

Matter of Romano
2013 NY Slip Op 33573(U)
December 23, 2013
Surrogate's Court, Nassau County
Docket Number: 2010-360394/A
Judge: Edward W. McCarty III
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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 Administrator of the Estate of

File No. 2010-360394/A

Dec. No. 29267

ANNE ROMANO,

Deceased.

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Before this court is the first and final account of the Public Administrator as administrator of the estate of Anne Romano. The administrator is seeking: (1) approval of (a) the account, (b) the commissions, and (c) the attorneys' and accountant's fees; (2) authorization to pay the net estate to the New York State Comptroller for the benefit of decedent's unknown distributees; and (3) discharge of the surety.

BACKGROUND

Anne Romano died intestate on July 25, 2009, leaving no known distributees closer than maternal and paternal cousins.

This court issued letters of administration to the Public Administrator on June 3, 2010. The Public Administrator filed a final account on February 6, 2013, which covered the period from July 25, 2009 through March 31, 2012, as well as an affidavit of due diligence.

The account reflects the decedent's gross assets were \$579,349.46; the balance on hand as of the closing date was \$535,826.53.

Objections to the account were filed by Steven D. Prager, Esq., on March 22, 2013, on behalf of eleven alleged paternal cousins, some of whom share the same name: Rosaria Proto; Anna Proto; Angela Proto; Anna Proto; Francesco Proto; Giuseppina Proto; Joseph Proto; Natale Proto; Natale Proto; Nicolo Proto; and Vincent Proto. Objections were also filed by John C.

Fisher, Esq., on March 26, 2013, on behalf of alleged paternal cousin, Anna C. Proto Astone. On April 29, 2013, Mr. Prager filed supplemental objections on behalf of seven alleged maternal cousins: Albert A. Barone; Bruce Barone; Charles S. Barone; John J. Barone; Claire T. Gelo; Antoinette C. Azzarello; and James Patrick Barone. On May 22, 2013, Mr. Prager appeared on behalf of alleged maternal cousin Saverio N. Barone, and on July 23, 2013, Mr. Prager filed another notice of appearance, on behalf of Carolyn Shannon, as the executor of the estate of alleged maternal uncle, Saverio J. Barone, who post-deceased the decedent. A kinship hearing in connection with decedent's estate was conducted on July 29, 2013.

A guardian ad litem was appointed to protect the interests of missing and unknown persons; he filed his report on October 1, 2013. The court must also set the fee of the guardian ad litem.

KINSHIP

The issue of kinship was referred to a court attorney/referee pursuant to SCPA 506, and a kinship hearing was conducted on July 29, 2013. 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.

Testimony was provided by: (1) Carolyn Barone Shannon, who was familiar with the maternal family tree; and (2) Vincent Proto, who was familiar with the paternal family tree. Eighty-one exhibits were submitted in support of the claimants.

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, 27:3 at 694 [2013]). 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:

A. Decedent's Immediate Family

1. The decedent, Anne Romano, died intestate on July 25, 2009.
2. Decedent married but was predeceased by her husband.
3. Decedent never had any issue, biological or adopted.
4. The decedent was the daughter of Rose Barone Proto and Vincent James Proto, both of whom predeceased her.

B. Decedent's Paternal Family Tree

1. Decedent's paternal grandparents, Natale Proto and Anna Palmisano, died on January 22, 1961 and December 16, 1942, respectively.
2. Natale Proto married Adele Pinassi on October 21, 1943, but no children were born of his second marriage. Adele Pinassi died on August 15, 1972.
3. Natale Proto and Anna Palmisano had six children:

- A. Vincent James Protto, who predeceased the decedent on February 19, 1988.

His only marriage was to Rose Barone, who predeceased the decedent on November 24, 1999. They had only one child, the decedent.

B. Dominick Proto, who predeceased the decedent leaving two children: Frances Proto Botro, who predeceased the decedent, and Anne C. Proto Astone.

C. Gaetano Proto, who predeceased the decedent, survived by Natale Proto, Nicolo Proto, Joseph Proto, and Vincent Proto.

D. Carmelo Proto, who predeceased the decedent, survived by Natale Proto and Francesco Proto.

E. Rosario Proto, who predeceased the decedent, survived by Anna Proto Scriffignano, Angela Proto Palmisano and Rosaria Proto DiPietro.

