

Matter of Banting
2013 NY Slip Op 33571(U)
December 19, 2013
Surrogate's Court, Nassau County
Docket Number: 346671/D
Judge: Edward W. McCarty III
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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
the Public Administrator of Nassau County,
as Administrator, c.t.a., of the Estate of

File No. 346671/D

Dec. No. 29210

MARGARET BANTING,

Deceased.

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Before the court is the first and final account of the Public Administrator for the estate of Margaret Banting, who died a resident of Wantagh, New York, on May 13, 2007, leaving a last will and testament dated February 11, 1997. Temporary letters of administration, c.t.a., were issued to the Public Administrator on September 25, 2007. The account of the Public Administrator was initially filed on February 20, 2013, and was amended on June 12, 2013. The Attorney General of the State of New York filed a notice of appearance and objections to the legal fees.

The account as brought down to date by the Public Administrator shows the receipt of \$469,222.52 of estate principal, which was supplemented by realized increases of \$1,181.09 and income collected totaling \$28,922.41. This resulted in total charges of \$499,326.02. This amount was reduced by administration expenses through August 31, 2012 in the amount of \$106,933.89, leaving a balance of \$392,392.13 on hand. The Public Administrator seeks approval of the accounting, approval of commissions, the fixing of fees for the services of the attorneys and accountant, release of the administrator from the surety bond, and authorization to distribute the net estate to the residuary beneficiaries named in decedent's last will and testament.

FEES

1. Legal fees

Regarding the fee of the attorney for the Public Administrator, 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]). 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]).

In the course of this estate administration, the Public Administrator was represented by two different law firms in succession. From the inception of the administration until December 31, 2011, representation was provided by Brosnan & Hegler, LLP. Since January 1, 2012, representation of the Public Administrator has been provided by Mahon, Mahon, Kerins & O'Brien, LLC. The court must admeasure the fees to be paid to each of these firms.

(A) Counsel for the Public Administrator from inception through December 31, 2011

Counsel for the Public Administrator has submitted an affirmation of Christian P. Staples addressing attorneys' fees. The detailed bills annexed to the affirmations of legal services show that counsel rendered total billings of \$38,442.75 between May 2007 and August 2012, plus a flat fee of \$1,500.00 in connection with the sale of decedent's Wantagh residence. Of these amounts, \$32,650.25 and the fee of \$1,500.00 have been paid, leaving \$5,792.50 unpaid. The services provided include a review of decedent's family history; preparation of the probate

petition; review of claims against the estate; arranging for a bond; preparation of renunciation for the successor executor nominated under the will; research regarding the effect of a bequest to an interested witness when there are not two other disinterested witnesses; preparation and filing of a petition for temporary letters; conferences and correspondence in connection with charitable residuary beneficiaries; collection of assets; closing out decedent's accounts; correspondence concerning cancellation of decedent's insurance policies and credit cards; preparation of multiple petitions to extend temporary letters of administration; and correspondence and interaction with International Genealogical Search concerning search for decedent's distributees.

Notwithstanding the unpaid portion of the fee, Brosnan & Hegler, LLP has asked the court to fix its fee in the reduced amount of fees paid, \$32,650.25 plus \$1,500.00.

The court notes that \$100.00 of the time billed was charged for services rendered on March 5, 2012 and August 15, 2012, after the firm was terminated as counsel to the Public Administrator, and that some of the time shown on the billable records pertains to the sale of decedent's home, for which counsel was paid a flat fee.

(B) Counsel for the Public Administrator from January 1, 2012 to Closing of the Estate

The law firm of Mahon, Mahon, Kerins & O'Brien, LLC, which took over this file as counsel to the Public Administrator effective January 1, 2012, initially requested a fee of \$7,500.00. The affirmation filed in support of this request indicates that the actual time rendered to date is 25.75 hours, for a total billable amount of \$9,393.75. Among the services provided, the firm searched for additional distributees; amended and filed the account; dealt with claims against the estate; and interacted with the charitable beneficiaries. In addition, counsel indicates that it anticipates additional fees in the amount of \$3,900.00. The anticipated time includes an

estimated six hours of paralegal services at \$225.00 per hour and six hours of services that have been or will be provided by a partner of the firm, at \$425.00 an hour. That brings the requested fee to \$13,293.75. The services anticipated are described as: review of decisions; compliance with court correspondence and requests; conduct conferences with the Public Administrator, creditors and unrepresented distributees; review of file and ledgers and preparation of affidavit bringing account current; supervise coordination with distributees; properly close the estate; report to court that the decree has been complied with; and carry out normal procedures in connection with closing of file, including retrieving relevant file information for Public Administrator annual reporting requirements to the Surrogate's Court in compliance with the appropriate guidelines and also in accordance with the requirements of the Office of Court Administration.

