

Matter of Kennedy

2017 NY Slip Op 32061(U)

September 5, 2017

Surrogate's Court, Nassau County

Docket Number: 348751/C

Judge: Meryl J. Berkowitz

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

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In the Matter of Funds on Deposit with the Office of DECISION & ORDER
the New York State Comptroller Received File No. 348751/C
from Nassau County Public Administrator as Dec. No. 32820
Administrator of the Estate of

JAMES KENNEDY,

Deceased.

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PRESENT: HON. MERYL BERKOWITZ

The following papers have been considered in the preparation of this decision:

Petition 1
Affirmation in Support of Petition 2
Attorney Affirmation 3
Answer filed by Attorney General of New York 4
Answer filed by Public Administrator of Nassau County 5
Initial Report of Guardian ad Litem 6
Final Report of Guardian ad Litem, with Time Records Annexed 7
Affirmation of Services of Counsel to the Public Administrator 8
Transcript of First Hearing dated October 25, 2016 9
Transcript of Second Hearing dated December 13, 2016 10
Transcript of Third Hearing dated February 16, 2017 11
Exhibits to Hearing 12
Accounting of Public Administrator ending May 31, 2011 13

PROCEDURAL HISTORY

Before the court is a petition filed pursuant to Abandoned Property Law § 1406 (2)¹

¹Abandoned Property Law § 1406 (2) (a) provides, in relevant part, that a “[c]laim in the amount or value of ten thousand dollars or more for any abandoned property . . . hereafter paid to the state comptroller . . . may be established only on order of the court which had original jurisdiction of the underlying matter, after service of notice upon the state comptroller and upon due notice to all parties to the action or proceeding which resulted in the monies being paid into court.”

and CPLR 2606 (1) and 2607,² seeking an order that the funds paid by the Nassau County Public Administrator to the New York State Comptroller in April 2013 (\$76,314.68), and May 2013 (\$844.10), be paid to the benefit of Lenore Herman, as the only known heir of James Kennedy.

BACKGROUND

Lenore Herman (hereinafter referred to as “the petitioner”) states that she is the maternal first cousin of James Kennedy (hereinafter referred to as “the decedent”), who died on November 20, 2006. The decedent’s death certificate lists the petitioner as the informant, and the petitioner planned and paid for the decedent’s funeral. The petitioner further states that during the decedent’s life, the petitioner handled his financial affairs and paid his bills.

The petition indicates that the petitioner provided the Public Administrator of Nassau County with the names of two additional first cousins of the decedent: Doreen Sommer, who is the petitioner’s sister; and William Sommers.³ Doreen Sommer was disabled and never married or had children, biological or adopted; she post-deceased the decedent on February 18, 2011, leaving the petitioner as her only distributee. The whereabouts of William

²CPLR Rules 2606 (1) provides that an order for payment of property out of the court shall be made on motion or by special proceeding, and CPLR 2607 provides that “[n]o property paid into court, or income from such property, shall be paid out except upon order of the court directing payment to a specified person”

³As seen below, the decedent’s family tree reflects two different spelling of the maternal surname: Sommer and Sommers. In addition, the paternal tree includes the surname Summers.

Sommers, who was not listed as a surviving distributee of the decedent in the December 16, 2010 affidavit of due diligence prepared by International Genealogical Search, Inc., were unknown at the time the petition was filed.

An affirmation in support was filed by counsel for the petitioner. The Attorney General of New York and the Public Administrator each filed an answer to the petition requesting a kinship hearing. Pursuant to a conference conducted on May 18, 2016, a hearing was scheduled. It was conducted over the course of three days: October 25, 2016, December 13, 2016, and February 16, 2017.

REPORTS OF THE GUARDIAN AD LITEM

Although a guardian ad litem had previously been appointed in the accounting proceeding and had reported to the court on March 15, 2012, the court appointed a guardian ad litem to represent the interests of unknown distributees in the context of the present proceeding for the withdrawal of funds. In his initial report, the guardian ad litem noted that the petition does not address the possible existence of paternal distributees. In his final report, which followed the conclusion of the kinship hearing, the guardian ad litem concluded that all paternal relatives had predeceased the decedent. He further concluded that on the maternal side, the heirs are: (1) the petitioner, Lenore Herman; (2) the estate of Doreen Sommer; and (3) William Sommers.

KINSHIP

The issue of kinship was initially scheduled for a hearing on October 13, 2016, but

was adjourned on consent of all parties to October 25, 2016. On that date, the kinship hearing was conducted before Hon. Margaret C. Reilly, Surrogate of Nassau County, after all of the participating attorneys signed a waiver of conflict. The New York State Attorney General's office did not appear, and the hearing proceeded with the understanding that a waiver from the New York State Attorney General would be required.

At the hearing, counsel for the petitioner advised the court that the decedent's maternal first cousin, William Sommers, had been located and was alive. Testimony was provided by Kenneth Herman, the petitioner's husband, and Lenore Herman, the petitioner.

The hearing was continued on December 13, 2016. As no waiver of conflict had been obtained from the New York State Attorney General, the matter was referred to Hon. Meryl Berkowitz, Acting Surrogate, and the second and third parts of the hearing were conducted before a court attorney-referee pursuant to SCPA § 506. 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 counsel for the Public Administrator and the petitioner, respectively, and by the guardian ad litem.

