

Matter of Falk
2018 NY Slip Op 32198(U)
September 7, 2018
Surrogate's Court, New York County
Docket Number: 2014-502/B
Judge: Rita M. Mella
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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

New York County Surrogate's Court
Date: September 7, 2018

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In the Matter of the Petition of D.L., as Attorney and
Co-Executor of the Estate of

SANDRA FALK,
Deceased,

DECISION and ORDER
File No.: 2014-502/B

for an Order Fixing Legal Fees pursuant to SCPA 2110.

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M E L L A, S.:

Petitioner, an attorney who has provided legal services in this estate and who also serves as one of its executors, seeks to fix his fees pursuant to SCPA 2110. The parties have consented to the court's determination of the reasonableness of such fees based on the papers submitted to the court and without a hearing.

BACKGROUND

Decedent died testate on January 7, 2014. In her will, admitted to probate on October 14, 2014,¹ decedent provided for her estate to be distributed to several individuals and charities. Originally, the estate value was estimated to be \$800,000.00, but after three years of administration, Petitioner valued the gross estate at \$574,996.27. Then, after the return of proceeds from decedent's Totten Trust account that had been erroneously paid to her estate, its value decreased to \$471,541.00. Petitioner is requesting approval of the legal fees he has been paid in the amount of \$166,307.50, for services rendered from January 8, 2014 through October 18, 2016. In support of his application, petitioner has submitted an affirmation and 117 pages of contemporaneous time records, and seeks compensation for 397.50 hours of legal services, at a

¹ An amended probate decree was issued on February 24, 2015.

rate of \$500 per hour, with a self-imposed reduction in fees of more than \$32,000.00.

The New York State Attorney General, as statutory representative of the charitable beneficiaries, has objected to the requested legal fees as excessive, inappropriate and disproportionate to the size of the estate.² Among other things, the Attorney General contends that a considerable number of hours were spent performing executorial duties which may not be billed as legal services.

Petitioner acknowledges that the attorney's fees incurred are disproportionate to the value of the estate, but suggests that there were circumstances in its administration which merited the number of hours spent performing legal services. Petitioner also posits that the fact that he has voluntarily reduced his fees and waived his executor's commissions should be considered by the court in determining the reasonable value of his services.

DISCUSSION

A fiduciary who provides legal services is allowed "compensation for his . . . services as appear to the court to be just and reasonable" (SCPA 2307 [1]; EPTL 11-1.1 [b] [22]). The Surrogate has ultimate authority to inquire into the reasonableness of legal fees and broad discretion to fix such fees (*Stortecky v Mazzone*, 85 NY2d 518, 526 [1995]; *Matter of Marsh*, 265 AD2d 253, 254 [1st Dept 1999]).

In making such a determination, the court may consider, among other factors, 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*

² The Attorney General also objected to accounting fees but those objections are not determined in this SCPA 2110 proceeding.

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 at stake 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 (*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]; *Matter of Freeman*, 34 NY2d 1 [1974]). The burden of establishing the reasonableness of the requested legal fees is on the attorney (*Matter of Potts*, 213 App Div at 61).

Upon review of time records submitted, the court finds widespread inefficiency in Petitioner's use of time as well as excessive time charged for completing uncomplicated tasks. For example, Petitioner spent approximately 56 hours in a period of eight months on the probate application, including (1) nine trips to this court to meet with clerks at the probate department; (2) research on basic legal issues such as EPTL 4-1.1 (to determine decedent's distributees) and "requirement of Application for Preliminary Letters [Testamentary]"; (3) review, preparation and multiple revisions of documents such as the citation, the amended probate petition, and affirmations to fix issues in the previously filed papers; (4) numerous phone conferences with process servers; and (5) multiple reviews of his own file, "analysis" of the preliminary letters testamentary as well as review of the original and 10 copies of the letters testamentary issued by the court. In another relevant example, in a September 21, 2015 entry, Petitioner charged the estate \$100.00 for reviewing a "thank you" email sent by the lawyers of a beneficiary. Not all the time Petitioner has charged is compensable.

Additionally, the time records include in excess of 300 entries describing communications between Petitioner and Al Frazia, a residuary beneficiary under the will who is not an attorney and whom Petitioner hired to perform estate administration work.³ Just in 2014, Petitioner spent more than 27 hours communicating with Frazia by telephone or email. These entries reveal not only the inefficient use of time and resources by Petitioner, but also significant duplication of efforts. If cost saving was the goal behind the hiring of Frazia to assist in the performance of executorial duties, the inordinate amount of time that Petitioner spent conferring with Frazia thwarted any attempt to reach that goal. A significant reduction of the time charged for these numerous unexplained communications is warranted.⁴

In addition to having Frazia assist him with the administration of the estate, Petitioner charged at least 41.30 hours for his own performance of executorial duties such as (1) marshalling assets; (2) making funeral arrangements; (3) surrendering decedent's apartment; (4) communicating with utility companies and banks; (5) emptying out safe deposit boxes; and (6) selling decedent's jewelry. Such charges for performing executorial services are improper (*see Matter of Colt*, 2017 NY Slip Op 30934[U] [Sur Ct, NY County]; *Matter of Trotman*, NYLJ, May 13, 1998, at 29, col 3 [Sur Ct, NY County]).

³ From the assets of the estate, Frazia was paid approximately \$16,000 for his work, according to an informal account of the co-executors that Petitioner has attached to his papers.

⁴ Many of these entries bundled the time for various services without allocation to a particular task, and fail to sufficiently link time charges with services performed. Therefore, the court is unable to determine with precision the nature of the services performed and to what extent the tasks completed were executorial in nature. The court is not obligated to discern or calculate the charge for each particular service (*Matter of Schwartz*, NYLJ, Oct. 17, 2017, at 22, col 5 [Sur Ct, NY County], *citing Matter of Nicastro*, 186 AD2d 805 [2d Dept 1992]).

Having considered the above-described factors, the court fixes Petitioner's legal fees for the time period in question, in the amount of \$110,543.40. Petitioner is directed to refund to the estate the difference between what he received in payment and \$110,543.40, within 30 days of the date of this decision (SCPA 2110 [3]).

This decision constitutes the order of the court.

The clerk is directed to mail a copy of this decision to Petitioner and the New York State Attorney General.

Dated: September 7, 2018



SURROGATE