

Matter of Mitchell

2014 NY Slip Op 33069(U)

September 30, 2014

Sur Ct, Nassau County

Docket Number: 30148

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
Alysia Massop, as Executor of the Estate of

File No. 2011-366007/A

GLEN ROY MITCHELL,

Dec. No. 30148

Deceased.

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Before the court is the first and final account of Alysia Massop, as Executor of the Estate of Glen Roy Mitchell.

BACKGROUND

Glen Roy Mitchell (the “decedent”) died on June 1, 2011, a resident of Freeport. Decedent left a will dated April 11, 2011, which was admitted to probate by this court on November 2, 2011; letters testamentary issued to decedent’s goddaughter, Alysia Massop (“Massop”). Under the terms of the will, the decedent divided his estate into the following shares: (1) 50% to his daughter, Letia Mitchell; (2) 45% to his friend, Audrey Stone; (3) 2% to Massop; (4) 2% to his cousin, Eunice Grey, who post-deceased; and (5) 1% to his friend, Dosley McNeil.

THE ACCOUNT

The account covers the period from November 2, 2011 to January 24, 2014. The account shows the receipt of \$315,314.80 of estate principal (of which \$304,455.88 represents the adjusted net proceeds of the sale of decedent’s home)¹, which amount was reduced by

¹Schedule K reflects that the gross taxable estate was \$2,203,178.80. Schedule E reflects actual distributions made in the total amount of \$1,887,864.00 from teacher’s insurance and retiree services. Schedule J, Note 6 of the account notes that Schedule E “represents the amount of non-probate assets that were paid directly to the designated beneficiary(ies). This amount is

administrative expenses in the amount of \$259,728.89 (including \$104,454.00 of estate taxes due, in large part, to non-probate assets) and payment of executor's commissions in the amount of \$13,459.44, leaving a balance of \$42,126.47 on hand. The executor seeks approval of the accounting, approval of commissions, the fixing of fees for the services of the attorney, and authorization to distribute the share of Eunice Grey to the Nassau County Commissioner of Finance if no fiduciary is appointed for her estate within 60 days of the issuance of a decree in connection with the present accounting. The executor also asks the court to approve the rejection of the claims filed by claimants LI Emergency Care, Ophthalmic Consultants, and Nassau Financial.

FEES

Regarding the fee of the attorney for the estate, 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]).

made up of pension distributions that resulted in a taxable estate in New York State. The executrix does not have any knowledge about who the beneficiary(ies) is/are who collected these amounts.”

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]). 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]).

The executor has petitioned the court for approval of the payment of \$30,806.00 to her attorney, Marcel Florestal, Esq., in connection with the administration of the estate, of which \$24,306.00 has been paid to date and \$6,500.00 remains unpaid. No objections were filed to the

fee request. The court has carefully reviewed the affirmation of services and the time records submitted to the court. 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]).

The record reflects that the attorney billed the client at the rate of \$500.00 per hour for more than 60 hours of legal services. Counsel met with the client, drafted documents, researched the veracity of a possible non-marital child (three hours), appeared in court, cleared up real estate title issues, prepared an inventory of assets, prepared and filed the judicial accounting, and prepared and filed personal tax returns for 2010 and 2011 and the New York Estate Tax return.

However, in fixing counsel's fee, the court is constrained by multiple factors. This is a relatively modest and non-contested estate, which consisted of a private home, some small refunds, two small bank accounts and an old Volvo automobile. The court notes further that counsel billed \$6,500.00 in connection with the sale of decedent's home, including travel time to pick up certificates and copies of papers from the court. Travel time is not compensable (*Matter of Trotman*, NYLJ, May 13, 1998, at 32, col 2 [Sur Ct, Nassau County]). Moreover, billing records reflect that \$1,750.00 of the real estate portion of counsel's fee was billed for the real estate closing on July 30, 2012. At the same time, Schedule C reflects that a payment of \$1,500.00 was made to Sonia Tanksley, Esq., on July 30, 2012, presumably also in connection

with the closing. The court cannot approve \$8,000.00 in legal fees for the sale of a private home which involved no litigation or transactional complexities.²

It is well established that 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 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. In this fairly straightforward estate administration, the legal fee requested represents approximately 10% of the gross probate assets.

The fee payable to Marcel Florestal, Esq., is approved in the amount of \$18,000.00, plus an additional \$2,500.00 for services provided in connection with the preparation of tax returns. This fee shall include all legal services required to complete the administration of decedent's estate. Within 30 days of the date of this decision, counsel will return to the estate \$3,806.00, the balance of the fee already paid.

The court notes that it appears that the commission of the executor was paid without court authorization. "Sections 2310 and 2311 of SCPA require court approval before an executor can pay himself or herself on account of his or her fiduciary commissions" (*Matter of Kalikow*, NYLJ, July 3, 2000 at 1, col 1 (Sur Ct, Nassau County). "A fiduciary who takes commissions without obtaining a court order risks penalties, usually a surcharge for interest from the date she

²The account does not include a real estate closing statement for the sale of decedent's home, but there is a summary of the closing included in Schedule J.

took the unauthorized commissions” (Margaret Valentine Turano, Practice Commentaries, McKinney’s Cons Laws of NY, Book 58A, SCPA 2310, citing *Matter of Hildreth*, 274 App Div 611 [2d Dept 1949], and *Matter of Crippen*, 32 Misc 2d 1019 [Sur Ct, New York County 1961]). However, no surcharge will be applied where consent was given by the beneficiaries. In this case, although there is no written consent by the interested parties to advance payment of commissions, there are also no objections raised. Consequently, the court will not apply a surcharge unless the executor fails to complete the administration in a timely and efficient manner.

CONCLUSION

The account, as filed, is approved.

The commission of the executor is approved subject to audit and subject to her timely completion of the estate administration.

The court approves the rejection of the claims shown on Schedule D.

The decree shall authorize the executor to distribute the balance of the net estate as follows: (1) 50% to Letia Mitchell; (2) 45% to Audrey Stone; (3) 2% to Massop; (4) 2% to the personal representative of the estate of Eunice Grey; and (5) 1% to Dosley McNeil. If there is no personal representative appointed in the estate of Eunice Grey, then the executor shall pay her share to the New York State Comptroller for the benefit of the estate of Eunice Grey.

Submit decree.

Dated: September 30, 2014

EDWARD W. McCARTY
Judge of the
Surrogate’s Court