

Matter of David

2016 NY Slip Op 32643(U)

September 20, 2016

Surrogate's Court, Nassau County

Docket Number: 2015-384920/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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**In the Matter of the Account of Proceedings of the
Public Administrator of Nassau County,**

as Administrator of the Estate of

**DECISION
File No. 2015 -
384920/A
Dec. No. 32048**

**RAYMOND T. DAVID
a/ka RAYMOND DAVID**

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.....	2
Waivers and Consents in Accounting.....	3
Affirmation of Legal Services.....	4
Affirmation of Tax Services.	5

I.PROCEDURAL HISTORY

Before the court is the first and final account of the Public Administrator for the estate of Raymond T. David a/k/a Raymond David. Letters of administration issued to the Public Administrator on July 24, 2015. The account of the Public Administrator was filed on June 21, 2016. Waivers and consents were filed by the decedent’s brother, Claude David, and by the attorney-in-fact for the surety. There were no other appearances.

II.BACKGROUND

The decedent, Raymond T. David, a/k/a Raymond David, died intestate on July 18, 2013. The petition reflects that the decedent's sole distributee is his brother, Claude David.

III.THE ACCOUNT

The account filed by the Public Administrator covers the period from July 24, 2015 through February 29, 2016 and shows the receipt of \$72,067.92 of estate principal, which was supplemented by income collected totaling \$205.99. This resulted in total charges of \$72,273.91. This amount was reduced by administrative expenses in the amount of \$2,514.00, leaving a balance of \$69,759.91 on hand.

IV.RELIEF REQUESTED

The Public Administrator seeks approval of the accounting, approval of commissions, the fixing of fees for the services of the attorney and the accountant, the release and discharge of the surety and authorization to distribute the net estate to the decedent's sole distributee.

V.FEES

A. Legal Fees for the Administrator's Attorneys

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 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 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]). A sizeable estate permits adequate compensation, but nothing beyond that (*Martin v Phipps*, 21 AD2d 646 [1st Dept 1964], *aff'd* 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]). 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]).

The Public Administrator has petitioned the court for approval of the payment of \$6,820.00 to Mahon, Mahon, Kerins & O'Brien, LLC., of which \$1,820.00 has been paid and \$5,000.00 is unpaid. The affirmation of legal services filed by Mahon, Mahon, Kerins & O'Brien, LLP reflects \$4,663.75 in fees incurred for 14.95 hours of services rendered. Counsel requests a fee of \$7,913.75, which includes anticipated time in the amount of \$3,250.00.

The court has carefully reviewed the affirmation of services and the time records submitted to the court. 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]). Counsel's time records reflect that he communicated with the Public Administrator and staff, as well as the court-appointed guardian for the decedent and the decedent's brother. Counsel prepared the petition for letters of administration and all supporting documents, made arrangements for the surety bond, and engaged in a search for assets. Counsel also prepared and filed the account of the Public Administrator.

Considering all of the foregoing criteria, and being cognizant of the modest balance on hand, the court fixes the fee of current counsel to the Public Administrator for services provided through July 5, 2016 in the amount of \$4,663.75, plus \$1,500.00 for future services, for total payment of \$6,163.75, of which \$4,343.75 remains unpaid.

B. Fee of the Administrator's 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 (*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 citation reflects the Public Administrator's request that fees in the amount of \$1,250.00 be approved, of which none has been paid. The accountant has submitted an affidavit of services requesting a total fee of \$1,850.00. The affidavit indicates that the accountant

prepared the decedent's personal income tax returns for 2013, totaling \$600.00. The accountant further notes that a return for the year ending June 30, 2016 and a final return will be required, and that the requested fee includes an additional \$1,200.00 for the preparation of these returns. The accountant states that of the total amount \$600.00 has already been paid.

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 \$1,850.00, of which \$600.00 has been paid and \$1,250.00 remains unpaid.

VI. CONCLUSION

Within 60 days of the date of this decision, the Public Administrator shall bring his account down to date.

The commission of the administrator is approved subject to audit. In addition, the Public Administrator is allowed, pursuant to SCPA § 1207 (4), the reasonable and necessary expenses of the office.

The decree shall discharge the surety and shall authorize the Public Administrator to distribute the balance of the net estate, after payment of outstanding legal and accounting fees noted above, to the decedent's brother, Claude David, in accordance with EPTL §4-1.1 (a) (5), which governs distribution of an estate where decedent is survived by issue of parents, and no spouse, issue, or parent.

Submit decree.

Dated: September 20, 2016

Mineola, New York

ENTER:

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