F. Giuseppe Proto, who predeceased the decedent, survived by Anna Proto La Ferrera and Giuseppina Proto.

C. Decedent's Maternal Family Tree

1. Decedent's maternal grandparents, Severio "Samuel" Barone and Caroline Benincasa, died on June 5, 1943 and May 12, 1942, respectively.

2. Severio "Samuel" Barone and Caroline Benincasa had nine children:

A. Rose Barone, who predeceased the decedent on November 24, 1999. Her only marriage was to Vincent James Protto, who predeceased the decedent on February 19, 1988. They had only one child, the decedent.

B. Louis Barone, who predeceased the decedent leaving three children: Louis Samuel Barone, who also predeceased the decedent, and Albert A. Barone and John Joseph Barone.

C. Charles Barone, who predeceased the decedent, survived by Charles S.

Barone.

D. Mary Barone Manfro, who predeceased the decedent, survived by Joseph J.

Manfro, who also predeceased the decedent, and by Claire T. Manfro Gelo.

E. Theresa Anne Barone Barone, who predeceased the decedent, survived by

Robert A. Barone, who predeceased the decedent, and by Mario Barone, Francis

J. Barone, Rita Barone, and Saverio “Sam” N. Barone.

F. Emily “Amy” Barone Fuoco, who predeceased the decedent, survived by

Antoinette Fuoco Azzarello.

G. Fannie Barone Costanzo, who predeceased the decedent, leaving no issue.

H. Joseph James Barone, who predeceased the decedent, survived by James

Patrick Barone and Bruce Barone,

I. Saverio J. “Samuel” Barone Jr., who survived the decedent but post-deceased.

His son, Saverio J. Barone, predeceased him, but he was survived by two

children, Stephen Barone and Carolyn Barone Shannon.

D. Kinship Findings

The decedent was not survived by spouse, issue, parent, whole siblings or half siblings, or by nieces or nephews.

Decedent was survived by 12 paternal cousins: (1) Anne C. Proto Astone, who is the child of predeceased paternal uncle Dominick Proto; (2) Natale Proto, (3) Nicolo Proto, (4) Joseph Proto and (5) Vincent Proto, who are the children of predeceased paternal uncle Gaetano Proto; (6) Natale Proto and (7) Francesco Proto, who are the children of predeceased paternal uncle Carmelo Proto; (8) Anna Proto Scriffignano, (9) Angela Proto and (10) Rosaria Proto DiPietro, who are the children of predeceased paternal aunt Rosario Proto;

and (11) Anna Proto La Ferrera and (12) Giuseppina Proto, who are the children of predeceased paternal Uncle Giuseppe Proto.

On the maternal side, decedent was survived by her maternal uncle, Saverio J. “Samuel” Barone, who post-deceased the decedent, and whose estate is represented by his executor, and by eleven other maternal cousins: (1) Albert A. Barone and (2) John Joseph Barone, children of predeceased maternal uncle Louis Barone; (3) Charles S. Barone, child of predeceased maternal uncle Charles Barone; (4) Claire T. Manfro Gelo, child of predeceased maternal aunt Mary Barone Manfro; (5) Mario Barone, (6) Francis J. Barone, (7) Rita Barone, and (8) Saverio “Sam” N. Barone, children of predeceased maternal aunt Theresa Anne Barone Barone; (9) Antoinette Fuoco Azzarello, child of predeceased maternal aunt Emily “Amy” Barone Fuoco; and (10) James Patrick Barone and (11) Bruce Barone, children of predeceased maternal uncle Joseph James Barone.

FEES

(1) Legal Fees

Regarding the fee of the attorney for the Public Administrator, 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 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], *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]). 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]).

In the course of this estate administration, the Public Administrator was represented by two different law firms in succession. From the inception of the administration until December

31, 2011, representation was provided by Brosnan & Hegler, LLP. Since January 1, 2012, representation of the Public Administrator has been provided by Mahon, Mahon, Kerins & O'Brien, LLC. The court must admeasure the fees to be paid to each of these firms.

