

Matter of Jones

2009 NY Slip Op 32773(U)

November 12, 2009

Sur Ct, Nassau County

Docket Number: 339731

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 Estate of

File No. 339731

JANE LINDA JONES,
 a/k/a JANE JONES,
 a/k/a JANE L. JONES,
 a/k/a LINDA JONES,
 a/k/a JANE LINDA MORRIS,

Dec. No. 682

Deceased.

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Before the court is the first and final account of the Public Administrator for the estate of Jane Linda Jones, who died intestate, a resident of Hempstead, on March 25, 2004. Letters of administration were issued to the Public Administrator on November 25, 2005. The account of the Public Administrator was initially filed on July 9, 2008 and subsequently amended on July 28, 2008, November 28, 2008 and January 12, 2009. A guardian ad litem was appointed by the court to represent the interests of decedent's unknown distributees.

The account filed by the Public Administrator shows the receipt of \$27,963.98 of estate principal, which was supplemented by income collected totaling \$359.73. This resulted in total charges of \$28,323.71. This amount was reduced by administrative expenses through May 31, 2008 in the amount of \$5,542.75, leaving a balance of \$22,780.96 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 accountant. The amended petition asks that the court approve payment of \$500.00 to Kurt J. Campbell, S.R.A., for the purpose of providing a date of death appraisal for decedent's real property which was the subject of a foreclosure sale. In addition, the court has been asked to determine whether decedent was married to Edward Stanley Jones at the time of her death, and if so, to direct the Public Administrator to distribute the net estate to

his estate, in accordance with EPTL 4-1.1 (a) (2), as Edward post-deceased the decedent.

Alternatively, if it is determined that decedent was not married to Edward at the time of her death, or if it is determined that Edward is disqualified as a surviving spouse in accordance with EPTL 5-1.2, the court has been asked to direct the Public Administrator to distribute the estate to the New York State Comptroller for the benefit of decedent's unknown distributees. The court must also set the fee for the guardian ad litem and release the administrator from the surety bond.

An affirmation was filed with the court on September 25, 2008 on behalf of Bernice Cannon, an alleged cousin of decedent who filed a notice of claim against the estate dated March 1, 2007. A second affirmation was filed on behalf of Cannon on February 19, 2009. The guardian ad litem submitted his preliminary report on April 21, 2009, and a kinship hearing was held on July 24, 2009. The guardian ad litem subsequently filed his final report on August 7, 2009.

The claim filed by Cannon was based upon her positions (1) that decedent was divorced from her husband, Edward, at the time of her death, and (2) that even if decedent was married to Edward at the time of her death, Edward relinquished his interest in decedent's estate in a signed and notarized statement. Cannon further claimed (3) that her brother and sisters "renounced" their shares of decedent's estate in favor of Cannon. The only evidence presented at the hearing was the testimony of Cannon, much of which was inadmissible as hearsay or barred by CPLR 4519.

In order to establish her rights as a distributee, the claimant, in a kinship proceeding, must prove: 1) her relationship to the decedent; 2) the absence of any person with a closer degree of consanguinity of 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]). Claimant, who claims to be a distributee of the decedent, has 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, King County]). The quantum of proof required to prove kinship is a fair preponderance of the credible evidence (*Matter of Jennings*, 6 AD3d 867, 868 [3d Dept 2004]; *Matter of Whelan*, 93 AD2d 891 [2d Dept 1983] *affd* 62 NY2d 657 [1984]).

The first question to be addressed by the court is whether Edward and the decedent were married or divorced at the time of decedent's death. If the court determines that the parties were married and that Edward was decedent's surviving spouse, then claimant is not a distributee and the estate would be distributed to Edward's estate in accordance with EPTL 4-1.1 (a) (2). The court may then address the second question, which is whether the document represented by Cannon to be a relinquishment of Edward's interest in decedent's estate qualifies as a valid renunciation which can be recorded with the Surrogate's Court pursuant to EPTL 2-1.11 (b) (2). Only if the answer to the second question is in the affirmative as well will the court reach the third question, which is whether Cannon is then the sole distributee pursuant to renunciations by her brother and sisters.

No challenge has been raised to the fact that decedent and Edward had been legally married. A valid marriage once entered into is presumed to continue in the absence of proof of divorce or other termination of the marriage (*Matter of Caltabellotta*, 183 AD 753 [4th Dept 1918]; *Matter of Botsford*, 27 NYS2d 932 [Sur Ct, Clinton County 1941]). Absolutely no documentary evidence has been offered to support Cannon's claim that decedent and Edward were divorced. Moreover, Edward's death certificate, a copy of which is annexed to the affidavit

in support of petition for judicial settlement of account of administrator filed July 9, 2008, reflects that when Edward post-deceased the decedent on December 10, 2004, he was a widow, which would indicate that he and decedent had not been divorced. None of the admissible testimony offered by Cannon at the kinship hearing was sufficient to rebut the presumption of a valid marriage.

