

**Matter of Vincent**

2007 NY Slip Op 30158(U)

March 8, 2007

Surrogate's Court, Nassau County

Docket Number: 0287640

Judge: John B. Riordan

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

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In the Matter of the Account of Proceedings of  
CHARLOTTE J. VINCENT, as Executrix of  
the Estate of

File No. 287640

Decision No. 881

BOBBIE J. RUSSELL,

Deceased.

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In this accounting proceeding, the guardian ad litem has submitted an interim report recommending that the executor, Charlotte Vincent, be directed to amend her account and that the court consider removing Charlotte Vincent as both executor and trustee of the trust for the benefit of the guardian ad litem's ward.

The decedent, Bobbie J. Russell, died on June 19, 1994. The decedent was survived by her son, Kyle Martin, and her grandson, J. Christopher Martin. The decedent left a will dated February 17, 1994, which was admitted to probate by decree of this court dated November 10, 1994. Letters testamentary issued to the decedent's sister, Charlotte Vincent, on the same date. Article THIRD of the will provides that 50% of any funds payable to the decedent's estate from a tax deferred annuity be held in trust until age thirty for the guardian ad litem's ward, J. Christopher Martin. The remaining 50% is bequeathed to the decedent's son, Kyle Martin, subject, however, to a trust for his benefit. Article FIFTH directs that the decedent's New York real property be sold and the proceeds be distributed outright to the decedent's son and grandson in equal shares. Article FIFTH further provides that the decedent's residuary estate, after distribution of the proceeds from the sale of the decedent's North Carolina property to her parents and after payment of five \$5,000.00 bequests and one \$2,500.00 cash bequest, is to be divided equally between the trust for the benefit of the decedent's son and the trust for the benefit

of the decedent's grandson.

The trust for the benefit of the decedent's son Kyle terminates when he attains age 40. If Kyle dies prior to termination, the principal of his trust is payable to the decedent's grandson. The trust for J. Christopher Martin terminates upon the earlier to occur of the beneficiary receiving his undergraduate degree or attaining the age of thirty (30) years. Letters of trusteeship with respect to both trusts issued to Charlotte Vincent by decree dated November 10, 1994.

The guardian ad litem has reviewed the account and filed an interim report. The executor charges herself with \$615,689.16 consisting of (i) real property in New York valued at \$110,000.00; (ii) real property in North Carolina valued at \$10,226.30; (iii) Teachers Retirement System death benefits and annuity, valued at \$420,548.70 and \$51,862.46, respectively; (iv) various bank accounts valued collectively at \$14,583.70; and (v) income tax refunds due the decedent valued at \$8,468.00.

The guardian ad litem points out a number of problems with Schedule A of the account. The guardian ad litem notes that there is no appraisal or market value letter to support the value of the New York real property listed on Schedule A. In addition, with respect to the value of the North Carolina property shown on Schedule A, the guardian ad litem concludes that the amount is understated by \$1,000.00 and that the value should be increased to \$11,226.30. The guardian ad litem also notes that there was a delay in collecting the proceeds of sale from the North Carolina property. Although the closing took place on April 7, 1995, a check representing the sales proceeds was not deposited until May 26, 1995.

The guardian ad litem further points out that Schedule A lists a death benefit of \$420,548.70 and an annuity of \$51,862.46 due from the Teachers' Retirement System. A letter from the City of New York Teacher's Retirement Board confirms the amount of the annuity as

\$51,862.46; however, a second letter states that the death benefit paid was \$460,548.78, a difference of \$40,000.00 from the amount reported by the executor on Schedule A. The \$40,000.00 discrepancy seems to correspond to the amount of group term life insurance due the estate which is separately shown due to the fact that such funds were not federally income taxable. Accordingly, the guardian ad litem believes Schedule A is understated by \$40,000.00.