Counsel's ongoing responsibilities require that he confer with his client; review the file; review this court's decision and comply with its directives; prepare an affidavit bringing account current and a proposed decree with Notice of Settlement on all appearing parties; make the final distributions; and ultimately close the estate. Although counsel notes, correctly, that he must retrieve all relevant file information for the Public Administrator's annual reporting requirements to the Surrogate's Court and the Office of Court Administration, these responsibilities are not chargeable to individual estates.

In preparing to fix the fee payable to each of the two firms who represented the Public Administrator, the court has thoroughly reviewed counsels' affirmations of services. When multiple attorneys are employed by the fiduciary of a decedent's estate, the aggregate fee should approximate what one attorney would charge (*Matter of Leopold*, 244 AD2d 411 [2d Dept 1997]);

Matter of Mattis, 55 Misc 2d 511 [Sur Ct, New York County 1967])). Some overlap in services may necessarily occur (*Matter of Patchin*, 106 AD2d 730 [3d Dept 1984]), and should be a factor when considering the aggregate fee (*see, e.g. Matter of Mergentime*, 155 Misc 2d 502 [Sur Ct, Westchester County 1992], *affd* 207 AD2d 453 [2d Dept 1994]). Moreover, the size of the estate or trust corpus can operate as a limitation on the fees payable (*see 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 court must also consider the verified objections to the fees filed on behalf of the New York State Attorney General, who represents the interests of the charitable beneficiaries, which cumulatively hold a 100% interest in the residuary estate. The objection is that the requested legal fees, totaling \$40,322.08, are excessive for the services required in this estate. Three weeks after the objections were filed, Mahon, Mahon, Kerins and O'Brien increased their firm's fee request to \$13,293.75, bringing the total requested fee to \$46,115.83.

After reviewing the file in its entirety, the court notes that decedent's assets are not complex. The initial principal, shown on the account with a value of \$469,222.52, consists of bank accounts, notes and bonds, a car, a modest home, a small pension and assorted refunds totaling just over \$4,000.00. Although there was an initial delay in the estate administration, resulting from the fact that decedent's distributees were not entirely known, temporary letters were issued to the Public Administrator on September 25, 2007. The only subsequent complicating factor was the search for decedent's distributees, which was primarily conducted by a professional genealogical search firm between 2008 and 2010. The search firm was paid \$24,251.26 for their services.

In consideration of the factors set forth above, the court fixes the fee of Brosnan & Hegler, LLP, in the amount of \$23,000.00 plus \$1,500.00 for services rendered in connection with the sale of decedent's house. The fee of Mahon, Mahon, Kerins & O'Brien, LLC is fixed in the amount of \$10,000.00. The total amount payable by the estate for legal services to both firms is \$34,500.00.

(2) The Fee of the Accountant

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, col 2 [Sur Ct, New York County] [internal citation omitted]; 7 Warren's Heaton, Surrogate's Court Practice § 93.08 [7th ed] [citing *Tortora*]).

Here, the Public Administrator requested payment to the accounting firm of Rispoli & Co., CPAs, PC, in the amount of \$3,925.00, of which \$3,350.00 has been paid and \$575.00 remains unpaid. Rispoli & Co., CPAs, PC, has submitted an affidavit requesting fees totaling \$4,556.25, of which \$3,981.25 has been paid and \$575.00 remains unpaid. The affidavit and attached invoices show that Rispoli & Co., CPAs, PC, prepared tax returns for the years 2007 through 2013 and corresponded with the Internal Revenue Service and the New York State

Department of Taxation. A final return will be required and has been billed at \$575.00. 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 disallows the fee of \$56.25 billed for correspondence with taxing authorities in connection with the estate's returns and approves the fees of Rispoli & Co., CPAs, PC, in the amount of \$4,500.00, of which \$518.75 remains unpaid.

CONCLUSION

The fee of Brosnan & Hegler, LLP, is fixed in the amount of \$24,500.00, inclusive of the flat fee for services rendered in connection with the sale of real estate. The amount paid in excess of the fee, \$9,650.00, is to be returned to the estate within 30 days of the date of this decision.

The fee of Mahon, Mahon, Kerins & O'Brien, LLC, is fixed in the amount of \$10,000.00, all of which remains unpaid.

The amended accounting is hereby approved.

Commissions are approved subject to audit.

The decree shall discharge the surety and shall authorize the Public Administrator to distribute the balance of the net estate to the residuary beneficiaries named in the will.

Settle decree.

Dated: December 19, 2013

EDWARD W. McCARTY
Judge of the
Surrogate's Court