

Matter of Mackay

2010 NY Slip Op 33067(U)

September 30, 2010

Surrogate's Court, Nassau County

Docket Number: 338881/B

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. 338881/B

Dec. No. 26488

HELEN MACKAY,
 a/k/a HELEN JEAN MIASTOSKI,

Deceased.

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Before the court is the final account of the Public Administrator for the estate of Helen Mackay a/k/a Helen Jean Miastoski, who died intestate on August 23, 2005. Letters of administration were issued to the Public Administrator on September 29, 2005. The account is for the period from August 23, 2005 to August 31, 2008.

Objections to the account were filed on November 24, 2008 by Christine Miaskowski and Deborah J. Connolly, who object to the account only to the extent that they are identified therein as alleged paternal cousins and not as paternal cousins. A guardian ad litem was appointed by the court on January 12, 2009 to represent the interests of missing persons and unknown distributees. The Attorney General of the State of New York appeared but did not participate in the proceeding. A kinship hearing was held before a referee on June 5, 2009, August 14, 2009 and December 11, 2009.

The account filed by the Public Administrator shows total charges of \$752,611.84, total credits of \$49,312.82 and a balance on hand of \$703,299.02. The Public Administrator seeks approval of the accounting, approval of fiduciary commissions, approval of the expenses of his office, approval of his rejection of the claim of Kent Companies, Inc., the fixing of fees for the services of the attorney and accountant, authorization to distribute the net estate to the New York

State Comptroller for the benefit of decedent's unknown distributees, the release and discharge of the surety and to be discharged and released from liability as to all matters set forth in the account. In addition, the court must determine kinship and set the fee of the guardian ad litem.

The issue of kinship was referred to a court attorney/referee pursuant to SCPA 506. The hearing was conducted and various documents were admitted in evidence. All parties stipulated to waive the report of the referee and to allow kinship issues to be decided by the court based upon the transcripts of the hearing, the documentary evidence and the arguments made by the attorneys for the claimant and the guardian ad litem.

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 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, Apr. 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, Jan. 7, 2002, at 29, col 4 [Sur Ct, Kings County]; *Matter of Balacich*, NYLJ, Jan. 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 [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 fact and conclusions of law:

1. The decedent, Helen Mackay, a/k/a Helen Jean Miastoski, died intestate on August 23, 2005.
2. The decedent was never married and never had any issue, either natural or adopted.
3. The decedent's parents were Stanley Mackay a/k/a Stanley Miastowski and Sophie Dlugolecki Mackay. They predeceased the decedent. Decedent was the only child of her parent's marriage.
4. Decedent's paternal grandparents were Stefan Miastkowski and Stephanie Slowikowski Miastkowski. They predeceased the decedent.
5. Decedent's maternal grandparents were Stanislaw a/k/a Stanley Dlugolecki and Marianne Mierezejewski. They predeceased the decedent.
6. The decedent had three paternal aunts, all of whom predeceased the decedent: (1) Sophia Janina Miastkowski, who had no issue; (2) Anne Sophia Miastkowski Andreas, who had no issue; and (3) Lillian Miaskowski Gocinski, who had one child, Leon Gocinski, who predeceased the decedent. The decedent had three paternal uncles, all of whom predeceased the decedent: (1) Edward Maskowski, who had no issue; (2) Joseph J. Miastkowski, who had one child, Stephen Miastkowski, who predeceased the decedent; and (3) Frank Miastkowski, who had two children, Christine Ann Miaskowski and Deborah Jane Miaskowski Connelly, both of whom survived the decedent. Thus, the decedent had a total of four paternal first cousins, two of whom predeceased her. The two paternal first cousins who survived the decedent are Christine Ann Miaskowski and Deborah Jane Miaskowski Connelly. The court is satisfied by the proof that no other paternal first cousins survived the decedent.

7. The decedent had one maternal aunt, Helena Wrobel, who predeceased the decedent, and who had two children, Ryszard Jozef Edmund Wrobel, who predeceased the decedent, and Danuta Gozniak, who is living. The decedent had five maternal uncles, all of whom predeceased the decedent: (1) Wladslaw a/k/a Walter Dlugolecki, who had four children, Wladyslaw Dlugolecki, who predeceased the decedent, Marian Dlugolecki, who predeceased the decedent, Ryszard Dlugolecki, who is living, and Grazyna Kaczorowska, who is also alive; (2) Edward Dlugolecki, who had no issue; (3) Henryk Dlugolecki, who had eight children, Judwiga Dlugolecki, who predeceased the decedent, Henryka Dlugolecki, who predeceased the decedent, Zdzislaw Dlugolecki, who is alive, Stanislaw Dlugolecki, who is alive, Marianna Dlugolecki Malachowska, who is alive, Regina Dlugolecki Dunkowska, who is alive, Danunta Dlugolecki Kubel, who is alive, and Alicja Dlugolecki Pienczykowska, who is alive; (4) Boleslaw Dlugolecki, who had three children, Paul Dlugolecki, who predeceased the decedent, Dorothy Dlugolecki, who is alive, and Barbara Dlugolecki Boyce, who predeceased the decedent, and (5) Franciszek Dlugolecki, who died without issue. Thus, the decedent had a total of seventeen maternal first cousins, seven of whom predeceased her. The ten maternal first cousins who survived the decedent are Danuta Gozniak, Ryszard Dlugolecki, Grazyna Kaczorowska, Zdzislaw Dlugolecki, Stanislaw Dlugolecki, Marianna Dlugolecki Malachowska, Regina Dlugolecki Dunkowska, Danunta Dlugolecki Kubel, Alicja Dlugolecki Pienczykowska and Dorothy Dlugolecki. The court is satisfied by the proof that no other maternal first cousins survived the decedent.

