

Matter of DeLuca (Schultz)

2016 NY Slip Op 32041(U)

August 16, 2016

Surrogate's Court, Nassau County

Docket Number: 2012-371301A

Judge: Margaret C. Reilly

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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**

DECISION

**File No. 2012-371301A
Dec. No. 31646**

GEORGE GERALD SCHULTZ,

Deceased.

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HON. PRESENT MARGARET C. REILLY

The following papers were considered in the preparation of this decision:

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| The Account, Citation and Petition on Accounting | 1 |
| Report of the Guardian Ad Litem | 2 |
| Objections | 3 |
| Transcript of Hearings | 4 |
| Exhibits | 5 |
| Affirmation of Legal Services | 6 |
| Affidavit of Tax Services | 7 |

Submitted for review is an accounting filed by the Public Administrator in the estate of George Gerald Schultz. The Public Administrator seeks the following relief: release and discharge of the Petitioner; allowing the commissions of the Petitioner in the amount of \$10,870.45 and reasonable and necessary expenses of the office in the amount of \$2,473.28; fixing and determining the attorneys’ fees of Mahon, Mahon, Kerins & O’Brien, LLC in the amount of \$14,856.26; fixing the accounting fees of Rispoli & Co., CPA in the amount of \$1,837.50; releasing and discharging the bond; and directing the net estate be paid to the New York State Comptroller on account of unknown kin. The court must also fix the fee of the guardian ad litem and address the outcome of the kinship hearing.

The decedent, George Gerald Schultz, died a resident of Nassau County on April 20, 2012. Letters of administration issued to the Public Administrator on September 5, 2012. This accounting is the first and final accounting.

I. Account

The summary statement shows charges to the accounting party of \$247,327.89 and credits in the total amount of \$49,982.73, leaving a balance of \$197,345.16. The account is approved as filed.

II. Kinship Hearing

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.

The following people testified at the hearing: Elizabeth Rooney and Katherine Cecilia Albers.

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 fact and conclusions of law:

1. The decedent George Gerald Schultz died on April 20, 2012 and letters of administration were issued to the Public Administrator on September 5, 2012.

2. The decedent George G. Schultz was never married and did not have any issue, adopted or otherwise.

3. The decedent's parents were Lillian Marie Shenor/Senor Schultz and George L. Schultz. The decedent's parents predeceased him. They had only one child, the decedent.

4. The decedent's maternal grandparents were Jaroslaw/Jerry Senor and Annie Senor. The maternal grandparents of the decedent had seven children: Mary/May Senor Cowdry; Cyril Senor; Lillian Marie Shenor/Senor (the decedent's mother); Anna Senor Maceli; Charles Senor; Edward Senor and Helen Senor Cobert.

5. The first child, Mary/May Senor Cowdrey, predeceased the decedent. She had six children: Archibald E. Cowdry who was missing and presumed dead during World War II; Robert Cowdry, who predeceased the decedent; Walter Cowdry, who post deceased the decedent; Mary Frances Cowdry McMillian, who predeceased

the decedent; Lester Cowdry, who post deceased the decedent; and Genie/Gene/Jean Cowdrey Euart who survived the decedent.

6. The second child, Cyril Senor, predeceased the decedent without issue. He had two children: Jenny Senor Serra and Jerry Daniel Senor. Jerry Daniel Senor predeceased the decedent. With regard to Jenny Senor Serra, the only information provided for her was a copy of the social security death index which does not identify her parents or provide any other evidence that the person identified on the Social Security death index is the child of Cyril Senor. As she was allegedly born in 1927, and would have been eighty-five years old at the time of the decedent's death, the court cannot apply the presumption that she predeceased the decedent (*see Young v Shulenberg*, 165 NY 385 [1901]; *Matter of Kuberka*, 22 Misc3d 1104(A) [Sur Ct Erie County 2008]).

7. The third child, Lillian Marie Shenor/Senor was the decedent's mother.

8. The fourth child, Anna E. Senor Maceli, predeceased the decedent and had three children: Frank Maceli, who survived the decedent; Joan Maceli Dimino, who survived the decedent; and Anita Maceli Gomes, who predeceased the decedent.

9. The fifth child, Charles Senor, predeceased the decedent. He had three children: Charles Senor, Jr., who survived the decedent; Patricia Senor, who survived the decedent; and

Dorothy Senor Sinfield, who post-deceased the decedent.

10. The sixth child, Edward Senor, predeceased the decedent. He had one child, Ronald Edward Senor, who survived the decedent.

11. The seventh child was Helen Senor Cobert. The only documentation provided with regard to her is an affidavit from the Public Administrator of Bronx County in which he states that he was appointed her fiduciary. Attached to the affidavit is a ledger which shows disbursements to various individuals who are named in this proceeding. Absent, however, is any form of evidence showing her relationship to the decedent, her birth certificate or even her death certificate.

Thus, on the maternal side, the court has identified at least nine first cousins who survived the decedent: Walter Cowdrey, Lester Cowdrey; Genie/Jean/Gene Cowdrey Euart; Frank Maceli; Joan Maceli Dimino; Charles Senor, Jr.; Patricia Senor; Dorothy Sinfield; and Ronald Edward Senor. The court, however, is unable to conclude as previously set forth that these first cousins are the sole maternal distributees of the decedent.

