

Matter of Anzalone (Recco 2007 Family Trust)

2016 NY Slip Op 32025(U)

July 1, 2016

Surrogate's Court, Nassau County

Docket Number: 355254A

Judge: Margaret C. Reilly

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

**SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

-----X
**Accounting by Norma Anzalone and Frank Recco
as the Trustees of**

**DECISION
File No. 355254A
Dec. No. 31583**

THE RECCO 2007 FAMILY TRUST.

-----X
PRESENT: HON. MARGARET C. REILLY

In connection with a trustees’ accounting proceeding, the following papers were considered in the preparation of this decision:

Amended Petition for Judicial Settlement of Account.	1
Affirmation in Support of Amendment.....	2
Amended Accounting.	3
Affidavit of Frank Recco.	4
Affidavit of Melissa Hoffman.....	5
Report of the Guardian ad Litem.	6
Affirmation of Services of the Guardian ad Litem.	7

I. Procedural History

Before the court is an amended petition for judicial settlement of the account of Norma Anzalone and Frank Recco as the trustees of The Recco 2007 Family Trust. The petition was filed on June 3, 2009 in response to a petition filed by Michael Recco on March 17, 2009 to compel the trustees to account. On November 14, 2011, the trustees filed an amended petition and account and a supporting affidavit from counsel. The amended account covers the period from November 5, 2007 through November 11, 2011, a period of four years.

II. Background

The Recco 2007 Family Trust (the trust) was created on November 5, 2007 by Norma E. Recco as grantor (the grantor), and two of her children, Norma Anzalone

(Norma) and Frank Recco (Frank), as trustees. The trust was funded with 90 non-voting shares of Recco Home Care Services, Inc. (Recco Home Care), a New York corporation founded by the grantor, who served as its president. According to the report of the guardian ad litem, discussed below, Recco Home Care is a licensed home care agency with approximately 1,500 employees. The 90 shares of Recco Home Care transferred into the trust represented 90% of the corporate common stock. In exchange for the grantor's transfer of the Recco Home Care stock to the trust, a promissory note was issued "on behalf of the grantor", which note is shown on Schedule A of the trustees' account as having a value equal to that of the stock transferred into the trust.

The trust instrument provides that during the grantor's lifetime, the trustees may pay income and principal to one or more members of the grantor's then living issue. Upon the death of the grantor, the trustees are directed to divide the trust corpus into separate shares for each of the grantor's then living issue per stirpes, to be held in a separate trust. The grantor died on April 20, 2011, survived by four adult children: Norma; Frank; Michael Recco (Michael and Patricia Ross Patricia). Pursuant to the terms of the trust, the shares of Norma, Frank and Michael are to be held pursuant to Article Third of the trust, while the share of Patricia is to be held in a supplemental needs trust pursuant to Article Fourth. On July 23, 2009, the court appointed an initial guardian ad litem to report and recommend to the court whether Patricia required a guardian ad litem to represent her interest in the trustees' accounting proceeding. On October 7, 2009, the initial guardian ad litem filed his report, stating that based upon his conversations with Michael, Frank, Patricia, and Patricia's daughter, Melissa Ross Hoffman (Melissa), "it is evident . . . that [Patricia] does not have a comprehension of these proceedings or her

rights as they relate to the Trust and that it would be in her best interest to have a guardian ad litem appointed.”¹ Accordingly, based upon the report of the initial guardian ad litem, on December 9, 2009, the court appointed a guardian ad litem to represent the interest of Patricia in this proceeding.

III. Relief Requested

In the amended petition, the only relief sought by the trustees is that the court settle the account. In addition, the court must fix the fee of the guardian ad litem.

IV. The Amended Account

Schedule A of the trustees’ amended account lists three items under “Principal Received”:

“90 non-voting shares of stock of Recco Home Care Services, Inc. valued as of December 31, 2007	\$1,639.350.00
As against the receipt of 90 non-voting shares of stock of Recco Home Care Services, Inc., a Promissory Note was issued on behalf of Norma E. Recco	\$1,639,350.00
With interest at 2.74% payable annually on the 29 th day of May of each year commencing May 29, 2009 - Value	
PRINCIPAL RECEIVED	\$0”

On the account summary attached to the amended account, under Schedule A-1, Realized Increases in Principal, the trustees list “Amount to be determined at trial”, rather

¹ In response to this report, on October 14, 2009, Frank filed an affidavit asking the court to appoint Melissa, who works as a billing assistant at Recco Home Care, as guardian ad litem for Patricia. Frank also asked that any costs associated with this proceeding be assessed against Michael only. Subsequently, Melissa filed an affidavit dated April 18, 2012, advising the court that by order of the Supreme Court, Nassau County, made on March 8, 2012 and entered on March 12, 2012, she had been appointed guardian of the person and property of her mother, Patricia, and requesting that this court discharge the court-appointed guardian ad litem “as being an unnecessary expense”

than provide an actual dollar amount for realized principal increases. On the actual Schedule A-1, the trustees show \$0.

