

**Matter of Molinelli**

2015 NY Slip Op 32462(U)

November 24, 2015

Surrogate's Court, Nassau County

Docket Number: 342826

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 of Jeffrey E. DeLuca as Administrator, c.t.a.,  
 of the Estate of

File No. 342826

EMILIO MOLINELLI,

Dec. No. 31169

Deceased.

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On May 26, 2015, this court issued Dec. No. 30683, in which it reviewed the accounting filed by the Public Administrator in the estate of Emilio Molinelli, who died on November 16, 2005. The court denied the application for relief as premature, on the ground that petitioner had offered no explanation for the extended delay in the issuance of full letters, which occurred in 2013 and the delay in the administration and distribution of this estate. The delays resulted in repeated expenditures of estate funds for bond premiums, accountant fees, attorney fees and fiduciary income taxes. Notice of the court's Dec. No. 30683 was given to prior counsel for the Public Administrator in anticipation of the possibility that if no satisfactory explanation for the delay were proffered, the Surrogate might order prior counsel for the Public Administrator to return fees of \$4,462.50 previously paid for legal services rendered through December 28, 2011.

In response to the court's decision, current counsel for the Public Administrator sent a letter to the court dated July 10, 2015, advising the court that a copy of the decision had been sent to prior counsel for the Public Administrator with a request that prior counsel reply directly to the court. No explanation was filed with the court by prior counsel, and current counsel then requested that a court conference be conducted with prior counsel and present counsel. Instead, a member of the court's Law Department sent another letter to both law firms, advising counsel

that the matter would be resubmitted for decision, and that if no explanation were received by the court prior to submission, the court might order the return of previously paid counsel fees.

The account reflects total charges of \$29,736.42 and total credits of \$17,074.49, resulting in a cash balance on hand of \$12,661.93, as of May 31, 2014. Under the terms of decedent's will, the sole residuary beneficiary of his estate is Sisters of Charity - Halifax.

Regarding the fee of the attorney for the estate, 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 if 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]). 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]).

In the course of this estate administration, the Public Administrator was represented by two different law firms in succession. From the inception of the administration until December 31, 2011, representation was provided by Brosnan & Hegler, LLP. Since January 1, 2012, representation of the Public Administrator has been provided by Mahon, Mahon, Kerins & O'Brien, LLC. The court must admeasure the fees to be paid to each of these firms, taking into account the extended delays and the resulting costs to the estate.

When multiple attorneys are employed by the fiduciary of a decedent's estate, the aggregate fee should approximate what one attorney would charge (*Matter of Leopold*, 244 AD2d 411 [2d Dept 1997]; *Matter of Mattis*, 55 Misc 2d 511 [Sur Ct, New York County 1967]).

Some overlap in services may necessarily occur (*Matter of Patchin*, 106 AD2d 730 [3d Dept 1984]), and should be a factor when considering the aggregate fee (*see e.g. Matter of Mergentime*, 155 Misc 2d 502 [Sur Ct, Westchester County 1992], *affd* 207 AD2d 453 [2d Dept 1994]). In determining the division of one aggregate fee among multiple firms, the court will take into account each firm's proportionate rendering of services to the estate.

(A) Counsel for the Public Administrator from inception through December 31, 2011

The Public Administrator has petitioned the court for approval of payment of \$4,462.50 to Brosnan & Hegler, LLP, plus disbursements of \$9.76, all of which has been paid. Counsel's affidavit reflects that the legal fees incurred were actually \$8,182.50. Notwithstanding this, based upon the failure of the firm to procure full letters between 2006 and 2011, followed by the firm's failure to respond to the court's request for a written explanation for the delay and resulting costs, the court directs Brosnan & Hegler to return to the estate, within 30 days of the date of this decision, the total amount of \$4,462.50 in legal fees.

(B) Counsel for the Public Administrator from January 1, 2012 to Closing of Estate

Mahon, Mahon, Kerins & O'Brien, LLC, took over this file as counsel to the Public Administrator effective January 1, 2012. In his petition, dated July 7, 2014, the Public Administrator petitioned for court approval of the fee of Mahon, Mahon, Kerins & O'Brien, LLC, in the amount of \$2,500.00, of which \$930.00 was paid and \$1,570.00 remained unpaid. However, the affidavit of services filed by Mahon, Mahon, Kerins & O'Brien, LLC, on January 30, 2015 seeks a fee of \$15,950.00, consisting of time expended totaling \$12,050.00 and additional anticipated time of \$3,900.00. It is unclear why the amount requested by the Public Administrator in the petition for judicial settlement of his account is so much lower than the

legal fee reflected in the affidavit of services, even taking into account the additional six months of legal services.

Considering the unfortunate extended delay in the administration and distribution of this estate, as well as the very small size of the estate, which 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], *aff'd* 23 NY2d 700 [1968]), the court fixes the fee of Mahon, Mahon, Kerins & O'Brien, LLC, in the total amount requested in the petition, \$4,500.00, of which \$930.00 has been paid and \$3,570.00 remains unpaid.

The Public Administrator also asked the court for approval of accountant's fees. The accountant submitted an affidavit reflecting a requested fee of \$1,700.00, of which \$450.00 has been paid and \$1,250.00 remains unpaid. Typically, an accountant's services are not compensable from estate assets unless there exist unusual circumstances that require the expertise of an accountant (*Matter of Meranus*, NYLJ, Mar. 31, 1994, at 28, 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 App Div 765 [2d Dept 1938]). The 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, col 2 [Sur Ct, New York County] [internal citation omitted]).

The billing records reflect that the accountant prepared decedent's personal tax return for 2005 and a fiduciary return for the year ending October 31, 2014. A final return will be

required. The work performed by the accountant was not duplicative of the services rendered by the estate attorney, and the requested amount for these services is reasonable. The court approves the fee in the amount of \$1,700.00. Of this amount, \$450.00 has been paid and \$1,250.00 remains unpaid.

Petitioner also requested approval of commissions, authorization to distribute the net estate to the beneficiary named under the will of Emilio Molinelli, and a release and discharge of the surety.

For the reasons discussed above, the commission is denied, although expenses may be taken pursuant to SCPA 1207 (4).

The surety is discharged and the Public Administrator is authorized to distribute the net estate, after payment of the above fees, to the sole residuary beneficiary, Sisters of Charity - Halifax.

Settle decree on prior counsel.

Dated: November 24, 2015

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