

Matter of Hood

2011 NY Slip Op 33525(U)

December 19, 2011

Sup Ct, Nassau County

Docket Number: 349515/A

Judge: III., Edward W. McCarty

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

-----X
Accounting by Jeffrey E. Deluca, Public Administrator
of Nassau County, as the Administrator of the
Estate of

File No. 349515/A

MILTON HOOD,

Dec. No. 27596

Deceased.
-----X

In this accounting by the Public Administrator of Nassau County as administrator of the decedent's estate, the issue of kinship was referred to a referee pursuant to SCPA 506. 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 attorney for the claimants and the guardians ad litem representing the interests of missing and unknown persons and disabled persons. Also before the court is the settlement of the Public Administrator's account for the period from March 8, 2007 to April 30, 2010, as well as the legal fees of the guardians ad litem. The two guardians ad litem have filed reports. In their reports, the guardians ad litem also make certain conclusions regarding kinship that are discussed below. One guardian ad litem had objections to the account which will be discussed below.

Milton Hood died intestate, a resident and domiciliary of Nassau County, on March 7, 2007. Letters of administration issued to the Public Administrator on January 17, 2008. The account shows total charges of \$96,812.23; total credits of \$39,515.67 and a balance on hand of \$57,296.56.

Objections to the account were filed and a hearing to establish kinship was held.

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, §27:3 [6th ed 2011]). 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, the court makes the following findings of fact and conclusions of law:

1. The decedent, Milton Hood, died intestate, a resident and domiciliary of Nassau County, on March 7, 2007.
2. The decedent was never married and never had any issue, either natural or adopted.
3. The decedent's father was Benjamin Hood and his mother was Sarah Yoselowitz Hood. They both predeceased the decedent.
4. The decedent's parents had one child, the decedent.
5. The decedent's maternal grandparents were Rubin Yoselowitz and Anna Aleberstein Yoselowitz. They predeceased the decedent.
6. The decedent had five maternal aunts and uncles. The decedent's maternal uncle Sam

Yoselowitz predeceased the decedent. He was survived by three children, Yelta Yoselowitz a/k/a Anne Joslin, who predeceased the decedent; Isidore Yoselowitz a/k/a Robert Joslin, who survived the decedent; and Harry Yoselowitz a/k/a Harry Joslin, who post-deceased the decedent.

7. The decedent's maternal uncle, Sol Yoselowitz a/k/a Charles Yoselowitz, predeceased the decedent. He was survived by two children, Sam Yoselowitz and Evelyn Yoselowitz Senewitsky, both of whom predeceased the decedent.

8. The decedent's maternal aunt, Rose Yoselowitz Levitz, predeceased the decedent. She was survived by two children, Anna Levitz Zeidberg, who survived the decedent, and Meyer Bernard Levitz, who predeceased the decedent.

9. The decedent's maternal aunt, Gertrude Yoselowitz Schargal, predeceased the decedent. She was survived by one child, Solomon Shargal, who survived the decedent.

10. The decedent's maternal uncle, Louis Yoselowitz a/k/a Louis Josel, predeceased the decedent. He was survived by two children, Morton Josel and Elayne Kobren, both of whom survived the decedent.

11. The decedent's paternal grandparents were Isaac Hood and Michle Robinson Hood. They predeceased the decedent and had five children, Benjamin Hood, Joseph Good a/k/a Joseph Hood, Molly Hood Goldberg, Rosa Hood and William Hood a/k/a William Wood.

12. The decedent's paternal uncle, Joseph Good, predeceased the decedent. He was survived by two children, Harry Good and Milton Good, both of whom predeceased the decedent.

13. The decedent's paternal aunt, Molly Hood Goldberg, purportedly predeceased the decedent. She was purportedly survived by four children, Sam Goldberg, Mildred Goldberg,

Morris Goldberg and Sylvia Goldberg. There is no further information about these alleged first cousins of the decedent on the paternal side.

14. The decedent's paternal aunt, Rose Hood, allegedly predeceased the decedent and was survived by one child, Mildred Hood. There is no additional information.

15. The decedent's paternal uncle, William Hood a/k/a William Good, purportedly predeceased the decedent, but there is no additional information regarding him.

The record reflects that a diligent and exhaustive search was made to discover additional distributees on the paternal side. Therefore, based upon the evidence before the court, it is held that the decedent, Milton Hood, was survived by six maternal first cousins, Isadore Yoselowitz a/k/a Robert Joslin, Harry Yoselowitz a/k/a Harry Joslin, Anna Levitz Zeidberg, Solomon Schargal, Morton Josel, and Elayne Kobren. The record is incomplete as to the paternal side and the court is thus unable to determine the decedent's paternal heirs at this time.

With regard to the report of the guardians ad litem, the main objection is that \$9,305.00 was paid out in checks post mortem and should not be included in the gross receipts and, accordingly, should be deducted from the assets collected and paid out for the purpose of computing commissions. The court agrees that commissions should be reduced.

Turning to the accounting, the Public Administrator's request to deny the claims of American Express, Discover, Long Beach Medical Center, and NES MED Service is granted. These individuals and entities were cited to show cause why their claims should not be denied, and all of them failed to appear in the proceeding.

Regarding the fee of the attorney for the Public Administrator, 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]). Additionally, 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, col 5 [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 a guardian ad litem's attorney's 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 fees 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]).

In the citation, supplemental citation and the petition, the Public Administrator requests that the court fix his counsel's fees in the reduced amount of \$5,546.25, of which \$4,596.25 has been paid and approximately \$950.25 remained unpaid.

The affirmation and the billing reports annexed thereto detail the legal services provided to the Public Administrator with respect to this matter. They include preparing the petition for letters of administration and accompanying papers; collecting estate assets; investigation of kinship; preparing the final account, the petition for judicial settlement thereof and the supporting affirmation; preparing the affidavit bringing the account current; and preparing for and attending the kinship hearing.

In light of all the factors to be considered (*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]), the court approves the legal fee for counsel to the Public Administrator in the amount of \$5,546.25.

The guardians ad litem have submitted affirmations of legal services. Each guardian ad litem reviewed the account and the petition in support, reviewed the objections, reviewed documents regarding kinship and investigated kinship issues, reviewed correspondence, prepared for and attended the kinship hearing, read the transcript from the kinship hearing, and prepared the guardian ad litem report.

One guardian ad litem represented missing and unknown distributees, while the other guardian ad litem represented two alleged distributees suffering from a disability. The guardian ad litem for the alleged distributees under a disability prepared a detailed review of the accounting which contained recommendations which inure to the benefit of his wards. As a result, the role of the two guardians ad litem were different and required expending different amounts of time. Considering the small size of the estate and the factors as set forth previously, Mr. McFaul is awarded the sum of \$2,500.00 in fees and Mr. Sayetta is awarded the sum of \$5,000.00.

With respect to accountant's fees, normally, 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 [2nd Dept 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)]" (Warren's Heaton on Surrogate's Court Practice §93.08 [7th ed]).

The accounting firm of Rispoli & Curti, CPAs, PC, has submitted an affidavit of services requesting fees totaling \$2,525.00. The work the firm performed was not duplicative of the services rendered by the Public Administrator's legal counsel. Further, the requested amount is reasonable. The court approves the fees of Rispoli & Curti, CPAs, P.C., in the requested amount of \$2,525.00.

Commissions are approved subject to audit.

One-half of the estate shall be distributed equally among the surviving maternal first cousins of the decedent. The remaining one-half shall be paid over to the New York State Comptroller's Office for the benefit of those who may be entitled to it.

This is the decision and order of the court.

Dated: December 19, 2011

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