

Matter of Paul

2017 NY Slip Op 30355(U)

February 17, 2017

Surrogate's Court, Nassau County

Docket Number: 2013-375862/A

Judge: Margaret C. Reilly

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

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**Accounting by Public Administrator of Nassau County
as the Administrator of the Estate of**

DECISION & ORDER

**File No.2013-375862/A
Dec. No. 32114**

**LAWRENCE GREGORY PAUL
a/k/a LAWRENCE PAUL,**

Deceased.

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PRESENT: HON. MARGARET C. REILLY

The following papers were considered in the preparation of this decision:

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I. PROCEDURAL HISTORY

Petitioner seeks a judicial settlement of an account of the Public Administrator as administrator of the estate of Lawrence Gregory Paul. The relief sought includes: (1) approval of the account; (2) release and discharge of the petitioner; (3) approval of the administrator’s commissions and the reasonable and necessary expenses of the office; (4) the fixing of attorneys’ and accountant’s fees; (5) the release and discharge of the surety; and (6) authorization to pay the net estate to the New York State Comptroller on account of the unknown next of kin of the decedent, Lawrence Gregory Paul.

The court appointed a guardian ad litem to represent the interests of missing and unknown heirs. The guardian ad litem filed her initial report and has no objections to the relief. The court must also set the fee of the guardian ad litem.

II. BACKGROUND

Lawrence Paul, a resident of Nassau County, died intestate on June 3, 2013. Letters of administration issued to the Public Administrator on September 5, 2013. The Public Administrator filed a final account which covered the period from June 3, 2013 through October 3, 2014.

III. THE ACCOUNT

The account shows charges of \$3,257,496.39 and credits of \$450,510.44, leaving a cash balance on hand in the amount of \$2,806,985.95.

IV. THE OBJECTIONS

Verified objections to the account were filed by Rick Paul a/k/a Richard I. Paul, Robert H. Paul and Barbara Paul, alleged distributees of the decedent, who requested that the court conduct a kinship hearing.

V. KINSHIP

Two hearings were held on the issue of kinship. All parties at the hearing stipulated to waive the report of the referee and to allow kinship issues to be decided by the court based upon the transcript of the hearing, the documentary evidence and the arguments made by the claimants and the guardian ad litem, representing the interests of unknown distributees.

In order to establish their rights as distributees, 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 whom they take (*Matter of Morrow*, NYLJ, April 12, 2001 at 23, col 1 [Sur Ct, Bronx County]; 2 Harris, *New York Estates*, 27:3 [6th ed 2016]). Claimants who allege to be distributees of the decedent have the burden of proof on each of these elements (*Matter of Cruz*, NYLJ, Jan. 7, 2002, at 29, col 4 [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 evidence presented before the court attorney/referee, the court makes the following findings of facts and conclusions of law:

1. The decedent, Lawrence Gregory Paul, died intestate on June 3, 2013.
2. The decedent was married to Eva Tinnesz. Eva Tinnesz Paul predeceased the decedent on April 26, 2013. The Public Administrator was appointed Administrator of her estate on March 20, 2014.
3. The decedent did not have any issue.
4. The decedent's parents were Robert Henry Paul and Gertrude Schaeffler Paul. The decedent's parents predeceased him. They had two children, the decedent, and his sister Sandra Paul. Sandra Paul predeceased the decedent and had no issue.
5. The decedent's maternal grandparents were Anton Schaeffler and Victoria Schneider Schaeffler. They both predeceased the decedent and had on child, Gertrude Schaeffler

Paul, the decedent's mother. After the death of Victoria Schaeffler, Anton Schaeffler married Louise Eberle Standenheimer Schaeffler. They had no issue. Anton Schaeffler married a third time to Clementhe Wach Schaeffler and they had no issue. Anton Schaeffler married a fourth time to Madeline Blin Schaeffler and they had no issue.

6. The decedent's paternal grandparents were Henry Robert Paul and Lillian Mertens Paul. They predeceased the decedent and had three children: Robert H. Paul, the decedent's father; Arthur Paul, who predeceased the decedent as a child and had no issue; and Richard Paul. Richard Paul predeceased the decedent and was survived by three children: Barbara Paul, Richard Paul and Robert Paul, all of whom are claimants in this proceeding.

Thus, on the paternal side of the family, the decedent was survived by the following: Barbara Paul, Richard Paul and Robert Paul.

The decedent was not survived by relatives in a closer degree on the maternal side of the family. Thus, in accordance with EPTL § 4-1.1 (a) (6), the entire estate shall be distributed to the surviving issue on the paternal side by representation.

VI. FEES

Regarding the fee of the attorney for the estate, 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]).

