

Matter of Passalacqua
2008 NY Slip Op 33338(U)
December 9, 2008
Surrogate's Court, Nassau County
Docket Number: 329549
Judge: John B. Riordan
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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
Eric P. Milgrim, Public Administrator of Nassau County,
as Administrator c.t.a. of the Will of

File No. 329549

Dec. No. 544

ROSARIA PASSALACQUA,

Deceased.

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In the Matter of the Motion for Sanctions and Costs
brought by Minerva & D’Agostino, P.C.
against Anthony Passalacqua and Peter Passalacqua
in connection with the Estate of

File No. 329549

Dec. No. 635

ROSARIA PASSALACQUA,

Deceased.

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Before the court are two separate but related matters which were filed in connection with the estate of Rosario Passalacqua, who died on July 15, 2003, leaving a last will and testament dated April 21, 1989. The will divides decedent’s residuary estate equally among her four adult children, Connie, Joseph, Peter and Anthony. Joseph is the nominated executor under the terms of decedent’s will, but when the will was offered for probate, decedent’s other children objected to his appointment. On December 17, 2003, an agreement was reached by all parties in open court, pursuant to which the will was admitted to probate on March 1, 2004 and the Public Administrator of Nassau County was appointed as administrator, c.t.a.

The first matter to be addressed is the petition filed by the Public Administrator, dated May 2, 2005, which asks the court to settle his account as administrator, c.t.a. and approve legal

fees and a fee for the accountant for the Public Administrator. The petition further requests that the court approve fees for the attorney who represented Joseph in his petition to serve as the nominated executor under the will, allow reimbursement of certain funeral expenses paid by Connie, and approve the payment of commissions and distributions.

The second matter before the court is a motion brought by Minerva & D'Agostino, P.C., counsel for Joseph, as the nominated executor. Movant asks the court to award costs and attorney's fees and impose sanctions on Peter and Anthony, the objectants to the accounting, pursuant to Rules of the Chief Administrator of the Court, 22 NYCRR §130-1.1. Under this section, the court may award to any party or attorney the costs and attorney's fees resulting from frivolous conduct and may impose financial sanctions. Neither Peter nor Anthony have responded to the motion.

I. Petition to Settle the Account

A. Background

The Public Administrator filed a petition on May 16, 2005 to judicially settle his accounting which covered the period from July 15, 2003 through March 31, 2005. This petition was supplemented by an affidavit bringing the final account current through June 30, 2008. The account reflects principal and income collected in the total amount of \$423,079.49. Jurisdiction over all of the parties was completed on August 30, 2006. A conference was held on that date, and the parties were given until October 6, 2006 to file objections to the accounting. Anthony alone filed objections within this time period. Peter filed objections almost six months later. Numerous court conferences were held, a trial was scheduled, and the Public Administrator moved for an order granting summary judgment dismissing the objections. In Decision 169,

issued June 30, 2008, this court dismissed all of the objections filed by Peter and all of Anthony's objections, except as to the correction of certain schedules and those objections which pertain to attorney's and accountant's fees. The court directed the Public Administrator to serve and file corrected schedules E and J and an affidavit bringing the account down to date, and further directed the Public Administrator, the accountant for the estate, and Minerva & D'Agostino, P.C. to file affidavits of services rendered, after which the court would review the fees. Affirmations bringing the account down to date and amending schedule E were filed with the court, but there is no record of an affirmation amending schedule J, which the court had directed the Public Administrator to file in order to correct a harmless clerical error. Affirmations of services rendered were filed by the attorney for the Public Administrator, the attorney for Joseph as the nominated executor and the attorney who represented Connie. An affidavit of services was also filed by the accountant for the Public Administrator.

B. Fee of the attorney for the administrator

(1) Considerations in setting the fee

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 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 [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 (*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]).