With regard to the paternal side of the family, the genealogist testified that she searched for information regarding the decedent's father, George L. Schultz, who was born in 1911 in New York. She was able to locate a 1920 census which showed a George Schultz, age 9, who was a boarder along with other boarders with the Rieger family. The genealogist testified that she searched birth and baptism records but could not locate any

information. She also searched for any records for the decedent's grandparents, George and Bertha Schultz, but could not find any records for them. She finally testified that she performed a thorough and exhaustive search and there was nothing else that she could do to locate potential relatives on the paternal side.

The petitioner requests that the court determine pursuant to SCPA §2225(b) that diligent and exhaustive efforts have been made from all available sources to ascertain paternal distributees and that as more than three years have elapsed and no claim to the share of the estate has been made that the court determine that there are no paternal distributees in existence other than those whose status has been established. The petitioner's application is **GRANTED**.

III. Commission and Reasonable Expenses of Fiduciary

The branch of the Petition to fix the commissions of the Public Administrator, pursuant to SCPA §2307, is approved. In addition, the Public Administrator is allowed, pursuant to SCPA §1207(4), the reasonable and necessary expenses of the office.

IV. Fees

A) 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 fees rendered in the course of an estate (*see 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 (*see Matter of Kelly*, 187 AD2d 718 [2d Dept 1992]); the complexity of the questions involved (*see Matter of Coughlin*, 221 AD2d 676 [3d Dept 1995]); the nature of the services provided (*see Matter of Von Hofe*, 145 AD2d 424 [2d Dept 1988]); the amount of litigation required (*see Matter of Sabatino*, 66 AD2d 937 [3d Dept 1978]); the amounts involved and the benefit resulting from the execution of such services (*see Matter of Shalman*, 68 AD2d 940 [3d Dept 1979]); the lawyer's experience and reputation (*see Matter of Brehm*, 37 AD2d 95 [4th Dept 1971]); and the customary fee charged by the Bar for similar services (*see 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]). Also, the legal fee must bear a reasonable relationship to the size of the estate (*see 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]).

In this case, the attorney employed by the Public Administrator filed an affirmation of legal services and annexed a copy of his time records to the affirmation. The attorney for the Public Administrator affirmed that his firm rendered 49.33 hours of legal services to date, at various hourly rates. The attorney for the Public Administrator performed the following services: opened and reviewed the file; prepared the petition for letters of administration; prepared the bond application; reviewed real estate and personal property appraisals; participated in the auction of the real property; prepared and

reviewed documents in connection with the closing of the real property; prepared correspondence; prepared the accounting and petition; appeared in court on the return date of the accounting citation; prepared for and attended kinship hearings; reviewed exhibits and transcripts; engaged in conversations with the court appointed guardian ad litem; and reviewed the report of the guardian ad litem.

The attorney further anticipates that in order for him to finalize the proceeding he will have to spend approximately 11 hours of time of both a partner and paralegal. The attorney affirms that he will have to review the decisions of the Court; bring the account current; prepare closing documents for the Public Administrator; and settle the decree. Although the citation asks the court to fix the fee of the attorneys in the amount of \$14,856.26, in his affirmation of legal services, the attorney asks the court to set the fee in the total amount of \$22,441.68. The fee request is higher than set forth in the account and citation. The legal fee is hereby **GRANTED**, in the amount of \$14,856.26. The Public Administrator shall procure the issuance and service of a supplemental citation for the additional amount sought. The additional legal fee shall be addressed after the return date of the supplemental citation.

B) Guardian ad Litem

The guardian ad litem submitted a final report in which he reported that he spent a total of 12 hours on this matter which include: reviewing all necessary pleadings and documentation; visiting the court to file all necessary documents; participating at the kinship hearings; reviewing and analyzing the documentary evidence and testimony of the witnesses; and preparing his report. Upon a review of all of the factors, the fee of the guardian ad litem is fixed in the amount of \$3,500.00.

C) Accountant Fee

The account and citation show accounting fees in the amount of \$1,837.50. The accountant, however, filed an affidavit of tax services in which she requests a total fee of \$3,187.50. The accountant avers that she prepared the fiduciary returns from 2013, 2014 and 2015. She must still prepare a fiduciary tax return for 2016 as well as a final return. The fee request is higher than set forth in the account and citation. The fee for the accountant is hereby awarded in the amount of \$1,837.50. The Public Administrator shall procure the issuance and service of a supplemental citation for the additional fee sought. The additional accountant fee will be addressed after the return date of the supplemental citation.

V. Distribution

The application to distribute the net estate to the claimants is **DENIED** as it is premature. The attorney for the maternal side of the family is directed to provide the court with the missing documentation within forty-five (45) days of the date of this decision. Failure to do so will result in the distribution of the estate to the New York State Comptroller for the benefit of those persons entitled to it.

This is the decision of the court.

Dated: August 16, 2016
Mineola, New York

E N T E R:

HON. MARGARET C. REILLY
Judge of the Surrogate's Court

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