

Matter of Komarek

2009 NY Slip Op 32208(U)

September 25, 2009

Surrogate's Court, Nassau County

Docket Number: 341155/2009

Judge: John B. Riordan

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SURROGATE'S COURT OF THE STATE OF NEW YORK
 COUNTY OF NASSAU

-----X
 Accounting by Eric P. Milgrim, Public Administrator of
 Nassau County, as the Administrator of the Estate of

File No. 341155

JOSEPH F. KOMAREK,

Dec. No. 467

Deceased.

-----X

In this accounting by the Public Administrator of Nassau County as administrator of the decedent's estate, the issue of kinship was referred to a referee pursuant to SCPA 506. All parties stipulated to waive the report of the referee and to allow kinship issues to be decided by the court based upon the transcripts of the hearing, the documentary evidence and the arguments made by the attorney for the claimants and the guardian ad litem representing the interests of missing and unknown persons. Also before the court is the settlement of the Public Administrator's account for the period from October 13, 2005 to September 30, 2008, as brought current through May 14, 2009, as well as approval of reimbursements to the administrator, commissions, the legal fees of the administrator and guardian ad litem, accounting fees and the disallowance of certain claims against the estate.

Joseph F. Komarek died intestate, a resident and domiciliary of Nassau County, on October 13, 2005. Letters of administration issued to the Public Administrator on March 14, 2006. The account filed by the Public Administrator for the period October 13, 2005 to September 30, 2008 shows total charges of \$614,863.33, total credits of \$72,849.32 and a balance on hand of \$595,994.34. Objections to the account were filed by Frank Prost, Margaret DeMarco, Maureen Robinson and Patricia Konrad, who claim to be distributees of the decedent. They objected to the disallowance of their claims against the decedent's estate and the Public Administrator's request to distribute the net estate to the New York State Comptroller for the

benefit of the decedent's unknown distributees, and they reserved their right to object to the Public Administrator's legal fees, but ultimately did not object to them. Thereafter, the Public Administrator filed an affidavit bringing the account current through May 14, 2009. It shows total charges of \$677,462.32 and total credits and cash on hand of \$677,462.32.

In order to establish their rights as distributees, the claimants in a kinship proceeding must prove: (1) their 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, Apr. 12, 2001, at 23, col 1 [Sur Ct, Bronx County]; 2 Harris, *New York Estates*, 21:3, at 21-1 [5th ed 1996]). Claimants who allege to be distributees of the decedent have the burden of proof on each of these elements (*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]). The quantum of proof required to prove kinship is a fair preponderance of the credible evidence (*Matter of Jennings*, 6 AD3d 867 [3d Dept 2004]; *Matter of Whelan*, 93 AD2d 891 [2d Dept 1983], *affd* 62 NY2d 657 [1984]).

Based upon the evidence presented, the court makes the following findings of fact and conclusions of law:

1. The decedent, Joseph F. Komarek, died intestate, a resident and domiciliary of Nassau County, on October 13, 2005.
2. The decedent was never married and never had any issue, either natural or adopted.
3. The decedent's parents were Agnes Prost Komarek and Joseph John Komarek, both of whom predeceased the decedent. The decedent was his parents' only child.

4. The decedent's paternal grandparents were Joseph J. Komarek and Johanna Cambala Komarek. They predeceased the decedent. They had two sons, Joseph John Komarek, who was the decedent's father, and John Joseph Komarek, the decedent's only paternal uncle. They both predeceased the decedent.

6. The decedent's maternal grandparents were Jerome Prost and Mary Kacer Prost. They predeceased the decedent. They had a daughter, Agnes Prost, who was the decedent's mother, and a son, Frank Jerome Prost, the decedent's only maternal uncle. They both predeceased the decedent.

7. The decedent had no paternal aunts.

8. The decedent's only paternal uncle, John Joseph Komarek, had one child, a daughter, Stephanie Komarek Davis, who survived the decedent and who is the decedent's sole paternal cousin and sole paternal distributee.

9. The decedent had no maternal aunts.

10. The decedent's only maternal uncle, Frank Jerome Prost, had four children, consisting of a son, Frank Gerald Prost, and three daughters, Patricia Prost Konrad, Margaret Prost DeMarco and Maureen Prost Robinson, all of whom survived the decedent and who are the decedent's sole maternal cousins and sole maternal distributees.

The record reflects that a diligent and exhaustive search was made to discover evidence of other possible distributees. Since more than three years have elapsed since the decedent's death, the known heirs are entitled to the benefit of the presumption of SCPA 2225. Therefore, based upon the evidence before the court, it is held that the decedent, Joseph F. Komarek, is survived by five distributees: one paternal cousin, Stephanie Komarek Davis, and four maternal cousins, Frank Gerald Prost, and Patricia Prost Konrad, Margaret Prost DeMarco and Maureen

Prost Robinson. Pursuant to EPTL 4-1.1(a)(6), one-half of the decedent's property passes to the issue of paternal grandparents, by representation, and one-half to the issue of maternal grandparents, by representation.

