

Matter of Russo

2014 NY Slip Op 33062(U)

March 27, 2014

Sur Ct, Nassau County

Docket Number: 29590

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 the
Public Administrator of Nassau County,
as Administrator of the Estate of

File No. 302600/B

Dec. No. 29590

SALVATORE RUSSO,
a/k/a SALVATORE J. RUSSO,

Deceased.
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Before the court is the first and final account of the Public Administrator as administrator of the estate of Salvatore Russo, who died on February 26, 1997, a resident of Oceanside in Nassau County. Letters of administration issued to the Public Administrator on October 2, 2003. The account was initially filed on October 29, 2007, and a citation and order for service by publication issued on January 2, 2008. Nevertheless, jurisdiction remained incomplete, and a first supplemental citation issued on November 21, 2012. The account was amended on December 24, 2012 to add the children of decedent's post-deceased brother, Joseph Russo. Jurisdiction was completed on the citation return date, January 9, 2013. By order dated March 6, 2013, a guardian ad litem was appointed to represent the interests of persons under a disability. The Attorney General of the State of New York filed an appearance. No objections to the account were filed.

BACKGROUND

Salavtore Russo (the "decedent") died intestate. His wife had predeceased him, and he had no children, biological or adopted. Decedent had nine siblings, four of whom predeceased him, and five of whom survived him. Since decedent's death, three of the surviving siblings have post-deceased.

THE ACCOUNT

The account of the Public Administrator, which covers the period from July 3, 2003 through July 31, 2007, shows the receipt of \$308,924.47 of estate principal, which was supplemented by income collected totaling \$24,432.09. This resulted in total charges of \$333,356.56. This amount was reduced by administrative expenses in the amount of \$68,570.33, leaving a balance of \$264,786.23 on hand. The Public Administrator seeks approval of the accounting, approval of commissions, the fixing of fees for the services of the attorneys and the accountant, the discharge of the surety, and authorization to distribute the net estate to the New York State Comptroller's Office for the benefit of decedent's unknown heirs. In addition, the court must set the fee for the guardian ad litem.

REPORT OF THE GUARDIAN AD LITEM

The guardian ad litem filed his report on December 19, 2013. After a thorough review of each schedule and the supporting documentation, the guardian ad litem notes the following:

After reviewing Schedule A, the guardian ad litem asked counsel for the Public Administrator to investigate why the proceeds from the sale of decedent's real property are shown as \$302,478.47 on Schedule A but as \$303,783.47 on the closing statement, a difference of \$1,405.00. The guardian ad litem advised the court that counsel for the Public Administrator agreed to investigate this difference. The Public Administrator is asked to address this issue when bringing the account down to date.

Schedule B includes an entry for \$1,820.00 in interest received for a late closing. The guardian ad litem notes that this amount should have been added to the net sales price of decedent's home and reflected on Schedule A. This change would bring the net sales price to

\$304,198.47, as further adjusted for the difference of \$1,405.00 noted above. Schedule A-2 would be reduced by \$1,820.00, to \$22,612.09. The Public Administrator is asked to address this issue when bringing the account down to date.

In connection with Schedule C, the guardian ad litem questions the cost basis used to determine the capital gains tax shown in the 2003 fiduciary income tax return. A change would impact the tax paid in 2003 and might require an amendment to Schedule A-1 to reflect an increase in the value of decedent's real property. The report indicates that the guardian ad litem agreed to speak to the accountant to resolve the issue. The Public Administrator is asked to address this issue when bringing the account down to date.

Also on Schedule C, the guardian ad litem notes that Brosnan & Hegler, LLP, the law firm which represented the Public Administrator through 2011, was paid \$19,586.25 plus \$1,500.00 for the real estate transaction. The firm seeks another \$5,000.00 in fees. The total of the requested fees is \$26,086.25. The guardian ad litem also questioned fees paid to the accountant. All legal and accountant's fees are addressed below by the court.

The guardian ad litem concludes that the estate was properly administered subject to the three issues noted above, to be determined by the Surrogate.

KINSHIP

Although no objections to the account were filed, the Public Administrator undertook an investigation of the decedent's next of kin, which included interviews with counsel to decedent's alleged stepson, former counsel to several of decedent's alleged nieces and nephews, and decedent's alleged nieces, Angela Russo and Angela Bruno, and a review of other records and databases.