In this case, the attorney for the Public Administrator submitted an affirmation of services which indicates that the firm spent in excess of 239 hours on this matter over the course of five years. The affirmation submitted by the attorney indicates, as does the court record, that the legal fees associated with this estate were dramatically increased by the conduct of Peter and Anthony throughout this administration, which included obstruction, threats and accusations, some of which will be addressed in the second part of this decision. The affirmation also reflects the many services provided by counsel, including, but not limited to, preparing and filing a decree granting probate and the oath of the Public Administrator; participating in numerous court conferences, control dates and return dates; preparing and filing a New York estate tax certificate and release of lien; preparing, executing and filing a notice to quit occupancy; commencing eviction proceedings; attending the public auction and related closing of the sale of the premises

owned by decedent; preparing, filing and serving the final account, the amendments, the affidavit updating the account and all of the related documents; making partial distributions; and reviewing objections and filing a motion to dismiss. The services will also include preparing, filing and serving the final decree. If the firm's billable rates were applied to the actual time spent, the result would be a bill in excess of \$45,000.00, in addition to the flat fee of \$1,500.00 paid in connection with the sale of decedent's real estate. Instead, the attorney has offered to accept a reduced fee, including disbursements, of \$40,000.00, of which \$27,640.75 has been paid and \$12,359.25 remains unpaid. This represents a fee reduction of approximately 12%. The court commends the attorney for his outstanding representation of the Public Administrator, often under extremely trying circumstances, and for the attorney's offer to voluntarily reduce his fee. The court fixes the fee of counsel for the Public Administrator in the amount requested, which is \$1,500.00 in connection with the sale of decedent's real estate and \$40,000.00 in connection with the estate administration.

(2) Allocation of the legal fee

In the concluding paragraph of his affirmation, the attorney for the Public Administrator requests that the court consider allocating and charging a portion of the attorney's fees against the shares of Peter and Anthony, with the balance to be paid out of the residuary estate. The Court of Appeals held, in 1971, that there is no authorization under SCPA 2110 for charging the legal services provided to one party against another party's share of the estate (*Matter of Dillon*, 28 NY2d 597 [1971]). In *Matter of Urbach*, the Third Department found that a lower court had "abused its discretion in charging respondent's residuary share with litigation expenses ... incurred by petitioners as the result of respondent's frivolous objections to the final

accounting ... Established New York common law requires that all parties to a controversy, the victors and the vanquished, pay their own counsel fees ... Although SCPA 2110 authorizes the court to fix the amount of counsel fees for services rendered to an executor or a testamentary beneficiary ... and to ‘direct payment therefor from the estate generally or from the funds in the hands of the [executor] belonging to [a testamentary beneficiary]’ in *Matter of Dillon* ... the Court of Appeals held that SCPA 2110 ‘does not authorize payment for legal services rendered a party to be charged against the share of other individual parties’” (*Matter of Urbach*, 252 AD2d 318, 321 [3d Dept 1999] [internal citations omitted]). In *Matter of Sall*, the First Department reviewed a decision of the Surrogate’s Court of New York County in which the court had directed payment by objectant of a portion of the fiduciary’s counsel fees. Citing *Matter of Urbach*, the court stated that “notwithstanding that a large portion of the legal services were necessitated by objectants’ unwarranted litigiousness, such discretion ‘does not authorize [the Surrogate] to charge a beneficiary for the counsel fees incurred by an executor’” (*Matter of Sall*, 292 AD2d 195, 195 [1st Dept 2002] [internal citations omitted]). In a decision rendered in 2001, this court also cited *Matter of Urbach* for the proposition that “[t]o the extent that the petitioner seeks under 2110 to authorize the payment for legal services rendered to the attorney for fiduciary in a contested accounting be charged against the share of ...the unsuccessful contestant, binding case law prohibits that result” (*Matter of White*, NYLJ, Jan. 9, 2001, at 30, col.3 [Sur Ct, Nassau County], citing *Matter of Urbach*, 252 AD2d 318 [3d Dept 1999]). While the court recognizes that a substantial portion of the costs of counsel incurred by the Public Administrator were the direct result of the conduct of Anthony and Peter, the court does not have the discretion to charge a portion of these legal fees against their share of the estate, and so must deny this

portion of the relief requested.