With respect to the death benefit and annuity, the guardian ad litem also points out that although the amount actually collected was \$512,411.16, the amount reported by the executor on the original Federal Form 706 and New York State Form ET-90 filed on behalf of the estate was \$538,290.44. The New York State Form ET-90 was subsequently amended to report the combined value of these assets at \$491,951.94, being \$20,459.22 less than the amount actually collected. The guardian ad litem argues that, although the estate actually paid less tax by reporting the incorrect lesser amount on the amended return, the extra work expended in amending the estate tax returns likely resulted in additional legal and/or accounting fees charged to the estate. It also appears that the death benefit and annuity were not collected by the executor until September 20, 1996, more than two years after the decedent's death, which resulted in lost interest.

Concerning the bank accounts reported on Schedule A, the guardian ad litem points out that since each account was payable to a named beneficiary, the accounts should have been reported on Schedule K. In addition, the guardian ad litem questions whether the Lincoln Savings Bank account shown on Schedule A and which was payable to her ward was, in fact, paid to her ward.

In addition, the guardian ad litem notes that the following assets which are reported on either the Federal Form 706, the New York State Form ET-90, the Amended New York State

Form ET-90 and/or the Inventory of Assets filed for the estate pursuant to Uniform Rule 207.20 have been omitted from Schedule A of the account: (i) NY Life Insurance Policy in the amount of \$35,000.00; (ii) UFT Life Insurance Policy in the amount of \$5,000.00; (iii) automobile valued at \$500.00; (iv) two fur coats valued at \$1,000.00; and (v) jewelry valued at \$3,350.00.

Concerning the insurance policies, the guardian ad litem requested from the executor's counsel a Form 712 for each policy in order to substantiate values and to determine whether the policies were payable to named beneficiaries or the decedent's estate. According to the guardian ad litem, she has not received the Forms 712 or an explanation as to why the policies have been omitted from Schedule A. With respect to the decedent's automobile, the executor claims that the automobile was given to the decedent's son Kyle. The guardian ad litem questions whether the transfer was a pre-death gift or was made post-death. The guardian ad litem argues that if the transfer was, in fact, a pre-death gift, the value of the automobile should not have been included on the estate tax returns, in which case the executor should be surcharged for the additional estate tax paid due to the inclusion of the car in the decedent's taxable estate. On the other hand, if the transfer was made post-death, the transfer should be treated as a distribution to Kyle and should be charged against his residuary share. Similarly, the executor claims that the decedent's jewelry was given to the guardian ad litem's ward prior to the decedent's death. Since the jewelry was included in the decedent's taxable estate, the estate paid unnecessary estate tax for which the guardian ad litem argues the executor should be surcharged. Schedule A also includes unexplained deposits which the guardian ad litem indicates may relate to additional assets required to be reported on Schedule A.

The executor reports total decreases on Schedule B of \$327,775.40. Schedule B reports the complete loss of the decedent's New York real property due to foreclosure. At the time of

her death on June 19, 1994, the decedent had an outstanding mortgage with GreenPoint Bank in the amount of \$89,126.43. Letters testamentary were not issued until almost five months after the date of death. The guardian ad litem notes that the executor did not seek preliminary letters testamentary in order to handle the foreclosure proceeding. According to the guardian ad litem who reviewed all of the documents relating to the foreclosure proceeding, the default did not occur until after the decedent's death when the October 1, 1994 payment became due and payable. The guardian ad litem reports that the decedent's son Kyle claims to have voluntarily assumed the mortgage payments for the months of July, August and September, 1994, but was unable to make any further payments. The summons and complaint in the foreclosure action were not filed until August of 1995, more than one year after the decedent's death. The guardian ad litem further reports that according to the estate account ledger, there was \$18,551.00 in the account prior to the foreclosure action being instituted. Although part of that amount consisted of the proceeds of sale of the North Carolina property that was paid to the decedent's parents, the guardian ad litem notes that this bequest was to take effect only if there were "no remaining debts or expenses." The guardian ad litem argues that, contrary to the direction in the will, the executor distributed the net proceeds from the sale to the decedent's parents within two months after the sale took place. She argues that these funds should have been used to make monthly mortgage payments of \$851.00 on the GreenPoint Bank mortgage. The guardian ad litem asserts that proceeds from the sale together with the collection of various tax refunds would have enabled the executor to make approximately twenty (20) months of mortgage payments, thereby, avoiding the foreclosure.

