

Matter of Cook
2012 NY Slip Op 32400(U)
September 4, 2012
Surrogate's Court, Nassau County
Docket Number: 364946/A
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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Proceeding to be Discharged and to Fix and Determine
Compensation of Legal Services Rendered by
Walsh Markus McDougal and DeBellis, LLP
in the Estate of

File No. 2011-364946/A

MARGARET COOK,

Dec. No. 28156

Deceased.

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In this proceeding, the court is asked to determine the attorneys’ fees due the former counsel for the executors of the decedent’s estate.

BACKGROUND

The decedent, Margaret Cook, died a resident of Nassau County on January 30, 2011. A last will and testament, dated December 28, 1995, was admitted to probate by this court by decree dated May 11, 2011. Letters testamentary issued to Gloria Brady (hereinafter, “Gloria”) and Eugene Siniscalchi (hereinafter, “Eugene”), as co-executors of the decedent’s estate.¹ Petitioner had represented both of the co-executors in the probate proceeding, but due to a conflict of interest sought to withdraw as counsel.²

LEGAL FEES

The court bears the ultimate responsibility for approving legal fees that are charged to an

¹ The will named Gloria Brady and Florence Siniscalchi (hereinafter, “Florence”) as co-executors, but Florence renounced and Eugene, who was named in the will as substitute co-executor for Florence, was appointed as co-executor, along with Gloria.

² The petition originally sought an order relieving the petitioner as counsel for the co-executors, in addition to the request for a determination of counsel fees, however, each of the co-executors subsequently retained new counsel who have appeared on their behalf in this proceeding.

estate and has the discretion to determine what constitutes reasonable compensation for legal services rendered in the course of the administration 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 [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: (1) the time spent (*Matter of Kelly*, 187 AD2d 718 [2d Dept 1992]); (2) the complexity of the questions involved (*Matter of Coughlin*, 221 AD2d 676 [3d Dept 1995]); (3) the nature of the services provided (*Matter of Von Hofe*, 145 AD2d 424 [2d Dept 1988]); (4) the amount and complexity of the litigation required (*Matter of Sabatino*, 66 AD2d 937 [3d Dept 1978]); (5) the amounts involved and the benefit resulting from the execution of such services (*Matter of Shalman*, 68 AD2d 940 [3d Dept 1979]); (6) the lawyer’s experience and reputation (*Matter of Brehm*, 37 AD2d 95 [4th Dept 1971]); and (7) 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]).

A sizeable estate permits adequate compensation, but nothing beyond that (*Matter of Martin v Phipps*, 21 AD2d 646 [1st Dept 1964], *affd* 16 NY2d 594 [1965]; *Matter of Yancey*, NYLJ, Feb. 18, 1993, at 28, col 1 [Sur Ct, Westchester County]; *Matter of Reede*, NYLJ, Oct. 28, 1991, at 37, col 2 [Sur Ct, Nassau County]). A large estate does not, by itself, justify a large fee (*Matter of Young*, 52 Misc 2d 398 [Sur Ct, Suffolk County 1966]). Further, 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 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 Phelan*, 173 AD2d 621 [2d Dept 1991]; *Matter of Von Hofe*, 145 AD2d 424 [2d Dept 1988]).

PETITIONER'S AFFIDAVIT OF SERVICES

The petitioner submitted an affidavit of legal services, along with detailed time records which itemize the legal services provided and the disbursements made.

The billing statements cover three time periods, namely:

January 28, 2011 through August 16, 2011, as reflected in Invoice No. 16444, for the amount of \$17,490.00 for services rendered, plus \$1,528.58 for disbursements, less a credit for \$1,280.00 paid by Gloria;

September 9, 2011 through November 22, 2011, as reflected in Invoice No. 16457, for the amount of \$2,595.00; and

December 5, 2011 through July 10, 2012, as reflected in Invoice No. 16543, for the amount of \$11,267.50.

The total fee requested by counsel is "a sum not less than \$31,000.00," plus

disbursements of \$1,582.58, of which \$1,280.00 was already paid by Gloria.

