

Matter of Divins (Randazzo)
2017 NY Slip Op 30680(U)
March 7, 2017
Surrogate's Court, Nassau County
Docket Number: 2016-387925/A
Judge: Margaret C. Reilly
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**SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

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**Accounting by Phyllis Randazzo Divins as the Executor
of the Estate of**

**PHILIP RANDAZZO a/k/a
PHILIP J. RANAZZO,
Deceased.**

**DECISION
File No. 2016-387925/A
Dec. No. 32563**

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PRESENT: HON. MARGARET C. REILLY

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

Account.	1
Petition and Approve Accounting.	2
Affirmation of Legal Services.	3
Affidavit of Accountant.	4
Citation.	5
Attorney Affirmation.	6

I. PROCEDURAL HISTORY

Submitted for review and approval is the final accounting filed by Phyllis Randazzo Divins, the executor of the estate of Philip J. Randazzo. The petitioner seeks approval of her final accounting; approval of claims and reimbursements for estate expenses made to the fiduciary in the sum of \$54,226.30; approval of commissions; approval of legal fees including future legal fees; approval of a reserve in the amount of \$5,000.00 to be held in the estate account for a period of six months for costs associated with finishing the estate and the filing of final tax returns; and discharge of the fiduciary. No objections have been filed.

II. BACKGROUND

The decedent died testate, a resident of Nassau County, on January 9, 2016. The decedent was survived by six children. The decedent's will dated January 26, 2006 was admitted to probate on February 24, 2016 and letters testamentary issued to Phyllis Randazzo Divins, the petitioner. The will provides for the equal division of the residuary in seven shares.

III. THE ACCOUNT

The account filed by the petitioner covers the period January 9, 2016 through September 27, 2016 and shows total charges of \$300,874.42, total credits of \$58,226.30, and a balance on hand of \$246,648.12.

IV. FEES

A. Legal Fees for the Petitioner's Attorney

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 fees rendered in the course of an estate (*see 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 (*see Matter of Kelly*, 187 AD2d 718 [2d Dept 1992]); the complexity of the questions involved (*see Matter of Coughlin*, 221 AD2d 676 [3d Dept 1995]); the nature of the services provided (*see Matter of Von Hofe*, 145 AD2d 424 [2d Dept 1988]); the amount of litigation required (*see Matter of Sabatino*, 66 AD2d 937 [3d Dept 1978]); the amounts involved and the benefit resulting from the execution of such services (*see Matter of Shalman*, 68 AD2d 940 [3d Dept 1979]); the lawyer's experience and reputation (*see Matter of Brehm*, 37 AD2d 95 [4th Dept 1971]); and the customary fee charged by the Bar for similar services (*see Matter of Freeman*, 34 NY2d 1 [1974]; *Matter of Potts*, 123 Misc 346 [Sur Ct, Columbia County 1924], *affd* 213 App Div 59 [4th Dept 1925], *affd* 241 NY 593 [1925]). 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 (*see 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 (*see 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 (*see Matter of McCranor*, 176 AD2d 1026 [3rd 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 (*see 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 (*see Matter of Von Hofe*, 145 AD2d 424 [2d Dept 1988]; *Matter of Phelan*, 173 AD2d 621 [2d Dept 1991]).

The attorney for the petitioner filed an affirmation of legal services in which he affirms that he performed the following services: preparation of the probate petition; held meetings with family members; reviewed the assets; prepared a fiduciary deed; prepared and filed the inventory of assets; engaged in numerous telephone calls with interested parties; held multiple meetings and discussions with the executor; and prepared a judicial accounting and petition. The attorney also affirms that he will have to prepare an updated accounting; prepare an affidavit of compliance; distribute the assets; and finalize tax returns. The account shows on schedule C the payment of legal fees in the amount of \$12,331.00 and unpaid fees of \$3,500.00. The citation asks for the approval of \$4,000.00 in unpaid legal fees and \$3,500.00 in future legal fees.

In consideration of the factors enumerated above, and the criteria established in *Matter of Freeman* (34 NY2d 1 [1974]) and *Matter of Potts* (123 Misc 346 [Sur Ct, Columbia County 1924], *affd* 213 App Div 59 [4th Dept 1925], *affd* 241 NY 593 [1925]), the court awards a fee in the requested amounts of \$4,000.00 in unpaid legal fees and \$3,500.00 in anticipation of legal fees to finalize the estate.

V. REIMBURSEMENT TO THE FIDUCIARY

The fiduciary was reimbursed \$54,226.30 from the estate assets for items which she paid personally. Included in the amounts paid were funeral bills and costs associated with the funeral, payment of taxes, payment of insurance bills, electric bills and fuel; car payments and a payment in the amount of \$350.00 to an accountant for the preparation of the decedents' tax returns. No objections were filed to the relief requested and it is GRANTED.

VI. CONCLUSION

The application for commissions is GRANTED, subject to audit. The application to maintain a reserve in the amount of \$5,000.00 is GRANTED. The decree shall provide for discharge of the petitioner and shall authorize the petitioner to distribute the balance of the estate in accordance with the decedent's last will and testament.

This constitutes the decision and order of the court.

Settle decree.

Dated: March 7, 2017

Mineola, New York

E N T E R:

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

cc: Bernard F. McGovern, Esq.
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