

Matter of Hart

2010 NY Slip Op 33540(U)

November 19, 2010

Sur Ct, Nassau County

Docket Number: 337948/A

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. 337948/A

Dec. No. 26858

WOODY HART,

Deceased.

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Before the court is the first and final account of the Public Administrator for the estate of Woody Hart, who died intestate, a resident of Roosevelt, on May 3, 2005, leaving no known distributees. The Public Administrator filed an affidavit in support of the petition for judicial settlement of the account; it reflects that the office of the Public Administrator performed an investigation into decedent's next of kin, through conversations with decedent's landlord and decedent's friend and by a review of the documents found at decedent's residence. In addition, the Public Administrator utilized the Social Security index and an online search engine and sent correspondence to every individual who had sent personal mail to decedent shortly before or after decedent's death. Decedent was 62 years old at the time of his death and it appeared that he had never married or had children.

Letters of administration were issued to the Public Administrator on July 1, 2005. An order for service of process by publication on decedent's parents, Alice Margaret Marrer Hart and Woodrow Hart, whose survivorship of decedent and whereabouts were unknown, and on any and all unknown distributees of decedent, was issued on May 8, 2006. The citation issued by this court was served on all other interested parties, comprised of seven creditors of the estate, the New York State Attorney General, and the surety. A guardian ad litem was appointed by the

court to represent the interests of decedent's missing and unknown heirs.

The account filed by the Public Administrator, as brought down to date by an affidavit filed with the court on October 18, 2010, shows the receipt of \$32,136.37 of estate principal, which was supplemented by income collected totaling \$1,833.34. This resulted in total charges of \$33,969.71. This amount was reduced by administrative expenses through August 31, 2010 in the amount of \$11,985.76 and payment of a creditor's claim in the amount of \$3,000.00 (a rent check written by decedent but cleared by the bank subsequent to his death), leaving a balance of \$18,983.95 on hand. The Public Administrator seeks approval of the accounting, approval of commissions, the fixing of fees for the services of the attorney and authorization to distribute the net estate to the Nassau County Department of Social Services in full satisfaction of its preferred claim against the decedent's estate and to the exclusion of the estate's remaining creditors. In addition, the affidavit bringing the account current reflects an unpaid fee payable to the accountant for the estate, and the court must set the fee for the guardian ad litem and release the administrator from the surety bond.

The report filed by the guardian ad litem, dated March 16, 2010, reflects her finding that she is satisfied that the search conducted by the Public Administrator for missing and unknown distributees was sufficient to establish that said individuals cannot be found. No distributee or heir appeared in this proceeding during the five years that elapsed since decedent's date of death. The guardian ad litem further notes that the estate is insolvent. The court finds that the search conducted by the office of the Public Administrator was sufficient to establish that no distributees of the decedent can be found.

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], *aff'd* 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 \$2,500.00 to his attorney in connection with the administration of the estate, of which \$1,815.00 has been paid and \$685.00 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 43 hours to this matter. The services provided by the attorney included but were not limited to searching

for decedent's distributees; petitioning for letters of administration; preparing and filing the affidavit in support of the petition; identifying and collecting decedent's assets; and preparing the final accounting. The attorney expects to perform additional legal services until the estate is closed. As of September 2005, counsel was paid \$1,815.00, as reflected on Schedule C of the account. Since then, the additional billable time amounts to \$8,841.25, for total billable time of \$10,656.25. In view of the exiguous balance that would remain if the attorney were to bill for the full amount of services provided, the attorney has offered to accept as a total fee the amount of \$2,500.00, of which \$685.00 remains unpaid. The court commends the attorney for his skillful representation of the Public Administrator and the voluntary reduction of his fee by more than 75%. The fee is approved in the amount requested.

The court must also 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 a fee of \$575.00 for the preparation of the estate's final tax return. The work to be performed by the accountant is

necessary and 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 seven hours of services on behalf of decedent's unknown and missing distributees. Considering all the factors set forth above concerning attorneys' fees, and the relatively small size of the estate, the guardian ad litem has graciously offered to accept the reduced fee of \$1,537.25 for her services. The court fixes the fee of the guardian ad litem in the sum of \$1,537.25, to be paid within thirty days of the date of decree. The court thanks the guardian ad litem for her efficient and proficient representation of her wards and the voluntary reduction of her fee.

The commission and expenses of the administrator are approved subject to audit.

The decree shall discharge the surety and shall authorize the Public Administrator to distribute the balance of the net estate to the Nassau County Department of Social Services in full satisfaction of its preferred claim against the decedent's estate.

Settle decree.

Dated: November 19, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court