

<b>Matter of John Fowler Marsden</b>
2009 NY Slip Op 33235(U)
September 25, 2009
Surrogate's Court, Nassau County
Docket Number: 330872
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. 330872

Dec. No. 601

JOHN FOWLER MARSDEN,

Deceased.

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Before the court is the first and final account of the Public Administrator for the estate of John Fowler Marsden, who died intestate, a resident of Freeport, on November 22, 2003. Letters of administration issued to the Public Administrator on January 9, 2004; the petition and account were initially filed on April 28, 2005. Objections were filed by a presumptive heir on October 11, 2006, and the administrator filed an affirmation amending his petition for judicial settlement of account on June 11, 2007. A guardian ad litem was appointed by the court on October 12, 2007 to represent the interests of decedent's unknown heirs. Following an initial kinship hearing on December 17, 2007, the objections were withdrawn by stipulation on March 24, 2008, and a second kinship hearing was conducted on September 8, 2008. Petitioner filed a supplemental affirmation amending the petition and account on April 20, 2009. Subsequently, a second guardian ad litem was appointed on May 27, 2009, to represent the interest of an incapacitated distributee. On the same day, petitioner filed an affidavit bringing the account current.

The account as updated shows the receipt of \$358,616.16 of estate principal, which was supplemented by income collected totaling \$44,673.08. This resulted in total charges of \$403,289.24. This amount was reduced by administrative expenses through March 31, 2009 in the amount of \$75,014.10, and payment of creditors' claims in the amount of \$353.84, leaving a balance of \$327,921.30 on hand. The executor 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 the benefit of decedent's unknown heirs. In addition, the court must address the outcome of the two kinship hearings, set the fees for two appointed guardians ad litem and release the administrator from the surety bond.

The Public Administrator filed a petition for letters of administration on January 2, 2004, which reflects that decedent died leaving no spouse, children, grandchildren, parents, siblings or grandparents. The Public Administrator initially identified six alleged surviving paternal first cousins of decedent, *viz.*, (1) Robert Montgomery; (2) Ruth White; (3) Grace Haining; (4) Jo-Ann Montgomery; (5) William Henry Montgomery; and (6) Ann Marie Lamberson, listed on the petition as an adult under disability. Objections to the account were filed on October 11, 2006 by Lisa Wallace, an alleged daughter of decedent's predeceased nephew, Hudson Marsden Meyer, Jr.

Testimony and evidence were introduced at the first kinship hearing by Lisa Wallace and her mother, Nancy Olsen. 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.

Wallace and Olsen testified at the first kinship hearing that Wallace's biological father, Hudson Marsden Meyer, Jr., was a nephew of the decedent, who predeceased decedent in 1997. However, in the course of the hearing, the witnesses vitiated Wallace's claim as a distributee by further testifying that Meyer surrendered his parental rights to Wallace, after the termination of

the marriage of Meyer and Olsen, in order to facilitate Wallace's adoption by her stepfather, Richard Francis Olsen. Accordingly, all parties subsequently conceded that pursuant to Domestic Relations Law 117 (b), the right of Wallace to inherit through her biological father, Meyer, was excised upon her adoption by Richard Francis Olsen, and that the exceptions provided under Domestic Relations Law 117 are not applicable to the specific facts before the court. A stipulation was signed on March 24, 2008 by (1) the attorney for Wallace, (2) the attorney for the Public Administrator and (3) the guardian ad litem appointed by the court to represent the interest of the unknown heirs, which agreement provided for the withdrawal of objections by Wallace on the ground that she is not a distributee of decedent. The stipulation further provided that the settlement of the account would be held in abeyance for three months to determine whether additional objections to the account would be filed by any other alleged distributees.

Objections were subsequently filed on behalf of five of decedent's alleged paternal first cousins, *viz.*, (1) Robert Montgomery; (2) Ruth White; (3) Grace Haining; (4) Jo-Ann Montgomery; and (5) William Henry Montgomery. A second kinship hearing was held on September 8, 2008. Testimony at this hearing, given by Jo-Ann Montgomery, supported the existence of a sixth alleged paternal first cousin who was incapacitated, (6) Ann Marie Lamberson. A guardian ad litem was appointed to represent Lamberson on May 27, 2009. The court has now received and reviewed the petition and account as amended, the objections to the account, the transcripts of and documentary evidence submitted at both hearings, the reports of the two guardians ad litem, and the affirmations and affidavits submitted in connection with services rendered, and will address the outcome of the kinship hearings as well as petitioner's

prayers for relief.