On Schedule B, Realized Decreases in Principal, the trustees list one item:
 “Interest Payment Due to Norma E. Recco pursuant to
 Promissory Note, set amount due as of May 29, 2011 (\$157,213.67)”

Schedules C, C-1, D, F, I and K show N/A without further explanation.
 Schedules E-1,G, G-1, and A-2 each show \$0 without further explanation.
 Schedule E, Distribution of Principal, lists the following:
 “22.5 shares of non-voting stock of Recco Home Care Services, Inc., were distributed to:
 22.5 Shares to Frank Recco Trust
 22.5 Shares to Norma Anzalone Recco Trust
 22.5 Shares to Patricia Ross Trust
 22.5 Shares to Michael Recco Trust

All subject to the indebtedness due to the Estate of Norma E. Recco evidenced by the Promissory Note and the interest due thereon, for a total value distributed of \$1,482,136.33.”

V. Report of the Guardian Ad Litem

Despite having been appointed on December 4, 2009, and filing her consent to serve on January 8, 2010, the guardian ad litem did not file her report until six years later, on December 22, 2015, and her affirmation of legal services was not filed until February 16, 2016. She notes that the corporate shares of Recco Home Services paid no dividends to the trust and the account shows no income earned by the trust. Further, despite the promissory note that required that interest payments be made to the grantor, it does not appear that the trustees paid interest to the grantor. The guardian ad litem opines that the promissory note was not a legitimate debt and that it is unclear why the trust was created. She states that despite repeated requests for the dividend history of the corporation and

information concerning corporate distributions, she was not provided with this information. She does note that she received a copy of the promissory note and the share certificates showing ownership. The guardian ad litem concludes:

“It is my opinion that the Trustees are under an obligation to pursue the collection of dividends and distributions from the family run business, Recco Homecare Services, Inc. regardless of their positions with that business. As stated above, the attorney for the Trustees stated that they intended to pursue legal proceedings against Michael Recco to collect the income rightfully due to the trust. Assuming that has been done, and there is nothing more the Trustees can do to collect the income from the company, the Trustees have fulfilled their fiduciary obligation to the beneficiaries, including my ward.”

VI. Michael’s Bankruptcy

In a separate proceeding in this court, Frank and Norma, as preliminary executors of the grantor’s estate, brought a petition dated August 3, 2012 (File No. 2011-365712/B), seeking an inquiry pursuant to SCPA §2103 and a decree directing Michael to return certain monies to the estate. Petitioners claim that Michael seized hundreds of thousands of dollars from the grantor through fraud. They also assert that the grantor transferred monies to Michael in reliance upon his promise to apply such monies in accordance with the grantor’s wishes, and that Michael violated that promise. The petition further alleges that Michael converted the grantor’s assets and borrowed money from the grantor which he failed to repay. Specifically, the petition seeks an order directing Michael to attend and be examined, and that the court issue a decree: (1) directing Michael to turn over \$325,000.00 to the grantor’s estate, plus interest at the rate of 9% annually; and (2)

awarding punitive damages, costs and fees. An order for Michael to attend and be examined on December 3, 2012 was issued on October 1, 2012; Michael defaulted. Frank and Norma then filed a motion for a default judgment, and this court issued Dec. Nos. 28737 and 28740, setting down the matter for an inquest. The inquest was conducted before a court attorney-referee on August 13, 2013, and the transcript is contained in the court's records. However, immediately thereafter the court was advised by the petitioners' attorney that Michael had filed for bankruptcy, staying the SCPA §2103 discovery proceeding (11 USC §362[a][1]). On April 18, 2016, the court received a copy of a document from the United States Bankruptcy Court, dated January 31, 2014, which granted Michael a Chapter 7 discharge of debt under Section 727 of Title 11 of the Bankruptcy Code.

VII. Fee of the Guardian Ad Litem

Regarding the fee of the guardian ad litem, 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 (*see 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]).

The guardian ad litem has submitted an affirmation of legal services reflecting that she provided more than 20 hours of services in the representation of her ward between January 8, 2010 and December 21, 2015. There was an extensive delay in submitting her report, as reflected by the fact that the annexed time sheets show that no services were provided after December 5, 2012, other than preparing and filing her report on December 21, 2015, the court hereby awards \$1,500.00 to the guardian ad litem.

VIII. Conclusion

Although no objections to the trustees' account have been filed, the court cannot approve the account or assess whether the interests of Patricia have been adequately protected. In view of: (1) the incomplete nature of the amended account filed by the trustees; (2) the extensive passage of time since the amended account was filed; and (3) the intervening events impacting upon the trust assets and the account, the court directs the trustees to bring their account down to date, to be filed no later than 60 days from the date of this decision, along with a supplemental citation so that this matter will be returned to the court calendar. In addition to serving the supplemental citation on all interested parties, the trustees are further directed to serve the supplemental citation on Melissa, as the guardian of the person and property of her mother, Patricia, whose interests Melissa will henceforth represent in these proceedings. The trustees are specifically directed to fully complete all relevant accounting schedules and to provide photocopies of all pertinent documentation, including, but not limited to, the certificates

representing current ownership of the shares of Recco Home Services and the promissory note for the benefit of the grantor.

This is the decision and order of the court.

Dated: July 1, 2016
Mineola, New York

E N T E R:

HON. MARGARET C. REILLY
Judge of the Surrogate's Court