

**Matter of Jashuk**

2009 NY Slip Op 32200(U)

September 15, 2009

Surrogate's Court, Nassau County

Docket Number: 332170/2009

Judge: John B. Riordan

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

File No. 332170

Dec. No. 334

JULIUS JASHUK,

Deceased.

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Submitted for decision in this accounting proceeding are the issues of attorney fees and accounting fees. Also submitted is approval of commissions to the Public Administrator. The Public Administrator also asks for approval of the disallowance of the claim of Alex Avery for reimbursement of travel expenses to attend the decedent's funeral. The Public Administrator also requests authorization to pay the net estate to the Nassau County Department of Social Services.

Julius Jashuk died on January 7, 2004, a resident of Nassau County. Letters of administration issued to the Public Administrator on April 7, 2004. The decedent's only distributees were a nephew, John Polovy, and a niece, Dorothy Jane Polovy. This is the Public Administrator's first and final account. The summary statement shows charges to the accounting party of \$100,656.86.

The decedent's wife, Helen, predeceased the decedent having died on November 22, 2002. Upon her death, Helen was indebted to the Nassau County Department of Social Services in the amount of \$177,320.57. Pursuant to Section 104 (1) of the Social Services Law of the Estate of New York, the Nassau County Department of Social Services is entitled to recover the cost of the care given to the decedent's spouse from the decedent's estate.

With respect to the issue of attorney fees, 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], *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 [3rd 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]).

With respect to accountants' fees, normally, an accountant's services are not compensable out of estate assets unless there exist unusual circumstances that require the expertise of an accountant (*Matter of Meranus*, NYLJ, Mar. 31, 1994, at 37, 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 AD 765 [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, col 2)” (Warren’s Heaton on Surrogate’s Court Practice §93.08 [7th ed]).

In this case, the attorney has supplied the court with an affirmation of services. As of May 31, 2007, the firm billed and was paid \$7,216.75 in attorney’s fees. Since then, the estate has incurred additional fees of \$7,110.17, all of which remains unpaid. The firm also expects at least an additional \$1,500.00 in attorney’s fees to conclude the administration. Notwithstanding this, counsel requests, due to the limited size of the estate, that the court fix his firm’s fee in the reduced amount of \$7,216.75, all of which has been paid.

The services rendered include, but are not limited to, preparation and filing of the petition for letters of administration and related papers, conferences with Nassau County Department of Social Services, research of Social Services Law, and preparation of the judicial account and related papers. The court notes that the summary of services provided in the affirmation erroneously recites that counsel attended “kinship hearings.” There were no kinship hearings held for the estate. A review of the contemporaneous time records annexed to the affirmation indicates that there are no charges for attendance at a kinship hearing and that the estate, in fact, was not billed for such services.

Considering all of these factors, the court fixes the total fee of counsel for the Public Administrator in the amount of \$7,216.75, all of which has been paid.

The accountant has submitted an affidavit which shows accounting fees of \$3,350.00 of which \$2,775.00 has been paid and \$575.00 remains unpaid. The accountant prepared the

estate's income tax returns for the years 2004, 2005, 2006, 2007 and 2008. The use of an accountant in this instance appears to be reasonable. Accordingly, the court approves accounting fees in the amount of \$3,350.00.

The claim by Alex Avery, the niece of the decedent's predeceased wife, for reimbursement of travel expenses in the amount of \$2,143.57 to attend the decedent's funeral is denied.

After payment of the above expenses, the Public Administrator shall distribute the net estate to Nassau County Department of Social Services in full satisfaction of its claim against the decedent's estate.

Commissions are approved subject to audit. The surety, Liberty Mutual Insurance Company, is released and discharged.

In all other respects, the account is approved.

Settle decree.

Dated: September 15, 2009

JOHN B. RIORDAN  
Judge of the  
Surrogate's Court