of \$31,446.70, of which \$16,016.88 has been paid. In view of the relatively modest size of the estate, counsel asks the court to approve a fee in the reduced amount of \$16,016.88, the amount already paid. The attorney's firm also received a fee

of \$1,500.00 for each of the two scheduled closings on the sale of the decedent's residence.

The services performed by counsel for the Public Administrator include: (1) preparation and filing of the petition for letters of administration and accompanying affidavits; (2) obtaining the Public Administrator's fiduciary bond; (3) assisting with the identification, collection, and sale of decedent's testamentary assets; (4) preparation and filing of petition for letters of administration, c.t.a. together with supporting documentation; (5) review of known family information and research as to the identity and whereabouts of decedent's family; (6) phone conversations with decedent's distributee; (7) preparation of the Public Administrator's final account and the petition and other related court papers; (8) multiple telephone conferences and correspondence with the Public Administrator of Nassau County and the employees of such office; (9) arranging for service of an accounting citation in order to secure the jurisdiction of the court over the decedent's alleged distributee and other interested parties; (10) preparation for and appearance at the accounting citation return date; and (11) preparation and filing of the proposed decree.

A review of the contemporaneous time records annexed to the affirmation of legal services and supplemental affirmation of legal services indicates that some charges are for work which is secretarial in nature (i.e. assembling documents). Nevertheless, the amount by which counsel has reduced the fee for which approval is sought more than covers such services. Accordingly, considering all of the factors used to determine the reasonableness of fees, the court fixes the fee of counsel for the Public Administrator in the amount of \$16,016.88 (exclusive of the real estate fee of \$3,000.00), all of which has been paid, as fair and reasonable compensation for services rendered.

Concerning the accountant's fee, the accountant has submitted an affidavit of services requesting a fee of \$1,150.00, of which \$575.00 has been paid and \$575.00 remains unpaid. The affidavit indicates that the accountant prepared the fiduciary income tax returns for the estate for 2009 and will prepare a final return. The work performed by the accountant was not duplicative of the services rendered by the estate attorney and the requested amount of these services is reasonable. Thus, the court approves the fee in the amount of \$1,150.00, of which \$575.00 remains unpaid.

Finally, the commission of the Public Administrator is approved subject to audit.

The decree shall discharge the surety.

Submit decree.

Dated: April 19, 2011

EDWARD W. McCARTY
Judge of the
Surrogate's Court