

Matter of Ludwig

2015 NY Slip Op 31298(U)

March 31, 2015

Sur Ct, Nassau County

Docket Number: 2012-372468/a

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

File No. 2012-372468/A

LILLIAN LUDWIG,

Dec. No. 30494

Deceased.

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Before the court is the first and final account of the Public Administrator for the estate of Lillian Ludwig who died intestate, a resident of Nassau County, on August 30, 2012. Letters of administration issued to the Public Administrator on December 7, 2012. A guardian ad litem was appointed by the court to represent the interests of the decedent’s unknown heirs. He filed his report and has no objections.

The Public Administrator filed his account which shows the receipt of \$594,895.87 of principal and income. This amount was reduced by administration expenses and creditors’ claims in the amount of \$16,029.00 leaving a balance of \$578,866.87 on hand. The Public Administrator seeks approval of the accounting, approval of commissions, the fixing of fees for the services of the attorneys and accountant and authorization to distribute the net estate. In addition, the court must address the outcome of the kinship hearings, set the fee for the guardian ad litem and release the administrator from the surety bond.

All parties at the hearing 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 whom they take (*Matter of Morrow*, NYLJ, April 12, 2001 at 23, col 1 [Sur Ct, Bronx County]; 2 Harris, New York Estates, 27:3 [6th ed 2014]). 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, Lillian Ludwig, died intestate on August 30, 2012, and letters of administration were issued to the Public Administrator on December 7, 2012.
2. The decedent, Lillian Ludwig, was never married and did not have any issue, adopted or otherwise.
3. The decedent's parents were Elsie Lindgren and Charles Ludwig. The decedent's parents predeceased her. They had two children, the decedent and her twin sister Elsie Ludwig. Elsie Ludwig predeceased the decedent and had no issue.
4. The decedent's maternal grandparents were Ida Granberg and John/Johannes Lindgren. They predeceased the decedent and had three children.
5. The first child was Lillian/Lydia Lindgren Keuchler who predeceased the decedent. She had two children: Charles Keuchler, Jr., who predeceased the decedent, and Joyce Keuchler

Anderson, who survived the decedent and is a claimant herein.

6. The second child was John Lindgren. He predeceased the decedent and had no issue.

7. The third child was Elsie Lindgren Ludwig, the decedent's mother.

8. Thus, on the maternal side of the family, the decedent was survived by one first cousin, Joyce Keuchler Anderson. In accordance with EPTL 4-1.1 (a) (6), one-half of the estate shall be distributed to Joyce Keuchler Anderson.

9. The decedent's paternal grandparents were Frederick Ludwig and Elizabeth Hassel. Both predeceased the decedent. Frederick and Elizabeth Ludwig had nine children.

10. The first child was Charles Ludwig, the decedent's father.

11. The second child was George Ludwig. He predeceased the decedent and had two children; Gail Ludwig Myers and George Ludwig, both of whom survived the decedent and are claimants herein.

12. The third child was William Ludwig. He predeceased the decedent and had one child, Lois Ludwig Weis, who survived the decedent and is a claimant.

13. The fourth child was Martha Ludwig Pilon. She predeceased the decedent and had one child, Renee Pilon Stelling, who survived the decedent and is a claimant.

14. The fifth child was Frederick Ludwig, Jr. He predeceased the decedent. He had five children: Dorothea Ruth Ludwig Schaaf; Alice Ludwig West; June Ludwig Parente; Barbara Ludwig Rathgeber; and Frederick Ludwig III. Alice Ludwig West predeceased the decedent. The four other children survived the decedent and are claimants.

15. The sixth child was Anna Ludwig Strong. She predeceased the decedent. She had three children: Audrey Strong Wenner, who survived the decedent and is a claimant; Myriam

Strong Molter, who predeceased the decedent; and Warren Edward Strong, who survived the decedent and is a claimant.

16. The seventh child was Elizabeth Ludwig Moore. She predeceased the decedent and had one child, Alfred E. Moore, who also predeceased the decedent.

17. The eighth child was Carolyn/Carrie Ludwig Kaiser, who predeceased the decedent. She had one child, John F. Kaiser, who also predeceased the decedent.

18. The ninth child was Sophia Ludwig Coleman, who predeceased the decedent. She had three children: Laura Coleman Tringali, who survived the decedent and is a claimant; Eleanore Coleman Meany, who predeceased the decedent; and Edward Coleman who survived the decedent and is a claimant.

19. Thus, on the paternal side of the family, the decedent was survived by twelve first cousins: Gail Ludwig Myers; George Ludwig; Lois Ludwig Weis; Renee Pilon Stelling; Dorothea Ruth Ludwig Schaaf; June Ludwig Parente; Barbara Ludwig Rathgeber; Frederick Ludwig III; Audrey Strong Wenner; Warren Strong; Laura Coleman Tringali; and Edward Coleman. In accordance with EPTL 4-1.1 (a) (6), one-half of the estate shall be distributed to aforementioned paternal first cousins by representation.

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]).

The attorney for the Public Administrator submitted an affirmation of legal services in which he states that he spent approximately 74.50 hours on this matter. The attorneys for the Public Administrator affirmed that they performed the following: prepared and filed the petition for letters of administration; identified and collected the decedent's testamentary assets; reviewed guardian accounts; corresponded and had conversations concerning the decedent's

family relationships; reviewed public record databases and indices; prepared the final account and petition seeking settlement of the account; attended conferences at the Surrogate's Court; prepared for the kinship hearings and attended same. The attorney also affirms that he anticipates spending an additional 12 hours of paralegal and attorney time to update the accounting, prepare the decree and the distributions and to close the file. In light of all of the foregoing factors, the court fixes the total fee, which should include amounts already paid, of Mahon, Mahon, Kerins & O'Brien in the amount of \$29,862.00.

The guardian ad litem submitted an affirmation of legal services. The guardian ad litem affirms that he spent over seven and one-half hours on this matter. He reviewed the file, prepared for and attended kinship hearings, reviewed the transcripts, reviewed the accounting and prepared his report. In light of the factors as set forth herein, the court sets the fee of the guardian ad litem in the amount of \$2,625.00.

Concerning the accountant's fee, the accountant has requested a fee of \$3,381.25 of which \$2,131.25 has been paid and \$1,250.00 remains unpaid. The accountant prepared the decedent's 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 \$3,381.25, of which \$1,250.00 remains unpaid.

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

The decree shall discharge the surety.

Settle decree.

Dated: March 31, 2015

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