

Matter of Emile

2010 NY Slip Op 33543(U)

November 30, 2010

Sur Ct, Nassau County

Docket Number: 356964

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 Estate of

File No. 356964

JULIUS EMILE,

Dec. No. 26765

an alleged decedent.
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This is a petition for letters of administration filed by Philip Emile, Jr. in connection with the estate of his son, Julius Emile. Petitioner also seeks a determination that the alleged decedent, Julius, be found to have been deceased as of June 1, 1994 pursuant to EPTL 2-1.7 (a) by virtue of his unexplained, continuous absence since June 1991. Petitioner obtained jurisdiction over Julius by service of process by publication pursuant to SCPA 1003 (1). The petitioner has submitted an affidavit and a supplemental affidavit of a private investigator, heirship affidavits from the three living siblings of Julius, and a third-party heirship affidavit from a friend of Julius. In connection with this proceeding, the court appointed a guardian ad litem to represent the interests of Julius; her report was filed on December 18, 2009.

The documents filed with the court establish the following facts: Julius was born on November 8, 1957. At the time of his disappearance from 128 Lillian Avenue, Freeport, New York, in or about June 1991, Julius was unmarried without children. An affidavit submitted by petitioner indicates that Julius was an unemployed artist who had been receiving Social Security disability payments. He did not notify any family members that he was leaving and left no indication that he would return. His wallet, which contained his Social Security card, driver's license, credit cards and money, as well as his keys, were left in his bedroom. Julius was never seen or heard from again.

The alleged decedent was survived by his father, Philip Emile, Jr. and his mother, Alice Emile, who died on April 24, 2009. The value of all personal property owned by Julius is \$65,716.80, which consists of one savings account held at Chase Bank.

Pursuant to EPTL 2-1.7, under certain circumstances the court may determine that an individual is deceased.

“A person who is absent for a continuous period of three years, during which, after diligent search, he or she has not been seen or heard of or from, and whose absence is not satisfactorily explained shall be presumed, in any action or proceeding involving any property of such person, contractual or property rights contingent upon his or her death or the administration of his or her estate, to have died three years after the date such unexplained absence commenced . . . ”(EPTL 2-1.7).

Thus, three years after an absence which cannot be otherwise explained, it may be presumed that the absent individual died (*Matter of Sanchez*, 22 Misc3d 1128A [Sur Ct, Nassau County 2009]).

The report of the guardian ad litem indicates her recommendation that Julius be declared dead. She refers to her interview of the petitioner in which he which indicated that while Julius had some history of leaving home from time to time, he would always return. The guardian ad litem advised the court that there has been no activity in connection with the alleged decedent's bank account since the date of his disappearance. She notes, also, that Julius' brother, Darrell, reported finding a letter in the wallet left behind by Julius in which Julius made reference to nuclear disaster, the end of the world, dying a virgin and his own murder. Although a missing person report was filed with the Freeport Police Department after Julius disappeared, to date it has yielded no results.

A report by a private investigator hired by the petitioner reflects that despite an extensive nationwide record search, no information or records were found concerning Julius during the 18

years since his disappearance in 1991. As part of the due diligence search, 16 individuals with the name “J. Emile” were identified and contacted, but none of said individuals were the missing person who is the subject of this proceeding. Phone searches were conducted along with a motor vehicles registration search, a death records search, a national persons search, a bankruptcy search, a national criminal search using Department of Corrections records, national arrest logs and national court records, a civil courts public information search, a Florida accident search, a sexual offenders search, a marriages and divorce search, a foreclosures search, a lien and judgment search, a driver’s license search, a professional license search, a recreational license search, a hunting and fishing license search, a voter registration search, a property deeds search, a water craft search, a corporations search, an international internet domains search, and an international email address search.

There is no evidence in the record to suggest that the disappearance of Julius is attributable to an estrangement from his family or to legal problems. He has not contacted his family since the date of his disappearance.

Based on the above, the court concludes that the petitioner has met his burden of satisfying the statutory mandates of EPTL 2-1.7 (a). Accordingly, the relief requested in the petition is granted, Julius Emile is declared dead as of June 1, 1994, three years after his disappearance, and letters of administration shall issue without bond to petitioner upon his qualifying as such.

The guardian ad litem has submitted an affirmation of services to which she has affixed her time sheet and asks the court to fix her fee. 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]). Although 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], *aff'd* 213 App Div 59 [4th Dept 1925], *aff'd* 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 that 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], *aff'd* 213 App Div 59 [4th Dept 1925], *aff'd* 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]). Additionally, the legal fee must bear a

reasonable relationship to the size of the estate (*Matter of Kaufmann*, 26 AD2d 818 [1st Dept 1966], *aff'd* 23 NY2d 700 [1968]; *Martin v Phipps*, 21 AD2d 646 [1st Dept 1964], *aff'd* 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]). 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], *aff'd* 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], *aff'd* 213 App Div 59 [4th Dept 1925], *aff'd* 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 Misc 2d 423 [Sur Ct, Bronx County 1978]; *Matter of Reisman*, NYLJ, May 18, 2000, at 34, col 5 [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]).

Based on the above, the court approves a fee for the guardian ad litem in the sum of \$1,100.00 and thanks the guardian ad litem for her effective and efficient representation of her ward's interests.

This constitutes the decision of the court.

Settle decree.

Dated: November 30, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court