

Matter of Wong

2010 NY Slip Op 31744(U)

June 24, 2010

Sur Ct, Nassau County

Docket Number: 327873

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. 327873

Dec. No. 26448

JAMES A. WONG
 a/k/a JAMES WONG
 a/k/a JAMES ANTHONY WONG,

Deceased.

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Before the court is the first and final account of the Public Administrator for the estate of James A. Wong, who died intestate, a resident of Seaford, on March 31, 2003. Letters of administration were issued to the Public Administrator on June 5, 2003. In connection with the account currently before the court, filed on March 6, 2009, the court appointed two guardians ad litem: the first to represent the interests of decedent's unknown distributees, and the second to represent the interests of decedent's alleged maternal first cousin, Patricia Ann Cahill-Gamroth, who is disabled. Objections to the account were filed on behalf of Patricia by the guardian ad litem appointed by this court to represent her interests, and by Beatrice Heaney, a co-guardian appointed in a separate proceeding to represent Patricia. Objections to the account were also filed on behalf of John F. Cahill, Jr., decedent's alleged maternal first cousin, who is Patricia's brother as well as her co-guardian.

The issue of kinship was referred to a court attorney/referee pursuant to SCPA 506, and a kinship hearing commenced on September 1, 2009. The hearing continued on September 22, 2009 and again on November 23, 2009, at which time it concluded. Various documents were admitted into evidence, including a purported family tree. 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 attorneys for the two claimants, Patricia and John, and the guardians ad litem representing the interests of Patricia and the unknown distributees, respectively.

For the reasons set forth below, the court sustains the objections filed on behalf of Patricia and John and finds that they are decedent's maternal first cousins and the sole distributees of this estate.

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

1. The decedent, James A. Wong, died intestate on March 31, 2003.
2. The decedent had been married to Barbara Moy, who predeceased decedent.

3. Decedent never had any issue, either natural or adopted.

4. The decedent's mother was Margaret Hart Wong and his father was Jung Que Wong, also known as Wong Jung Que or Charles Wong, a native of China. Decedent's father was born in 1871 and immigrated to the United States around 1887. Both of decedent's parents predeceased him. Decedent was the only child of his parent's marriage, and neither of his parents had other children.

5. Despite extensive and diligent searches by genealogical experts, including the efforts of a professional forensic genealogist in China, no survivors of decedent's paternal family were located.

6. Decedent's maternal grandparents were Dominick F. Hart and Elizabeth Annie Madden. They predeceased the decedent.

7. Decedent had seven maternal aunts and uncles who predeceased him, five of whom died as infants. Decedent's aunt Marie Agnes Hart McGowan had one daughter, Elizabeth Mary McGowan, who died in 1956, leaving no issue. Decedent's aunt Elizabeth Hart Cahill was survived by two children, Patricia and John, claimants herein, who are decedent's first cousins. The court is satisfied by the proof that no other maternal first cousins survived the decedent.

8. Accordingly, distribution of decedent's estate must be in accordance with by EPTL 4-1.1 (a) (6), which governs distribution of an intestate estate where decedent is survived by one or more grandparents or the issue of grandparents, as in this case.

Based upon the evidence before the court, it is held that the decedent, James A. Wong, was survived by two (2) distributees. They are his two maternal first cousins: Patricia Ann Cahill-Gamroth and John F. Cahill, Jr. The court also finds that the diligent searches to find any

unknown paternal next of kin were sufficient to establish that no paternal first cousins survived the decedent. As three years have elapsed since the decedent's death, the known heirs are entitled to the benefit of the presumption of SCPA 2225 that there are no other distributees of the decedent other than those set forth above. Pursuant to EPTL 4-1.1 (a) (6), the entire net distributable estate passes to the issue of maternal grandparents, by representation, that is, the two (2) maternal first cousins.

