

Matter of Zepf

2016 NY Slip Op 32034(U)

August 30, 2016

Surrogate's Court, Nassau County

Docket Number: 2010-362935A

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. 2010-362935A
Dec. No. 31535

EDITH ZEPF,

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 |
| Further Affirmation to Amend Account. | 3 |
| Report of the Guardian ad Litem. | 4 |
| Affirmation of Legal Services by Brosnan & Hegler, LLP..... | 5 |
| Affirmation of Legal Services by Mahon, Mahon, Kerins & O’Brien, LLC..... | 6 |
| Amended Affirmation of Legal Services by Mahon, Mahon, Kerins & O’Brien, LLC, filed April 25, 2016. | 7 |
| Affirmation of Tax Services. | 8 |
| Affirmation as to Genealogy Search. | 9 |

I. PROCEDURAL HISTORY

Before the court is the first and final account of the Public Administrator for the estate of Edith Zepf. Letters of administration issued to the Public Administrator on November 24, 2010. The account of the Public Administrator was initially filed on December 20, 2013, and was amended on August 31, 2015.

II. BACKGROUND

The decedent, Edith Zepf, died intestate on January 19, 1995 at the age of 91. When the petition to settle the account of the Public Administrator was originally filed, it reflected

that the decedent was survived by a daughter, Eleanor Zepf, who post-deceased.¹ However, further investigation, discussed below, revealed that Eleanor Zepf was, in fact, the decedent's step-daughter.

III. FURTHER AFFIDAVITS

Counsel for the Public Administrator filed an affidavit on August 30, 2015 amending the account to include additional information concerning the decedent's heirs, and an additional affirmation, at the request of the court, on May 24, 2016. Counsel advised the court that the information concerning the decedent's heirs reflects research by Bill Diliberto of Diliberto Probate Research, LLC, who obtained the information from naturalization documents contained in the National Archives as well as passenger manifests maintained by Ancestry.com. In addition, Mr. Diliberto reported communicating with Hoerner Bank, a private asset management and heir search firm in Germany, which advised him that they had been unsuccessful in identifying potential heirs of the decedent, despite an extensive search, as most records were destroyed during World War II. The decedent had been married to Gustav Zepf, a/k/a Adolf Zepf, who had predeceased the decedent in February of 1987. The decedent had no children, biological or adopted.

Correspondence from Mr. Diliberto to counsel for the objectants in the estate proceeding of Eleanor Zepf included a paternal family tree for the decedent. The diagram shows that the decedent's father was Johan Lanzrath, who was born in Germany, and who

¹The estate of Eleanor Zepf was also administered by the Public Administrator.

had predeceased the decedent. The name of the decedent's mother was unknown. However, based upon the age of the decedent at her death, which was 91, it may be presumed that the decedent's mother would have been more than 100 years old and predeceased her daughter (*see Young v Shulenberg*, 165 NY 385 [1898]; *Matter of O'Brien*, NYLJ, Oct. 18, 1990, at 25, col 3 [Sur Ct, Westchester County]).

Based upon Mr. Diliberto's research, it is believed that the decedent had two sisters: Elly Lanzrath, who married a person named Trautmann in Germany in 1931, and another sister, whose name is unknown, who married a person named Kassalsky or Massalsky in Germany prior to 1935. Despite extensive research, it remains unknown whether these two sisters are alive or whether they had issue. On the basis of these facts, the Attorney General of the State of New York was cited and he filed a notice of appearance. The court issued an order for service by publication on September 3, 2015 for Elly Lanzrath a/k/a Elly Trautmann, and Unknown Lanzrath a/k/a Unknown Kassalsky a/k/a Unknown Massalsky, and all other unknown heirs of the decedent. Jurisdiction over all interested parties was completed, and on January 20, 2016 the court appointed a guardian ad litem to represent the interests of the missing and unknown distributees.

No objections to the account have been filed.

IV. THE ACCOUNT

The account filed by the Public Administrator covers the period from November 24, 2010 through May 31, 2013, and shows the receipt of \$108,240.66 of estate principal, which

was supplemented by income collected totaling \$26,853.07. This resulted in total charges of \$135,093.73. This amount was reduced by administrative expenses in the amount of \$8,332.49, leaving a balance of \$126,761.24 on hand. The Public Administrator seeks approval of the accounting, approval of commissions, the fixing of fees for the services of the attorneys and the accountant,² and the release and discharge of the surety. In addition, the court must fix the fee of the guardian ad litem.

No objections to the account were filed.