C. Fee of attorney for the nominated executor

The attorney who represented Joseph in his capacity as nominated executor has also submitted an affirmation of fees. The court has reviewed this document, which incorporates concurrent time records, and finds that the services provided by Joseph's attorney included obtaining the affidavits of attesting witnesses, which required locating a missing witness, serving citation on the other interested parties, and participating in the negotiations and resulting stipulation which led to the appointment of the Public Administrator. The time records reflect that the fee requested reflects only those services provided to the estate between August 5, 2003, and December 29, 2003, which is prior to the appointment of the Public Administrator in place of Joseph. The court has carefully reviewed the affirmation and time records and notes that all of the services reflected were directly related to assisting Joseph in fulfilling his responsibilities as the nominated executor. Therefore, the court approves the requested fee of \$5,212.50, of which \$5,107.50 should be paid directly to Joseph as reimbursement for his payment of legal fees, and the balance of \$105.00 should be paid to the attorney for unpaid fees.

D. Fee of attorney for an interested party

An affirmation of services has also been submitted by the attorney who represented Connie in connection with her interest in this estate. The attorney is asking that the court direct that payment of her fee, as well as the fee of the attorney for the Public Administrator, be paid out of the shares of Anthony and Peter, whose actions, she argues, "inordinately delayed" the finalization and closing of the estate. The attorney indicates that she spent approximately 21 hours of time in her representation of Connie, for a total fee of \$7,350.00. For numerous reasons,

the court is unable to grant this attorney's request. First, "[e]xcept when the SCPA otherwise provides or when compelling reasons exist for so doing, the court shall not fix attorneys' compensation or make allowances to parties for counsel expenses unless a proceeding is instituted under SCPA 2110 or unless, in an accounting, the petition and citation state that an application will be made for determination of compensation, the allowance of counsel expenses and the amount thereof" (*Matter of Carver*, 2008 NY Slip Op 50632U [Sur Ct, Essex County 2008]). Counsel did not initiate a proceeding pursuant to SCPA 2110, and the petition of the Public Administrator does not include a request for the payment of this attorney's fee. Second, "[a]s a general rule, services performed for a distributee or a legatee must be compensated for by such client and not paid out of the estate. An exception arises where it is shown that the efforts of the attorney benefited (sic) the estate. The test of benefit to the estate is whether the services rendered resulted in an enlargement of the beneficiaries' interest over what they would have received if the services had not been rendered" (*Matter of Weinstock*, NYLJ, Nov. 30, 1998, at 32, col. 3 [internal citations omitted]). "[I]n the cases where compensation is paid by the estate to one who represents an individual interest, the benefit to the estate is invariably a financial benefit" (*Matter of Greer*, 198 Misc 921 [Sur Ct, New York County [1950]). In the present case, no benefit accrued to the estate as a result of counsel's legal services. The attorney herself states that she "performed no services with regard to the marshalling (sic) of the assets, except to keep abreast of the status of the estate on behalf of her client (affirmation of Diane E. Wilkie dated March 3, 2008, at paragraph 6)." Third, even if the court were to find merit in the attorney's request for a fee in the amount requested, the court must reiterate that as to the branch of relief which requests that fees be paid out of the residuary shares of Anthony and Peter, the court lacks

discretion to charge a specific beneficiary for legal fees incurred by another party. On these grounds, the court must deny all of the relief requested.

E. Fee of accountant for the estate

The court has also been asked to review the accountant's fees. In Decision 169, issued by this court on June 30, 2008, the question of when it might be appropriate to compensate an accountant for services provided to an estate was addressed. The accountant for this estate has submitted an affidavit of services requesting a fee of \$2,800.00. The affidavit and the accounting indicate that the accountant prepared the estate's fiduciary income tax returns for the years ending on June 30th of 2004, 2005, 2006, and 2007, and that the firm will prepare the final return. 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 \$2,800.00, which includes paid fees of \$1,650.00 and unpaid fees of \$1,150.00.

F. Other relief requested

The petition of the Public Administrator also asks that the court approve reimbursement of Connie for her outlay of specified funeral expenses. Reimbursement is approved. The petition asks that the court approve commissions and distributions, and the court approves the distribution of the funds remaining in the estate and approves the commissions, subject to audit.

The Public Administrator's petition also asks that \$6,000.00 of rent payments collected by Peter after decedent's death be treated as an advance distribution to Peter of his share of decedent's estate. Pursuant to Decision 169, the court granted this branch of the Public Administrator's motion for summary judgment and dismissed all objections to the requested allocation.