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 of 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*, 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, January 7, 2002, at 29, col. 4 [Sur Ct, Kings County]; *Matter of Balacich*, NYLJ, January 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, 868 [3d Dept 2004]; *Matter of Whelan*, 93 AD2d 891 [2d Dept 1983] *aff'd* 62 NY2d 657 [1984]).

It is well established that the size of the estate and the degree of the relationship will affect the extent of a diligent search in a kinship or status hearing (Warren's Heaton on Surrogate's Court Practice § 74.17 [2] [b] [viii] [7th ed], citing *In re Whelan*, 93 AD2d 891 [2d Dept 1983] *aff'd* 62 NY2d 657 [1984]). In searching for decedent's distributees, counsel for the Public Administrator interviewed (1) decedent's neighbor, Karen Renucci; (2) decedent's friend, Doris Zacchia; (3) decedent's friend, Margaret Smith; (4) counsel for the alleged next of kin, Steven D. Prager; (5) decedent's alleged paternal first cousin, Robert Montgomery; (6) personnel at (i) Washington Mutual, (ii) Chase and (iii) Fleet banks, all of which held assets belonging to decedent; (7) personnel at the office of the Town of Hempstead; and (8) the court-appointed guardian ad litem for unknown heirs. Counsel also reviewed (9) court documents filed (i) in

connection with this estate and (ii) the estates of other family members; (10) family tree charts; and (11) extensive documentation filed with the court in connection with the two kinship hearings. Additionally, counsel searched using (12) Ancestry.com genealogical databases and (13) public record databases and indices. The court finds that a diligent and exhaustive search was rendered by counsel to the Public Administrator to discover evidence of all of decedent's distributees (*see Matter of Whelan*, 93 AD2d 891 [2d Dept 1983] *affd* 62 NY2d 657 [1984] [internal citations omitted]).

Based upon the evidence presented before the court attorney/referees at the two kinship hearings dated December 17, 2007 and September 8, 2008, the court makes the following findings of fact and conclusions of law:

1. The decedent, John Fowler Marsden, died intestate on November 22, 2003.
2. The decedent never married.
3. The decedent had no children.
4. The decedent's parents were Susan Helen Talley Marsden and Fowler Marsden, who predeceased decedent. They had two children, *viz.*, (1) decedent; and (2) Suzanna Elizabeth Marsden. Suzanna predeceased decedent leaving one surviving child, Hudson Marsden Meyer, Jr., who was decedent's nephew. Suzanna's other child was a stillborn infant.
5. Hudson Marsden Meyer, Jr. predeceased decedent. He had one child, Lisa Wallace, but after Meyer's marriage to Wallace's mother was annulled by court order dated February 18, 1966, Meyer surrendered all parental rights so as to enable Wallace's adoption by her stepfather, Richard Francis Olsen. Meyer had no other issue.

6. The decedent's maternal grandmother was Susan F. Ahrens Talley, who was married twice: the first time to Thomas Matthew Ray, and the second time to Albert Sidney Talley. The first marriage produced Catherine Elizabeth Ray Ahrens, who died without issue, and Susan Helen Talley Marsden, decedent's mother, but no other children. The second marriage produced no issue.

7. The decedent was not survived by any maternal aunts or uncles or by any issue of his maternal grandparents who would be entitled to inherit from his estate pursuant to EPTL 4-1.1.

8. The decedent's father was Fowler Marsden, who predeceased decedent.

9. Decedent's paternal grandparents were John Fowler Marsden and Anna May Scott Marsden, both of whom predeceased the decedent.

10. The marriage of decedent's paternal grandparents produced four children: (1) Fowler Marsden, who was decedent's father; (2) Harriet May Marsden Lamberson; (3) Ethel S. Marsden Voss; and (4) Ruth Elizabeth Marsden Montgomery, all of whom predeceased decedent.

