

Matter of Peter B. McAlpine

2010 NY Slip Op 31705(U)

June 30, 2010

Surrogate's Court, Nassau County

Docket Number: 335489

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 by Alissa Russo, as the
Executor of the Estate of

PETER B. McALPINE,
a/k/a PETER BOWES McALPINE,

File No. 335489

Dec. No. 26355

Deceased.

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In this contested accounting proceeding, the executor, Alissa Russo, moves for summary judgment dismissing all twenty-four objections filed by her brothers, Peter McAlpine, Scott McAlpine and Glenn McAlpine. Peter, Scott and Glenn, who are self-represented, oppose the motion and have cross-moved for an order (I) restraining the executor from pursuing further repetitive, unnecessary and frivolous legal tactics; (ii) surcharging the executor, personally, for unnecessary costs incurred with regard to her unnecessary and frivolous summary judgment motion; and (iii) compelling the executor to comply with respondents' request for discovery.

The decedent, Peter McAlpine, died on July 22, 2004. He was survived by four children, Alissa Russo, Peter McAlpine, Scott McAlpine and Glenn McAlpine. Letters testamentary issued to Alissa Russo on January 21, 2005. Alissa Russo has filed an account of her proceedings covering the period July 22, 2005 through September 30, 2007. The accounting shows charges to the accounting party of \$743,421.73. The accounting was then updated through October 31, 2009 showing total charges of \$930,449.00. Peter, Scott and Glenn filed verified objections containing twenty-four separate objections to the account. On the executor's motion for summary judgment, the following determinations are made on each of the twenty-four objections to the account.

OBJECTIONS 1 and 2

The objectants object to the inconsistent periods shown in the petition (July 22, 2004 through August 9, 2007) and the accounting (July 22, 2005 through September 30, 2007) (Objection 1) and the inconsistent gross value shown in the petition (\$735,708.21) and the accounting (\$743,421.73) (Objection 2).

According to the petitioner, the inconsistencies are because the accounting was redrafted. The correct period is the period shown on the accounting and the correct value is the value shown on the accounting. Nevertheless, the court notes that the decedent died on July 22, 2004 and letters testamentary issued to petitioner on January 21, 2005. Thus, her accounting does not cover the appropriate period. The petitioner's accounting should begin at the decedent's date of death. Here, petitioner states in response to the objections that her accounting runs from July 22, 2005, a full year after the decedent died and six months after letters testamentary were issued to her. Accordingly, petitioner is directed to file an amended accounting commencing with the decedent's date of death.

OBJECTION 3

The objectants object to the inconsistent commissions shown in the petition (\$25,171.00) and the accounting (\$26,311.00).

According to the petitioner, the commissions computation was amended after the wrongful death action which accounts for the difference in the computation.

Summary judgment is granted as to Objection 3 and the objection is dismissed solely as to the issue of inconsistency and not as to whether such commissions are allowed.

OBJECTION 4

The objectants claim that the accounting underestimates the cash located in the decedent's home. Although the executor is charged with the responsibility of investigating whether property exists and taking every step necessary to obtain the property, the burden of establishing assets of the estate is upon the objectant and it must be established with reasonable certainty, and not left to mere conjecture or suspicion (*Matter of Antoniadès*, 43 Misc 2d 782 [Sur Ct, Nassau County 1964]). Here, the petitioner asserts that she has listed all of the cash located in the decedent's home. "While some of the facts may have aroused suspicion, no concrete evidence of any unaccounted...assets has been shown by the objectants" (*Matter of Antoniadès*, 43 Misc 2d 782, 783 [Sur Ct, Nassau County 1964]).

The objectants have failed to come forward with any proof that the value of the cash is underestimated or that the petitioner commingled the cash with her own funds. Nevertheless, the petitioner admits that she did not deposit the cash into an estate checking account until sometime after she took it in her possession even though she claims her brothers were in agreement with her actions. A triable issue of fact has been raised as to whether the petitioner should be surcharged for her failure to invest the funds in an interest-bearing account.

Accordingly, summary judgment is granted as to Objection 4 and Objection 4 is dismissed other than as to the branch of the objection relating to the petitioner's failure to invest in an interest-bearing account.

