

Matter of Kushnir

2011 NY Slip Op 33229(U)

August 31, 2011

Sur Ct, Nassau County

Docket Number: 341931/B

Judge: III., Edward W. McCarty

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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
Jeffrey E. DeLuca, Public Administrator of Nassau County,
as Limited Administrator of the Estate of

File No. 341931/B

Dec. No. 27413

ANDREY KUSHNIR
a/k/a HENRY KUSHNIR,

Deceased.
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Before the court is the first and final account of the Public Administrator as limited administrator of the estate of Andrey Kushnir. The limited administrator is seeking (1) approval of (a) the account, (b) the commissions, and (c) the attorneys' and accountants' fees; (2) authorization to pay the net estate to the New York State Comptroller for the benefit of decedent's unknown distributees; (3) disallowance of the claims of two creditors; and (4) release of the Public Administrator from the surety bond. The court must also (5) determine kinship; (6) address the objections to the account; and (7) fix the fee of the guardian ad litem appointed to represent unknown distributees. The guardian ad litem filed his report and has no objections to the account.

Background

Andrey Kushnir died intestate on March 15, 2006 leaving no spouse or issue. This court issued limited letters of administration to the Public Administrator on May 3, 2006. The Public Administrator filed a final account on March 17, 2010, which covered the period from March 15, 2006 through December 31, 2009. The court appointed a guardian ad litem to represent the interests of unknown heirs on June 23, 2010, and his report was filed on May 3, 2011.

Objections to the account were filed by counsel on behalf of George Hawrysko, Karen Dickman and Matthew Dickman, purported distributees of decedent, and by the Attorney General of New York on behalf of the Office of the New York State Comptroller.

Kinship

The issue of kinship was referred to a court attorney/referee pursuant to SCPA 506, and a kinship hearing commenced on December 15, 2010 and continued on February 16, 2011. Testimony was given by (1) Pauline Kushnir, a purported paternal first cousin of decedent; (2) Matthew Dickman, a purported paternal first cousin once removed; and (3) Charles Roocke, decedent's neighbor. Various documents were admitted into evidence during the kinship hearing, including a purported family tree; additional documentation was submitted subsequent to the hearing. All parties stipulated to waive the report of the referee and to allow kinship issues to be decided by the court based upon the transcripts of the hearing, the documentary evidence and the arguments made by the attorneys for the Public Administrator, the claimants, and the guardian ad litem representing the unknown distributees.

In order to establish their rights as distributees, the claimants in a kinship proceeding must prove: (1) their relationship to the decedent; (2) the absence of any person with a closer degree of consanguinity to the decedent; and (3) the number of persons having the same degree of consanguinity to the decedent or to the common ancestor through which they take (*Matter of Morrow*, NYLJ, Apr. 12, 2001, at 23, col 1 [Sur Ct, Bronx County]; 2 Harris, *New York Estates*, 21:3, at 21-1 [5th ed 1996]). Claimants who allege to be distributees of the decedent have the burden of proof on each of these elements (*Matter of Balacich*, NYLJ, Jan. 24, 1997, at 30, col 2

[Sur Ct, Kings County]). The quantum of proof required to prove kinship is a fair preponderance of the credible evidence (*Matter of Jennings*, 6 AD3d 867 [3d Dept 2004]; *Matter of Whelan*, 93 AD2d 891 [2d Dept 1983], *affd* 62 NY2d 657 [1984]).

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

1. The decedent, Andrey Kushnir, died intestate on March 15, 2006.
2. The decedent never married.
3. Decedent never had any issue, either natural or adopted.
4. The decedent's mother was Ellen Louisa Carter (also referred to as Helen Carter), born in England in 1899. His father was Nicholas Kushnir, a native of Austria, born in 1889. Both of decedent's parents predeceased him. Decedent was the only child of his parent's marriage, and neither of his parents had other children.
5. Decedent's maternal grandparents were Charles Henry Carter and Laura Louisa Green. They had two children, namely, decedent's mother and Harry James Carter (born 1894). Despite extensive genealogical research, no determination could be made as to whether Harry married or had issue.
6. Decedent's paternal grandparents were Oleks Kushnir and Mary Czorna Kushnir. They had three children: decedent's father, Anna and Michael, all of whom predeceased the decedent.

7. Anna Kushnir had five children: Alexander, Annie, Mary (all of whom predeceased the decedent), Nina (who post-deceased the decedent on May 13, 2006), and Sophie (who post-deceased the decedent on January 18, 2007).

8. Michael Kushnir had three daughters: Pauline, Olga and Mary. Only Pauline survived the decedent.

The court finds that distribution of decedent's estate must be in accordance with EPTL 4-1.1 (a) (6), which governs distribution of an intestate estate where decedent is survived by one or more grandparents or the issue of grandparents, but which does not extend distribution to issue more remote than the grandchildren of a decedent's grandparents. In addition, the court finds that the diligent searches to find any unknown maternal next of kin were sufficient to establish that no maternal first cousins survived the decedent. As three years have elapsed since the decedent's death, the known heirs are entitled to the benefit of the presumption of SCPA 2225 that there are no other distributees of the decedent other than those set forth above.