II. Motion for Costs, Attorney's Fees and Sanctions

A. Background

This motion was filed on August 21, 2008 by Minerva & D'Agostino, P.C., the law firm which represented Joseph in his petition for letters testamentary. It charges the objectants, Anthony and Peter, with frivolous conduct as defined under 22 NYCRR 130-1.1, and asks the court to award costs and attorney's fees incurred by movant as a result of this conduct. In addition, movant asks the court to impose financial sanctions on Anthony and Peter. The relevant portions of the rule provide:

Section 130-1.1. Costs; sanctions

(a) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part ...

(b) The court, as appropriate, may make such award of costs or impose such financial sanctions against either an attorney or a party to the litigation or against both ...

(c) For purposes of this Part, conduct is frivolous if:

(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;

(2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or

(3) it asserts material factual statements that are false.

Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.

B. The statements underlying the motion

In the affirmation in support of the relief requested, movant quotes written statements made by Anthony and Peter, characterized by movant as defamatory and slanderous, which he argues fall within the definition of frivolous conduct pursuant to the above rules. These statements charge movant with bullying, threatening, intimidation, underhanded and manipulative conduct, documented and recorded lying and criminal corruption, dishonesty, criminal fraud, tyranny, conspiracy, obstructing justice and defrauding due process. Among the recipients of one or more of these statements are movant, the mayor of the town in which movant practices law, Joseph, the court, the Surrogate and his staff, the United States Attorney General, Speaker of the House Nancy Pelosi, and counsel for the Public Administrator. For the sake of brevity, as well as decency and a desire to avoid repeating these accusations beyond what is necessary to support this decision, the court will not quote the full text of all of the written statements verbatim. Instead, the court will note the date, recipients and context for the relevant statements, and will cite some of the language pertinent to movant's prayer for relief. As indicated below, the first letter was written by Anthony, while statements (2) through (7) were written by Peter.

(1) July 31, 2008 correspondence from Anthony to the court, in which Anthony opposed Joseph's request for reimbursement of legal fees incurred in connection with Joseph's petition to be appointed executor of decedent's estate prior to the settlement agreement under which the Public Administrator was appointed administrator c.t.a.

In this letter, Anthony charges that Charles Rattoballi, the attorney who drafted the will and to whom, after decedent's death, Anthony gave possession of the original, told

Anthony that Albert D'Agostino, a partner in movant's law firm, "bullied him, intimidated him, and pressured him into giving up the will over to him."

(2) August 11, 2008 correspondence from Peter to the Surrogate and some of his staff, Joseph, Albert D'Agostino, and the Public Administrator and his attorney

"D'Agostino is a liar and criminally corrupt".

"This is all well documented, and is Court record."

"Before this is over, D'Agostino will pay prior to going to prison ...".

(3) Peter's objections to the accounting dated February 26, 2007

Paragraph First of the objections charges that D'Agostino is "as corrupt, as dishonest [sic], as evil, as criminal as can possibly be ..." and Paragraph Third refers to Joseph and D'Agostino as "the low life scum of the earth."

(4) Peter's correspondence dated February 22, 2007 to Mark Brosnan, counsel for the Public Administrator, and copied to the U.S. Attorney General and House Speaker Nancy Pelosi

Peter charges that "D'Agostino, Joseph Passalacqua (sibling to Estate), Minerva, McGrath are one entity in full conspiracy to criminally defraud all at all cost, are the evil below all evil, the corrupt below all corrupt ... and all Judges they deal with both in the town of Valley Stream and County of Mineola are in full Matrix of tyranny and corruption." Peter goes on to say that "D'Agostino has been trying to buy himself a Judgeship in Mineola, but his corruption is too rough and too open and he needs to polish it for a few decades."

(5) Peter's correspondence to the court dated September 15, 2003

Peter charges that "D'Agostino stole the original Death Certificate."

(6) *Peter's correspondence to the court dated November 4, 2003*

In this letter Peter charges Joseph and D'Agostino with "intended conspiracy to defraud with full purpose and intent."

