

Matter of Wolfel

2009 NY Slip Op 32206(U)

September 25, 2009

Surrogate's Court, Nassau County

Docket Number: 338225/2009

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

File No. 338225

INGE WOLFEL,

Dec. No. 543

Deceased.
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Submitted for decision in this accounting proceeding is the issue of kinship. Also submitted are the issues of (i) attorney's fees, (ii) accountant's fees; (iii) commissions; and (iv) the guardian ad litem's fee.

The decedent, Inge Wolfel, died intestate on June 3, 2005, a resident of Nassau County. Letters of administration issued to the Public Administrator on July 22, 2005. The summary statement shows charges to the accounting party of \$1,120,252.74. A guardian ad litem was appointed to represent the interest of missing and unknown heirs.

There are four individuals who claim to be the distributees of the decedent on the paternal side. They are Luise Schricker Schneck, Barbl Meta Luise Wolfel (a/k/a Barbl Wolfel Rahm), Heidemarie Wolfel Schonweiss, and Adam Alwin Karl Wolfel (a/k/a Karl Wolfel), all of whom claim to be first cousins of the decedent. Luise Schricker Schneck post-deceased the decedent. Joan Lorance claims to be an alleged first cousin of the decedent on the maternal side and the only distributee on the maternal side.

The issue of kinship was referred to a court attorney/referee pursuant to SCPA 506. A hearing was conducted on March 14, 2008 and various documents were admitted into evidence. All parties have stipulated to waive the referee's report and to allow the kinship issues to be

decided by the court based upon the transcript of the hearing, the documentary evidence and the arguments made by the attorneys and the guardian ad litem.

In order to establish their distributive rights, claimants must establish: (i) their relationship to the decedent; (2) the absence of any person with a closer degree of relationship; and (3) the maximum number of persons having the same degree of relationship to the decedent (this is known as “closing the class”) (*see Matter of Morrow*, NYLJ, Apr. 12, 2001, at 23, col 1 [Sur Ct, Bronx County]). Claimants have the burden of proving each element (*Matter of Cruz*, NYLJ, Jan. 7, 2002, at 29, col 4 [Sur Ct, Kings County]; *Matter of Balacich*; NYLJ, Jan. 24, 1997, at 30, col 2 [Sur Ct, Kings County]).

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, Inge Wolfel, died on June 3, 2005. Letters of administration issued to the Public Administrator on July 22, 2005. The Public Administrator has now filed a petition to settle his account.
- 2) The decedent was never married. There is no evidence of the decedent having any issue.
- 3) The decedent’s mother was Else Wolfe and her father was Albin Wolfel. The decedent’s father died on April 20, 1980. The decedent’s mother died on August 26, 1995. The decedent was their only child.
- 4) The decedent’s paternal grandparents were Johann Adam Wolfel and Rosine Gemeinhardt Wolfel, both of whom predeceased the decedent. They had seven children, including Albin Wolfel, the decedent’s father. One of the children was stillborn in 1908. Wolmut Wolfel, another child, died in infancy in 1909. The other four children were Andreas Wolfel, Ida Wolfel Schricker, Anna Meta Luise Wolfel Kleinhenz and Arthur Wolfel. Andreas Wolfel

predeceased the decedent. He had two sons, one of whom predeceased the decedent and another Adam Alwin Karl Wolfel (a/k/a Karl Wolfel), who survived the decedent. Ida Wolfel Schricker predeceased the decedent. She was survived by two children, Arthur Schricker and Luise Schricker Schneck. Arthur Schricker predeceased the decedent. Luise Schricker Schneck post-deceased the decedent. Anna Meta Luise Wolfel Kleinhenz predeceased the decedent. She had one daughter, Joyce Fantin Du Fayet, who also predeceased the decedent. Arthur Wolfel predeceased the decedent and was survived by two children, Barbl Meta Luise Wolfel Rahm (a/k/a Barbl Wolfel Rahm) and Heidemarie Wolfel Schonweiss.

- 5) The decedent's maternal grandparents were August Georg Riederich and Ida Selma Kumprad Riederich. The decedent's maternal grandparents had five children. Helen Selma Riederich (a/k/a Wilma Selma Riederich), Else Wolfel, and three sons, two who died in infancy between 1902 and 1904, and a third son named George Max Riederich. Helen Selma Riederich predeceased the decedent. She had two children, Joan Lorance and Michelle Pailthorp. Michelle Pailthorp predeceased the decedent. George Max Riederich predeceased the decedent.
- 6) As to the decedent's uncle, George Max Riederich, it is believed that he had a non-marital child by the name of Elsa Hildegard Symalla. Else Hildegart Symalla predeceased the decedent. In addition, he was married to Agnes Trephan on July 11, 1925 and was divorced from her on June 26, 1939. Agnes Trephan had one child while married to George Max Riederich, who was adopted out by Paul Kollney and Auguste Alma Kollney in 1944.

