

Matter of Sabot

2010 NY Slip Op 31742(U)

May 18, 2010

Sur Ct, Nassau County

Docket Number: 272558/G

Judge: John B. Riordan

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

-----X

In the Matter of the Accounting by ERIC P. MILGRIM,
Public Administrator of Nassau County, as the
Administrator, c.t.a. of the Estate of

File No. 272558/G

ALBERT I. SABOT,

Deceased.

-----X

In this uncontested accounting proceeding submitted for judicial settlement, review and approval is the accounting filed by Eric P. Milgrim, the Public Administrator, functioning as administrator c.t.a., in the estate of Albert I. Sabot, deceased. The Public Administrator seeks release and discharge from all liability, accountability and responsibility as to matters set forth in his accounting; the fixing and determination of his commissions and expenses; the fixing of the fees of his accountant, Rispoli & Curti, P.C.; the fixing of the accounting fees of the firm of Boyce, Hughes & Farrell; the fixing of the fees of his attorneys, Brosnan & Hegler LLP; the fixing of the fees of John W. Sinon, Esq., attorney for the former public administrator; the fixing of the fees of Schulte Roth Zabel for services rendered to the decedent’s estate; fixing the fees of Anthony T. Scotto, Esq., as attorney for petitioner; authorization for the distribution of the net estate equally to Kathi Anne Sabot, Lori Sabot and David Sabot; approving petitioner’s rejection of the claim of Holland & Knight, LLP; and approving the petitioner’s rejection of the claim of Howard Metzner.

The decedent died intestate, a resident of Nassau County, on August 31, 1991. The account as filed shows total charges of \$183,178.85 and total credits of \$53,996.95, leaving a

balance on hand as of August 31, 2009 of \$129,181.90.

The prior executor, Bernard Mayer, filed a petition for judicial settlement of his account as executor dated November 1, 2002. It covered the period August 29, 1991 to July 31, 2002. As set forth in this court's Decision No. 438, dated June 15, 2007, Bernard Mayer died on April 24, 2004 and the nominated successor executor executed a renunciation of appointment on April 12, 2005. One of the beneficiaries applied for appointment as administrator c.t.a. and the other beneficiaries objected. The court appointed the Public Administrator as administrator c.t.a. The Public Administrator has filed an accounting for the period from June 15, 2007 through August 31, 2010.

With respect to the issue of attorney's 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 (*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 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 (*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 [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 (*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 [3rd 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.

As described in the affirmation of legal services made by Anthony T. Scotto, Esq., as counsel to the Public Administrator, sworn to on December 21, 2009, counsel expended approximately in excess of 48.44 hours on this estate, with a billable value in excess of \$14,000.00, and expended \$44.52 in disbursements. Nothing has been paid on account. Services cover the period from January 1, 2008 forward. Counsel seeks fees in the amount of \$13,500.00.

The affirmation and billing reports annexed thereto detail the legal services provided to the Public Administrator. The services include extensive review of documents and correspondence, communications with various interested persons, meetings, analysis of proposed sale transaction, analysis of partnership agreement, and work on final account. Based upon the presentation and the factors described above, counsel's fees are set at \$13,500.00, none of which has been paid. Disbursements are approved as requested.

As described in the affirmation of legal services made by Kevin J. Wimmer of the firm of Brosnan & Hegler, LLP, counsel to the Public Administrator, filed on May 3, 2010, counsel expended in excess of 59 hours on this estate, with a billable value in excess of \$8,750.00. \$7,500.00 was been paid on account on May 2, 2003. Counsel also seeks reimbursement of \$1,295.00 in disbursements.

The affirmation and billing reports annexed thereto detail the legal services provided to the Public Administrator. The services covered the period from April 21, 2002 through the present. The services included numerous telephone conferences with Howard Metzner and Bernard Mayer regarding the petition for settlement of the account, the status of estate administration, current addresses for the distributees, the review and revision of the executor's final account, preparation of the accounting petition for judicial settlement of the executor's account, various accounting schedules, accounting citations, an affidavit amending the executor's final account, affidavits of service correspondence with the court and two appearances before the court and arranging for the proper renunciation of the executor and appointment of the administrator c.t.a. Based upon the presentation and the factors described above, counsel's fees

are set at \$8,750.00, \$7,500.00 of which has been paid and \$1,250.00 of which is unpaid and disbursements are allowed at \$1,295.00.

As described in the affirmation of legal services made by John W. Sinon, counsel to the Public Administrator, sworn to on February 6, 2010, counsel expended 21.5 hours of legal time and 2 hours and 35 minutes of paralegal time on this estate, with a billable value in excess of \$5,633.66. Counsel seeks fees in the amount of \$5,633.66, all of which has been paid.

The affirmation and billing reports annexed thereto detail the legal services provided to the Public Administrator. The services covered the period September 4, 2007 through December 31, 2007. The services were focused on obtaining possession and control of estate records from Howard Metzner and investigating the estate's 12.5% interest in a real estate partnership. Counsel also prepared and prosecuted the amended petition for the appointment of the administrator c.t.a. Counsel's fees are set at \$5,633.66, all of which has been paid.

With respect to the accountant's fees, normally, an accountant's services are not compensable out of estate assets unless there exist unusual circumstances that require the expertise of an accountant (*Matter of Meranus*, NYLJ, Mar. 31, 1994, at 37, col 2 (Sur Ct, Suffolk County)). The fee for such services is generally held to be included in the fee of the attorney for the fiduciary (*Matter of Musil*, 254 AD 765 [2d Dept 1938]). "[T]he purpose of this rule is to avoid duplication (*Matter of Schoonheim*, 158 AD2d 183 [1st Dept 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" (Warren's Heaton on Surrogate's Practice § 93.08 [7th ed.]).

Here, the accounting firm of Rispoli & Curti, CPAs, PC, has submitted an affidavit requesting fees totaling \$3,900.00, \$2,175.00 of which has been paid. The affidavit and attached invoices show that Rispoli & Curti, CPAs, PC prepared the federal and state fiduciary tax returns for the years ended July 31, 2004 through July 31, 2009, for which they have billed \$2,750.00. A final return is required at an estimated cost of \$1,150.00. The court approves the fees of Rispoli & Curti, CPAs, PC in the amount of \$3,900.00, \$2,175.00 of which has been paid.

Here, the accounting firm of Boyce Hughes & Farrell requests fees totaling \$1,850.00, all of which has been paid on May 2, 2003. Although no supporting affidavit has been submitted, the court approves the fees as requested in the amount of \$1,850.00, all of which has been paid.

The administrator has rejected the claims of Holland & Knight (\$925.95) and Howard Metzner (\$9,750.00) because they related to services that are not enforceable against the estate and seeks the court's approval of such rejection. Neither creditor has appeared or objected. The rejection of these claims is accordingly approved.

The accounting is approved subject to audit. The decree shall provide for release of the administrator and his surety

Settle decree.

Dated: May 18, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court