

Matter of Kelly

2016 NY Slip Op 32055(U)

September 21, 2016

Surrogate's Court, Nassau County

Docket Number: 2015-383220/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 Richard J. Kelly
as the Administrator, c.t.a., of the Estate of**

**DECISION
File No. 2015-383220/A
Dec. No. 31840**

ALFRED J. KELLY,

Deceased.

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PRESENT: HON. MARGARET C. REILLY

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

Petition for Judicial Settlement of Account.....	1
Accounting by Administrator, c.t.a.....	2
Closing Statement for 26 Roxbury Road, filed January 15, 2016.	3
Attorney’s Affirmation Amending Petition, filed January 15, 2016.	4
Attorney’s Affirmation Amending Account, filed January 15, 2016.	5
Affidavit by Fiduciary Amending Account, filed May 9, 2016.....	6
Report of Guardian ad Litem.	7
Affirmation of Fees for Legal Services, filed by Jason P. Torres.	8
Revised Affirmation of Fees for Legal Services, filed by Jason P. Torres...	9
Affidavit of Legal Services filed by Scott P. Sorel for Sale of 26 Roxbury Road.	10
Affidavit of Legal Services, filed by Victor Vysochan for Transfer of Property.....	11
Affidavit of Accounting Services, filed by Jason A. DeLaurentiis.	12

I. PROCEDURAL HISTORY

Richard J. Kelly is petitioning for the judicial settlement of his final account as administrator, c.t.a., of the estate of his father, Alfred J. Kelly.

II. BACKGROUND

Alfred J. Kelly (the decedent) died on November 28, 2014, survived by three adult children: Michael J. Kelly, Catherine A. Bonura and Richard J. Kelly (the petitioner).

His last will and testament, dated October 10, 2004, was admitted to probate by this court on March 20, 2015. Both the nominated executor, Barbara A. Huszcza, and the nominated successor executor, Catherine A. Bonura, filed renunciations. Letters of administration, c.t.a., issued to petitioner.

The petitioner's account was filed on January 8, 2016; citation issued on February 26, 2016 and was served on Michael J. Kelly, Catherine A. Bonura and the decedent's granddaughter, an infant over 14 years of age. Waivers were filed by the decedent's adult grandchildren and residuary legatees, Anna Grace Kelly and Shane R. Kelly. No one appeared on the return date of the citation.

By order dated March 11, 2016, the court appointed a guardian ad litem to represent the interests of the two infant legatees. The guardian ad litem filed her report on May 11, 2016.

III. RELIEF REQUESTED

A. Relief Sought by Petitioner

As stated in his petition and amended by affidavits dated January 15, 2016 and May 9, 2016, the petitioner seeks judicial settlement of his account, approval of attorneys' and accountants' fees and disbursements, and authorization for counsel to retain in escrow funds for the payment of specified fees and tax penalties.

B. Additional Relief

The court must fix the fee of the guardian ad litem.

IV. THE ACCOUNT

The amended account, which covers the period from November 28, 2014 through December 17, 2015, shows total charges of \$913,185.74 and total credits of \$285,465.14, leaving a balance on hand of \$627,720.60.¹ This amount is subject to the commission of the administrator, c.t.a., unpaid fees and disbursements, and funds to be held in escrow for the payment of attorneys' and accountants' fees for services to be performed, as well as for income tax penalties payable to the Internal Revenue Service and New York State for 2013 and 2014.²

V. REPORT OF THE GUARDIAN AD LITEM

The guardian ad litem filed her report, which includes her review of jurisdiction and all of the accounting schedules. Following discussions between the guardian ad litem and counsel for the petitioner, it was agreed that commissions would not be taken on the in-kind transfer of unsold real property, located at 2478 South St. Marks Avenue, Bellmore, New York, but that the administrator, c.t.a. could claim commissions on the rental income collected for this property. This resulted in a reduction of commissions from \$31,385.08 to \$23,841.84, a difference of \$7,543.24, or 24%. The guardian ad litem

¹Although the amendments to the account made adjustments to the schedules of charges and credits, the balance on hand remain unchanged.

