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
Eric P. Milgrim, Public Administrator of Nassau County,
as Administrator of the Estate of

File No. 328503

Dec. No. 452

MORRIS ALDERMAN.
a/k/a MORRIS DAVID ALDERMAN
a/k/a MORRIS DAVID ADELMAN
a/k/a M. DAVID ALDERMAN

Deceased.

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Before the court is the first and final account of the Public Administrator for the estate of Morris Alderman, who died intestate, a resident of Nassau County, on May 6, 2003. Letters of administration were issued to the Public Administrator on January 19, 2005. The account was initially filed on November 28, 2006, and a guardian ad litem was appointed by the court to represent the interests of unknown distributees.

Objections to the account were filed on March 6, 2007 by Rosalie Adelman Beloff, in which she claimed to be the half-sister and sole distributee of Morris Alderman. The issue of kinship was referred to a court attorney/referee pursuant to SCPA 506. Hearings were conducted and various documents were admitted in evidence, including a purported family tree. All parties stipulated to waive the report of the referee and to allow kinship issues to be decided by the court based upon the transcript of the hearing and the documentary evidence. For the reasons set forth below, the court sustains Rosalie's objections to the account and concludes that she is the half-sister and sole distributee of decedent, Morris Alderman.

In order to establish her rights as a distributee in the kinship proceeding , the claimant must prove: 1) her relationship to the decedent; 2) the absence of any person with a closer degree of consanguinity to the decedent; and 3) the number of persons having the same degree of consanguinity to the decedent or to the common ancestor through which they take (*Matter of Morrow,* NYLJ, April 12, 2001, at 23, col 1; 2 Harris, New York Estates, 21:3 at 21-1 [5th ed 1996]). Claimant, who alleges that she is a distributee of the decedent, has the burden of proof on each of these elements (*Matter of Cruz,* NYLJ, January 7, 2002, at 29, col 4; *Matter of Balacich,* NYLJ, January 24, 1997, at 30, col 2). The quantum of proof required to prove kinship is a fair preponderance of the credible evidence (*Matter of Jennings,* 6 AD 3d 867 [2004]; *Matter of Whelan,* 93 AD2d 891 [1983], *affd* 62 NY2d 657 [1984]).

The record reflects that a diligent and thorough search was undertaken to discover all of decedent's distributees. Based upon the evidence presented before the court/attorney referee, the court makes the following findings of fact and conclusions of law:

1. The decedent, Morris Alderman, died intestate on May 6, 2003, and letters of administration were issued to the Public Administrator on January 19, 2005.

2. The decedent, Morris Alderman, was unmarried at the time of his death, and never had any issue, either biological or adopted.

3. The decedent's parents were David Adelman and Louise Adelman, both of whom predeceased the decedent, in 1967 and 1977, respectively. The decedent was the only child of his parents' marriage.

4. Decedent's father, David Adelman, had previously been married to Emma Adelman. Born of David's marriage to Emma were a stillborn infant son and one daughter,

Rosalie, who is the objectant herein.

5. Decedent's father entered into no marriages other than his marriages to Emma Adelman and Louise Adelman, and had no children, either biological or adopted, other than the decedent and the objectant.

6. Decedent's mother, Louise Adelman, died without entering into any marriages other than her marriage to David Adelman, and without any children, either biological or adopted, other than the decedent.

7. Decedent has only one surviving sibling, his half-sister, Rosalie.

Therefore, based upon the evidence before the court, it is held that the decedent, Morris Alderman, is survived by one distributee. Pursuant to EPTL 4-1.1(a)(5) and (b), all of the decedent's intestate property passes to his half-sister, Rosalie.

The account filed by the Public Administrator shows the receipt of $59,635.37 of estate principal, which was supplemented by realized increases and income collected totaling $8,862.78. This resulted in total charges of $68,498.15. This amount was reduced by administrative expenses through July 1, 2008 in the amount of $20,006.13, leaving a balance of $48,492.02 on hand. The Public Administrator seeks approval of the accounting, approval of commissions, and the fixing of fees for the services of the attorney and the accountant. In addition, the court must set the fee for the guardian ad litem and release the administrator from the surety bond.

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 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 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], *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 [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.

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]).

In this case, the attorney's affirmation of services indicates that the firm spent in excess of 229 hours on this matter over the course of more than five years. The services provided by the attorney included the filing of a purported will and locating the named beneficiaries; attempting to locate the original instrument; determining whether the purported will had been revoked; petitioning for temporary letters; searching for unknown distributees; publishing the administration citation; identifying and collecting assets; preparing the final accounting and the subsequent affidavit bringing the account current; and preparing for and participating in a kinship

hearing. If the firm's billable rates were applied to the actual time spent, the result would be a bill in excess of $29,000.00. In view of the exiguous balance that would remain after a payment of that size, the attorney has offered to accept a total fee, including disbursements, of $11,338.75, which represents a reduction of approximately 60%. The court commends the attorney for his skillful representation of the Public Administrator and the voluntary reduction of the attorney's fee. The fee is approved in the amount requested.

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 37 [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]). "[T]he purpose of this rule is to avoid duplication (*Matter of Schoonhein*, 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 Court Practice §93.08 [7th ed]).

The accountant has submitted an affidavit of services requesting a fee of $3,775.00. The affidavit indicates that the accountant prepared the decedent's personal income tax returns for 2002 and the estate's federal and state fiduciary income tax returns from 2003 to date. The work performed by the accountant clearly 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 $3,775.00.

With respect to the fee of the guardian ad litem, the court notes that the guardian ad litem's affirmation reflects almost twelve hours of services on behalf of the unknown distributees. Considering all the factors set forth above concerning attorneys' fees, and the relatively small size of the estate, the court fixes the fee of the guardian ad litem in the sum of $2,350.00, to be paid within thirty days of the date of decree. The court thanks the guardian ad litem for his efficient and proficient representation of his wards.

The commission of the administrator is approved subject to audit.

The decree shall discharge the surety and direct that the balance of the estate, after payment of fees to the attorney, accountant, and guardian ad litem, and payment of commissions and expense reimbursement to the administrator, shall be distributed to the decedent's half-sister, Rosalie Adelman Beloff.

Settle decree.

Dated: September 16, 2008

JOHN B. RIORDAN
Judge of the
Surrogate's Court