The legal services performed can be subdivided as follows:

January 28, 2011 - March 1, 2011: During this period, counsel spoke by telephone multiple times with Gloria, a nominated co-executor, and with her daughter, Susan Schmalacker (hereinafter, "Susan"), and he met with Susan once. Counsel billed \$1,295.00 for this work.

March 2, 2011 - March 27, 2011: Counsel began working on the probate proceeding, including the family tree affidavit. According to the billing records, counsel also worked on researching and redeeming decedent's savings bonds, a non-probate asset, as well as bonds belonging to Gloria, Susan and Florence. The charges for this time period come to \$4,537.50.

March 28, 2011 - July 17, 2011: On March 28, 2011, counsel sent a retainer letter to Gloria and Eugene to confirm that he had been engaged to represent them as co-executors of decedent's estate and to assist in the transfer of non-testamentary assets. Counsel then continued working on the estate administration, including the renunciation of Florence as co-executor and the appointment of Eugene in her place. The services rendered included dealing with decedent's medical bills and counsel's interaction with banks. Beginning on June 28, 2011, counsel had an associate assist him with rendering legal services to the estate. Documents submitted by counsel indicate that on July 12, 2011, the day after his initial meeting with Eugene, counsel noted for the first time that decedent's bank records reflected pre-death transfers by check to Susan and Gloria, by Susan as decedent's attorney-in-fact. Counsel states that he discussed these checks with Eugene and explained that they were irregular and might constitute self-dealing by Susan. Counsel and Eugene agreed to review an additional year of

statements. The billable time for this period totaled \$7,535.00.

July 18, 2011 - November 3, 2011: Counsel's time records reflect that on July 18, 2011, he began to research the possibility that he had an ethical conflict in jointly representing the co-executors, based upon the exercise of a power of attorney granted by the decedent to Susan, which power had apparently been exercised to make transfers to Susan and Gloria. The records reflect that counsel continued to represent the co-executors while researching and discussing the issue with his clients. A list summarizing all of the transfers made by Susan to Susan and Gloria was prepared and sent to both co-executors. Counsel reports that Eugene then advised counsel that he did not want to pursue a claim in connection with these transfers. On September 16, 2011, counsel wrote to Eugene seeking written confirmation from Eugene that he intended to waive any claim regarding the transfers made by Susan. Eugene did not sign the letter as requested. Instead, he consulted with another law firm, Franchina and Giordano, P.C. (hereinafter, "Franchina"), which ultimately was substituted as Eugene's new counsel in this matter. The total amount billed for this time period, exclusive of disbursements, was \$6,077.50.

November 4, 2011 - November 22, 2011: On November 4, 2011, counsel advised the co-executors that he could no longer represent them. On November 7, 2011, counsel wrote to Franchina regarding payment of his invoice and Franchina's request for the estate file. At that time, counsel also reviewed correspondence from Gloria. The time records reflect that over the next few days, there was some back-and-forth between counsel and Franchina about the transfer of the file and payment of counsel's invoice. The billable time for this period was \$640.00. As evidenced in counsel's initial petition, counsel considered the invoice which

concluded on November 22, 2011 to be the final statement.

November 23, 2011 - July 10, 2012: Counsel annexed to his amended petition, filed on July 12, 2012, an additional invoice for services rendered during this period, all of which occurred after he ceased serving as counsel to the co-executors. This additional invoice primarily consists of phone conversations with, and emails to and from, Franchina, many of which concerned counsel's invoices. Counsel also researched filing a claim against the estate and commencing a proceeding to fix and determine attorneys' compensation. He drafted an affirmation of legal services, along with a petition and citation for the present proceeding. The total bill for this time period, during which counsel appropriately represented only his own interests and the interests of his firm, is \$11,267.50.

OBJECTIONS

Gloria has taken no position as to the fees and disbursements sought by the petitioner. Franchina, on behalf of Eugene, has filed an affirmation in opposition to the fees sought by the petitioner. Franchina argues that the petitioner should not have performed any further services once it was determined that counsel had a conflict of interest. Franchina also takes issue with the amount of time billed for telephone calls and for postage costs.

