

Matter of Piccolo

2011 NY Slip Op 33236(U)

November 2, 2011

Sur Ct, Nassau County

Docket Number: 2010-362445

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 Estate of

File No. 2010-362445

STEPHEN T. PICCOLO,

Dec. No. 27535

Deceased.

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In this probate proceeding, counsel for the executor has objected to a request from the court's accounting department for the payment of an additional fee of \$625.00 pursuant to 22 NYCCR 207.20 [d] upon the executor's required filing of his "List of Assets - Inventory" (22 NYCCR 207.20 [a]). The additional payment was requested based upon the inclusion in the completed form of real property located in North Carolina. The executor excluded that property from the gross value of the estate as reported on the probate petition (when the value based fee was initially calculated) because the form for that petition arguably required that improved and unimproved real property be listed only if it is located in New York State (*see Turano & Radigan, New York Estate Administration*, 2011 edition, § 3.03 [b].¹)

Pursuant to the language of SCPA 725, the Uniform Rules provide for the filing of the List of Assets - Inventory (22 NYCCR 207.20 [a]). That rule states in part:

[a] The fiduciary or the attorney of record shall furnish the court a list of assets constituting **the gross estate for tax purposes**, but separately listing [emphasis added]:

[1] those assets that either were owned by the decedent

¹ The treatise does not reference a source for its conclusion, which, in any event, relates to the initial probate fee only.

individually including those in which the decedent has a partial interest, or were payable or transferrable to the decedent's estate; and

[2] those assets held in trust, those assets over which the decedent had the power to designate a beneficiary, jointly owned property, and all other nonprobate property of the decedent. This list of assets shall be filed with the court by the latter to occur of the following events: [intentionally omitted]

Subsections [c] and [d] are also relevant to the analysis:

[c] In the event such list of assets is not so filed, the court may refuse to issue certificates, may revoke the letters and may refuse to issue new ones **until such list has been filed and the fees paid as provided in SCPA 2402**. Failure to voluntarily file such list of assets may also constitute grounds for disallowance of commissions or legal fees. [Emphasis added].

[d] If any additional filing fees are due, they shall be paid to the court at the time of the submission of any of the documents described in subdivision [a] of this section. [emphasis added].

The basis for the fees is found in SCPA 2402, which provides with respect to a probate proceeding:

1. Probate. Upon filing a petition to commence a proceeding for probate of a will the fee shall be as shown by the following schedule **computed initially upon the gross estate passing by will** as stated in the petition; provided however that in a proceeding for ancillary probate of a will the fee shall be computed only upon the property within the state passing under such will **and provided that in all cases if the value of the estate so passing as subsequently shown** by a tax return filed under article twenty six of the tax law, by a proceeding under such article, by any proceeding in surrogate's court involving such estate, or **by such papers or documents in connection with such estate as court rules may require to be filed with the court, exceeds the value originally stated and upon which the fee was paid, then an additional probate fee shall be immediately payable.** Such

additional fee shall be the difference between the fee based on the value subsequently shown and the fee which was initially paid. In the event that the value of the estate so passing as subsequently shown is less than the value originally stated and upon which the fee was paid, then a refund shall be made which shall be the difference between the fee initially paid and the fee based on the actual value subsequently shown [emphasis added].

A careful reading of this provision shows no basis for excluding non-New York real property from the valuation of the “gross estate passing by will,” except with respect to a proceeding for ancillary probate. The section specifically requires the collection of the additional fee upon the filing of the List-Inventory, a requirement clearly contemplated by the enabling statute (SCPA 725).

The court does not read official form P-1 [adopted in February of 2008] as either intending or requiring exclusion of non-New York State realty from the valuation of the decedent’s gross testamentary estate. Paragraph 9[a] on that form reads as follows:

[a] To the best of the knowledge of the undersigned, the approximate total value of all property constituting the decedent’s gross testamentary estate is greater than \$_____ but less than \$_____.
 Personal Property \$_____ Improved real property in New York State \$_____ Unimproved property in New York State \$_____ Estimated gross rents for a period of 18 months \$_____ ²

Notably the form does not have an entry for either all real property or all non-New York realty; nor are there instructions to omit non-New York realty from the petitioner’s estimate of the “total value of all property constituting the decedent’s gross testamentary estate.”

² There could be many reasons for requiring a valuation of New York improved and unimproved real property in the probate petition, information not required in former Official Form 7.

The initial probate fee is based upon the petitioner's estimate of the value of the "gross testamentary estate" required by the first sentence of ¶ 9 [a]. In this instance, the probate petition stated the approximate value of decedent's gross testamentary estate as greater than \$250,000.00 but less than \$500,000.00, requiring a processing fee of \$625.00. The purpose of the additional numbers requested is unclear from either the form or the statute.³ What is of most importance is the fact that the court clerk is required to determine the final and more accurate number from the subsequent filing of, for example, the List- Inventory filed pursuant to 22 NYCCR 207.20 [a], a form that may include a copy of the estate tax return.

While, as argued by petitioner's counsel, the language used in the official form for a probate petition suggests that a distinction should be drawn between real property located within and without New York State, there is no statutory direction as to the significance of the distinction. SCPA 2402 requires that the probate fee be computed based upon the gross value of the estate passing by will, with an initial valuation at the time of the filing and a subsequent valuation that may require an additional probate fee. SCPA 725 authorizes the chief administrator to promulgate rules to assure that the proper fee is ultimately paid and 22 NYCCR 207.20 was adopted to accomplish that purpose. Here the List-Inventory filed properly shows real estate "individually owned by decedent or payable to the estate" at \$481,000.00, inclusive of "property outside New York State valued at \$169,000.00." The out-of-state property is properly

³ It has been held as dicta with respect to "distributive share" that: "[t]he New York courts, in determining the value of a resident decedent's estate for the purpose of fixing distributive shares, under Section 83, subdivision 4 of the Decedent's Estate Law, do not include real property situated outside of the state (*In re Ineson's Estate*, 198 Misc 999, 1000 [Sur Ct, Westchester County 1951]). This does not address the question of what is included in or excluded from the decedent's gross testamentary estate or taxable estate for the purposes of SCPA 2402.

included because it is part of the decedent's taxable estate. The inclusion of the foreign realty brings the column total to \$545,066.61, requiring a total fee under SCPA 2402 [7] of \$1,250.00. As the initial probate fee was \$625.00, the clerk is mandated to collect an additional fee of \$625.00.

This is the decision and order of the court.

Dated: November 2, 2011

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