Turning to the accounting, the Public Administrator's reimbursement to Frank Prost in the amount of \$7,469.00 for the decedent's funeral is approved as a reasonable and necessary administration expense. The Public Administrator has asked for the court's approval for disallowing the following claims: (1) \$1,500.00 by Frank Prost for payment of legal fees; (2) \$2,880.00 by Frank Prost for cleaning services at the decedent's residence; (3) \$480.00 by Margaret DeMarco for cleaning services at the decedent's residence; and (4) \$2,880.00 by Maureen Robinson for cleaning services at the decedent's residence. The basis of the Public Administrator's rejection of the claims is that these individuals were not authorized by the Public Administrator to provide cleaning services to the estate. These four claims have now been withdrawn, making the request for approval of their disallowance moot. The claim of Petro Heating Oil and Services is disallowed for failure to submit documentary evidence sufficient to substantiate such claim and for failure to complete and return the affidavit of claim required by SCPA 1803.

Regarding the fee of the attorney for the Public Administrator, 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]). Additionally, 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 Misc 2d 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 a guardian ad litem's 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]).

The affirmation of legal services filed by counsel for the Public Administrator shows that the attorney's fees actually incurred total \$50,574.25 at hourly rates ranging from \$200.00 to \$350.00 for attorneys and from \$125.00 to \$175.00 for paralegals. However, in his affirmation,

counsel for the Public Administrator requests the lower amount of \$40,000.00 (exclusive of the flat fee of \$1,500.00 for the sale of the decedent's real property), of which \$31,578.25 was paid and the balance was unpaid on June 16, 2009 when the affirmation was executed.

The affirmation and the billing reports annexed thereto detail the legal services provided to the Public Administrator with respect to this matter. They include preparing the petition for letters of administration; securing a fiduciary bond; reviewing the administration decree; reviewing asset information; identifying and collecting the decedent's liquid assets and reviewing statements with respect thereto; identifying and dealing with the decedent's life insurance policies; identifying and determining the disposition of the decedent's pension plan death benefits; dealing with creditors' claims against the decedent's estate; dealing with the decedent's tangible personal property; making court appearances; dealing with kinship issues, including investigating and communicating with the decedent's relatives; preparing the final account, the petition for judicial settlement thereof and the supporting affirmation; preparing the affidavit bringing the account current; and preparing for and attending the kinship hearing. With respect to the sale of the real property, counsel reviewed the title report and clearance of title exceptions; prepared the schedule of balances due, real property tax adjustments and closing costs; prepared the deed and transfer forms; conducted the closing; and prepared the closing statement. The court notes that some of the billing entries are for services secretarial in nature or for interoffice conferences with multiple attorneys. However, the voluntary reduction in the requested legal fee more than compensates for the fees incurred on those activities. In light of all the factors to be considered (*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])), the court approves the legal fee for counsel to the Public Administrator in the amount of \$40,000.00, plus

\$1,500.00 for services rendered with respect to the sale of the decedent's real property, for a total fee of \$41,500.00.

The guardian ad litem has submitted an affirmation outlining the services he performed during the 45.30 hours he spent on this matter. In that regard, the guardian ad litem reviewed the account and the petition in support, reviewed the objections, reviewed documents regarding kinship and investigated kinship issues, reviewed correspondence, prepared for and attended the kinship hearing, read the transcript from the kinship hearing, reviewed additional affidavits submitted after the hearing with respect to kinship, participated in a conference call with other counsel and the referee and prepared the guardian ad litem report. Based upon the criteria established by *Matter of Freeman* (34 NY2d 1 [1974]) and *Matter of Potts* (123 Misc 346 [Sur Ct, Columbia County 1924], *affd* 213 App Div 59 [4th Dept 1925], *affd* 241 NY 593 [1925]) as applied to guardians ad litem (*Matter of Burk*, 6 AD2d 429 [1st Dept 1958]; *Matter of Reisman*, NYLJ, May 18, 2000, at 34, col 5 [Sur Ct, Nassau County], the court awards the guardian ad litem the fee of \$12,500.00. The guardian ad litem's fee shall be paid within thirty (30) days from the date of the decree to be entered herein.

With respect to accountant's fees, normally, 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, 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 [2nd 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])” (Warren’s Heaton on Surrogate’s Court Practice §93.08 [7th ed]).

The accounting firm of Rispoli & Curti, CPAs, PC, has submitted an affidavit of services requesting fees totaling \$3,300.00, of which \$2,150.00 was paid and \$1,150.00 for additional estimated billing to prepare the final fiduciary tax return is unpaid. The affidavit and attached invoices show that Rispoli & Curti, CPAs, PC, handled the preparation of the estate’s federal and state income tax returns for the years ended 2006-2008 and the preparation of the decedent’s 2003 federal and state personal income tax returns. The work the firm performed was not duplicative of the services rendered by the Public Administrator’s legal counsel. Further, the requested amount is reasonable. The court approves the fees of Rispoli & Curti, CPAs, P.C., in the requested amount of \$3,300.00.

The surety, Liberty Mutual Insurance Company, is released and discharged.

Commissions are approved subject to audit.

The Public Administrator is directed to settle a decree.

Dated: September 25, 2009

JOHN B. RIORDAN
Judge of the
Surrogate’s Court