

Matter of Yanchuk

2014 NY Slip Op 33529(U)

June 15, 2014

Sur Ct, Nassau County

Docket Number: 2012-368315/B

Judge: Edward W. McCarty III

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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 the
Public Administrator of Nassau County,
as Administrator of the Estate of

File No. 2012-368315/B

Dec. No. 30902

JAMES W. YANCHUK,

Deceased.

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Before the court is the first and final account of the Public Administrator as administrator of the estate of James W. Yanchuk, who died intestate on December 26, 2011, a resident of Seaford in Nassau County. Letters of administration issued to the Public Administrator on July 16, 2012. The account was initially filed on September 11, 2014, along with an affidavit of due diligence. A citation and order for service by publication issued on September 18, 2014. By order dated December 3, 2014, a guardian ad litem was appointed to represent the interests of unknown heirs. The Attorney General of the State of New York filed an appearance. Objections to the account were filed on behalf of William P. Hazy, the alleged maternal cousin of James W. Yanchuk.

THE ACCOUNT

The account of the Public Administrator, which covers the period from December 26, 2011 through November 13, 2013, shows charges of \$456,386.99 and credits of \$92,176.30, leaving a balance of \$364,210.69 on hand. The Public Administrator seeks approval of the accounting, approval of commissions, the fixing of fees for the services of the attorneys and the accountant, the discharge of the surety, and authorization to distribute the net estate to the New

York State Comptroller's Office for the benefit of decedent's unknown heirs. In addition, the court must set the fee for the guardian ad litem.

REPORT OF THE GUARDIAN AD LITEM

The guardian ad litem filed his report on April 17, 2015. After a thorough review of each schedule and the supporting documentation, the guardian ad litem concludes that he has no objections and that the Public Administrator is entitled to judicial settlement of his account. He further reports that based upon his review of the documents and his attendance at the kinship hearing, he has concluded that William P. Hazy is the sole surviving relative of the decedent.

KINSHIP

As noted above, objections to the account were filed on behalf of William P. Hazy. The Public Administrator undertook an investigation of the decedent's next of kin. At the kinship hearing, 45 documents were introduced into evidence; oral testimony was provided by: decedent's best friend, Gary Paulson; decedent's alleged maternal cousin, William P. Hazy; and forensic genealogist Dennis Langel.

Based upon the testimony and the documentary evidence, as well as the report of the guardian ad litem, the court makes the following findings regarding decedent's next of kin:

1. Decedent was 61 years of age at the time of his death.
2. Decedent was divorced from his former wife.
3. Decedent had no children, biological or adopted.
4. Decedent's parents, Boris Yanchuk and Mary J. Hazy, predeceased him.
5. Decedent had no siblings.
6. Decedent's maternal grandparents were John Hazy and Jennie Melymuka, who predeceased

him. They had four children:

(1) Mary J. Hazy, mother of the decedent.

(2) Anna Hazy, who predeceased the decedent, survived by one son, Michael Pokladok, who also predeceased the decedent.

(3) Paul Hazy, who predeceased the decedent leaving no issue.

(4) William Hazy, who predeceased the decedent leaving one son, William Paul Hazy, a/k/a William Hazy, Jr., who survived the decedent.

7. Decedent's paternal grandparents were Peter Yanchuk and Mary Modney, who predeceased him. Despite diligent effort, no evidence was found that decedent's paternal grandparents had any issue other than their son, Boris Yanchuk, and his son, the decedent.

FEES

(1) Legal Fee of Counsel to the Public Administrator

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 administration (*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]). 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 affidavit of services filed on April 23, 2015 by the law firm which represented the Public Administrator indicates that the firm seeks \$28,695.86 for services billed, plus

disbursements of \$30.00, as well as \$3,900.00, for anticipated services to complete the estate administration.

