

Matter of Felix Sotin
2010 NY Slip Op 31707(U)
June 30, 2010
Surrogate's Court, Nassau County
Docket Number: 339220/B
Judge: John B. Riordan
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SURROGATE'S COURT OF THE STATE OF NEW YORK
 COUNTY OF NASSAU

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

File No. 339220/B

FELIX SOTIN,

Dec. No. 26599

Deceased.

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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 August 26, 2005 to August 31, 2007, as brought current through August 31, 2009, as well as the legal fees of the guardian ad litem. The guardian ad litem has filed a report dated April 23, 2010 in which she states that she has no objections to the account as brought current and which she finds to be complete. In her report, the guardian ad litem also makes certain conclusions regarding kinship that are discussed below.

Felix Sotin died intestate, a resident and domiciliary of Nassau County, on August 26, 2005. Letters of administration issued to the Public Administrator on October 7, 2005. The account, as brought down to date, shows total charges of \$621,723.92, total credits of \$147,469.51 and a balance on hand of \$474,254.41.

Objections to the account were filed by Oluwaseyi Coker and Kehinde James, who claim to be distributees of the decedent. They objected to 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 asked for a hearing to establish kinship.

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, Felix Sotin, died intestate, a resident and domiciliary of Nassau County, on August 26, 2005.
2. The decedent was never married and never had any issue, either natural or adopted.
3. The decedent's father was Emmanuel Babatunde Sotin and his mother was Comfort Yetunde Sotin a/k/a Comfort Yetunde Adebowale. They both predeceased the decedent.
4. The decedent's father had one child, the decedent.
5. The decedent's mother had three children, the decedent, a daughter, Kehinde James,

and a son, Oluwaseyi Coker.

6. Kehinde James and Oluwaseyi Coker survived the decedent. They are the decedent's half-siblings and his sole 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, Felix Sotin was survived by two distributees: a half-sister, Kehinde James, and a half-brother, Oluwaseyi Coker. Pursuant to EPTL 4-1.1(a)(5), the whole of the decedent's property passes equally to Kehinde James and Oluwaseyi Coker.

Turning to the accounting, the Public Administrator's request to deny the claims of Edward Wind, M.D., Barry Kaplan, M.D., Barry Kanzer, M.D., Bibiana Stephan, M.D., Richard B. Libman, M.D., Frank Manetta, M.D., North American Partners in Anesthesia, Long Island Jewish Pulmonary, Long Island Jewish Cardiology and Long Island Jewish Emergency Medicine is granted. These individuals and entities were cited to show cause why their claims should not be denied, and all of them failed to appear in the proceeding.

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]).

In the citation, supplemental citation and the petition, the Public Administrator requests that the court fix his counsel's fees in the approximate amount of \$47,103.75, of which \$35,527.50 has been paid and approximately \$11,576.25 remained unpaid. Of the \$11,576.25, \$1,576.25 was for unpaid legal fees for services already performed and \$10,000.00 was for estimated future legal fees, as reflected respectively in schedules C and C-1 of the accounting. The affidavit bringing account current, sworn to on December 1, 2009, shows the amount of \$1,576.25 was paid, bringing the total paid to \$37,103.75 and that since May 1, 2007 approximately \$22,936.25 in additional fees was incurred, bringing the total fees incurred, exclusive of the real estate matters, to \$60,040.00. However, in the affirmation of legal services, counsel for the Public Administrator asks that the court fix legal fees in the reduced amount of \$45,000.00, exclusive of the fee received for the real estate matters, of which \$37,103.75 has been paid and \$7,896.25 has not been paid. Counsel expended more than 340 hours on matters involving the estate at hourly rates ranging from \$200.00 to \$350.00 for attorneys and from \$125.00 to \$175.00 for paralegals.

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 and accompanying papers; collecting estate assets; investigation of kinship; 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. Counsel also spent an extensive amount of time successfully defending a proceeding for the revocation of the letters of administration issued to the Public Administrator.

With respect to the sale of the two parcels of real property, in each instance, counsel

reviewed the title report and cleared 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.

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 \$45,000.00, plus \$3,000.00 for services rendered with respect to the sales of the two parcels of real property, for a total fee of \$48,000.00.

Counsel for the Public Administrator also requests approval of disbursements in the amount of \$32.68, of which \$27.88 for international certified mail is approved and \$4.80 for postage is not approved.

The guardian ad litem has submitted an affirmation of legal services. In it, she states that she expended more than 30 hours 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, 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 \$9,000.00. The guardian ad litem's fee shall be paid within thirty (30) days from the date of the decree to be entered.

The Public Administrator's request for reasonable and necessary expenses of the office of the Public Administrator in the amount of \$5,920.15 is approved, pursuant to SCPA 1201(4).

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 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, 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 \$4,475.00, of which \$3,900.00 was paid and \$575.00 for additional estimated billing to prepare the final fiduciary tax return is unpaid. The affidavit and attached invoices show that Rispoli & Curti, CPAs, PC, prepared the decedent's personal income federal and state income tax returns for 2002, 2003, 2004 and 2005, prepared the estate's federal and state fiduciary income tax returns for the years ending July 31, 2006, July 31, 2007, July 31, 2008 and July 31, 2009. 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 \$4,475.00, which amount includes \$575.00 estimated to prepare the final fiduciary tax return.

Commissions are approved subject to audit.

In the court's file is a claim against the estate by Nassau County Department of Social Services in the amount of \$31,215.35. A contingent and possible claim in the amount of \$40,289.00 by the Department is listed on schedule D of the account. However, the actual claim was filed after the period of the account. Accordingly, the Public Administrator is directed to file by August 11, 2010 an affirmation bringing the account down to date, on notice to all parties, with respect to the status of the claim by the Department of Social Services and any other matters pertinent to the account. The additional requests for relief contained in the petition will be addressed by the court after the affirmation is filed.

This is the decision and order of the court.

Dated: June 30, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court