The results of the investigation were reported to the court in the affidavit in support of petition for judicial settlement of account of administrator, filed with the petition to settle the account. Based upon the affidavit, as well as the report of the guardian ad litem, discussed below, the court makes the following findings regarding decedent's next of kin:

1. Decedent was 68 years of age at the time of his death.
2. Decedent's wife, Lucia Russo, predeceased him on December 4, 1990.
3. Decedent had no children, biological or adopted.
4. Decedent's parents, Julio Russo and Angela Franco Russo, are presumed to have predeceased him.
5. Decedent was survived by five siblings and by the issue of four predeceased siblings:

(1) Sarah Russo Lofink, who post-deceased in Bronx County, New York, on November 21, 1998, leaving no spouse or issue; no probate or administration proceeding was commenced and no fiduciary was appointed to administer her estate;

(2) Josephine Russo Loiacono, who is under a disability;

(3) Joseph Russo, who post-deceased, survived only by three children:

(i) Kenneth Russo,

(ii) Kevin Russo, and

(iii) Lisa A. Russo-Stewart;

(4) Rose Russo Montana, who post-deceased on May 23, 2005, and was predeceased by her husband but survived by three children:

(i) Angelina Bruno,

(ii) Anthony Montana, and

(iii) Rosaria Bruno; and

(5) Concetta Russo, who is under a disability.

Decedent had four additional siblings who predeceased him:

(6) Angelo Russo, who was survived by a daughter,

(i) Angela Russo;

(7) Paul Russo, who was survived by two sons:

(i) Michael Russo, whose whereabouts are unknown, and

(ii) Paul Russo;

(8) Jack Russo, who was survived by three children:

(i) Larry Russo,

(ii) Susan Russo, and

(iii) John Russo, who post-deceased, survived by two children, whose whereabouts are unknown. It is unknown whether a fiduciary was appointed in the estate of John Russo;

(9) Julius Russo, who was survived by four children:

(i) Giulio Russo,

(ii) John Russo

(iii) Peggy Ann Russo, and

(iv) Robert Russo.

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 administration (*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. From June 26, 2003 until December 31, 2011, representation was provided by Brosnan & Hegler, LLP. Beginning 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.

(A) Counsel for the Public Administrator from June 26, 2003 through December 31, 2011

Counsel for the Public Administrator has submitted an affirmation and a supplemental affirmation addressing attorneys' fees during this time period. The detailed bills annexed to the two affirmations of legal services, filed on March 20, 2007 and November 17, 2010, show that counsel rendered total billings of \$33,476.25, of which \$22,071.25 was paid. Notwithstanding the actual billings, counsel requests a fee of \$24,586.25, as reflected on the citation, of which \$2,515.00 remains unpaid. In addition, as noted on page two of counsel's original affirmation, the firm was paid a flat fee of \$1,500.00 in connection with the sale of decedent's real property, bringing the total requested fee to \$26,086.25, as noted above in this court's review of the report of the guardian ad litem.

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]).

The affirmation submitted by Brosnan & Hegler, LLP, reflects that more than 119 hours of legal services were provided between June 26, 2003 through April 30, 2007, and that an additional 78 hours were provided from May 1, 2007 through April 23, 2010. These services include preparing and filing the petition for letters of administration, together with all of the related documents; conferring and corresponding with the interested parties and their representatives; locating the distributees and the heirs of the post-deceased distributees; preparing and filing an affirmation of due diligence; identifying and collecting decedent's assets; and preparing and filing the Public Administrator's judicial account.

The billing records indicate that the judicial account was initially prepared in 2004, at which time a search for decedent's heirs was conducted. The assets contained in the estate were quite simple: a bank account with \$4,672.40; a refund of \$1,873.60; and the proceeds from the sale of decedent's home. Subsequent billing in 2005, 2006 and 2007 consists largely of phone conferences regarding the status of the administration and continued billing for the preparation of the account and the search for heirs. After the account was filed, on October 29, 2007, there was additional billing in 2007, 2008, 2009 and 2010 for continued work on the account and the search

for heirs. The only heirs added by amendment of the account were the three children of decedent's post-deceased brother, Joseph Russo. In addition, the statements reflect multiple entries for legal services pertaining to the sale of decedent's real estate, for which the firm was paid a separate flat fee, as noted above. The court notes that during this extended period of time, while Brosnan & Hegler, LLP continued identifying the distributees and proceeding with the judicial account, the estate also had to pay an accountant to file seven annual returns for 2004 through 2010, at a cost of \$3,925.00. The court has not yet been advised of the additional administrative costs incurred after July 31, 2007, as no supplemental account has been filed to date.

