

Matter of Frank

2015 NY Slip Op 31297(U)

March 30, 2015

Sur Ct, Nassau County

Docket Number: 2011-367002/A

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 the Public Administrator as the Administrator
 of the Estate of

File No. 2011-367002/A

TAMARA FRANK
 a/k/a TAMARA LYNN FRANK,

Dec. No. 30450

Deceased.

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Submitted for review is the first and final accounting by the Public Administrator as administrator of the estate of Tamara Frank. The Public Administrator also seeks approval of commissions, attorney's fees and accountant's fees, as well as the expenses of his office pursuant to SCPA 1207 (4), and a decree releasing and discharging the surety. The Public Administrator was initially appointed as administrator of the estate when it appeared that the decedent had died intestate. After locating a will of the decedent and having it admitted to probate, letters of administration, c.t.a. issued to the Public Administrator.

The summary statement shows charges to the accounting party of \$237,964.14. Jurisdiction was obtained over all necessary parties and no objection to the relief sought has been interposed.

Considering now the fee sought by counsel to the Public Administrator, as with any request for a fee, 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]).

According to counsel's affirmation, supported by contemporaneous time records, counsel's office has 67.5 hours of legal services of a partner, associate and paralegal at various hourly rates. The firm's efforts included but were not limited to securing letters of administration, identifying and marshaling the assets of the estate, determining the whereabouts of the decedent's distributees and the beneficiaries of the will, all of the necessary services included in the preparation of the final account and supporting documents, as well as correspondence with the Public Administrator and the guardian ad litem, review of the reports of the guardian ad litem and preparation of the affidavit bringing the account down to date and the proposed decree. Counsel also represented the Public Administrator in the sale of the decedent's residence. Counsel also anticipates additional services in the preparation, filing and service of the final decree and the final distribution of the estate.

Considering all of the foregoing, and particularly the modest size of the estate, the court fixes the fee of the Public Administrator's counsel in the sum of \$15,000.00, for all services rendered or to be rendered.

The Public Administrator also seeks approval of accounting fees of \$2,856.00 for the preparation of the decedent's final state and federal fiduciary income tax returns and for fiduciary income tax returns for four years. Normally, accountants' services are not compensable out of estate assets unless there exists unusual circumstances which require the expertise of an accountant (*Matter of Meranus*, NYLJ, Mar. 31, 1994, at 37; *Matter of Smith*, NYLJ, Jan. 15, 1998, at 36). In *Matter of Smith* (NYLJ, Jan. 15, 1998, at 36), this court held that routine work, such as the preparation of income tax returns and fiduciary accountings, should be performed by the attorney. Generally, the fee for such service is held to be included in the fee of the attorney for the fiduciary (*Matter of Musil*, 254 AD 765 [1938]) to avoid duplication (*Matter of Schoonheim*, 158 AD2d 183 [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). The legal fees of counsel for the Public Administrator in this case do not include compensation for the services rendered by the accountants. Since there is no duplication and the fee requested appears to be fair and reasonable, the court will approve payment of the accountant's fees from the estate in the sum sought of \$2,856.25 of which \$1,706.25 has been paid and \$1,150.00 remains unpaid.

The Public Administrator's prayer for an award of \$2,379.64 for the reasonable and necessary expenses of his office is also approved (SCPA 1207 [4]).

Finally, the commission of the Public Administrator is approved subject to audit.

Counsel is directed to file an affirmation bringing the account down to date and submit a decree.

Proceed accordingly.

Dated: March 30, 2015

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