The record reflects that a diligent and exhaustive search was rendered to discover evidence of other possible distributees. As three years have elapsed since the decedent's date of death, the known heirs are entitled to the benefit of the presumptions of SCPA 2225 that there are no other distributees of the decedent other than the decedent's four paternal first cousins, Luise

Schricker Schneck, Barbl Meta Luise Wolfel (a/k/a Barbl Wolfel Rahm), Heidemarie Wolfel Schonweiss, and Adam Alwin Karl Wolfel (a/k/a Karl Wolfel) and one maternal first cousin, Joan Lorange.

Based upon the foregoing analysis and findings of fact, the court rules that the decedent was survived by four paternal first cousins, Luise Schricker Schneck, Barbl Meta Luise Wolfel (a/k/a Barbl Wolfel Rahm), Heidemarie Wolfel Schonweiss, and Adam Alwin Karl Wolfel (a/k/a Karl Wolfel), who are entitled to share in one-half (½) of the net estate equally, and one maternal first cousin, Joan Lorange, who is entitled to one-half (½) of the net estate.

With respect to the issue of attorney's 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 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 Freeman*, 34 NY2d 1 [1974], *Matter of Potts*, 123 Misc 346 [Sur Ct, Columbia County 1924], *affd* 213 App Div 59 [4th Dept 1925], *affd* 241 NY 593 [1925]). 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]).

These factors apply equally to an attorney retained by a fiduciary or to a court-appointed guardian ad litem (*Matter of Burk*, 6 AD2d 429 [1st Dept 1958]; *Matter of Berkman*, 93 Misc2d 423 [Sur Ct, Bronx County 1978]; *Matter of Reisman*, NYLJ, May 18, 2000, at 34, col 5 [Sur Ct, Nassau County]). Moreover, the nature of the role played by the guardian ad litem is an additional consideration in determining his or her fee (*Matter of Ziegler*, 184 AD2d 201 [1st Dept 1992]).

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 [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, col 2 [Sur Ct, New York County]; Warren's Heaton on Surrogate's Court Practice §93.08 [7th ed]).

In this case, the Public Administrator's attorney has supplied the court with an affirmation of legal services and it shows that the attorney rendered more than 334 hours of legal

services of a partner, associate and paralegal at various hourly rates. The services the firm performed included: (a) investigation into the family relationships of the decedent; (b) preparation and filing of the administration petition and accompanying documents and affidavits; (c) correspondence and communications with the guardian ad litem; (d) review of the report of the guardian ad litem; (e) the identification and collection of decedent's assets, which consisted of bank accounts, securities, real property and assorted personal property and income, having a value of approximately \$1,120,252.74; (f) the preparation of the administrator's final account, the petition for judicial settlement of account of administrator, and the accounting citation; (g) correspondence and communication with various distributees regarding the status of the estate; (h) arranging for service of an accounting citation and ensuring adequate service of same to secure the jurisdiction of the Nassau County Surrogate's Court over the respondents; (i) attendance at the citation return date; (j) communications and conferences with attorneys for each of the distributees of the estate; (k) preparation for and conduct of the kinship hearing, and review of family tree charts and birth, death and marriage records offered into evidence at the aforementioned kinship hearing; (l) review of the transcript of the kinship hearing; and (m) multiple telephone conferences with the Public Administrator, and the employees of such office. The firm also handled the sale of the decedent's residence and charged a flat fee of \$1,500.00 in connection with the sale.

The firm's total fee and disbursements are anticipated to be in the approximate amount of \$65,240.75, (exclusive of the real estate fee), of which \$58,983.73 has been paid and \$6,256.25 remains unpaid. Considering all these factors, the court believes the proposed fee to be reasonable. Therefore, the court approves a total fee of counsel to the Public Administrator in

the sum of \$66,740.75, inclusive of the fee for the closing, as fair and proper compensation for the services rendered.

Concerning the accountant's fee, the accountant has submitted an affidavit of services requesting a fee of \$3,975.00, of which \$2,825.00 has been paid and \$1,150.00 remains unpaid. The affidavit indicates that the accountant prepared the federal and New York State fiduciary income tax returns for the years 2006, 2007 and 2008, as well as the decedent's final income tax returns. 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. Thus, the court approves the fee in the amount of \$3,975.00, of which \$1,150.00 remains unpaid.

The guardian ad litem has supplied the court with an affidavit of services, and it shows that he rendered approximately 33.75 hours of legal services. Considering all these factors, the court believes the sum of \$8,500.00 is fair and proper compensation for the services rendered by the guardian ad litem.

Finally, the commission of the Public Administrator is approved subject to audit.

The decree shall discharge the surety.

Settle decree.

Dated: September 25, 2009

JOHN B. RIORDAN
Judge of the
Surrogate's Court