Matter of Swingearn
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Sur Ct, Nassau County
Docket Number: 345536/A
Judge: III., Edward W. McCarty
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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
Jeffrey Deluca, Public Administrator of Nassau County,
as Administrator of the Estate of

MATTLEE SWINGEARN,

Deceased.

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File No. 345536/A

Dec. No. 27533

Before the court is the first and final account of the Public Administrator of Nassau County for the estate of Mattlee Swingearn, who died intestate, a resident of Great Neck, New York, on August 8, 2006. Letters of administration issued to the Public Administrator on April 19, 2007; the petition and account were initially filed on November 6, 2009. The petition identifies a combined total of 29 alleged maternal and paternal first cousins. A guardian ad litem was appointed by the court to represent the interests of decedent's missing or unknown distributees. Kinship hearings were conducted before a referee on September 23, 2010 and November 16, 2010. Over 130 exhibits were admitted into evidence at the hearings, and an additional 14 exhibits were admitted after the hearing on the consents of counsel and the guardian ad litem. Testimony was taken from a professional genealogist and several members of decedent's family, both blood relatives and those related by marriage.

The account as filed shows total charges of $830,114.16, and total credits of $123,505.94. The account was filed in November 2009 and must be brought current. The executor seeks approval of the accounting, approval of commissions, the fixing of fees for the services of the attorney and accountant. In addition, the court must address the outcome of the two kinship hearings, set the fee for the guardian ad litem and release the administrator from the

surety bond.

The testimony at the kinship hearings and the exhibits admitted into evidence are testament to the extraordinary efforts expended by counsel to the Public Administrator, the genealogist, and the attorney for the claimants to identify all of the heirs of this very extended and extraordinary family. The court notes that the family tree prepared for the paternal side of the decedent's family is nearly seven feet in length; the family tree for the maternal side is over ten feet in length. The court will also take judicial notice that records of vital statistics in the 19th and early 20th centuries for African-American families in the deep south, where decedent and many of her ancestors and other relatives were born, are often incomplete or non-existent.

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, 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], *affd* 62 NY2d 657 [1984]). As indicated above, the voluminous records admitted into evidence, including the reports of the professional genealogist, are testament to the efforts expended to locate and identify the decedent's distributees. 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, the court determines that the decedent Mattlee Swingearn was survived by the following distributees, all of whom are first cousins:

<u>On the paternal side</u>

1. Arlthea (Aleetha) Swingearn Jones, post-deceased
2. Ethel Swingearn Ellison
3. Rebecca Swingearn Cotton
4. Emily Lloyd Bussey
5. Hazel Lloyd Thurmond
6. Annie Willie Lloyd
7. Thelma Lloyd Bates, post-deceased
8. Pearlena Lloyd Perkins
9. Joseph Clyde Lloyd
10. Anne Marie Thomas Logan
11. Thelma Thomas Hall
12. Thomas Thomas, Jr.
13. Sumpter Thomas

<u>On the maternal side</u>

1. Otis Ouzts
2. Herbert Ouzts
3. Mae Loretta Ouzts Green
4. Mildred Ouzts Saylor
5. Mattie Ouzts Braxton
6. Theodore Ouzts
7. Saundra Ouzts Lewis
8. Samuel Mathis
9. Josie Ruth Mathis Jones
10. Helen Mathis Smith
11. Nelba Mathis McLennon
12. Fred Mathis
13. Artletha (Aleetha) Swingearn Jones, post-deceased
14. Ethel Swingearn Ellison
15. Rebecca Swingearn Cotton
16. Grady Ouzts, Jr.
17. Eddie Ouzts
18. Jenny Roundtree Segure
19. James Roundtree

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 and notes that neither the claimants' counsel nor the guardian ad litem has 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 $49,767.00. Counsel requests that its fee be allowed in the sum of $49,500.00. 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 and exhaustive searches and interviews described above, which all enured to the benefit of the claimants in this case as the court was able to identify them as the decedent's distributees. The court commends the counsel for their skillful representation of the Public Administrator and the exhaustive efforts described above. 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 $4,650.00, of which $3,500.00 has been paid and $1,150.00 remains unpaid. The affidavit and supporting documents indicate that the accountant prepared the decedent's individual federal and state income tax returns for the years 2003, 2004, 2005 and 2006, as well as the federal and state fiduciary income tax returns for the years ending July 31, 2007 through July 31, 2010. Two additional returns will therefore be necessary. 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 $4,650.00, of which $3,500.00 has been paid and $1,150.00 remains unpaid.

The guardian ad litem for unknown heirs has submitted his report and affidavit of services. They show that he spent 26.8 hours on the matter, including attendance at both kinship hearings. The guardian ad litem does not indicate his customary billing rate, asking simply that the court grant a fair and reasonable fee for his services. The guardian ad litem reviewed the accounting and rendered a report on the kinship hearing, which, due to the number of first cousins on both sides of the family, was considerably more complicated than typically encountered. Considering all of the foregoing, the court awards the guardian ad litem a fee in the sum sought, $7,500.00, which 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 equally to the distributees or their legal representatives as aforesaid.

The Public Administrator is directed to settle a decree within 60 days hereof, along with an affidavit bringing the account down to date.

Dated: September 27, 2011

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