

Matter of McFaul (Schmidt)
2017 NY Slip Op 30356(U)
February 22, 2017
Surrogate's Court, Nassau County
Docket Number: 2013-376392
Judge: Margaret C. Reilly
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**SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

**In the Matter of the Account of Proceedings of
Edward M. Schmidt, as Administrator of the Estate of**

**ANNIE G. MCFAUL a/k/a
ANNIE GRACE MCFAUL,**

Deceased.

DECISION & ORDER

**File No. 2013-376392
Dec. No. 32513**

PRESENT: HON. MARGARET C. REILLY

The following papers were considered in the preparation of this decision:

Petition for Judicial Settlement of Account and Amendments	1
Accounting by Administrator and Exhibits.	2
Reports of the Guardian Ad Litem.	3
Affirmations in Support of Legal Fees.	4
Memorandum of Law in Support of Application for Attorney's Fees.	5

PROCEDURAL HISTORY

The petition before the court seeks judicial settlement of an account filed in connection with the estate of Annie G. McFaul, who died on June 13, 1947. Letters of administration issued to Edward M. Schmidt on September 12, 2013. The administrator's account was filed on January 12, 2015, and amended on April 7, 2015. The initial account reflects total charges of \$476,823.53, total credits of \$399,363.20, and a balance on hand in the amount of \$133,057.55. Amendments to the petition and account were subsequently filed, which reflect that as of November 9, 2015, the amount available for distribution was \$124,557.17.

This court previously issued the following three decisions in connection with the petition:

Dec. No. 31071, issued on September 29, 2015, in which the court directed the attorney for the administrator to serve his affirmation of legal services and time records

on the Guardian Ad Litem appointed to represent the interest of William J. Mayo, whose whereabouts are unknown. William J. Mayo is the husband and sole distributee of a post-deceased distributee of the decedent.

Dec. No. 31339, issued on April 20, 2016, in which the court directed the attorney for the administrator to file an affirmation with additional information regarding the legal services provided and the fees charged. The court concluded by stating that the balance of petitioner's requests for relief would be addressed in a subsequent decision.

Dec. No. 31769, issued on October 17, 2016, in which the court directed the attorney for the administrator to file a memorandum of law clarifying whether the various services shown on the time records were performed by attorneys, paralegals or administrative staff, and in support of the application for legal fees, particularly those fees charged for services rendered prior to the execution of a retainer agreement.

The attorney for the administrator submitted the requested memorandum of law, which has been reviewed by the court. Accordingly, this decision will address: (1) legal fees; (2) the fee of the Guardian Ad Litem; (3) commissions; (4) distribution of the net estate; and (5) release of the surety.

FEE OF THE ATTORNEY FOR THE ADMINISTRATOR

Counsel for the administrator has submitted a memorandum of law in which he makes the following three points in support of his fee application:

1. Extensive, reasonable and necessary legal services were rendered for the estate to the benefit of all interested parties. Counsel was initially engaged by Patricia L. McFaul, one of the distributees of Annie G. McFaul, but subsequently counsel had extensive contact with multiple family members in order to address the complicated entanglements caused by the passage of more than 66 years between the death of Annie

G. McFaul, on June 13, 1947, and the issuance of letters of administration to Edward M. Schmidt, on September 12, 2013. This required the attorneys to provide more than 133 hours of services over the course of 10 years. The attorney advises the court that the decedent's real property, which constituted her primary asset, was in real estate tax foreclosure and, furthermore, that no steps had been taken since the decedent's death to change the title of the property out of the decedent's name.

2. Despite the decades in which the decedent's real property was neglected by family members, the legal services provided by counsel ultimately resulted in a successful outcome for the benefit of the interested parties. All services billed were for attorney services only; there were no charges for work performed by administrative staff. Counsel further notes that a review of the time records reflects multiple issues that counsel had to address, and that counsel was in constant communication with all parties. Prior to counsel providing legal services in connection with the estate administration, the issues that necessitated counsel's attention included the tax foreclosure proceeding and outstanding real estate issues.

