

**Matter of the Estate of Romano**

2007 NY Slip Op 30424(U)

March 26, 2007

Sur Ct, Nassau County

Docket Number: 0314939

Judge: John B. Riordan

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

-----X  
Accounting of Joseph J. Sciacca as Executor of the  
Estate of

File No. 314939

CASIMIRO ROMANO,

Dec. No. 63

Deceased.

-----X  
In this contested accounting proceeding, most of the issues were resolved after trial (*see* Dec. No. 212, June 29, 2005). The only outstanding issues are: attorney fees paid to Joseph Sciacca, Esq., the executor; fees of the guardian ad litem; and accountant fees. The guardian ad litem objects to the fees of the executor as being excessive and duplicative. The guardian ad litem has also questioned the amount of commissions.

With regard to the question of commissions, Schedule I of the second amended accounting shows receiving commissions paid on total property received of \$1,835,521.43 and paying out commissions based on a total property paid out of \$1,389,166.17. The amount of paying and receiving commissions totals \$57,260.48, of which \$15,000 was paid in advance pursuant to court order. The guardian ad litem objects to the calculation of commissions as it includes unsold realty in the amount of \$340,994.00. The unsold realty in question was property that was transferred by the executors into the Casey Romano Trust and the Gabrielle Romano Trust. The guardian ad litem calculates that the commissions should total \$37,838.34.

Commissions are not normally payable on unsold real property (*Matter of Passuello*, 184 AD2d 108 [3d Dept 1992]). Only in special circumstances will the court allow the unsold realty to be included for the purpose of calculating commissions (*see Matter of Tucker*, 75 Misc2d 318 [Sur Ct, New York County 1973]). The circumstances identified by the fiduciary in the instant

proceeding do not satisfy the criteria as set forth in *Matter of Tucker* (*id.*; *see, e.g., Matter of Phelps*, 79 Misc2d 99 [Sur Ct, Westchester County 1974 and *Matter of Driver*, 77 Misc2d 664 [Sur Ct, New York County 1974]). The total amount of commissions payable to the fiduciary amounts to \$37,838.34, of which \$15,000 has already been paid.

With respect to the issue of attorney 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]. 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 [1925], *affd* 241 NY 593 [4th Dept 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], *affd* 16 NY2d 594 [1965] [Sur Ct, Nassau County]; *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 [3rd 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 Misc2d 423 [Sur Ct, Bronx County 1978]; *Matter of Reisman*, NYLJ, May 18, 2000, at 34 [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 accountant's fees, normally, accountant's services are not compensable out of estate assets unless there exist unusual circumstances that require the expertise of an accountant (*Matter of Meranus*, NYLJ, Mar. 31, 1994, at 37 [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 [1938]). "[T]he purpose of this rule is to avoid duplication (*Matter of Schoonhein*, 158 AD2d 183 [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)" (Warren's Heaton on Surrogate's Court Practice §93.08 [7<sup>th</sup> ed]).

In the instant proceeding, schedule C of the second amended accounting shows that Mr. Sciacca, the attorney/fiduciary, paid himself legal fees in August and September of 2005 in the amount of \$60,675.00. The schedule shows payment of \$20,000 to Ressa & Aitken, of which \$5,000 was purportedly returned to the estate and payment of \$47,773.27 to Mahon, Mahon & Kerins for legal fees incurred as trial counsel. Finally, Schedule C shows fees paid to the accountant, Benedict Lonetto, in the amount of \$9,900.

Mr. Sciacca's affirmation of legal services contains time records for the period of November 15, 2002 through December 23, 2004. His affirmation reflects services rendered in the total amount of \$45,675.00. With regard to the \$15,000 difference (the total amount paid to Mr. Sciacca [\$60,675.00] less time records [\$45,675.00]), Mr. Sciacca explains that he originally agreed to cap the fees to administer the estate (whether performed by Ressa & Aitken or himself)

at \$30,000. As he purportedly paid Ressa & Aitken \$15,000, Mr. Sciacca affirms that he performed the rest of the estate administration tasks and is entitled to the additional \$15,000. He further represents that the additional \$45,675 in legal fees was incurred as a result of defending the contested accounting proceeding.