Accordingly, the court finds that the decedent was survived by three distributees, who are the issue of decedent's paternal grandparents and who will share decedent's net distributable estate by representation. They are: (1) decedent's surviving paternal first cousin, Pauline Kushnir Frey; and decedent's two paternal first cousins who post-deceased him and whose shares will be paid to each cousin's respective estate, (2) Nina Daledowich DiGiovanna; and (3) Sophie (also known as Sonia) Daledowich Dickman.

Disallowance of Claims

The Public Administrator has asked the court to disallow the claims of two creditors of the estate, namely, Bank of America in the amount of \$34.98 and South Nassau Community

Hospital in the amount of \$69.51. The request is based upon each creditors' failure to submit documentary evidence in substantiation of its claim. The record reflects that each of these two creditors also failed to complete and return the affidavit of claim required by SCPA 1803. The court grants the relief requested.

Fees

The issue remaining is a determination of the fees to be paid to the attorney for the Public Administrator, the accountant for the estate, and the guardian ad litem. It is noted that the Attorney General of the State of New York, on behalf of the Office of the Comptroller, has objected to the fee requested by counsel to the Public Administrator in the total amount of \$40,000.00. The basis of the objection is that the amount requested is excessive for the legal services required in this estate. No responsive papers to the objections have been filed.

The court bears the ultimate responsibility for approving fees that are charged to an estate and has the discretion to determine what constitutes reasonable compensation for services rendered in the course of an estate (*Matter of Stortecky v Mazzone*, 85 NY2d 518 [1995]). The attorney's affirmation reflects that more than 445 hours of services were rendered on behalf of decedent's estate; this is a highly unusual amount of time for an estate with a gross value of \$193,079.32. In support of the fee request, counsel filed a 13-page substantive affirmation of services with detailed time sheets attached.

The legal services provided on behalf of the Public Administrator which are listed in the affirmation are too numerous to be fully listed here, but the court has thoroughly reviewed the affirmation and annexed time sheets. In addition to the typical legal services necessary for the administration of an estate, which in this case included preparation for and participation in a two-

part kinship hearing, one factor which necessitated additional services on behalf of the Public Administrator was counsel's efforts to recover estate assets which had been claimed by decedent's neighbors. These efforts included an investigation; conferences and research of real property ownership assets, decedent's financial records and decedent's bank accounts; preparation and service of subpoenas; correspondence and documentation sent to the Nassau County District Attorney concerning the neighbors' questionable involvement in decedent's financial affairs; preparation and filing of an order to show cause and petition to set aside a purported trust and deed transfer; and the preparation and execution of a stipulation of settlement by which \$162,000.00 was restored to the estate. Moreover, although the legal services which were provided resulted in actual billable time of \$92,351.27, counsel for the Public Administrator is requesting a fee of \$40,000.00, which represents a reduction of 57%. It is noted that when the fee objection was filed, counsel's supporting data had not yet been submitted.

A 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]; *Matter of Yancey*, NYLJ, Feb. 18, 1993, at 28, col 1 [Sur Ct, Westchester County]). A modest estate may require 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. If counsel for the Public Administrator had requested the full amount of their billed time charges, \$92,351.27, the court undoubtedly would have reduced their fee to reflect the modest size of this estate. However, the actual fee requested by counsel includes a voluntary

reduction to less than half of the actual time charges. Neither the guardian ad litem nor any of the distributees has objected to the fee.

The court thanks counsel for the Public Administrator for their excellent representation and the voluntary reduction of their fee and approves the legal fee in the amount of \$40,000.00, of which \$30,000.00 has been paid and \$10,000.00 remains unpaid.

The fee of the accountant is approved in the amount of \$3,325.00, of which \$575.00 remains unpaid.

The guardian ad litem's affirmation reflects more than 25 hours of services. Applying the guardian ad litem's billable rate, this would result in a fee of \$8,925.00. However, as noted above, even when excellent services have been provided, a legal fee may be adjusted to reflect an estate's modest size. The court sets the fee of the guardian ad litem in the amount of \$4,800.00 and thanks the guardian ad litem for his assiduous and outstanding service.

Conclusion

The court has reviewed the account and the supporting documents and grants all of the relief requested therein with the exception of authorization of payment to the New York State Comptroller for the benefit of unknown distributees, and with the proviso that the commission is approved subject to audit. After payment of the above expenses, the balance of the estate should be paid to decedent's distributees, Pauline Kushnir, and the estates of Nina Daledowich DiGiovanna and Sophie (Sonia) Daledowich Dickman.

Within 45 days of the issuance of this decision, counsel for the Public Administrator shall file and serve an affirmation bringing the account down to date.

The surety is discharged.

Settle decree.

Dated: August 31, 2011

EDWARD W. McCARTY III
Judge of the
Surrogate's Court