

Matter of Secchia

2016 NY Slip Op 32160(U)

October 7, 2016

Surrogate's Court, Nassau County

Docket Number: 2013-377015/A

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 the Public Administrator of Nassau County, as Administrator of the Estate of	DECISION File No. 2013-377015/A Dec. No. 31739

**PAUL SECCHIA,

Deceased.**

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PRESENT: HON. MARGARET C. REILLY

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

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I. PROCEDURAL HISTORY

Before the court is the first and final account of the Public Administrator for the estate of Paul Secchia. Letters of administration issued to the Public Administrator on November 7, 2013. The account of the Public Administrator was initially filed on November 17, 2014, and was amended on January 23, 2015.

II. BACKGROUND

The decedent, Paul Secchia, died intestate on May 22, 2013 at 9:05 p.m. The Public Administrator filed an affidavit of due diligence, dated November 5, 2014, stating that the decedent's father, John Secchia, predeceased him, and his mother, Virginia Secchia a/k/a Jean Secchia, post-deceased the decedent on May 22, 2013 at 10:05 p.m. Accordingly, the decedent's mother, Virginia Secchia, was his sole distributee.

III. THE ACCOUNT

The account filed by the Public Administrator covers the period from May 22, 2013 through October 22, 2014, and shows the receipt of \$374,892.91 of estate principal, which was supplemented by realized increases of \$13,695.26 and income collected totaling \$6,757.41. This resulted in total charges of \$395,345.58. This amount was reduced by realized decreases of \$8,752.41 and administrative expenses in the amount of \$40,458.27, leaving a balance of \$346,134.90 on hand.

IV. RELIEF REQUESTED

The Public Administrator seeks approval of the accounting, approval of commissions, the fixing of fees for the services of the attorneys and the accountant, the release and discharge of the surety, and a direction that the net estate be paid to the New York State Comptroller for the unknown next of kin of Paul Secchia.

In addition, the court must set the fees of the two guardians ad litem.

V. OBJECTIONS TO THE ACCOUNT

Objections to the account were filed by Vincent T. Sclafani, an alleged nephew of the decedent's mother, Virginia Secchia. These objections were addressed at a kinship hearing conducted in connection with the estate of decedent's mother, Virginia Secchia, and are discussed in Dec. No. 31784, being issued simultaneously with this decision.

VI. REPORT OF THE FIRST GUARDIAN AD LITEM

On February 16, 2015, the court appointed a guardian ad litem to represent the interests of the missing and unknown distributees, heirs at law and next of kin of Paul Secchia. The guardian ad litem filed a report and recommendation, dated December 29, 2015, stating that the decedent was unmarried and without issue at the time of his death. He was predeceased by his father and sister, and survived by his mother, Virginia Secchia. Accordingly, pursuant to EPTL § 4-1.1 (a) (4), all of the decedent's property passes to his mother. The guardian ad litem had no objections to the account or to the supporting schedules. On December 30, 2015, the guardian ad litem advised the court that he was unable to continue to serve in that position; his appointment was rescinded by the court by order dated December 30, 2015.

VII. REPORT OF THE SECOND GUARDIAN AD LITEM

On January 8, 2016, the court appointed a second guardian ad litem, whose report was filed on April 19, 2016. He reviewed the documents in the file, including the account and the schedules. The guardian ad litem had no objections to the account and stated that Virginia Secchia is the sole distributee of the decedent.

VIII. FEES

A. Fee of the Administrator's Attorney

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 (*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 (*see Matter of Brehm*, 37 AD2d 95, 97 [4th Dept 1971]; *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]). 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 (*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]). 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 (*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]; *see e.g. Matter of Spatt*, 32 NY2d 778 [1973]).

The Public Administrator has petitioned the court for approval of the payment of legal fees to Mahon, Mahon, Kerins & O'Brien, LLC. The affirmation of legal services filed by counsel reflects \$13,285.42 in fees incurred for more than 38 hours of services rendered. The billing records reflect expense charges of \$58.32. Counsel requests a fee, inclusive of disbursements, of \$16,760.42, which includes anticipated time in the amount of \$3,475.00.

Of this total amount, \$2,000.00 has been paid.

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 (*see Matter of Von Hofe*, 145 AD2d 424 [2d Dept 1988]; *Matter of Phelan*, 173 AD2d 621 [2d Dept 1991]). Counsel's affirmation reflects that he communicated with the Public Administrator and staff upon the receipt of a reported death, including contacting the investigators, the informant, funeral directors, the landlord and neighbors, and anyone else with information concerning the decedent, including possible heir claimants. Counsel reviewed all documentation, conducted computer searches for possible heirs, prepared the petition for letters of administration and all supporting documents, including an affidavit of due diligence, made arrangements for the surety bond, and engaged in a search for assets. Counsel prepared and filed the account of the Public Administrator.