Although, the executor claims that she could not preserve and protect the New York real property because Kyle Martin denied access to potential purchasers, the guardian ad litem

reports that there is no documentation to support this allegation. The guardian ad litem argues that irrespective of the issue of access, the executor failed to fulfill her fiduciary duty to secure and maintain the property, for which she must be surcharged.

Concerning Schedule C of the account, the guardian ad litem points out the following:

- (i) \$285.00 which was paid in connection with a church service for the decedent is shown as an expense on Schedule C, but no deduction was taken on the estate tax returns;
- (ii) \$700.00 for accounting fees is shown as an expense on Schedule C; however, the estate account ledger shows accounting fees of \$4,825.00 and a deduction of only \$4,125.00 was taken for accounting fees on the estate tax return;
- (iii) an advance payment of commissions in the amount of \$26,000.00 is shown to have been made to the executor on October 26, 1996 without an order of this court pursuant to SCPA 2311;
- (iv) \$5,570.66 in interest and penalties was paid with respect to the income tax relating to the estate's collection of the death benefit and annuity from the New York City Teacher's Retirement System. The tax was required to have been paid on or before April 15, 1997, but was not paid until June 18, 1997, resulting in the assessment of interest of \$2,880.53 and a penalty of \$2,690.13;
- (v) no deduction was taken on the 1997 fiduciary income tax returns for the \$350.00 charged for accountant's services in connection with the preparation of the returns;
  
- (vi) interest in the amount of \$5,211.48 was paid with respect to the New York State estate tax liability. The account ledger shows that there was a balance on hand in the estate account of approximately \$8,000.00 which could have been used to make a payment on account;
  
- (vii) Schedule C also reports a payment of \$180.00 to the City of Greensboro, North Carolina. The guardian ad litem argues that this amount should have been paid from the proceeds of sale of the North Carolina property and not charged to the estate;
  
- (viii) Schedule C shows travel expenses in the amount of \$722.00. A review of the estate account ledger shows that these charges relate to the purchase of two airline tickets, one for the executor in the amount of \$211.00 and one for the executor's New York counsel in the amount of \$511.00, in order to attend the closing on the North Carolina property. The guardian ad litem objects to the payment of New York counsel's airfare and questions why no deduction was taken on the estate tax return for travel expenses; and
  
- (ix) there are a number of expenses shown on Schedule C for which either no deduction was taken on the estate tax return or the deduction was understated resulting in the estate paying increased estate tax.

The guardian ad litem also points out that there are a number of expenses shown in the estate account ledger, including payments for safe deposit box fees and operating expenses, which are absent from Schedule C of the accounting. According to Schedule F of the Federal Form 706, the decedent did not maintain a safe deposit box, yet these payments shown in the account ledger seem indicate otherwise. The guardian ad litem requested an inventory of the contents of the safe deposit box, but has not been provided with one. The guardian ad litem was advised that the fee was a renewal fee. The guardian ad litem objects to the executor's failure to terminate the ongoing liability. The guardian ad litem also seeks an explanation as to the contents of the safe deposit box to determine if there are additional estate assets with which the executor is chargeable. With respect to the operating expenses, the guardian ad litem requested an explanation as to the nature of these expenses but has not received any information to determine whether these expenses are proper.

The guardian ad litem also objects to three payments of \$6.00 each shown in the estate account ledger classified as an "analysis charge" relating to Kyle's trust but not listed on Schedule C. The guardian ad litem argues that these charges should have been paid from Kyle's trust not from the estate. She claims, therefore, that one-half of these fees should be returned to her ward's trust.