(7) *Peter's correspondence to movant dated December 29, 2003, in connection with a variance application that Minerva & D'Agostino, P.C., was handling, which correspondence was copied to movant's client and to the mayor of the town where movant's office is located*

Peter states that Ross Gerber, a partner at Minerva & D'Agostino, "stumbled continuously because he did not understand/did not want to understand the 'Rule of Law' and 'Due Process'", and goes on to say that Gerber "was totally out of control, nasty and started to make a number of threats at me. After he was told to stop, he continued to lie, and lie, and lie, and lie. He was in complete 'Obstruction of Justice' and continued to no end to defraud' "Due Process ... "

C. Analysis

Anthony's statement in document (1) above doesn't rise above the level of opinion, and it is even possible that the statement is a somewhat accurate reflection of Rattoballi's defense of his decision to give the original will to D'Agostino, despite Anthony's direction that Rattoballi retain it. The court takes a similar view of Peter's opinion as stated in document (5) that "D'Agostino stole the original Death Certificate." D'Agostino found the death certificate in an envelope intended for Anthony which had mistakenly been delivered to D'Agostino's law firm. D'Agostino took the death certificate out of the envelope intended for Anthony and filed the death certificate with the court. No sanctions can be imposed on the basis of these statements.

Statements made in documents (4) and (7) above were contained in correspondence that was not sent to or filed with the court. Correspondence outside of actual court proceedings and not directed to the court appears to be outside the parameters of frivolous conduct as described in 22 NYCRR §130-1.1. In a decision addressing allegedly defamatory letters and flyers sent to recipients other than the court, the First Department denied sanctions for prosecuting a frivolous action because, among other factors, it could not be said that the conduct “resulted in improper use of the court’s time” (*McGill v Parker*, 179 AD2d 98 [1st Dept 1992]) [internal citations omitted]). Statements contained in letters sent to recipients other than the courts cannot, in and of themselves, be said to have improperly utilized court time. On this basis, no sanctions are available in connection with these two letters.

The last statements to be addressed in the context of this motion are those contained in documents (2) and (6) - Peter’s correspondence to the court, and document (3) - Peter’s objections to the Public Administrator’s accounting. While the ugly and vitriolic language found in these documents is disturbing, the question to be determined by the court is whether these statements constitute frivolous conduct within the meaning of 22 NYCRR § 130-1.1. Subsection (c) provides that “[f]or purposes of this Part, conduct is frivolous if ... (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false” (22 NYCRR § 130-1.1[c] [2] and [3]). The statements contain baseless charges and threats, and it would be obvious to a reasonable person reading these documents in their entirety that these statements are not based in reality. Further, it is not clear that the purpose of the statements is to delay or prolong litigation, or harass or maliciously injure D’Agostino. In fact, it is unclear that this conduct serves any

purpose whatsoever. The court is reluctant to impose sanctions for these comments, even as the court acknowledges that these excerpts come dangerously close to conduct which would be sanctioned. The court hereby puts Peter as well as Anthony on notice that it is within the court's power to protect the estate from incurring expenses which are the result of behavior that is frivolous within the meaning of 22 NYCRR 101-1.1, and that a continuation of such conduct on their part will only serve to reduce their interest in the estate (*Matter of Denend*, NYLJ, Mar. 23, 1993, at 25, col.5 [Sur Ct, Suffolk County]).

Movant also asks that the court award costs for legal fees and expenses incurred in connection with objectant's statements. The court is unable to grant this portion of the relief because the motion contains no specific charges that the objectant's statements resulted in additional costs or fees for legal services. Moreover, even if additional fees and costs had been incurred, movant has failed to provide the court with an affirmation of services or concurrent time records in support of this relief. In connection with a motion for sanctions, the Supreme Court of New York County noted that where an application for costs and fees is made, movant "must submit a particularized affidavit setting forth the costs and fees associated with this motion" (*Chiu v City of New York*, 12/16/05 NYLJ 23, (col.1) [Sup Ct, New York County]). This branch of the motion which seeks costs and legal fees is denied.

III. Conclusion

The Public Administrator is directed to file and serve a corrected schedule J and settle a decree within sixty days of the date of this decision. The decree shall discharge the surety and direct that the balance of the estate, after payment from the residuary estate of

(A) fees for

- (1) the attorney for the Public Administrator,
- (2) the attorney for Joseph as the nominated executor,
- (3) the accountant for the estate,

(B) reimbursable funeral expenses to Connie; and

(C) the fiduciary's commissions and reasonable expenses,

shall be distributed in equal shares among Connie, Joseph, Peter and Anthony.

Settle decree.

Dated: December 9, 2008

JOHN B. RIORDAN
Judge of the
Surrogate's Court