

Matter of Plotkin

2009 NY Slip Op 33100(U)

December 23, 2009

Supreme Court, Nassau County

Docket Number: 337947

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. 337947

Dec. No. 793

JOAN PLOTKIN,

Deceased.
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In this accounting of the Public Administrator, the issue of kinship was referred to a court attorney/referee pursuant to SCPA 506. A hearing was conducted and various documents were admitted into evidence, including the purported family tree. All parties stipulated to waive the report of the referee 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 claimants and the guardian ad litem representing the interests of unknown distributees.

Joan Plotkin died on March 1, 2005, a resident and domiciliary of Nassau County. Letters of administration issued to the Public Administrator on July 1, 2005. The summary statement shows charges to the accounting party of \$127,103.26.

Parties claiming to be the distributees of Joan Plotkin have appeared, and they are three alleged paternal first cousins, Francine Plotkin Gillman, Mark Plotkin and Sheldon Plotkin and two alleged maternal first cousins, Mark Swillinger and Andrea Tagle.

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, April 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 before the court attorney/referee, the court makes the following findings of fact and conclusions of law:

- 1) The decedent, Joan Plotkin, died intestate on March 1, 2005.
- 2) The decedent was unmarried at the time of her death and was never married.
- 3) The decedent never had any children, either natural or adopted.
- 4) The decedent's parents were Aaron Plotkin and Edith Swillinger, both of whom predeceased the decedent.
- 5) The decedent had one sibling, Leslie Plotkin, who predeceased her, having died on January 2, 2001, without issue.
- 6) The decedent's maternal grandparents were Benjamin Swillinger and Jennie Alterman, both of whom predeceased the decedent. The decedent had two maternal uncles; namely, Ralph Swillinger and Isidore Swillinger.
- 7) The decedents' maternal uncle Ralph Swillinger predeceased her. Ralph Swillinger had one child, Andrea Tagle, who survived the decedent. The decedent's maternal uncle Isidore Swillinger predeceased her. Isidore Swillinger had one child, Mark Swillinger, who survived the decedent.

- 8) The decedent's paternal grandparents were Abraham Plotkin and Jennie Lapidus. The decedent had two paternal uncles, Irwin Plotkin and Herbert Plotkin. The decedent's paternal uncle Irwin Plotkin predeceased the decedent. Irwin Plotkin had three children, Francine Plotkin Gillman, Mark Plotkin and Sheldon Plotkin, all of whom survived the decedent. Herbert Plotkin predeceased the decedent without issue.

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 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, Joan Plotkin, was survived by three paternal cousins, Mark Plotkin, Francine Plotkin Gillman and Sheldon Plotkin, and two maternal cousins, Andrea Tagle and Mark Swillinger. Pursuant to EPTL 4-1.1(a)(6), one-half (½) of the decedent's property passes to the issue of paternal grandparents, by representation and one-half (½) to the issue of maternal grandparents, by representation.

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 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]).

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 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 [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)” (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 legal services and a supplemental affirmation of legal services, and it shows that the attorney rendered more than 106 hours of legal services of a partner, associate and paralegal at various hourly rates. The attorney’s time amounts to a total of \$14,887.50, of which \$8,335.00 which has been paid. In view of the modest size of the estate, counsel asks that the firm’s fee be fixed in the amount of \$8,335.00, all of which has been paid. The attorney performed the following services: preparation of the petition for letters of administration and accompanying affidavits of appointment as administrator; identification and collection of decedent’s assets; the preparation of the administrator’s final account, the petition for judicial settlement of account of administrator, and the affidavit in support of the petition for judicial settlement of account of administrator; arranged for service of an accounting citation and adequate service of same to secure the jurisdiction of the Nassau County Surrogate’s Court over the respondents; attendance at the citation return date; multiple telephone conferences and correspondence with attorney for claimants; telephone conferences with the Public Administrator of Nassau County, and the employees of such office; review of family tree charts and birth, death, marriage and familial records, and prepared for, conducted and participated in protracted kinship hearings on separate occasions in the Nassau County Surrogate’s Court; preparation of affidavit bring account current and proposed decree judicially settling account of administrator. Considering all of these factors, the court fixes the total fee of counsel for the Public Administrator in the amount of \$8,335.00, all of which has been paid.

The accounting also shows accounting fees of \$2,875.00, of which \$2,300.00 has been paid. The services included preparation of the federal and state fiduciary income tax returns for the years 2006, 2007, and 2008. A final return is also required. The use of an accountant in this case appears to be reasonable. Therefore, the fee of the accountant in the amount of \$2,875.00 is approved.

The guardian ad litem has supplied the court with an affidavit of services, and it shows that he rendered approximately 12 hours of legal services. The guardian ad litem's usual hourly rate is \$350.00. The guardian ad litem prepared for and attended the kinship hearings, reviewed the documents, prepared his report and had discussions with counsel for the Public Administrator. Considering all of these factors, the court believes the sum of \$3,500.00 is fair and proper compensation for the services rendered by the guardian ad litem. The foregoing fee shall be paid within thirty (30) days from the date of the entry of the decree herein.

Commissions are approved subject to audit.

The claims of VNA of Long Island, Inc. in the amount of \$195.00 and Cablevision c/o NCO Financial Systems, Inc. in the amount of \$113.80 are disallowed for failing to file an affidavit of claim (SCPA 1803[1]). In all other respects, the accounting is approved.

The decree shall discharge the surety.

Settle decree.

Dated: December 23, 2009

JOHN B. RIORDAN
Judge of the
Surrogate's Court