OBJECTION 5

The objectants object to the petitioner's failure to invest the \$896.77 in coins in jars or confirm the market value until twenty-six months after she collected the coins. The petitioner claims that her brothers requested that she not deposit the coins, and she followed this request until their relationship became adversarial. The objection as to the petitioner's failure to obtain the market value is without merit. Although an issue of fact has been raised as to whether the petitioner should be surcharged for her failure to invest the funds in an interest-bearing account, the amount earned would be de minimus and does not warrant further proceedings on that issue.

Accordingly, summary judgment is granted as to Objection 5 and Objection 5 is dismissed.

OBJECTION 6

The objectants object to the listing of the personal property shown on Schedule A (furniture and furnishings \$15,499.74) as incomplete and inaccurate. According to the objectants, the petitioner failed to value and safeguard the property and improperly disposed of the furnishings. The objectants further claim that the petitioner has in her possession items not included on Schedule A.

According to the petitioner, she had agreed with her brothers to make an in-kind distribution of the personalty. She admits that she did not have the contents of the decedent's residence appraised. The petitioner, however, alleges that her brothers "looted" the house of all valuable personalty several days before the closing and have refused to allow appraisers to have

access to value the property. She claims that, since her brothers did not cooperate with appraisers and refused to allow them to view and appraise the property, she has included in the account only the items of personal property known to her. The petitioner acknowledges that she is in possession of items numbered 35-43, which are valued at \$799.74, and this amount has been credited against her share.

Summary judgment is granted as to this objection since it appears that the objectants impeded the petitioner's ability to inventory and appraise the personalty and took possession of these items without the petitioner's participation. Allegations regarding the disposal of items of value are conclusory. Nevertheless, for purposes of computing distribution, arrangement must be made for an appraiser to view the item so that an appraisal may be conducted. A conference shall be held on July 20, 2010 at 9:30 a.m. to make arrangements for the appraisal.

OBJECTION 7

The objectants object to the sale of the real property at 81 Whitehall Road, Rockville Centre New York for \$450,307.00 as below fair-market value.

The petitioner claims that the purchaser learned of the availability of the property from a real estate broker who contacted Peter. The broker advised the petitioner that the purchaser had agreed to pay her commission on the sale and that the purchaser would pay net to the seller \$450,000.00. If a 4 percent commission was, in fact, paid by the estate as seller on a sales price of \$467,000.00, the estate would have paid a commission of \$18,680 and would have netted only \$448,320. Moreover, the petitioner claims that she obtained an appraisal prior to offering the

property for sale, which valued the property at \$465,000.00. She also alleges that she received a list of comparable sales in the area, which showed prices below \$450,000.00. However, petitioner has not filed any appraisal reports in support of her claims.

As there is a question of fact as to whether the petitioner sold the property at market value, summary judgment is denied on Objection 7.

OBJECTION 8

The objectants object to the sale of the Hope Falls real property to the petitioner and her husband for \$54,325.09 on the basis of self-dealing and her failure to obtain an appropriate valuation.

The petitioner claims that she and her brothers all agreed that the Hope Falls property should stay in the family and that she obtained an appraisal valuing the property at \$54,000.00, which she in fact paid. The objectants contend that other offers were made and that at one point, the petitioner listed the property for \$82,000.00

The objectants have raised a triable issue of fact as to the issue of self-dealing. Accordingly, summary judgment is denied as to Objection 8.

OBJECTION 9

The objectants object to the legal fees paid to the petitioner's prior counsel as excessive.

Summary judgment is denied as to this Objection 9. The court will determine the reasonableness of all legal fees upon submission of affirmations of legal services.

OBJECTIONS 10 - 12

The objectants object to various expenses relating to the cleanup of the Whitehall Road residence on the basis that paid receipts have not been provided.

The petitioner is directed to submit copies of paid receipts to the court within twenty (20) days of the date of this decision. Upon submission of same, summary judgment will be granted and Objections 10, 11 and 12 will be dismissed. Failure to submit these receipts will result in the denial of summary judgment.

OBJECTION 13

The objectants object to the fee paid to the accountant. The fee of the accountant will be determined by the court upon submission of an affidavit of accounting services.

OBJECTIONS 14 and 15

The objectants object to the payment of interest and penalties in the amounts of \$98.23 and \$307.95 relating to the late filing of tax returns and late payments.