11. Harriet May Marsden Lamberson was survived by four children: John Lamberson, who predeceased the decedent, and three children who survived the decedent, (1) Ruth White, (2) Grace Haining and (3) Ann Marie Lamberson, who post-deceased the decedent on June 1, 2009.

12. Ethel S. Marsden Voss had no issue.

13. Ruth Elizabeth Marsden Montgomery had four children: Betsy Ethel Montgomery, who predeceased decedent, and three children who survived the decedent, (1) Robert Bruce Montgomery, (2) Jo-Ann Ruth Montgomery and (3) William Henry Montgomery.

Thus, the court finds that decedent's sole distributees are the six first cousins who survived the decedent and are the issue of decedent's paternal grandparents:

(1) Ruth White,

- (2) Grace Haining,
- (3) Ann Marie Lamberson, who post-deceased the decedent on June 1, 2009,
- (4) Robert Bruce Montgomery,
- (5) Jo-Ann Ruth Montgomery, and
- (6) William Henry Montgomery.

Regarding the fee of the attorney for the estate and the fee of the guardian ad litem, 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]). 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 court has carefully reviewed counsel's affirmation of services and the time records submitted to the court; the guardians ad litem have not objected to counsel's fee. 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's actual billable time on this matter amounts to \$28,702.30, of which \$21,973.80 has been paid and \$6,728.50 remains unpaid. The services provided by the attorney included petitioning for letters of administration; identifying and

collecting decedent's assets; preparing the final accounting, participating in two kinship hearings and conducting the extensive searches and interviews described above. The attorney has offered to accept as a total fee the amount of \$24,350.00, of which \$2,376.20 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 15%. The fee is approved in the amount requested.

The court has also 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 Schoonhein*, 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 \$3,400.00. The affidavit indicates that the accountant prepared the estate's annual federal and state fiduciary income tax returns for the years 2004, 2005, 2006 and 2007. The accountant further notes that the requested fee includes an additional \$575.00 for accounting work that will be required before the estate is concluded. 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 \$3,400.00, of which \$2,825.00 has been paid and \$575.00 remains unpaid.

The guardian ad litem for unknown heirs has submitted her report and affidavit of services. They show that she spent more than 35 hours on the matter, over the course of thirteen months, including attendance at both kinship hearings. Applying her usual hourly rate, this resulted in billable time of \$9,861.25. The guardian ad litem reviewed the accounting and rendered a report that evaluated the kinship issues. It was her thorough research and analysis which led to the stipulation dated March 24, 2008, by which Wallace's status as a distributee was clarified and her objections to the account were withdrawn. The court awards the guardian ad litem a fee in the sum sought, \$9,861.25.

The guardian ad litem for the incapacitated heir submitted his report and affidavit of services with celerity. They show he spent more than 20 hours on the matter during the eight week period between June 1, 2009 and July 27, 2009, resulting in billable time, applying his usual hourly rate, of \$8,370.00. The guardian ad litem reviewed the entire accounting file and all of the supporting documentation and rendered a report that comprehensively reviewed the status of his ward and the payment to be made to her estate. The court awards the guardian ad litem a fee of \$6,500.00.

The foregoing fees for the guardians ad litem shall be paid within thirty (30) days of the date of the decree to be entered herein.

The court notes that none of the interested parties have otherwise objected to the account. Thus, the account is approved. The commission of the Public Administrator (SCPA 2307 [1]) and the expenses of his office (SCPA 1207 [4]) 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, after payment of the above fees, in accordance with EPTL 4-1.1 as follows:

The net estate shall be divided into six (6) equal shares, and one such share shall be distributed to each of decedent's six paternal first cousins who were living at the time of his death, *viz.*, (1) Robert Montgomery; (2) Ruth White; (3) Grace Haining; (4) Jo-Ann Montgomery; (5) William Henry Montgomery; and (6) Ann Marie Lamberson, whose share shall be paid to her estate.

This constitutes the decision of the court.

The Public Administrator is directed to settle a decree within 60 days hereof.

Dated: September 25, 2009

JOHN B. RIORDAN  
Judge of the  
Surrogate's Court