When multiple attorneys are employed by the fiduciary of a decedent's estate, the aggregate fee should approximate what one attorney would charge (*Matter of Leopold*, 244 AD2d 411 [2d Dept 1997]; *Matter of Mattis*, 55 Misc 2d 511 [Sur Ct, New York County 1967]). Some overlap in services may necessarily occur (*Matter of Patchin*, 106 AD2d 730 [3d Dept 1984]), and should be a factor when considering the aggregate fee (*see, e.g. Matter of Mergentime*, 155 Misc 2d 502 [Sur Ct, Westchester County 1992], *affd* 207 AD2d 453 [2d Dept 1994]). In determining the division of one aggregate fee among multiple firms, the court will take into account each firm's proportionate rendering of services to the estate.

(A) Counsel for the Public Administrator from inception through December 31, 2011

The Public Administrator has petitioned the court for approval of payment of \$28,258.93 to Bronson & Hegler, LLP. Of this amount, \$28,152.50 has been paid and \$327.50 remains unpaid. The firm was also paid \$1,500.00 for services rendered in connection with the sale of decedent's real property. Counsel's affidavit reflects that the legal fees incurred were actually \$28,480.00. Notwithstanding this, counsel only seeks approval of the amount paid to date, \$28,152.50, and forgoes payment of the balance of the unpaid portion of his fees.

The court has carefully reviewed the affirmation of services and the time records submitted to the court. 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]). The record shows that the attorney devoted 145 hours to this

matter. The many services provided by the attorney included preparing and filing the petition for letters of administration; communicating with decedent's former co-guardians; investigating decedent's family; identifying and collecting decedent's assets; evaluating and rejecting or facilitating payment of claims against the estate; and preparing the final accounting. At the same time, counsel's affirmation includes a substantial number of entries pertaining to the real estate transaction for which counsel was paid a flat fee of \$1,500.00. The affirmation also reflects charges for some services which were performed by a paralegal but which are secretarial in nature and, therefore, not billable. "Services which are secretarial in nature are part of office overhead" (*Matter of Efsthathiou*, 41 Misc 3d 1219A [Sur Ct, Nassau County 2013]).

Counsel's fee is approved in the amount of \$25,250.00, plus \$1,500.00 in connection with the real estate transaction, all of which has been paid. Any amount paid in excess of this fee shall be returned to the estate within 30 days of the date of this decision.

(B) Counsel for the Public Administrator from January 1, 2012 to Closing of Estate

The Public Administrator also petitioned for court approval of an anticipated fee, as of February 6, 2013, of \$6,500.00, payable to the law firm of Mahon, Mahon, Kerins & O'Brien, LLC, which took over this file as counsel to the Public Administrator effective January 1, 2012. Counsel's affirmation, filed on September 26, 2013, seeks a fee of \$12,795.83 for services it provided between January 26, 2012 and August 18, 2013. The services are described, in part, as: participation in conferences; review of court file and preparation of proposed affidavit bringing account current and decree; and coordination with distributees. The records also reflect disbursements of \$383.01.

Present counsel's affirmation of services includes a significant number of entries for services performed by a paralegal. While counsel may bill for the services of a paralegal who

performs those services under the supervision of counsel, the paralegal's time may be billed only for legal services which the attorney himself could have been compensated for (SCPA 2110 [4]). Here, nearly all of the time billed for the paralegal are for services which are secretarial in nature and are considered part of office overhead and not compensable (*Matter of Efstathiou*, 41 Misc 3d 1219A [Sur Ct, Nassau County 2013]; *Matter of Brannen*, 14 Misc 3d 1222A [Sur Ct, Dutchess County 2007]; *Matter of Gliosca*, NYLJ Jan. 5, 2006, at 20, col 1 [Sur Ct, Suffolk County]).

The firm further requested an additional fee of \$3,900 for future services that it anticipated may be necessary to close this estate. The fee is based on upon an estimated six hours of paralegal services at \$225.00 per hour and six hours of services that have been or will be provided by a partner of the firm, at \$425.00 per hour. The services are described as: review of decisions; compliance with court correspondence and requests; conduct conferences with the Public Administrator, creditors and unrepresented distributees; review file and ledgers and preparation of affidavit bringing account current; properly close the estate; report to court that the decree has been complied with; and carry out normal procedures in connection with closing of file, including retrieving relevant file information for Public Administrator annual reporting requirements to the Surrogate's Court in compliance with the appropriate guidelines and also in accordance with the requirements of the Office of Court Administration.