In view of all of the above factors, the court fixes the fee of the firm which represented the Public Administrator through December 31, 2011, in the amount of \$15,000.00, inclusive of disbursements and the firm's representation of the Public Administrator in connection with the real estate transaction. Within 30 days of the date of this decree, counsel shall refund all funds received in excess of this amount to the Public Administrator for payment to the estate.

(B) Counsel for the Public Administrator from January 1, 2012 to present

The affirmations of services filed on January 8, 2014, by the law firm which represented the Public Administrator beginning on January 1, 2012, indicates that the firm seeks \$5,062.50 for services billed after January 1, 2012, plus disbursements of \$211.50, as well as \$3,900.00, for anticipated services to complete the estate administration, all of which remains unpaid.

The affirmation filed for the period of time between January 30, 2012 and December 19, 2013 indicates that 14.50 hours of services were provided during this time period. The annexed time sheets reflect that counsel participated in conferences; engaged in correspondence; reviewed

files and documents; performed internet searches for decedent's family members; and prepared and disseminated information requested by the guardian ad litem.

A number of the billable entries are 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 for which the attorney could have been compensated (SCPA 2110 [4]). Here, a portion 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]). For the same reason, the court must disallow the expense slip of \$100.00 for closing out and scanning the file.

The court has thoroughly reviewed counsel's affirmation for services provided since January 1, 2012. The court fixes the fee for this time period in the amount of \$4,562.50, plus disbursements of \$211.50, all of which remains unpaid.

An additional fee may be fixed for legal services required to bring the account down to date from 2007 to 2014 and to address the issues raised in the report of the guardian ad litem. Counsel may file a supplemental affirmation of services when these administrative tasks have been completed.

(C) Fee of the Guardian ad Litem

The guardian ad litem for the missing persons has filed an affidavit of services wherein he states that he spent a total of eight and one-half billable hours on the matter at a regular billing rate of \$350.00 per hour. The services included review of the court file and the accounting and

related documents, correspondence with the attorney and the accountant for the Public Administrator, review of the fiduciary income tax returns, and the preparation of the guardian ad litem's report.

In consideration of these factors, and following the criteria established in *Matter of Freeman* (34 NY2d 1 [1974]) and *Matter of Potts* (213 App Div 59 [4th Dept 1925], *aff'd* 241 NY 593 [1925]), the court awards a fee in the amount of \$2,750.00. The guardian ad litem fee shall be paid within 30 days of the entry of the decree to be entered herein.

(3) The Fee of the Accountant

With respect to the accountant's 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 [Sur Ct, New York County] [internal citation omitted]; Warren's Heaton on Surrogate's Court Practice § 93.08 [7th ed] [citing *Tortora*]).

Here, the accounting firm submitted an affidavit requesting fees totaling \$6,856.25, of which \$1,150.00, to prepare a return for the year ending January 31, 2014 and a final return, remains unpaid. The affidavit and attached invoice show that the accountant prepared federal and New York State fiduciary tax returns for the years ending January 31, 2004 through January

31, 2013.

The work performed was not duplicative of the legal services rendered by the Public Administrator's legal counsel. The court approves the fees of the accountant in the amount of \$6,800.00, of which \$1,150.00 remains unpaid.

CONCLUSION

The account is hereby approved.

Commissions are approved subject to audit.

Within 60 days, petitioner is directed to file an affidavit bringing the account down to date and addressing the three issues raised by the guardian ad litem, as noted above.

The court finds that distribution of decedent's estate must be in accordance with EPTL 4-1.1 (a) (5), which governs distribution of an estate where decedent is survived by issue of parents, and no spouse, issue or parent. As more than 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.

The Public Administrator shall distribute the net estate accordingly, except that shares distributable to (1) the estate of decedent's post-deceased sister, Sarah Russo Lofink; (2) decedent's nephew, Michael Russo, whose whereabouts are unknown; and (3) the estate of decedent's post-deceased nephew, John Russo, shall be paid instead to the Nassau County Treasurer.

The decree shall discharge the surety

Settle decree.

Dated: March 27, 2014

EDWARD W. McCARTY
Judge of the
Surrogate's Court