The account filed by the Public Administrator shows the receipt of \$842,316.99 of estate principal, which was supplemented by realized increases of \$18,932.01 and income collected totaling \$116,098.77. This resulted in total charges of \$977,347.77. This amount was reduced by realized decreases on principal in the amount of \$98.21, administrative expenses through January 1, 2009 in the amount of \$120,587.28, and payment of creditors' claims in the amount of \$4,135.34, leaving a balance of \$852,526.94 on hand. The Public Administrator seeks approval of the accounting, approval of commissions, and the fixing of fees for the services of the attorneys and the accountant. In addition, the court must set a fee for each of the guardians ad litem and release the Public Administrator from the surety bond.

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 his attorneys' fees, of which \$58,000.00 has been paid. In addition, the attorney was paid \$1,500.00 for services rendered in connection with the sale of decedent's home. The account further reflects that \$1,000.00 was paid to another attorney in August of 2003 in connection with services rendered for the opening of decedent's safe deposit box. There have been no objections 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 Phelan*, 173 AD2d 621 [2d Dept 1991]; *Matter of Von Hofe*, 145 AD2d 424 [2d Dept 1988]). The record shows that the attorney for the Public Administrator devoted more than 300 hours to this matter. The services provided by the attorney included identifying and locating decedent's distributees; searching for unknown distributees in the United States and in China through correspondence and conversations with various individuals and professional genealogists; petitioning for letters of administration; identifying and collecting

decedent's assets, which included real property, jewelry, numismatic items, an automobile, insurance proceeds, bank accounts, brokerage accounts and bonds, as well as an estate inherited from decedent's pre-deceased mother-in-law; preparing the final accounting and participating in a tripartite hearing which was held on three different dates in two locations. The fee for all of the legal services performed on behalf of the Public Administrator totals \$63,467.50, of which \$5,467.50 remains unpaid. The attorney has graciously offered to reduce his fee to \$58,000.00, which represents a reduction of almost 9 percent. The court approves the fee of \$58,000.00, plus \$1,500.00 for the real estate transaction, all of which has been paid. The fee in the amount of \$1,000.00, which was paid to a separate law firm in 2003, is also approved.

The court has 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, July 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 approval of a paid fee of \$4,025.00 for services rendered through February 26, 2009, and an additional \$1,150.00 for the preparation of tax returns for the fiscal years ending March 31, 2008 and March 31, 2009. The

affidavit indicates that the accountant prepared the decedent's personal income tax returns for 2002, 2003 and 2004 and the estate's annual federal and state fiduciary income tax returns from 2004 to date. 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 of \$5,175.00, of which \$4,025.00 has been paid and \$1,150.00 remains unpaid. In addition, since it appears that the estate was not closed prior to March 31, 2010, the accountant may submit a supplemental affidavit of services for the preparation of a final return for the fiscal year beginning April 1, 2010, should said return be required.

With respect to the fee of the guardian ad litem appointed to represent the interests of decedent's unknown distributees, the court notes that his affirmation reflects twenty (20) hours of services. The affirmation of the guardian ad litem appointed to represent the interest of Patricia, decedent's disabled maternal first cousin, reflects twenty-one (21) hours of services. Both of these attorneys provided excellent and efficient representation of their wards. Their responsibilities included a review of the extensive foreign and domestic documentation submitted to the court as well as appearances at three separate hearings, including one held in an alternate location to accommodate a witness who was unable to travel to the courthouse. Considering all of the factors set forth above concerning attorneys' fees, the court fixes the fee of each guardian ad litem in the sum of \$6,750.00, to be paid to each guardian ad litem within thirty days of the date of decree.

The commission of the administrator is approved subject to audit.

Within forty-five days of the issuance of this decision, the following documents shall be filed with the court and served upon the interested parties: (1) an affirmation bringing the

account down to date; and (2) a supplemental affidavit of tax services if it is determined that the estate will be required to file a final fiduciary tax return for the year beginning April 1, 2010.

The decree shall discharge the surety and shall authorize the Public Administrator to distribute the balance of the net estate as follows:

One-half to the co-guardians of Patricia Ann Cahill-Gamroth; and

One-half to John F. Cahill, Jr.

This constitutes the decision of the court.

Settle decree.

Dated: June 24 , 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court