Accordingly, distribution of decedent's estate must be in accordance with by EPTL 4-1.1 (a)(6), which governs distribution of an intestate estate where decedent is survived by one or

more grandparents or the issue of grandparents, as in this case. This section directs that “[f]or the purposes of this subparagraph, issue of grandparents shall not include issue more remote than grandchildren of such grandparents.”

Therefore, based upon the evidence before the court, it is held that the decedent, Helen Mackay a/k/a Helen Jean Miastoski, was survived by twelve distributees. They are her two paternal first cousins, Christine Ann Miaskowski and Deborah Jane Miaskowski Connelly, and her ten maternal first cousins, Danuta Gorniak, Ryszard Dlugolecki, Grazyna Kaczorowska, Zdzislaw Dlugolecki, Stanislaw Dlugolecki, Marianna Dlugolecki Malachowska, Regina Dlugolecki Dunkowska, Danunta Dlugolecki Kubel, Alicja Dlugolecki Pienczykowska and Dorothy Dlugolecki. Pursuant to EPTL 4-1.1 (a)(6), fifty per cent of the entire net distributable estate passes to the issue of paternal grandparents, by representation, that is, to the two paternal first cousins, and fifty per cent of the entire net distributable estate passes to the issue of maternal grandparents, by representation, that is, to the ten maternal first cousins.

The record reflects that a diligent and exhaustive search was made 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 that there are no other distributees of the decedent other than those set forth above.

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], *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]).

As reflected in the citation dated November 3, 2008, the Public Administrator originally petitioned the court for approval of legal fees in the approximate amount of \$45,176.25, with \$20,176.25 listed on the citation as paid and \$25,000.00 as unpaid. Schedule C -1 of the account reflects that the \$25,000.00 figure encompassed incurred and unpaid fees as well as future estimated fees. The affirmation of legal services dated October 31, 2008, which was filed with the account, requests that the court fix and determine fees in the amount of \$20,176.25 for services rendered through February 29, 2008, that the firm had incurred an additional \$2,908.75 in legal fees and that additional fees that had been incurred or that would be incurred in the future would be addressed in a supplemental affirmation of legal fees. A supplemental affirmation of legal fees dated March 26, 2010 was filed with the court. It states that, in addition to the \$20,176.25 in fees already paid, the firm had incurred or expected to incur additional legal fees of \$26,391.25, making the total fees \$46,567.50. Notwithstanding that amount, the Public

Administrator requests that the court fix and determine its legal fee in the amount of \$45,176.25, of which \$45,067.50 has been paid and \$108.75 remains unpaid.

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 records show that the attorneys provided more than 239 hours of legal services to the Public Administrator in connection with this estate. The attorney's time records reflect that the services rendered included preparing and filing the petition for letters of administration; identifying and collecting decedent's assets; a detailed investigation into the family of the decedent; corresponding with family members; corresponding with International Genealogical Search Inc.; preparing the judicial account and related documents; dealing with claims against the estate; appearing in court; reviewing objections to the account; corresponding with counsel for the claimants and with the guardian ad litem. In addition, counsel for the Public Administrator prepared for and participated in the kinship hearing. No objections have been filed to the requested fee. The court commends the attorney for his skillful representation of the Public Administrator and the voluntary reduction of his fee. The fee is approved in the requested amount of \$45,176.25, of which \$45,067.50 has been paid and \$108.75 remains unpaid.

With respect to the fee of the guardian ad litem, the court notes that the guardian ad litem's affirmation of services reflects a total of 27.55 hours of services. His services included reviewing the court's administration and accounting files; reviewing kinship documents, preparing and reviewing correspondence, attending the kinship hearing, and preparing his report.

The guardian ad litem's billing record reflects a small amount of time for preparing his affirmation of services, a task for which the estate cannot be charged. The court fixes the fee of the guardian ad litem in the sum of \$9,600.00, to be paid within thirty days of the date the decree is entered.

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 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 citation requested that accountant's fees in the amount of \$2,700.00 be approved. However, the accountant has submitted an affidavit of services requesting a fee of \$3,850.00, of which \$2,700.00 has been paid and \$1,150.00 is estimated for preparing a return for the year ending July 31, 2010 and preparing the final return and is unpaid. The work performed by the accountant was not duplicative of the services rendered by the estate attorney. The affidavit of services filed by the accountant reflect that the accountant prepared the estate's fiduciary income tax returns for the years ending July 31, 2005-2009. The court approves the requested fee in the amount \$3,850.00, of which \$1,150.00 is unpaid.

The expenses of the office of the Public Administrator in the amount of \$7,562.12 are approved (SCPA 1207[4]).

The commissions of the Public Administrator are approved subject to audit.

The Public Administrator's rejection of the claim of Kent Companies, Inc, for rent for the months of September and October 2005 in the amount of \$2,247.74 due to the termination of the decedent's lease agreement by reason of his death in August 2005 is approved. Kent Companies, Inc. was served with a copy of the citation in this proceeding, but did not appear.

The decree shall authorize the discharge of the surety, Liberty Mutual Insurance Company, and shall authorize the Public Administrator to distribute the balance of the net estate in accordance with the foregoing.

Settle decree.

Dated: September 30, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court