V. REPORT OF THE GUARDIAN AD LITEM

The guardian ad litem reports that the decedent left no surviving spouse or issue, and that “any and all heirs are of unknown whereabouts at this time and there is no individual who can be served.” He advises the court that jurisdiction was completed through service by publication and that he does not object to the amended account.

VI. 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 (*see Matter of Stortecky v Mazzone*, 85 NY2d 518 [1995]; *Matter of Vitole*, 215

²The petition also asks the court to direct that the net estate be paid to the Public Administrator as the administrator of the estate of Eleanor Zepf, but the affidavit amending the account advises the court that it was subsequently discovered that Eleanor Zepf is not a distributee of the decedent.

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" (*see Matter of Brehm*, 37 AD2d 95, 97 [4th Dept 1971]; *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], *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 (*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]; *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.

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.

(1) Fee of Counsel From Inception Through December 31, 2011

The Public Administrator has petitioned the court for approval of the payment of \$6,305.99 to Brosnan & Hegler, LLP, all of which has been paid. The affirmation of legal services filed by Brosnan & Hegler, LLP reflects \$7,407.50 in fees incurred for more than 35 hours of services rendered, of which \$6,305.99 was paid and \$1,103.75 remains unpaid. Counsel requests that the fee be fixed in the reduced amount of \$7,160.00, of which \$6,305.99 has been paid and \$865.25 remains unpaid.

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 (*see Matter of Von Hofe*, 145 AD2d 424 [2d Dept 1988]; *Matter of Phelan*, 173 AD2d 621 [2d Dept 1991]). The time records attached to counsel's affirmation indicate that the estate administration was somewhat complex, including lost or stolen United States Savings Bonds purchased over a 25-year period, and the fact that no heirs could be found, despite a diligent search.

Among other services, 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. The court notes that the time sheets include some charges for preparation of the affirmation of legal services. Time spent in preparation of affidavits of services is not compensable (*see Matter of Marshak*, NYLJ, Apr. 30, 1996, at 26, col 6 [1st Dept]; *Wynyard v Beiny*, NYLJ, Nov. 25, 1994, at 30, col 5 [1st Dept]).

Further, the size of the estate 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], *affd* 23 NY2d 700 [1968]), without constituting an adverse reflection on the services provided. In view of all of the factors cited above, the fee is approved in the amount of \$7,160.00, inclusive of disbursements, of which \$6,305.99 has been paid.

(2) Fee of Counsel From January 1, 2012 to Closing of Estate

The court also received an affirmation of services and an amended affirmation from the law firm of Mahon, Mahon, Kerins & O'Brien, LLC, which took over this file as counsel to the Public Administrator effective January 1, 2012. The amended affirmation reflects billable charges totaling \$13,262.50 for nearly 38 hours of services rendered to date. The billing records reflect expense charges of \$12.00. Counsel requests a fee, inclusive of disbursements, of \$16,512.00, which includes anticipated time in the amount of \$3,237.50, none of which has been paid.

The time records annexed to the amended affirmation cover the period between January 27, 2012 and February 8, 2016. During this four-year period, counsel collected assets from New York State Unclaimed Funds, prepared the account and supporting documents, sent and received correspondence, and appeared in court.

Considering all of the foregoing criteria, the court fixes the fee of current counsel to the Public Administrator for services provided through February 8, 2016 in the amount of \$12,000.00, plus \$3,237.50 for future services, plus disbursements of \$12.00, for total payment of \$15,238.00, all of which remains unpaid.

B. Fee of the Guardian ad Litem

With respect to the fee of the guardian ad litem, the court notes that the guardian ad litem's affirmation reflects three and one-half hours of services on behalf of decedent's missing and unknown distributees. Considering all the factors set forth above concerning attorneys' fees, the court fixes the fee of the guardian ad litem in the sum of \$1,050.00, to be paid within thirty days of the date of decree.

C. 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 (*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 (*see 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 \$1,512.50 be approved. The accountant has submitted an affidavit of services requesting a total fee in the same amount, of which \$362.50 has been paid and \$1,150.00 remains unpaid. The affidavit indicates that the accountant prepared the Internal Revenue Service and New York State estate tax waivers. The accountant states that two additional returns 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 \$1,512.50, which will cover all past and future services on behalf of the decedent’s estate. Of this amount, \$362.50 has been paid and \$1,150.00 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 the outstanding fees noted above, to the New York State Comptroller, pursuant to SCPA §2222, for the benefit of unknown persons.

This constitutes the decision and order of the court.

Settle decree.

Dated: August 30, 2016
Mineola, New York

E N T E R:

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

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