

**Matter of DeLuca**

2014 NY Slip Op 33065(U)

September 30, 2014

Sur Ct, Nassau County

Docket Number: 30087

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 Estate of

MICHAEL DELUCA,

Deceased.

File No. 352359/B

Dec. No. 30087  
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This is the first and final account of the Public Administrator of Nassau County as administrator of the estate of Michael DeLuca. The Public Administrator seeks approval of attorneys' fees, accountant's fees and commissions. In addition, the Public Administrator seeks settlement of his account and discharge of the surety. The court must also fix the fee of the guardian ad litem.

The decedent, Michael DeLuca, died intestate on May 7, 2008, a resident of Nassau County. The summary statement shows charges of \$107,713.50 and credits of \$88,885.29, leaving a balance on hand of \$18,828.21. The accounting runs from May 7, 2008, to August 31, 2012. A guardian ad litem was appointed for the decedent's unknown heirs. The supplemental citation returnable on January 8, 2014 asked that the following claims be fixed and allowed: (i) Bay Tree III Homeowners Association in the amount of \$1,255.30; (ii) Chengwen Dong Home Care in the amount of \$117,000.00, (iii) CSANT in the amount of \$161.85; (iv) HSBC in the amount of \$138.87; (v) Little River Water & Sewage Company in the amount of \$96.48; (vi) NTKC Management LLC for Dr. Aragon in the amount of \$38.42; and (vii) Texas Ear, Nose & Throat Specialists, LLP in the amount of \$33.72.

The guardian ad litem has filed her report and states that she has no objection 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]).

These factors apply equally to an attorney retained by a fiduciary or to a court-appointed guardian ad litem (*Matter of Burk*, 6 AD2d 429 [1st Dept 1958]; *Matter of Berkman*, 93 Misc 2d 423 [Sur Ct, Bronx County 1978]; *Matter of Reisman*, NYLJ, May 18, 2000, at 35, col 4 [Sur Ct, Nassau County]). Moreover, the nature of the role played by the guardian ad litem is an

additional consideration in determining his or her fee (*Matter of Ziegler*, 184 AD2d 201 [1st Dept 1992]).

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.

The firm of Brosnan & Hegler has submitted an affirmation of legal services. According to counsel, his firm rendered 165 hours of legal services for a total of \$33, 905.00, of which \$21,551.25 has been paid and \$12, 353.75 remains unpaid, and incurred disbursements in the amount of \$260.63, all of which has been paid. The firm seeks approval of a reduced fee in the amount of \$21,551.25, all of which has been paid, and of disbursements in the amount of \$260.63, all of which has been paid. The services performed by the firm include: (i) preparing the petition for letters of administration and related papers; (ii) research into decedent's family; (iii) preparation of correspondence to bank; (iv) investigate evidence in connection with

decedent's South Carolina property; (v) work in connection with delinquent real property taxes on South Carolina property; (vi) telephone conferences with attorney for decedent's paternal aunt; and (vii) conversations with guardian ad litem.

Given the modest size of the estate, the court approves a fee of \$11,000.00 to the firm of Brosnan & Hegler and approves disbursements in the amount of \$260.63, all of which has been paid. Any amount paid in excess of \$11,260.63 shall be refunded to the estate.

The firm of Mahon, Mahon, Kerins & O'Brien, LLC has submitted an affirmation of legal services. According to counsel, his firm has rendered a total of 47 hours on this matter for a total of \$14,075.00 and anticipates additional services in the amount of \$3,900.00, for a total of \$17,975.00 plus disbursements of \$68.00. The services performed include: (i) preparation of the accounting and related papers; (ii) communications with South Carolina counsel; (iii) communications with guardian ad litem; and (iii) communications with counsel for the decedent's distributee. The anticipated services include gathering information for compilation of the Public Administrator's annual reporting requirements. Such services are not chargeable to individual estates. Given the relatively modest size of the estate, the court approves a fee of \$8,500.00.

South Carolina counsel has submitted an affidavit of services in which he states that his firm spent a total of 143.30 hours for a total of \$27,957.00 and incurred disbursements of \$2,560.53, for a total of \$30,517.53, none of which has been paid. The firm handled all work in connection with the ancillary probate and the decedent's South Carolina property. Based upon the modest size of the estate, the court approves a fee in the amount of \$11,500.00.

With respect to the accountant's fee, the accountant has submitted an affidavit of tax services in which she seeks a fee of \$2,175.00, of which \$1,025.00 has been paid and \$1,150.00

remains unpaid. The accountant prepared the decedent's 2008 personal returns and fiduciary returns for the year ending April 30, 2010. A return for the year ending April 30, 2014 and a final return will be required. The accountant's fee appears reasonable and is approved in the amount of \$2,175.00, of which \$1,025.00 has been paid and \$1,150.00 remains unpaid.

The guardian ad litem has submitted an affidavit of services in which she states that she spent 7.35 hours on this matter. Her normal hourly rate is \$250.00 per hour. The guardian ad litem reviewed the accounting, communicated with counsel for the Public Administrator, communicated with counsel for the decedent's distributees, and prepared her report. The court approves a fee of \$1,500.00 for the guardian ad litem, which shall be paid within thirty (30) days of the decree to be entered herein.

Commissions are approved subject to audit.

Based upon the above fees, there are insufficient funds to satisfy the approved claims. The approved claimants will be paid on a pro rata basis from the funds remaining after payment of administration expenses.

The Public Administrator shall file an affidavit bringing the account down to date within thirty (30) days of the date of this decision.

The decree shall discharge the surety.

Settle decree.

Dated: September 30, 2014

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