²After making inquiries with the Internal Revenue Service and the New York State taxing authority concerning payment of the decedent's income taxes, the petitioner determined that the decedent failed to file personal tax returns for 2012 and 2013. These returns were filed on September 29, 2015, along with a return for 2014, which was also filed late, as the petitioner was awaiting transcripts of prior years' filings. Applications have been submitted for waivers of the penalties for late filings; the amended account reflects that the petitioner has not yet received responses to these applications.

also noted that while legal fees had increased, to reflect the additional services provided in connection with settlement of the account, she is satisfied that the fees are reasonable and should receive court approval. In conclusion, the guardian ad litem reported that she is satisfied with the account filed by the administrator, c.t.a. and recommended that the account be judicially settled as filed and amended.

VI. FEES

Regarding the fees of the attorney for the estate and the guardian ad litem, 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 (*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 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 (*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 (*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]).

When multiple attorneys are employed by the fiduciary of a decedent's estate, the aggregate fee should approximate what one attorney would charge (*see 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 (*see 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. Fees Of Attorneys for the Administrator, c.t.a.

1. Fee of Torres Law Offices, P.C.

Jason P. Torres, Esq. has submitted an affirmation of legal services, as well as a revised affirmation filed on May 9, 2016, on behalf of the firm that represented the petitioner in his capacity as the administrator, c.t.a., throughout the administration of the decedent's estate. The affirmation reflects that legal services were provided beginning on December 12, 2014 and will continue until the estate is closed. The total amount requested by counsel for legal services are fees of \$12,635.50 plus disbursements of \$3,464.73. Of these amounts, the firm has been paid \$6,284.23, consisting of \$4,819.50 in fees and \$1,464.73 for disbursements. The balance due, of \$9,816.00, consists of \$7,816.00 in unbilled and estimated legal fees as of May 4, 2016, and disbursements of \$2,000.00. The time billed was 14.6 hours, with an additional 33.9 hours as yet unbilled and an anticipated 6.5 hours that will be needed to complete settlement of the account. The total time, which is approximately 55 hours, will include all services rendered and to be rendered. Counsel notes that as evidenced by the petitioner's submission of an

amended Schedule C-1 and Schedule J, the administrator, c.t.a., was consulted and has agreed to the fee requested.

Although counsel did not provide the court with contemporaneous time records, he supplied a detailed narrative of 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], *aff'd* 213 App Div 59 [4th Dept 1925], *aff'd* 241 NY 593 [1925]; *see e.g. Matter of Spatt*, 32 NY2d 778 [1973]). Counsel's affirmation indicates that he participated in conferences with the petitioner; prepared and filed the probate petition and the supporting documentation; prepared jurisdictional documents necessary for the appointment of an administrator, c.t.a.; prepared and filed the inventory of assets; prepared, filed and revised the judicial accounting with all pertinent schedules; prepared and filed the petition to settle the account along with the citation and waivers; corresponded with interested parties; conferenced and corresponded with the guardian ad litem; and prepared and filed a proposed judicial decree. Counsel anticipates that the firm will also arrange for entry of the decree and the preparation of receipts and releases and related correspondence to be followed by the final distributions.

The requested legal fee of \$12,635.50 is an increase of \$2,797.00 over the fee of \$9,838.50 reflected on the citation and waivers executed more than six months ago. Even with this increase, the legal fee represents less than 1.4% of the gross estate. The fee of Torres Law Offices, P.C. is approved in the amount requested and shall include all future

work to be performed by this firm for settlement of the account and closure of this estate administration.

Counsel seeks reimbursement of expenses in the amount of \$1,464.73 that has been paid, as shown on Schedule C of the amended account. 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 similar items (*Matter of Graham*, 238 AD2d 682 [3d Dept 1997]; *Matter of Diamond*, 219 AD2d 717 [2d Dept 1995]). The amount sought by counsel includes \$20.20 for postage; this amount is disallowed. The balance of the reimbursements, totaling \$1,444.53, is approved.

Counsel also requests \$2,000.00 for unbilled and future disbursements. Reimbursement of additional amounts disbursed by counsel shall be approved in the decree following counsel's submission to the court of a detailed list of disbursements, to be filed along with an affidavit bringing the account down to date, within 60 days of the date of this decision.