In addition, the guardian ad litem points out additional errors on the Amended New York Form ET-90 which she asserts resulted in the estate paying an increased amount of New York estate tax. No charitable deduction was taken for the two \$5,000 cash bequests paid to the Children's Leukemia Research Association and the Nassau County Medical Center-Kiwanis Pediatric AIDS Society. In addition, the value of the North Carolina real property was not deducted in computing the decedent's gross estate. Similarly, the preparer subtracted the adjustable taxable gifts rather than adding them in computing the tentative tax base which resulted in an

underpayment of estate tax and an assessment of interest.

Concerning Schedule D, the guardian ad litem notes that there are no claims listed; however, the account ledger reflects payment of two debts which should have been reported. The first is a payment on October 12, 1996 of \$3,128.89 for credit card charges, and the second is a payment of \$200.00 to a gardener for pre-death services.

The guardian ad litem also notes that the executor properly deducted the value of the outstanding mortgage on the New York real property on Schedule K and the default interest on Schedule L; however, the deductions taken together only amount to \$106,081.53. The value of the New York real property which was included for estate tax purposes was \$110,000.00. Accordingly, the estate paid estate tax on \$3,918.47 even though the New York real property was totally lost to the estate.

Concerning Schedule E, the guardian ad litem is unable to determine whether her ward's trust was properly funded since no calculation as to the funding of the trust was provided. The account also fails to include a Schedule F setting forth new investments, exchanges and stock distributions. Similarly, Schedule A-2 was not included with the account. Schedule C-2 and E-1 also have no entries; however, the summary statement reflects an amount for each of these schedules.

Concerning the computation of commissions shown on Schedule I, the guardian ad litem contends that commissions were not calculated in accordance with SCPA §2307. In addition, the guardian ad litem argues that, based upon the executor's conduct in administering the estate, the executor should be barred from receiving any commissions and should be required to return the full commission taken, plus interest.

The guardian ad litem asks that the executor be directed to amend her account and provide the

information which the guardian ad litem previously requested but never received and that the executor's letters be suspended. Concerning the suspension of letters, SCPA 719 authorizes the court in a proper case to suspend or revoke letters without either petition or citation. The statute enumerates nine different situations authorizing such suspension or removal and in subdivision (10) expands the instances to include those set forth in SCPA 711. Where an estate is being improvidently managed, the fiduciary can be removed or suspended (SCPA 711[2]). The court is satisfied that there are sufficient circumstances warranting the suspension of letters issued to Charlotte Vincent. Accordingly, the letters issued to Charlotte Vincent are suspended and letters testamentary shall issue to the successor executor, Brenda Scarborough Edge, upon duly qualifying. If Brenda Scarborough Edge shall not so qualify within twenty (20) days of the date of this decision, letters of administration c.t.a. shall issue to the Public Administrator upon duly qualifying. The clerk of the court is directed to mail a copy of this decision and order to Brenda Scarborough Edge, at her last known address, and to the Public Administrator. The matter is scheduled for a hearing on April 27, 2007 at 9:30 a.m. on the issue of removal of the executor. Concerning the remaining issues raised in the interim report of the guardian ad litem, the executor is directed within twenty (20) days of the date of this decision to amend her account in accordance with the comments made in the report and to provide any information requested by the guardian ad litem.

With respect to the advance payment of commissions taken by the executor without prior court order, the executor is hereby directed to return to the estate the sum of \$26,000.00 plus interest at 9% from the time of receipt to the date of the decree (*Matter of Frewin*, NYLJ, May 6, 1999 at 34, col. 5 [Sur Ct, Queens County]; *see also Matter of Kern*, NYLJ, Apr. 1, 2002, at 25, col. 4 [Sur Ct, Nassau County]; *Matter of Dickman*, NYLJ, Aug. 8, 2000 at 28, col. 3 [Sur Ct, Nassau

County]).

This is the decision and order of the court.

Dated: March 8, 2007

JOHN B. RIORDAN  
Judge of the  
Surrogate's Court