Counsel's ongoing responsibilities require that he confer with his client; review the file; review this court's decision and comply with its directives; prepare an affidavit bringing account current and a proposed decree with Notice of Settlement on all appearing parties; make the final distributions; and ultimately close the estate. Although counsel notes, correctly, that he must retrieve all relevant file information for Public Administrator's annual reporting requirements to

the Surrogate's Court and the Office of Court Administration, these responsibilities are not chargeable to individual estates.

The affirmation submitted by Mahon, Mahon, Kerins & O'Brien, LLC is based in part upon services rendered to date, for which time records are annexed, and in part upon the firm's estimate of the services that will be necessary to close this estate. While § 207.45 of the Uniform Rules for Surrogate's Court anticipates that an attorney's affirmation of services may include services "to be rendered up to and including settlement of the decree and distribution . . . " this court does not anticipate that an additional 12 hours of legal services will be necessary once the account has been approved. Moreover, some of the services anticipated by counsel are not chargeable to individual estates.

Considering all of the foregoing criteria, the court fixes the fee of current counsel to the Public Administrator for services provided through August 18, 2013 in the amount of \$10,825.00, plus \$875.00 for future services, plus disbursements of \$383.01, for total payment of \$12,083.01, all of which remains unpaid.

(2) Fee of the Guardian ad Litem

The Court must also set the fee of the guardian ad litem. The guardian ad litem has submitted his report; his affirmation of services reflects that he devoted 10 hours to this matter. The affirmation indicates that two hours were spent in conversation and meetings with counsel to the Public Administrator; one hour was utilized for review and execution of necessary court documents; two hours were spent on review of pleadings and attendance at the kinship hearing; and two hours were devoted to the research and writing of the kinship report. While the report is fairly thorough, paragraph (33) does not accurately reflect the complete results of the kinship hearing. The court fixes the fee of the guardian ad litem in the amount of \$3,250.00, to be paid

within 30 days of the decree to be issued in connection with this account.

(3) The Fee of the Accountant

The court has also been asked to review the accountant's fees. Typically, an accountant's services are not compensable from estate assets unless there exist unusual circumstances that require the expertise of an accountant (*Matter of Meranus*, NYLJ, Mar. 31, 1994, at 28, 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 App Div 765 [2d Dept 1938]). The 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 [Sur Ct, New York County] [internal citation omitted]).

Although the petition and citation indicate the Public Administrator's expectation that the accountant's fees would be approximately \$1,725 .00, the accountant has submitted a final affidavit of services, dated October 15, 2013, requesting a fee of \$2,931.25, of which \$1,781.25 was paid and \$1,150.00 remains unpaid. The billing records reflect that the accountant prepared the estate's annual federal and state fiduciary income tax returns for the years ending June 30, 2011 and June 30, 2012. It further indicates a charge for filing a fiduciary income tax return for the year ending December 31, 2012, without offering an explanation for the filing of this additional return. The accountant states that she will be required to file an additional return for the year ending June 30, 2014 (the accountant may have meant the year ending June 30, 2013) and a final return.

These two returns will incur additional fees of \$1,150.00. The accountant also seeks a fee of \$56.25 for “telephone tax correspondence” pursuant to a statement dated January 3, 2013.

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. The court approves the fee in the amount of \$2,875.00, which includes \$1,150 for the preparation of two more tax returns. Of this amount, \$1,781.25 has been paid and \$1,093.75 remains unpaid.

CONCLUSION

The account, as filed, is approved.

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

The commission of the administrator is approved subject to audit.

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 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. The decree shall discharge the surety and shall authorize the Public Administrator to distribute one-half of the balance of the net estate, after payment of outstanding legal, accounting and guardian ad litem fees noted above, to the issue of decedent’s maternal grandparents, by representation, and one-half to the issue of

decedent's paternal grandparents, by representation, in accordance with EPTL 4-1.1 (a) (6).

Settle decree.

Dated: December 23, 2013

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