

Estate of Famiglietti
2012 NY Slip Op 31536(U)
April 3, 2012
Sup Ct, Nassau County
Docket Number: 349830/A
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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 Proceeding to Settle the Account of Kenneth Capuder
 as the Executor of the Estate of

File No. 349830/A

DONATO FAMIGLIETTI,

Dec. No. 27722

Deceased.

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This is a petition (and amended petition dated April 15, 2011) to settle the account of the executor for the period October 11, 2007 through February 10, 2011. Although denominated as a final accounting, unresolved questions regarding the assets of the estate and administration expenses require that it be treated as an intermediate accounting.

The petitioner seeks approval of attorneys' fees and disbursements, accountant's fees, executor's commissions and expenses and distributions to infants.

There is a pending personal injury action. The size of the residuary estate is, therefore, undetermined. No objections were raised to the account, with the exception of those raised by the guardian ad litem, who represents seven infants who are the beneficiaries of specific bequests and also beneficiaries of the residuary estate.

The guardian ad litem filed a detailed report and supplemental report. The first report raised issues concerning expenses reimbursed to the executor and fees of the attorneys Adrienne Lynch, Esq. and McCoyd Parkas and Ronan, LLP. In response to the first report of the guardian ad litem, Adrienne Lynch filed a supplemental affirmation. McCoyd Parkas and Ronan filed an affirmation of services on February 29, 2012. Additionally, an affirmation was filed by Adrienne Lynch in support of the executor's claim for expenses. The supplemental report of the guardian ad litem further addresses the payment of legal fees and other administration expenses.

The account shows the receipt of \$578,383.39 in principal, supplemented by income of \$24,856.21. The primary asset of the estate was a residence. Additional assets were bank accounts and insurance proceeds.

The account seeks approval of fees paid to Ms. Lynch in the amount of \$12,494.03 (Schedule C) and unpaid fees in the amount of \$6,000.00 (Schedule C-1) and disbursements. A mathematical error in calculating the fees for the period August 26, 2009 through December 7, 2011 is conceded, reducing the requested fee by \$166.67. McCoyd Parkas and Ronan seeks approval of legal fees in the amount of \$30,563.60 (Schedule C). The firm was retained as trial counsel in the probate proceeding.

In evaluating what constitutes a reasonable attorney's fee, factors to be considered include the time and labor expended, the difficulty of the questions involved and the required skill to handle the problems presented, the attorney's experience, ability, and reputation, the amount involved, the customary fee charged for such services, and the results obtained (*Matter of Barich*, 91 AD3d 769 [2d Dept 2012]; *Matter of Talbot*, 84 AD3d 967 [2d Dept 2011]; *Matter of Szkambara*, 53 AD3d 502, 502-503 [2008]).

Ms. Lynch seeks payment of fees in connection with the preparation of the executor's account. The estate paid an accountant to prepare the account. Ms. Lynch notes the difficulty in identifying and locating heirs, but the estate paid a substantial fee to an attorney to provide these services. Difficulties encountered with respect to the sale of the real property are cited in support of the additional fee of \$4,625.000. However, these fees exceed the amount customarily charged by the Bar (*Matter of Smolley*, 188 AD2d 535 [2d Dept 1992]). There do not appear to be any extraordinary difficulties in the administration of the estate.

The invoice for the period February 28, 2008 through August 29, 2008 contains a charge for secretarial services in the amount of \$162.00 for typing and copying. The invoice for the period August 26, 2009 through April 15, 2011 contains a charge for secretarial services in the amount of \$540.00, which includes “collating and stapling accountings” and “letters to beneficiaries.” Routine copying of documents in connection with legal services is part of office overhead (*Matter of Graham*, 280 AD2d 683 [3d Dept 1997]), as are related services. Payment for these services is disallowed regardless of the terms of the retainer agreement. The Surrogate bears the ultimate responsibility of deciding what constitutes a reasonable legal fee regardless of the existence of a retainer (*Matter of Talbot*, 84 AD3d 967 [2d Dept 2011]). The attorney seeks reimbursement for postage in the amount of \$289.03 (Schedule C) and \$58.99 (Schedule C-1). Normal postage is also a part of overhead and the disbursement is disallowed.

The fee of Ms. Lynch is approved in the amount of \$12,500.00.

McCoyd, Parkas and Ronan were retained as trial counsel in the probate proceeding which was settled for \$17,500.00. Although retained as trial counsel, the bulk of the firm’s services were related to a motion by respondents to vacate a default. No trial was held, in fact, no depositions were taken. SCPA 1404 examinations were scheduled, but the examinations did not take place. The attorneys attended conferences at court. Counsel’s requested fee of \$35,503.75 represents more than 6% of the estate. Considering all of the criteria used in determining a reasonable fee for legal services, the Court allows a fee to McCoyd Parkas and Ronan in the amount of \$12,000.00. The disbursements for postage (\$59.85) pertain to priority mail (not normal postage) and are approved.

The executor seeks approval of expenses in the amount of \$665.13, which include travel expenses from his home in New Jersey to Massapequa (location of real estate). These routine travel expenses are compensated by commissions (*Matter of Stalbe*, 130 Misc 2d 725 [Sur Ct, Queens County 1985]). The expenses are disallowed, with the exception of the UPS and Federal Express charges.

The guardian ad litem requested additional information concerning the disbursement of \$2,800.00 to Charles Gordon, Esq. whose services were for the location of heirs. Mr. Gordon submitted an affirmation of services. This was a proper disbursement (*Matter of Barich*, 91 AD3d 769 [2d Dept 2012]) and the payment is approved.

The executor seeks to retain the sum of \$9,205.00, the sum claimed by Edward Rimmel, Esq. for attorney's fees, which was rejected by the executor. The application of the executor to withhold funds from distribution until the claim is resolved is approved.

The guardian ad litem objects to the payment of the infants' share directly to their parents pursuant to SCPA 2220 on the grounds that their share may exceed \$10,000.00. Until such time as the exact amount of the infants' share is determined, the payment cannot be approved.

The accountant has submitted an affidavit of services which indicates billing at the rate of \$150.00 per hour for a total of \$2,250.00, is approved. The fee of \$300.00 for pending work will be addressed on the final accounting.

The court acknowledges the thorough report of the guardian ad litem and her interim fee is allowed in the amount requested (\$1,500.00).

A decision approving the account in its entirety is held in abeyance pending resolution of the issues outstanding as indicated above and the filing of amended account reflecting

compliance with this decision.

This decision constitutes the order of the court.

Dated: April 3, 2012

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