

Matter of Fullum

2014 NY Slip Op 33430(U)

December 24, 2014

Sur Ct, Nassau County

Docket Number: 340751

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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Proceeding to Settle the Account of Jeffrey E. DeLuca,
Public Administrator of Nassau County, as Administrator
of the Estate of

File No. 340751

THERESA FULLUM,

Dec. No. 30323

Deceased.

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Before the court is the final account of the Public Administrator for the estate of Theresa Fullum, who died intestate, a resident of Nassau County, on December 4, 2005. Letters of administration issued to the Public Administrator on February 15, 2006. A guardian ad litem was appointed by the court to represent the interests of the decedent’s unknown heirs. He filed his report and has no objections.

The Public Administrator filed his account which shows the receipt of \$894,983.24 of principal and income. This amount was reduced by administrative expenses and creditor’s claims in the amount of \$94,910.98 leaving a balance of \$800,172.26 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 and authorization to distribute the net estate to the New York State Comptroller’s Office. In addition, the court must fix the fee of the guardian ad litem and release the administrator from the surety bond.

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 34 [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.

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 28, 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)" (Warren's Heaton on Surrogate's Court Practice § 93.08 [7th ed]).

In this case, there were two different attorneys employed by the Public Administrator. Each has submitted an affirmation of legal services and each application will be treated separately. The first attorney supplied the court with an affidavit of legal services and it shows that the attorney rendered more than 261 hours of legal services of a partner, associate and paralegal at various hourly rates. The attorneys for the Public Administrator performed the following services: prepared and filed the petition for letters of administration; obtained and secured the bond; identified and collected the testamentary assets; obtained information regarding the decedent's family; retained International Genealogical Search, Inc. and worked with them; evaluated and paid claims filed; prepared and filed the final account, the petition for

judicial settlement and affidavit in support; arranged for proper service of the accounting citation; and held multiple telephone conferences with the Public Administrator and his staff. The attorney requests that the court set the fee in the amount of \$48,710.00 of which \$39,206.25 has been paid and \$9,503.75 remains unpaid. In light of all of the foregoing, the fee of Brosnan & Hegler, LLP is set in the total amount of \$45,000.00.

The Public Administrator also employed an additional law firm. The attorney filed an affirmation of legal services in which he affirms that he has spent over 8.75 hours on this matter and performed the following services: opened a file; engaged in conferences with prior counsel; appeared in Surrogate's Court on the return date of citation; corresponded with the guardian ad litem; reviewed documents and affidavit of due diligence; reviewed reports; and engaged in telephone conferences with the court regarding possible kinship hearings. The attorney also affirms that in order to finalize the proceeding, he will have to perform the following services: review file; review decisions of the court; prepare affidavit bringing account current and proposed decree; participate in conferences and communications with the Public Administrator's office; and coordinate distribution of the estate. The attorney asks for a fee of \$7,268.75. In light of all of the foregoing factors, the court fixes the fee of Mahon, Mahon, Kerins & O'Brien in the amount of \$6,500.00.

The guardian ad litem has submitted an affirmation of legal services. The guardian ad litem affirms that he spent over 9 hours on this matter. The guardian ad litem performed the following services: reviewed the file; held conversations with the Public Administrator; reviewed files of the Public Administrator; reviewed the accounting and prepared the final guardian ad litem report. In light of all of the considerations as set forth previously, the court fixes the fee of the guardian ad litem in the amount of \$2,250.00.

Concerning the accountant's fee, the accountant has requested a fee of \$5,975.00 of which \$4,825.00 has been paid and \$1,150.00 remains unpaid. The accountant prepared the federal and state income tax returns as well federal and state fiduciary income tax returns for several years. 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 \$5,975.00, of which \$1,150.00 remains unpaid.

Finally, the commission of the Public Administrator is approved subject to audit. The Public Administrator is directed to bring the account down to date within 45 days of the date hereof.

The decree shall discharge the surety.

Settle decree.

Dated: December 24, 2014

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