The court notes that the time sheets for November 25, 2014 include a charge of \$56.25 for scanning documents. While counsel may bill for the services of a paralegal who performs those services under the supervision of counsel, the paralegal's time may be billed only for legal services for which the attorney could have been compensated (SCPA 2110 [4]). In this instance, the time billed for the paralegal is for a service which is secretarial in nature and considered part of office overhead and not compensable (*see Matter of Efstathiou*, 41 Misc 3d 1219A [Sur Ct, Nassau County 2013]; *Matter of Brannen*, 14 Misc 3d 1222A [Sur Ct, Dutchess County 2007]; *Matter of Gliosca*, NYLJ Jan. 5, 2006, at 20, col 1 [Sur Ct, Suffolk

County])).

Further, the court must disallow a charge of \$1,062.50 for counsel's appearance at the kinship hearing in the estate of Virginia Secchia, as counsel has properly billed this charge to the estate of Virginia Secchia. Considering all of the foregoing criteria, the court fixes the fee of current counsel to the Public Administrator for services provided through April 3, 2016 in the amount of \$12,166.67, plus \$3,475.00 for future services, plus disbursements of \$58.32, for total payment of \$15,700.00.

B. Fees of the Guardians ad Litem

Due to unforeseen circumstances, the first guardian ad litem appointed by the court was unable to continue serving in that capacity after December 31, 2015, and a successor guardian ad litem was subsequently appointed. In fixing their respective fees, the court is mindful that when multiple attorneys are employed to represent the same interest in connection with a decedent's estate, the aggregate fee should approximate what one attorney would charge (*see Matter of Leopold*, 244 AD2d 411 [2d Dept 1997]; *Matter of Mattis*, 55 Misc 2d 511 [Sur Ct, New York County 1967]). Some overlap in services may necessarily occur (*Matter of Patchin*, 106 AD2d 730 [3d Dept 1984]), and should be a factor when considering the aggregate fee (*see Matter of Mergentime*, 155 Misc 2d 502 [Sur Ct, Westchester County 1992], *affd*, 207 AD2d 453 [2d Dept 1994]).

With respect to the fee of the first guardian ad litem, the court notes that the guardian ad litem's affirmation reflects that after his appointment on February 23, 2015, he reviewed all pleadings and documentation, corresponded with the attorney representing the petitioner,

attended the kinship hearing conducted on July 27, 2015 in connection with the estate of the decedent's mother, and submitted his report. Although the guardian ad litem provided more than nine hours of services on behalf of decedent's missing and unknown distributees, he voluntarily reduced this, for billing purposes, to six hours at \$300 per hour. Considering all the factors set forth above concerning attorneys' fees, the court fixes the fee of the guardian ad litem in the sum of \$1,800.00, to be paid within thirty days of the date of decree.

The second guardian ad litem, who was appointed on January 8, 2016, submitted an affidavit of service on April 19, 2016 that reflects that he provided nine hours of service on behalf of his wards, which included speaking with the other attorneys working on this matter, reviewing documents and the transcript of the July 27, 2015 kinship hearing, reviewing the account, affirmations and exhibits, and preparing his report. His normal billing rate is \$450.00 per hour. As noted above, the court is constrained in fixing the fee of the second guardian ad litem, in light of the need to appoint two guardians ad litem in succession to represent the same interests in this estate. Accordingly, the court fixes the fee of the second guardian ad litem in the amount of \$2,700.00.

C. Fee of the Administrator's Accountant

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 (*see Matter of Meranus*, NYLJ,

Mar. 31, 1994, at 28, 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 (*see 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]). The citation reflects the Public Administrator’s request that fees in the amount of \$1,900.00 be approved. The accountant has submitted an affidavit of services requesting a total fee of \$3,775.00. The affidavit indicates that the accountant prepared personal income tax returns for the decedent for 2005 and 2013, for a fee of \$1,150.00. Fiduciary returns were filed for the years ending April 30, 2014 and April 30, 2015, for a combined fee of \$1,375.00. A fiduciary return for the year ending April 30, 2016 and a final return will be required, resulting in additional fees totaling \$1,250.00.

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 of \$3,775.00, which will cover all past and future services on behalf of the decedent’s estate. Of this amount, \$2,525.00 has been paid and \$1,250.00 remains unpaid.

IX. CONCLUSION

Within 60 days of the date of this decision, the Public Administrator shall bring his account down to date.

The commission of the administrator is approved subject to audit. In addition, the Public Administrator is allowed, pursuant to SCPA § 1207 (4), the reasonable and necessary expenses of the office.

The decree shall discharge the surety and shall authorize the Public Administrator to distribute the balance of the net estate, after payment of the outstanding fees noted above, to the Public Administrator as the administrator of the Estate of Virginia Secchia.

This constitutes the decision and order of the court.

Settle decree.

Dated: October 7, 2016
Mineola, New York

E N T E R:

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

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