

Matter of Saccone

2014 NY Slip Op 33434(U)

December 19, 2014

Surrogate's Court, Nassau County

Docket Number: 2013-373054A

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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Accounting by Joann Saccone as the Administratrix of the
Estate of

File No. 2013-373054/A

ANTHONY SACCONI,

Dec. No. 30345

Deceased.

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Before the court is the first and final account of Joann Saccone as administrator of the estate of Anthony Saccone, the decedent. The administrator seeks approval of attorneys’ fees and the settlement of her account, including the settlement of claims and approval of distribution. The administrator also seeks to be discharged.

The decedent, Anthony Saccone died on May 8, 2012. He was survived by his wife, Joann, and by six children, Sandra Sperrazza, Barbara Saccone, Anthony Saccone, Nicole Saccone, Annemarie Saccone and Christina Saccone. Letters of administration issued to Joann Saccone on February 25, 2013. The accounting covers the period February 25, 2013 to May 1, 2014. The summary statement shows charges to the accounting party of \$69,370.89 and credits of \$18,923.45, leaving a balance on hand of \$50,447.44. The gross assets consist of \$64,209.44 representing the proceeds of sale from the decedent’s residence and bank accounts totaling \$5,161.45.

Schedule D, as amended, shows the following claims as rejected: Dr. Tom Hopkins - \$12,500.00; St. Francis Hospital - \$100.31; St. Francis Hospital - \$1,132.00; St. Francis Hospital - \$1,156.00; and St. Francis Hospital - \$56.82. The petitioner states that “[t]hese claims were rejected on or about February 8, 2014 because the Estate has very little assets.” The six children have filed waivers and consents 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]).

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 attorney for the administrator has submitted an affirmation of legal services in which he states that his time charges amount to \$22,122.00; however, he agreed to reduce his firm's legal fee to a flat fee of \$12,500.00. The time records show that the attorney: (i) prepared the petition for letters of administration; (ii) had conferences with the family members; (iii) prepared a stipulation among the family members regarding a prenuptial agreement between the decedent and his wife; (iv) engaged in communications with client; (v) analyzed appraisal issues; (vi) engaged in conferences with the real estate broker; (vii) drafted correspondence to creditors; and (viii) prepared the accounting and related court papers.

A review of the time sheets indicates that counsel included time spent preparing his affirmation of legal services and work which is executorial in nature, neither of which is compensable (*Matter of Bitzer*, 208 AD2d 723 [2d Dept 1994]; *Matter of Gallagher*, NYLJ, Feb. 2, 1993, at 26, col 3 [Sur Ct, Bronx County]).

Based upon the factors set forth above, including the size of the estate, the court fixes counsel's fee in the amount of \$5,000.00, exclusive of the flat fee of \$1,750.00 for the sale of the decedent's residence. Any amount paid in excess of that amount shall be returned to the estate within thirty (30) days of the date of this decision.

The petitioner requests that the creditors' claims be denied because "the Estate has very little assets." Here, the estate is not insolvent. In fact, the accounting proposes to make a distribution to the distributees. Petitioner has not put forward a valid basis to reject such claims. Accordingly, the creditors' claims are allowed.

Petitioner should submit an amended accounting within thirty (30) days of the date of this decision adjusting the distribution schedule in accordance with this decision.

This constitutes the decision and order of this court.

Proceed accordingly.

Dated: December 19, 2014

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