In addition, the court grants the petitioner's request for authorization for the retention of \$750.00 to pay for counsel appearance on the return date of the accounting citation, if that amount has not already been paid. Schedule C-1 reflects that this appearance was made by the firm of Lewis Johns Avallone Aviles, LLP.

2. Fee of Sorel Gianelli, LLP

Scott P. Sorel represented the petitioner in connection with the sale of 26 Roxbury Road, Port Washington, New York. Counsel's firm was paid \$1,575.00, as reflected on the closing statement for the sale of the decedent's real property. \$1,500.00 of this payment was for legal services and \$75.00 was for overnight postage. The court approves this amount.

3. Fee of Underberg & Kessler, LLP

On behalf of the firm of Underberg & Kessler, LLP, Victor Vysochan billed \$220.00 for preparation of a deed transferring the decedent's property at 2478 South St. Marks Avenue, Bellmore, New York. The fee is approved in that amount.

B. Fee of the Accountant

The court has also been asked to review the accountant's fees. Typically, an accountant's services are not compensable from estate assets unless there exist unusual circumstances that require the expertise of an accountant (*see 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 (*see 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 firm provided services in connection with the decedent's personal income tax returns due for the years 2012, 2013 and 2014, and the bill reflects a discount of \$495.00. The accountant has submitted affidavits of services requesting a fee of \$1,200.00, all of which has been paid. The fee is approved in the amount requested.

In addition, the court grants the petitioner's request for authorization to retain \$650.00 in escrow for payment of additional accounting fees to be charged if the accountant prepares and files a fiduciary income tax return on behalf of decedent's estate.

C. Fee of the Guardian ad Litem

With respect to the fee of the guardian ad litem, the court notes that the guardian ad litem submitted an affidavit of services showing that she provided 13.35 hours of services, and that her standard hourly rate is \$300.00 per hour. The annexed time records reflect phone conferences and correspondence, requests for supporting documentation and a review of the revised schedules. The court fixes the fee of the guardian ad litem in the total amount of \$4,000.00.

VII. ESCROW REQUEST

In addition to asking the court for authorization to set aside \$750.00 for legal fees and \$650.00 for accounting fees to be held in an escrow account, as discussed above, the petitioner has also asked the court to authorize counsel to set aside and maintain \$4,326.67 for the payment of Internal Revenue Service income tax penalties, and \$564.59 for the payment of New York State income tax penalties, for 2013 and 2014. This request, to set aside funds for the payment of penalties that resulted from the decedent's

failure to file personal tax returns, is granted. If any or all of the penalties are waived, the funds remaining shall be distributed in accordance with the terms of the decedent's will.

VIII. CONCLUSION

The commissions of the administrator, c.t.a. are approved subject to audit.

A. Legal fees are approved in the following amounts:

1. Torres Law Offices, P.C.: \$12,635.50, of which \$4,819.50 has been paid and \$7,816.00 remains unpaid. In addition, counsel for the petitioner may hold in escrow \$750.00 for payment to Lewis Johns Avallone Aviles, LLP for a court appearance, if such payment has not been made. Reimbursement of amounts disbursed by Torres Law Offices, P.C. are approved in the amount of \$1,444.53. Additional amounts may be approved in the decree, following the submission to the court of: (a) a detailed list of disbursements, and (b) an affidavit bringing the account down to date, within 60 days of the date of this decision.

2. Sorel Gianelli, LLP: \$1,575.00, all of which has been paid.

3. Underberg & Kessler, LLP: \$220.00, all of which has been paid.

B. Fees of the accountant are approved in the amount of \$1,200.00, all of which has been paid. Counsel may retain \$650.00 in escrow for the payment of the accountant in the event that he prepares and files a fiduciary income tax return on behalf of the administrator, c.t.a. In addition, counsel for the petitioner may hold in escrow \$4,326.67 and \$564.59 for the payment of federal and New York State income tax penalties,

respectively, for the years 2013 and 2014. Any funds not so utilized will be distributed in accordance with the terms of the decedent's will.

C. The fee of the guardian ad litem is fixed at \$4,000.00, to be paid within 30 days of the date of the decree.

D. The decree shall authorize the petitioner to distribute the balance of the net estate in accordance with the terms of the decedent's will.

Settle decree.

Dated: September 21, 2016
Mineola, New York

E N T E R:

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

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