

**Matter of Weiss**

2013 NY Slip Op 30716(U)

March 27, 2013

Surrogate's Court, Nassau County

Docket Number: 358061/A

Judge: III., Edward W. McCarty

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SURROGATE’S COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

-----x

Proceeding to Settle the Accounts  
of Jeffrey E. DeLuca, Public Administrator of Nassau  
County, as Administrator of the Estate of

File No. 358061/A

HELENE J. WEISS,  
a/k/a HELENE WEISS,

Dec. No. 28677

Deceased.

-----x

Before the court is the first and final account of the Public Administrator for the estate of Helene Weiss, who died intestate, a resident of Nassau County, on February 6, 2008. Letters of administration issued to the Public Administrator on October 26, 2009. A guardian ad litem was appointed by the court to represent the interests of the decedent’s unknown heirs. He has filed his report.

The Public Administrator filed his account which shows the receipt of \$262,254.11 of estate principal and income. This amount was reduced by administrative expenses and creditor’s claims in the amount of \$33,560.22 leaving a balance of \$228,693.89 on hand. The Public Administrator seeks approval of the accounting, approval of commissions, the fixing of fees for the services of the attorney and accountant, and authorization to distribute the net estate to the New York State Comptroller for unknown heirs. In addition, the court must address the outcome of the kinship hearings, set the fee for the court appointed guardian ad litem and release the administrator from the surety bond.

Objections to the account were filed and a hearing was held where Juan Montoya, William Finegan and Mark Spivak testified.

All parties at this hearing as well as at the subsequent hearing, discussed below, stipulated to waive the report of the referee and to allow 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.

In order to establish their rights as distributees, 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, 27:3 at 21-1 [5th ed 2012]). 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]). 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 facts and conclusions of law:

1. The decedent, Helene Weiss, died intestate on February 6, 2008, and letters of administration were issued to the Public Administrator on October 26, 2009.

2. The decedent, Helene Weiss, was married to Walter Weiss who predeceased her. They never had any issue, either natural or adopted.

3. The decedent's parents were Arthur Gerson and Marie a/k/a Madeline Roth, both of whom predeceased the decedent. The decedent was her parents' only child.

4. The decedent's maternal grandparents were Herman Roth and Anna Heflich. They predeceased the decedent. The maternal grandparents had three children, James H. Roth, Marie a/k/a Madeline Roth (the decedent's mother) and Herbert Roth, all of whom predeceased the decedent. Herbert Roth had three children, Harriet Roth, Marvin J. Roth, who died at the age of

six, and Marvin Jerome Roth. Harriet Roth and Marvin Jerome Roth both survived the decedent. James H. Roth had two children, Hugh Roth and James Robert Roth. Hugh Roth predeceased the decedent and James Robert Roth survived the decedent but subsequently passed away.

5. The decedent's paternal grandparents were Henry H. Gerson and Minnie Newberger. They predeceased the decedent. They had two children children, Gustav Gerson and Arthur Gerson (decedent's father). Gustav Gerson predeceased the decedent and was survived by one child, Babette Lenore Gerson, who survived the decedent but subsequently passed away.

Thus, the court finds that the decedent was survived by three first cousins on the maternal side, Harriet Roth, Marvin Jerome Roth and James Robert Roth. On the paternal side, the decedent was survived by one first cousin, Babette Lenore Gerson. Pursuant to EPTL 4-1.1(a)(6), where the decedent is survived by issue of grandparents, the net estate is distributed one-half to the issue of paternal grandparents, by representation, and one-half to the issue of maternal grandparents, by representation.

The record reflects 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.

With respect to the issue of attorneys' 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 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]). 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 [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 disbursements, the tradition in Surrogate's Court practice is that the attorney may not be reimbursed for expenses that the court normally considers to be part of overhead, such as photocopying, postage, telephone calls, and other items of the same matter (*Matter of Graham*, 238 AD2d 682 [3d Dept 1997]; *Matter of Diamond*, 219 AD2d 717 [2d Dept

1995]; Warren's Heaton on Surrogate's Court Practice §106.02 [2] [a] [7th ed]). In *Matter of Corwith* (NYLJ, May 3, 1995, at 35, col 2 [Sur Ct, Nassau County]), this court discussed the allowance of charges for photocopies, telephone calls, postage, messengers and couriers, express deliveries and computer-assisted legal research. The court concluded that it would permit reimbursement for such disbursements only if they involved payment to an outside supplier of goods and services, adopting the standards set forth in *Matter of Herlinger* (NYLJ, Apr. 28, 1994, at 28, col 6 [Sur Ct, New York County]). The court prohibited reimbursement for ordinary postage and telephone charges other than long distance.

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 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)" (Warren's Heaton on Surrogate's Court Practice §93.08 [7th ed]).

In this case, there were two different attorneys employed by the Public Administrator. Each has submitted an affirmation of legal services and each application will be treated separately. The first attorney supplied the court with an affidavit of legal services and it shows that the attorney rendered more than one hundred and thirty-three (133) hours of legal services of a partner, associate and paralegal at various hourly rates. The attorneys for the Public

Adminstrator performed the following services: prepared and filed petition for letters of administration; obtained and secured the bond; held conversations and conferences with friends of the decedent; held conversations with alleged relatives of the decedent; engaged in multiple conversations and correspondence with the attorney for the objectants; reviewed the decedent's income tax transcripts; identified and collected the decedent's assets; engaged in discussions with genealogical review company; reviewed creditors' claims; and prepared and filed the final account. The attorney requests that the court set the fee in a reduced amount of \$15,240.00, of which \$5,240.00 has been paid and \$10,000.00 remains unpaid. Under the circumstances, the court fixes the fee of Brosnan & Hegler, counsel for the Public Administrator, in the reduced amount of \$15,240.00.

The Public Adminstrator also employed an additional law firm. The attorney filed an affirmation of legal services in which he affirms that he has performed the following services: opened a file; engaged in conferences; prepared letters to claimants; reviewed correspondence; reviewed records in preparation for kinship hearing; appeared at kinship hearing; and had telephone calls with guardian ad litem. The attorney also affirms that in order to finalize the proceeding, he will have to perform the following services: review file; review decisions of the court; prepare affidavit bringing account current and proposed decree; conferences and communications with the Public Administrator's office; coordinate distribution of funds and normal procedures in connection with closing the file. As some of the items that the attorney cited are not compensable (retrieving file information for the annual reporting requirements) and some items may not have to be performed, the court fixes the fee of Mahon, Mahon, Kerins & O'Brien in the amount of \$4,500.00.

The guardian ad litem has submitted an affirmation of legal services. He affirms that he spent twenty-four hours on this matter and performed the following: reviewed the court file and the extensive documentation submitted in support of the kinship claims; prepared for and attended kinship hearings; examined the Public Administrator's file; reviewed the accounting and prepared two reports. In light of all of the considerations as set forth previously, the court fixes the fee of the guardian ad litem in the amount of \$7,400.00.

Concerning the accountant's fee, the accountant has requested a fee of \$2,175.00 of which \$1,600.00 has been paid and \$575.00 remains unpaid. The accountant prepared the federal and state income tax returns as well federal and state fiduciary income tax returns for several years. The work performed by the accountant was not duplicative of the services rendered by the estate attorney and the requested amount of these services is reasonable. Thus, the court approves the fee in the amount of \$2,175.00, of which \$575.00 remains unpaid.

Finally, the commission of the Public Administrator is approved subject to audit.

The decree shall discharge the surety.

Settle decree.

Dated: March 27, 2013

EDWARD W. McCARTY III  
Judge of the  
Surrogate's Court