In evaluating the cost of legal services, the court may consider a number of factors. These include: the time spent (*see Matter of Kelly*, 187 AD2d 718 [2d Dept 1992]); the complexity of the questions involved (*see Matter of Coughlin*, 221 AD2d 676 [3d Dept 1995]); the nature of the services provided (*see Matter of Von Hofe*, 145 AD2d 424 [2d Dept 1988]); the amount of litigation required (*see Matter of Sabatino*, 66 AD2d 937 [3d Dept 1978]); the amounts involved and the benefit resulting from the execution of such services (*see Matter of Shalman*, 68 AD2d 940 [3d Dept 1979]); the lawyer's experience and reputation (*see Matter of Brehm*, 37 AD2d 95 [4th Dept 1971]); and the customary fee charged by the Bar for similar services (*see 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 (*see 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]). A sizeable estate permits adequate compensation, but nothing beyond that (*see Martin v Phipps*, 21 AD2d 646 [1st Dept 1964], *aff'd* 16 NY2d 594 [1965]; *Matter of Reede*, NYLJ, Oct. 28, 1991, at 37, col 2 [Sur Ct, Nassau County]; *Matter of Yancey*, NYLJ, Feb. 18, 1993, at 28, col 1 [Sur Ct, Westchester County]). Moreover, the size of the estate can operate as a limitation on the fees payable (*see Matter of McCranor*, 176 AD2d 1026 [3d Dept 1991]; *Matter of Kaufmann*, 26 AD2d 818 [1st Dept 1966], *affd* 23 NY2d 700 [1968]), without constituting an adverse reflection on the services provided. 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]).

A. Legal Fee for Administrator's Attorney

The administrator has petitioned the court for approval of the payment of \$56,304.19 to the attorneys for the administrator in connection with the administration of the estate. Schedule C indicates that \$29,516.69 has been paid, plus reimbursements for disbursements of \$200.00. The court has carefully reviewed the affirmation of services and the time records submitted to the court and notes that the fee request in the affirmation is \$56,429.37, inclusive of disbursements. This amount reflects billable time of \$52,179.19, based upon 137.83 hours plus anticipated time of \$4,125.00 and disbursements in the amount of \$125.18.

The record shows that the services provided to date by the attorneys include: communications with the Public Administrator and his staff; contact with investigators and others; contact with claimants and counsel; review of documents; search for potential heirs; prepare and file affidavit of due diligence; assist the Public Administrator with the collection of assets; prepare and file the petition for judicial settlement of the accounting; and prepare for and attend the kinship hearings.

The anticipated fee is based on upon an estimated seven 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 additional services are described as: review of decisions; preparation of the affidavit bringing the account down to date; preparation, service and filing of the proposed decree; securing the addresses and social security numbers of the heirs; reviewing the fiduciary tax return and K-1 forms; preparation and review with the Public Administrator of the signed decree and the close out letter; forwarding the respective distributions and K-1 forms to the heirs; and closing the estate file.

Considering all of the foregoing criteria, the court fixes the fee of counsel to the Public Administrator for services provided in the amount requested of \$56,429.37.

B. Attorney's Fee of the Guardian Ad Litem

With respect to the fee of the guardian ad litem, the court notes that the guardian ad litem's affirmation reflects 49 hours of services on behalf of her wards. The guardian ad litem averred that she performed the following services: reviewed the file; reviewed the Public Administrator's records; reviewed the account; reviewed correspondence and

emails from all attorneys; prepared for and attended two kinship hearings; reviewed the evidence presented in support of the hearings; reviewed affirmations and prepared her report. Considering all the factors set forth above concerning attorneys' fees, the court fixes the fee of the guardian ad litem in the sum of \$20,000.00, to be paid within thirty days of the date of decree.

C. Fee of the Administrator's 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]).

The accountant filed an affidavit of tax services in which she averred that she prepared the decedent's 2012 and 2013 individual tax returns; prepared the estate tax returns and amended tax returns; prepared the fiduciary tax returns for the tax years ending 2014, 2015 and 2016. She will also have to file final tax returns. The accountant asks that her fee be fixed in the total amount of \$8,768.75, of which \$7,518.75 has been paid and \$1,250.00 remains unpaid. Considering all of the factors above, the fee of the accountant is fixed in the total amount of \$8,768.75.

VIII. CONCLUSION

The account, as filed, is approved.

Within forty-five (45) days of the date of the issuance of this decision and order, 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. In addition, the Public Administrator is allowed, pursuant to SCPA §1207(4), the reasonable and necessary expenses of the office.

The decree shall discharge the surety and shall authorize the Public Administrator to distribute the balance of the net estate, after payment of outstanding legal, accounting and guardian ad litem fees noted above, in accordance with EPTL §4-1.1(a)(6), which governs distribution of an estate where decedent is survived by the issue of grandparents, and no spouse, issue or parent or issue of parents.

Accordingly, the decedent's net estate will be divided equally among: Barbara Paul, Richard Paul and Robert Paul.

This constitutes the decision and order of this court.

Dated: February 17, 2017
Mineola, New York

E N T E R:

HON. MARGARET REILLY
Judge of the Surrogate's Court

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