The guardian ad litem objects to Mr. Sciacca's fee request on the following grounds: some of the hours represent work that was duplicative in nature; some of the charges were confusing and impossible to reconcile; and the \$15,000 was for anticipated services and would have been subsumed in the subsequent affirmation of legal services. Finally, the guardian ad litem requests that Mr. Sciacca be charged interest on the payment of legal fees to himself as he did not get prior court approval (SCPA 2111).

With regard to the payment of legal fees without court approval, SCPA 2111 is clear and provides that at any time during the administration of the estate an attorney who is a sole fiduciary may petition the court praying that he or she be permitted to receive a sum on account of his or her compensation for legal services (SCPA 2111[1]). Where an executor violates this section, it has been held that the "court cannot condone and must admonish counsel for his failure to comply with SCPA 2111" (*Matter of Gillett*, 139 Misc2d 188, 190 [Sur Ct, New York County 1988]; *see also Matter of Kinzler*, 195 AD2d 464 [2d Dept 1993]; 22 NYCRR §207.52).

After reviewing all of the aforementioned factors and in light of SCPA 2111, the court approves a total legal fee in the amount of \$52,000.00 to Mr. Sciacca. The overpayment shall be returned to the estate. The accountant fees are approved in the total amount of \$9,900.

The guardian ad litem has requested a fee of \$80,000 for his services rendered on behalf of Gabriella Romano and Casey Romano, the beneficiaries of the trust under the decedent's will. The guardian ad litem was appointed in 2003 to represent the two minor beneficiaries in this

contested accounting proceeding. The guardian ad litem attended multiple conferences, participated in six examinations of witnesses before trial, reviewed deposition transcripts, participated in many conferences both in court and outside of court, reviewed motion papers, met with the attorneys in an attempt to resolve the matter, filed multiple reports on behalf of his wards and participated in the four day trial on the contested accounting. The time records annexed to the guardian ad litem's affirmation of legal services shows that he spent 618.75 hours on this matter. The time spent and the services rendered by the guardian ad litem on behalf of his ward were, in the court's opinion, necessary and reasonable in the circumstances of this case. At the guardian ad litem's usual and customary billing rate of \$375 per hour, this would amount to approximately \$232,031.00 in legal services rendered. Mr. Sciacca objects to the fee request of the guardian ad litem on the grounds that the results achieved were insignificant. He further requests that pursuant to SCPA 406 that the fee of the guardian ad litem be assessed against Louis Romano personally.

SCPA 405 provides that the guardian ad litem shall receive reasonable compensation payable from the estate, the interest of the person under a disability or "for good cause shown, any other party" (SCPA 405[1][a],[b] and [c]). Where a party generated "unnecessary, unfounded or purely self-serving litigation", that party may be charged with the payment of the fee of the guardian ad litem (*Matter of Ault*, 164 Misc2d 272,274 [Sur Ct, New York County 1995]). In the instant proceeding, there were questions of fact which warranted a trial on the matter. Clearly, the litigation was not unfounded or purely self-serving. For this reason, Mr. Sciacca's request that the fee of the guardian ad litem be charged to Louis Romano, personally, is denied.

After consideration of all of the factors as set forth previously, the fee of the guardian ad

litem is fixed in the amount of \$80,000 which shall be payable 90% from the trust for the benefit of Casey Romano and 10% from the trust for the benefit of Gabrielle Romano.

The foregoing guardian ad litem fee shall be paid within 30 days of the date of the entry of the decree herein.

Settle decree.  
Dated: March 26, 2007

JOHN B. RIORDAN  
Judge of the  
Surrogate's Court