Moreover, while the Public Administrator asked the court to determine whether Edward is disqualified as a surviving spouse in accordance with EPTL 5-1.2, no evidence in support of a disqualification was put before the court. Pursuant to this section, a decedent's wife or husband will be considered a surviving spouse, unless it is shown to the satisfaction of the court that at the time the deceased spouse died, a final decree or judgment of separation, divorce, or dissolving the marriage on the basis of absence, was in effect and valid under New York law. No decree or judgment has been offered to refute Edward's status as decedent's surviving spouse.

Based upon the evidence presented before the court attorney/referee, the court makes the following finding of facts and conclusions of law:

1. The decedent, Jane Linda Jones, died intestate on March 25, 2004.
2. The decedent, Jane Linda Jones, was married once, to Edward Stanley Jones.
3. Edward Stanley Jones was decedent's surviving spouse.
4. The decedent had no children, either biological or adopted.

As to the second question, which is whether the document represented by Cannon to be a signed and notarized relinquishment of the interest of Edward in decedent's estate qualifies as a valid renunciation which can be recorded with the Surrogate's Court pursuant to EPTL 2-1.11 (b) (2), Cannon's attorney annexed to his affirmation filed September 25, 2008 a copy of the document, which states in its entirety:

“MARCH 27th, 2004
I, EDWARD S. JONES, THE HUSBAND OF JANE LINDA JONES, GIVE
AUTHORIZATION TO JOANN POUND, THE COUSIN OF JANE LINDA
JONES TO MAKE FUNERAL ARRANGEMENTS. I RELINQUISH ALL OF
MY BURIAL RIGHTS TO MRS. JOANN POUND. I FURTHER RELINQUISH
ALL RIGHT TO HER ESTATE AND ANY PROCEEDS FROM HER DEATH.
[signed] EDWARD S. JONES”

Beneath the signature of Mr. Jones, the document bears the signature of Jewell S. Ward, a notary public.

Irrespective of Edward’s possible intent when he executed this document, it does not conform with EPTL 2-1.11 (b) (2), which requires that a “renunciation shall be in writing, signed and acknowledged by the person renouncing . . .” The copy of the document reflects that it was notarized but not acknowledged. Moreover, in order to comply with the statute, Edward would have had to file his renunciation with the Surrogate’s Court, accompanied by an affidavit stating that he received no consideration from anyone whose interest would be accelerated as a result of the renunciation (*id.*). For all of the above reasons, the court determines that the document presented is not a valid renunciation under the EPTL. Accordingly, decedent’s net estate shall be paid to the personal representative of the estate of decedent’s post-deceased spouse, Edward Stanley Jones, and the court need not address Cannon’s claim that she is entitled to decedent’s entire net estate, to the exclusion of all others having the same degree of consanguinity to the decedent.

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 (*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]).

The Public Administrator has petitioned the court for approval of the payment of \$3,000.00 to the attorney for the Public Administrator in connection with the administration of the estate, of which \$1,900.00 has been paid and \$1,100.00 remains unpaid. The guardian ad litem has not objected to these payments. 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 (*Matter of Von Hofe*, 145 AD2d 424 [2d Dept 1988]; *Matter of Phelan*, 173 AD2d 621 [2d Dept 1991]). The record shows that the attorney devoted more than 62 hours to this matter prior to July 1, 2008, and the court is aware that additional time has been spent on this matter since that date, including representation of the Public Administrator at the kinship hearing held July 24, 2009. The services provided by the attorney prior to the hearing included, but was not limited to: identifying and locating decedent's distributees; searching for unknown distributees; petitioning for letters of administration; identifying and collecting decedent's assets; foreclosure proceedings; litigation commenced on behalf of an alleged cousin of the decedent to set aside the foreclosure sale by the Public

Administrator; commencing and concluding a surplus money proceeding; preparing the final accounting; and participating in the kinship hearing. In view of the exiguous balance that would remain if the attorney were to bill for the full amount of services provided, which would amount to more than \$12,000.00, the attorney has offered to accept \$3,000.00 as a total fee. The court commends the attorney for his skillful representation of the Public Administrator and the voluntary reduction of his 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, 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 [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, Jul. 19, 1995, at 26, col 2 [Sur Ct, New York County] [internal citation omitted]; Warren's Heaton on Surrogate's Court Practice § 93.08 [7th ed] [citing *Tortora*]).

The accountant has submitted an affidavit of services requesting a fee of \$575.00 for the preparation of a first and final fiduciary tax return. 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 \$575.00, all of which remains unpaid.

With respect to the fee of the guardian ad litem, the court notes that the guardian ad litem's affirmation reflects more than 15 hours of services on behalf of decedent's unknown

distributees. Considering all the factors set forth above concerning attorneys' fees, and the extremely small size of the estate, the court fixes the fee of the guardian ad litem in the sum of \$1,000.00, 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 Public Administrator's payment of \$500.00 to Kurt J. Campbell, S.R.A., for the purpose of providing a date of death appraisal for decedent's real property which was the subject of a foreclosure sale, is approved.

The decree shall discharge the surety and shall authorize the Public Administrator to distribute the balance of the net estate to the personal representative of the estate of Edward Stanley Jones.

This constitutes the decision of the court.

Settle decree.

Dated: November 12, 2009

JOHN B. RIORDAN
Judge of the
Surrogate's Court