The petitioner claims that the penalties are minor and were due to confusion regarding due dates.

Upon searching the record, summary judgment is granted to objectants with respect to Objections 14 and 15. The petitioner is responsible for timely filing the returns. Her response claiming that she was confused regarding due dates is unavailing. The petitioner is surcharged for interest and penalties in the amount of \$406.18.

OBJECTIONS 16 and 17

The objectants object to expenses paid by the estate in connection with the sale of the Hope Valley property to the petitioner.

The court has denied summary judgment on objection 8 on the basis that the objectants have raised a triable issue of self-dealing by petitioner with respect to the sale. Accordingly, summary judgment is denied as to Objections 16 and 17.

OBJECTION 18

The objectants object to Schedule E which sets forth a proposed distribution of principal on the basis that the values do not represent the fair-market value of the personalty and that they should not be charged with distribution because they are only safe-guarding the personalty.

The issue of the personalty, including valuation and distribution, will be addressed at the conference on July 20, 2010.

OBJECTION 19

The objectants object to the proposed distribution because it is incorrect.

According to the petitioner, subsequent to filing the accounting, she made two partial distributions. As a result, the proposed distribution is incorrect because it does not reflect the subsequent distributions.

Summary judgment is granted and the objection is dismissed. The amended accounting directed to be filed above shall bring the account down to date.

OBJECTION 20

The objectants object to the commissions on the basis that the computation is incorrect and on the basis that commissions should be denied on the grounds of self-dealing and other wrongdoing.

Summary judgment is denied as the Objection 20 as the objectants have raised an issue of fact as to wrongdoing in connection with the sale of the Whitehall residence and the Hope Valley property.

OBJECTION 21

The objectants object to the petitioner's failure to include in the account her father's interest in a wrongful death proceeding commenced by the petitioner as administrator of her mother's estate.

The petitioner states that the case was settled for \$275,000.00. The distribution was included in the accounting for her mother's estate. The decree settling the account was on notice to the objectants. Although the original accounting did not show the proceeds, the amended accounting incorporated the settlement.

Summary judgment is granted and Objection 21 is dismissed.

OBJECTION 22

The objectants object to the failure of the executor to include in her account loans made to her and her husband. The petitioner denies any loans were made by the decedent to either her or her husband.

The allegations made by the objectants regarding loans are conclusory. The objectants have not come forward with any evidence of such loans. Accordingly, summary judgment is granted and Objection 22 is dismissed.

OBJECTION 23

The objectants object to the failure of the petitioner to include in the account jewelry which previously belonged to her mother and grandmother.

The petitioner claims that her father gifted various pieces of her mother's and grandmother's jewelry to her.

The party alleging a gift has the burden of proof (*Gruen v Gruen*, 68 NY2d 48 [1986]; *Matter of Szabo*, 10 NY2d 94 [1961]). The petitioner must establish all of the elements of a gift. Accordingly, summary judgment is denied as to Objection 23.

OBJECTION 24

The objectants object to the petitioner's failure to include the decedent's automobile in the account.

According to the petitioner, her father owned a 1990 Mercury Cougar at the time of his death. She does not know the value. Her brother, Scott, used the auto prior to her father's death and for some months thereafter until the petitioner declined to renew the insurance. She claims Scott gave the car to the decedent's friend because that was the decedent's wish. Petitioner alleges that she was not involved in the transfer.

The objectants dispute the petitioner's allegations as to her involvement in the transfer. A fiduciary is responsible for safeguarding and preserving the decedent's assets" (*Matter of Antoniades*, 43 Misc 2d 782, 783 [Sur Ct, Nassau County 1964]).

A triable issue has been raised as to the petitioner's failure to account for the automobile. Accordingly, summary judgment is denied as to Objection 24.

With respect to the cross-motions, the branches seeking an order (I) restraining the petitioner from pursuing further repetitive, unnecessary and frivolous legal tactics; and (ii) surcharging the petitioner, personally, for unnecessary costs incurred with regard to her unnecessary and frivolous summary judgment are denied. The branch of the cross-motion requesting an order compelling the petitioner to comply with outstanding discovery will be addressed at the conference on July 20, 2010 as the petitioner denies there is any outstanding discovery.

The foregoing constitutes the decision and order of the court.

Dated: June 30, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court