

**Matter of Deluca (Brigulio)**

2011 NY Slip Op 31356(U)

March 29, 2011

Surrogate's Court, Nassau County

Docket Number: 329523/A

Judge: III., Edward W. McCarty

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

-----x

In the Matter of the Settlement of the Account of  
 Proceedings of Jeffrey E. Deluca, Public Administrator of  
 Nassau County, as Administrator of the Estate of

File No. 329523/A

SANTA BRIGULIO  
 a/k/a SANTA BRIGUGLIO,

Dec. No. 27074

Deceased.

-----x

Submitted for decision in this accounting proceeding is the issue of kinship. Also submitted are the issues of: (i) attorneys' fees; (ii) accountants' fees; (iii) commissions; and (iv) the guardian ad litem's fee.

The decedent, Santa Brigulio (also known as Santa Brigulio) died intestate on June 29, 2003, a resident of Nassau County. Letters of administration issued to the Public Administrator on September 12, 2003. The Public Administrator filed an account of the proceedings covering the period June 29, 2003 to October 31, 2004. The summary statement shows charges to the accounting party of \$286,543.07. The affidavit bringing the account current through July 31, 2010 shows additional principal and income received and realized increases of \$35,733.37. A guardian ad litem was appointed to represent the interest of missing and unknown heirs.

Objections to the account were filed by Santa Wilson, Nicholas Andronica, Joseph Andronica, Vincent Andronica, John Andronica and Giuseppa Brigulio. Santa P. Bachmeier, Anna Bucci and Vincent Bucci also appeared in the proceeding.

The issue of kinship was referred to a court attorney/referee pursuant to SCPA 506. A hearing was conducted on October 12, 2005 and continued on June 8, 2006. All parties

stipulated to waive the referee's report and to allow the kinship issues to be decided by the court upon the transcript of the hearing, the documentary evidence and the arguments made by the attorneys and the guardian ad litem.

In order to establish their distributive rights, claimants must establish: (1) their relationship to the decedent; (2) the absence of any person with a closer degree of relationship; and (3) the maximum number of persons having the same degree of relationship to the decedent (this is known as "closing the class") (see *Matter of Morrow*, NYLJ, Apr. 12, 2001, at 23, col 1 [Sur Ct, Kings County]). Claimants have the burden of proving each element (*Matter of Cruz*, NYLJ, Jan. 9, 2002, at 29, col 4 [Sur Ct, Kings County]); *Matter of Balacich*, NYLJ, Jan. 24, 1997, at 30, col 2 [Sur Ct, Kings County]).

Based upon the evidence presented before the court attorney/referee, the court makes the following findings of fact and conclusions of law:

- 1) The decedent, Santa Brigulio, died on June 29, 2003. Letters of administration issued to the Public Administrator on September 12, 2003. The Public Administrator has now filed a petition to settle his account.
- 2) The decedent was never married. There is no evidence of the decedent having any issue.
- 3) The decedent's mother was Maria (a/k/a Mary) Rullo. The decedent's father was Luigi (a/k/a Louis) Brigulio. The decedent's father died in February 1967, and the decedent's mother died in September 1985.
- 4) The decedent had two siblings, Susan (a/k/a Assunta Briguglio) Brigulio and Gloria Brigulio. Both of the decedent's sisters predeceased her leaving no issue surviving. Susan Brigulio died on March 17, 1997, and Gloria Brigulio died on May 7, 2003.
- 5) Decedent's maternal grandparents were Alfonso Rullo and Assunta Albanese, both of whom predeceased her. They had two children, including the

decedent's mother, Maria Rullo. The other child was the decedent's mother's brother, Anthony Rullo. Anthony Rullo predeceased the decedent. He was survived by two children, Frank Rullo and Rosemarie Rullo Testolin, first cousins of the decedent.

6) The decedent's paternal grandparents were Carmello Brigulio (a/k/a Carmello Briguglio) and Santa Cirone, both of whom predeceased her. They had six children, including the decedent's father, Luigi Brigulio, all of whom predeceased the decedent. The other children were: Anna Brigulio Bucci, Rosa Brigulio, Rosa Brigulio Andronica, Maria Brigulio Marisca and Enrico Brigulio. Rosa Brigulio died as an infant. Anna Bucci predeceased the decedent. She was survived by six children: Michael J. Bucci, who post-deceased the decedent; Carmine Bucci, who predeceased the decedent; Frank Bucci, who predeceased the decedent; Anna Bucci; Vincent Bucci; and Santa Bucci Bachmeier. Rosa Brigulio Andronica predeceased the decedent. She was survived by seven children: Emil Andronica, who predeceased the decedent; Pauline McLaughlin, who predeceased the decedent; Vincent Andronica, Joseph (Giuseppe) Andronica; John Andronica; Nicholas Andronica; and Santa Andronica Wilson. Maria Marisca predeceased the decedent. She had two children, Giovanni Marisca, who predeceased the decedent, and Carmelo Marisca, who died as an infant. Enrico Brigulio also predeceased the decedent. He had one child, Guiseppa Brigulio Borgosano, who survived the decedent.

The record reflects that a diligent and exhaustive search was rendered to discover evidence of other possible distributees. As three years have elapsed since the decedent's date of death, the known heirs are entitled to the benefit of the presumptions of SCPA 2225 that there are no other distributees of the decedent other than the decedent's two maternal first cousins, Frank Rullo and Rosemarie Rullo Testolin, and ten paternal first cousins: Michael J. Bucci, who post-deceased the decedent, Anna Bucci, Vincent Bucci, Santa Bucci Bachmeier, Vincent Andronica, Joseph (Giuseppe) Andronica, John Andronica, Nicholas Andronica, Santa Andronica Wilson and Giuseppa Brigulio Borgosano.