ANALYSIS

The invoices submitted by petitioner raise numerous issues, some small and some large. Among the less significant but troubling points is the frequency of telephone calls, many of them seemingly brief, most of which were billed to the estate at .20 hours each, or \$70.00 per phone call. The system used by counsel's firm allows for billable increments as small as .05 hours. The frequency of, and charges for, telephone "conferences" seem excessive. To note

just two examples, on March 2, 2011, counsel billed \$70.00 for “Telephone conference with Susan Schmalaker - set up meeting for next week.” On March 15, 2011, counsel billed the clients \$105.00 for telephone conferences, some of which are shown as having been conducted with Federal Express.

In addition, it is evident that many of the services provided by counsel were executorial in nature or were rendered for the benefit of various individuals, not for the benefit of the estate or the co-executors in their official capacities. Inasmuch as SCPA 2307 (1) authorizes the payment of only those legal fees that are just and reasonable, the proponent bears the additional burden of proving that the requested amount for legal fees represents expenditures that were necessary, fair, and reasonable. The court notes that services that are executorial or ministerial in nature are not subject to compensation as legal expenses because the fiduciary is compensated to perform those services out of commissions (*Matter of McCranor*, 176 AD2d 1026 [1991]). The rule against the estate paying legal fees for executorial services is intended to prevent the estate from being billed by the lawyer for what the executor is paid commissions to do (*Matter of Bitzer*, 208 AD2d 723 [2d Dept 1994]; *Matter of Mergentime*, 207 AD2d 452 [2d Dept 1994]; *Matter of Passuello*, 184 AD2d 108 [3d Dept 1992]; *Matter of Schoonheim*, 158 AD2d 183 [1st Dept 1990]). Nevertheless, the executor may be personally liable to the attorney for these services (*Matter of Grace*, 62 Misc 2d 51 [1970]).

The court must also disallow the hours shown on petitioner’s time sheets for drafting, revising and discussing the affidavit of legal services. Time spent in preparation of affidavits of services is not compensable (*Matter of Marshak*, NYLJ, Apr. 30, 1996, at 26, col 6; *Wynyard v Beiny*, NYLJ, Nov. 25, 1994, at 30, col 5).

Overall, the total requested fee in excess of \$31,000.00 seems quite excessive for the work performed between January 28, 2011 and November 22, 2011, even factoring in the additional services required by Florence's renunciation of her appointment as co-executor and counsel's discovery of transfers by an attorney-in-fact, which ultimately required that he resign as counsel. Undoubtedly, the attorneys currently representing the co-executors will have to eventually address the transfers made under the power of attorney. Still, it is hard to say why this administration should have required more than 106 hours of legal services to date. In addition, more than one-third of these hours were for services rendered after the attorney no longer represented the co-executors.

The court must also address the objections to postage disbursements which were raised. The court finds these disbursements to be in order. Although expenses for postage are considered part of overhead, an attorney may be reimbursed for payments made for express delivery service (*Matter of Graham*, 238 AD2d 682 [3d Dept 1997]; *Matter of Diamond*, 219 AD2d 717 [2d Dept 1995]; *Matter of Corwith*, NYLJ, May 3, 1995, at 35, col 2 [Sur Ct, Nassau County]). According to the petitioner, the clients requested that documents be sent by Federal Express and such charges are documented in an exhibit to the petitioner's reply affidavit. The petitioner's other disbursements are proper and include proper credit for a payment made by Gloria.

CONCLUSION

Counsel rendered competent legal services to the estate, including his swift recognition and investigation of the potential ethical conflict which arose during the course of the administration. Despite this, counsel cannot be compensated for excessive billing for

telephone calls, administrative and executorial services, time spent preparing his affidavit of legal services, and all of the time invoiced for services performed after counsel advised his clients that he no longer represented them. In consideration of all of these factors, counsel's fee is fixed in the amount of \$17,500.00, plus disbursements of \$1,582.58, of which \$1,280.00 was already paid by Gloria and \$302.58 remains unpaid.

This decision constitutes the order of the court and no additional order need be submitted.

Dated: September 4, 2012

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