The affirmation indicates that 76.50 hours of services were provided. The annexed time sheets reflect that counsel participated in conferences; engaged in correspondence; reviewed files and documents; appeared at the bank in connection with the safe deposit box opening; prepared an affidavit of due diligence; prepared a notice to quit occupancy; prepared the petition for letters of administration, the citation and an order for publication; prepared an affidavit concerning decedent's divorce; prepared a family tree; prepared a memorandum regarding sale of decedent's real properties; prepared the decree and the revised decree; appeared at a real estate auction for the sale of decedent's real properties; prepared for the closing, attended the closing and prepared a closing statement in connection with the sale of one piece of real property; negotiated and arranged for the sale of second piece of real property; scheduled and attended a second real estate closing; prepared the accounting and supporting documents; arranged for publication of the accounting citation; reviewed all kinship documents; prepared for the kinship hearing; reviewed the transcript of the kinship hearing; and reviewed the report of the guardian ad litem.

The court has thoroughly reviewed counsel's affidavit of services and the annexed time sheet. The court fixes the fee in the amount of \$27,250.00, plus disbursements of \$30.00, of which \$16,372.50 has been paid and \$10,907.50 remains unpaid.

(2) Fee of the Guardian ad Litem

The guardian ad litem for the unknown heirs has filed an affidavit of services wherein he states that between December 8, 2014 and April 14, 2015, he spent in excess of 30 billable hours on the matter at a regular billing rate of \$450.00 per hour. The annexed abridged time sheet

reflects 21 hours to review documents, 7 hours to prepare a report, and 2 hours for attendance at the kinship hearing, along with one-quarter hour to speak on the telephone with counsel for the Public Administrator.

In consideration of these factors, and following the criteria established in *Matter of Freeman* (34 NY2d 1 [1974]) and *Matter of Potts* (213 App Div 59 [4th Dept 1925], *affd* 241 NY 593 [1925]), the court awards a fee in the amount of \$5,250.00. The guardian ad litem fee shall be paid within 30 days of the entry of the decree to be entered herein.

(3) The Fee of the Accountant

With respect to the accountant's 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, 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 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, col 2 [Sur Ct, New York County] [internal citation omitted]; Warren's Heaton on Surrogate's Court Practice § 93.08 [7th ed] [citing *Tortora*]).

Here, the accounting firm submitted an affidavit requesting fees totaling \$3,662.50, of which \$2,412.50 remains unpaid. The affidavit and attached invoice show that the accountant prepared individual returns for 2011 (\$525.00) as well as federal and New York State fiduciary tax returns for the years 2012 through 2014 (\$1,775.00). The accountant states that a return for

the year 2015 and a final return will be required, and the accountant has billed \$1,250.00 for this anticipated work, as well as \$112.50 for correspondence.

The work performed was not duplicative of the legal services rendered by the Public Administrator's legal counsel. The court will not approve the additional charges for correspondence, and notes that the return for the year ending November 30, 2015 is likely to be the final return for this estate. Accordingly, the court approves the fees of the accountant in the amount of \$2,925.00, of which \$512.50 remains unpaid.

An additional fee may be fixed in the event that the accountant is required to file a final return for a period of time after November 30, 2015. The accountant may file a supplemental affidavit of services if the accountant makes a final determination that this additional return will be required.

CONCLUSION

The account is hereby approved.

Commissions are approved subject to audit.

Within 60 days, petitioner is directed to file an affidavit bringing the account down to date.

The court finds that distribution of decedent's estate must be in accordance with EPTL 4-1.1 (a) (6), which governs distribution of an estate where decedent is survived by issue of grandparents, and no spouse, issue, parent or issue of parents. As more than three years have elapsed since the decedent's death, the known heir is entitled to the benefit of the presumption of SCPA 2225 that there are no other distributees of the decedent other than the one set forth above.

The Public Administrator shall distribute the net estate to William P. Hazy.

The decree shall discharge the surety.

Settle decree.

Dated: June 15, 2014

EDWARD W. McCARTY
Judge of the
Surrogate's Court