3. A correct retainer agreement has been filed with an appropriate explanation and justification for its execution many years after the legal work commenced in 2005. Counsel explains that Patricia L. McFaul, the family member who engaged counsel, was a friend and former neighbor of a partner at the law firm. The work was undertaken by counsel on the basis of a verbal understanding. Counsel reports that the client lacked any funds to pay for the legal services requested, and that counsel agreed to assist her although the depth and breadth of the problems presented by the estate administration were as yet unknown. The parties agreed that the law firm would keep track of their time and expenditures and would receive payment and reimbursement at the conclusion of the matter.

Time passed and the work continued, but counsel forgot to memorialize in writing the agreement with his client. The written retainer agreement was not executed until May 4, 2016, although the agreement states that it will apply retroactively to the initial date of employment, November 23, 2005. The agreement provides that legal services will be billed at the rate of \$335.00 per hour.

As discussed at length in Dec. No. 31339, this court has the power to determine appropriate legal fees to be paid to the attorney of the estate administrator (*see Matter of Stortecky v Mazzone*, 85 NY2d 518 [1995]). As further noted in that decision, the services provided by counsel to the administrator included, but were not limited to: filing a petition for letters of administration; searching for William J. Mayo; providing services in connection with the foreclosure and change in title of the decedent's real estate; and preparing and filing the administrator's judicial accounting. These combined services resulted in a total requested fee of \$44,794.92. According to Schedule C of the account, \$9,000.00 has been paid. Schedule C-1 reflects that \$35,794.92 remains unpaid.

The court has reviewed the memorandum of law recently submitted by counsel, along with the previously filed affirmations of services and the time records. Although a substantial portion of these services were provided prior to the execution of a written retainer agreement, and prior to the issuance of letters, and the total fee is proportionately higher than might be typical for an estate of this size, the court is mindful that providing legal services over a ten-year period in connection with the administration of the estate of a decedent who died in 1947 would require addressing unusual issues and complications, especially when one of the decedent's children predeceased her and the other five children post-deceased prior to the commencement of the administration proceeding.

Pursuant to 22 NYCRR §1215.1, before undertaking the representation of a client, or shortly thereafter, a lawyer must provide the client with a letter of engagement,

commonly referred to as a retainer agreement. This rule applies to all civil actions in which the disputed amount is \$3,000.00 or more. The letter must detail the scope of the services that the lawyer will provide, the lawyer's fees and billing methods, and information regarding the arbitration of fee disputes.

In the present proceeding, counsel's representation began in 2005, yet there was no retainer agreement signed until 2016. However, 22 NYCRR §1215.1 does not provide a penalty for non-compliance (*Seth Rubenstein, P.C. v Ganea*, 41 AD3d 54, 59 (2d Dept 2007)). Instead, in the absence of a written retainer agreement, the attorney can recover in quantum meruit for the value of the legal services provided (*id.*; *Tomei v Schwartz*, 45 Misc3d 1207[A][Civ Ct, Bronx County 2010]).

Based upon the court's extensive review of all of the documents submitted by counsel in support of the fee application, and noting that there were no objections to the fee, the court approves the legal fee in the amount requested.

FEE OF THE GUARDIAN AD LITEM

With respect to the fee of the Guardian Ad Litem, the Court notes that the Guardian Ad Litem's affirmation reflects more than eight hours of services on behalf of her ward. Considering all the factors set forth above concerning attorneys' fees, the Court fixes the fee of the Guardian Ad Litem in the sum of \$2,800.00, to be paid within thirty days of the date of decree.

CONCLUSION

The commission of the administrator is approved subject to audit.

The decree shall discharge the surety and shall authorize the administrator to distribute the balance of the net estate to the decedent's distributees, except that the administrator shall submit a check to the Chief Clerk of the Surrogate's Court for the

amount payable to William J. Mayo. The check, which will be deposited on behalf of William J. Mayo, shall be made payable to the Treasurer of Nassau County, pursuant to SCPA §2223.

Settle decree.

Dated: February 22, 2017
Mineola, New York

E N T E R:

HON. MARGARET C. REILLY
Judge of the Surrogate's Court

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