Based upon the foregoing analysis and findings of fact, the court rules that the decedent was survived by two maternal cousins, Frank Rullo and Rosemarie Rullo Testolin, who are

entitled to share in one-half (½) of the net estate equally, and ten maternal first cousins, Michael J. Bucci (post-deceased), Anna Bucci, Vincent Bucci, Santa Bucci Bachmeier, Vincent Andronica, Joseph (Giuseppe) Andronica, John Andronica, Nicholas Andronica, Santa Andronica Wilson and Giuseppa Brigulio Borgosano, who are entitled to share in one-half (½) of the net estate equally (EPTL 4-1.1 [a] [6]).

With respect to the issue of attorneys' 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 services 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 value 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]).

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, 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]).

With respect to disbursements, the tradition in Surrogate's Court practice is that the attorney may not be reimbursed for expenses that the court normally considers to be part of overhead, such as photocopying, postage, telephone calls, and other items of the same matter (*Matter of Graham*, 238 AD2d 682 [3d Dept 1997]; *Matter of Diamond*, 219 AD2d 717 [2d Dept 1995]; Warren's Heaton on Surrogate's Court Practice §106.02 [2] [a] [7th ed]). In *Matter of Corwith* (NYLJ, May 3, 1995, at 35, col 2 [Sur Ct, Nassau County]), this court discussed the allowance of charges for photocopies, telephone calls, postage, messengers and couriers, express deliveries and computer-assisted legal research. The court concluded that it would permit reimbursement for such disbursements only if they involved payment to an outside supplier of goods and services, adopting the standards set forth in *Matter of Herlinger* (NYLJ, Apr. 28, 1994, at 28, col 6 [Sur Ct, New York County]). The court prohibited reimbursement for ordinary postage and telephone charges other than long distance.

With respect to accountants' fees, normally, an 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, col 2 [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 AD 765 [1938]). "[T]he purpose of this rule is to avoid duplication (*Matter of Schoonheim*, 158 AD2d 183 [1st Dept 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, col 2)" (Warren's Heaton on Surrogate's Court Practice §93.08 [7th ed]).

In this case, the Public Administrator's attorney has supplied the court with an affirmation of legal services and it shows that the attorney rendered more than one hundred and five (105) hours of legal services of a partner, associate and paralegal at various hourly rates. The services the firm performed included: (a) preparation of the petition of letters of administration, the affidavit in support of the petition, all accompanying documentation and obtaining the Public Administrator's fiduciary bond; (b) collection of miscellaneous assets, including the real property owned by the decedent, collectively having a total value of approximately \$282,737.00; (c) detailed investigation into the family of decedent, both in the United States and in Italy, and correspondence with pro se distributees and attorneys retained by alleged distributees; (d) preparation of: (i) the administrator's final account, (ii) the petition for judicial settlement of account of administrator; and (iii) accounting citation; (e) arranging for service of an accounting citation and publication of same, and ensuring adequate service of same

to secure the jurisdiction of the court over the respondents; (f) attendance at the citation return date on March 2, 2005; (g) correspondence and conferences with the office of the New York State Attorney General and the guardian ad litem; (h) preparation for and attendance at several kinship hearings and court conferences, including the review of family tree charts and birth, death and marriage records offered into evidence at the aforementioned kinship hearings and conferences; (i) review of the transcripts of the kinship hearings; (j) multiple telephone conferences with the Public Administrator and his staff; and (k) preparation, filing and serving of the affidavit bringing account current. The firm also handled the sale of the decedent's residence and charged a flat fee of \$1,5000.00 in connection with the sale.

The firm's total fee and disbursements are anticipated to be in the approximate amount of \$23,948.50 (exclusive of the real estate fee), of which \$17,976.25 has been paid. The attorney asks for approval of his firm's fee in the reduced amount of \$19,000.00, of which \$17,976.25 has been paid and \$1,023.75 remains unpaid. Considering all these factors, the court believes the proposed fee to be reasonable. Therefore, the court approves a total fee of counsel to the Public Administrator in the sum of \$20,500.00, inclusive of the fee for the closing, as fair and proper compensation for the services rendered.

Concerning the accountant's fee, the accountant has submitted an affidavit of tax services requesting a fee of \$4,475.00, of which \$3,900.00 has been paid and \$575.00 remains unpaid. The affidavit indicates that the accountant prepared the federal and New York State fiduciary income tax returns for the years 2004, 2005, 2006, 2007, 2008, 2009, and 2010 and will also prepare a 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. Thus, the court approves the fee in the amount of \$4,475.00, of which \$575.00 remains unpaid.

The guardian ad litem has supplied the court with an affirmation of services, and it shows that she rendered approximately 14.40 hours of legal services. The work performed by the guardian ad litem was of the utmost quality; however, the court is constrained by the size of the estate. Considering all these factors, the court believes the sum of \$4,5000.00 is fair and proper compensation for the services rendered by the guardian ad litem.

Finally, the commission of the Public Administrator is approved subject to audit.

The decree shall provide for the release of the administrator and his surety.

Settle decree.

Dated: March 29, 2011

Edward W. McCarty III  
Judge of the  
Surrogate's Court