Testimony on December 13, 2016 was provided by Dennis Langel, a forensic genealogical investigator, and voluminous records were submitted by counsel for the petitioner. Subsequently, by letter dated January 17, 2017, the New York State Attorney General's office advised that it had no objection to the use of the October 25, 2016 transcript in the Acting Surrogate's deliberations.

The hearing was continued on February 16, 2017. No testimony was provided but counsel for the petitioner submitted additional supporting documents and a complete family tree.

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 whom they take (*Matter of Morrow*, NYLJ, Apr. 12, 2001, at 23, col 1 [Sur Ct, Bronx County]; 2 Harris, New York Estates, 27:3 [6th ed 2014]). 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, the court makes the following findings of fact and conclusions of law:

A. Decedent's Immediate Family

1. The decedent, James Kennedy, died intestate on November 20, 2006.
2. Decedent never married or had issue, biological or adopted.
3. The decedent was the son of Christopher Kennedy and Katchen/Kathe Sommer, both of whom predeceased him.

4. Christopher Kennedy and Katchen/Kathe Sommer together had one child, James Kennedy, the decedent.

B. Decedent's Paternal Family Tree

1. Decedent's paternal grandfather was James Kennedy and his paternal grandmother was Elizabeth/Eliza Summers. They predeceased the decedent.

2. James Kennedy and Elizabeth/Eliza Summers had eight children:

A. Christopher Kennedy, the decedent's father.

B. Beatrice Kennedy, who predeceased the decedent. Her three children, William James Reginald Thompson, Elizabeth Evelyn Thompson and Horace Leslie Thompson, all predeceased the decedent.

C. Thomas Henry Kennedy, who predeceased the decedent, leaving no issue.

D. Georgina Kennedy, who predeceased the decedent, leaving no issue.

E. James Joseph Kennedy, who predeceased the decedent, leaving no issue.

F. Elizabeth/Lily Kennedy, who predeceased the decedent, leaving no issue.

G. Ambrose John Kennedy, who predeceased the decedent, leaving no issue.

H. Agnes Muriel Kennedy, who predeceased the decedent, leaving no issue.

C. Decedent's Maternal Family Tree

1. Decedent's maternal grandfather was Franz Wilhelm Sommer and his maternal grandmother was Antonie Winter. They predeceased the decedent.

2. Franz Wilhelm Sommer and Antonie Winter had three children:

A. Katchen/Kathe Sommer, the decedent's mother.

B. Henri/Henry Sommer, who predeceased the decedent. He was survived by two children:

(1) Doreen Sommer, who post-deceased the decedent on February 18, 2011.

(2) Lenore Sommer, the petitioner.

C. William/Wilhelm Sommers, who predeceased the decedent. He had two children:

(1) Sally/Sarah T. Sommers, who predeceased the decedent.

(2) William Sommers, who survived the decedent.

D. Kinship Findings

The decedent was not survived by spouse, issue, parent, whole siblings or half siblings, or by nieces or nephews. The decedent was survived by the following three maternal first cousins: (1) Doreen Sommer, who post-deceased the decedent; (2) Lenore Sommer; and (3) William Sommers.

FEES

“The Surrogate's Court bears the ultimate responsibility for deciding what constitutes a reasonable attorney's fee, and the evaluation of what constitutes a reasonable attorney's fee is a matter within the sound discretion of the court. 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 Goliger*, 58 AD3d 732, 732 [2d Dept 2008][internal quotation marks and citations omitted]; *accord*, *Matter of Freeman*, 34 NY2d 1, 9, [1974]; *Matter of Potts*, 123 Misc 346 [Sur Ct, Columbia County 1924], *affd* 213 App Div 59 [4th Dept 1925], *affd* 241 NY 593 [1925]).

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]). In this instance, the entire estate consists of \$77,158.78, which will operate as a limitation on the fees payable (*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.

Counsel for the Public Administrator submitted an affirmation of services stating that he provided 14.5 hours of services, resulting in a bill of \$5,862.50. It is not anticipated that additional services will be required, as this is a withdrawal proceeding, and the petitioner will be required to prepare, notice and file the decree. The court fixes the fee of counsel to the Public Administrator in the amount of \$3,200.00.

The guardian ad litem reports that he expended 23.5 hours of services between May 6, 2016 and March 1, 2017, including four court appearances for a conference and the three-part kinship hearing. His usual billing rate is \$350.00 per hour, resulting in a fee of

\$8,225.00. The court fixes the fee of the guardian ad litem in the amount of \$4,600.00.

CONCLUSION

Given the size of the estate, and the testimony and documentary evidence provided, petitioner's search for heirs was sufficient to support the conclusion that no paternal heirs exist, and no maternal heirs exist apart from: (1) the petitioner, Lenore Herman; (2) the estate of Doreen Sommer; and (3) William Sommers (*see Matter of Whalen*, 93 AD2d 891 [2nd Dept 1983], *affd* 62 NY2d 657 [1984]).

Accordingly, upon presentation of a certified copy of this Order, it is:

ORDERED that the following fees shall be paid out of the funds deposited by the Public Administrator of Nassau County with the New York State Comptroller for the unknown heirs of James Kennedy, pursuant to the order of this court issued on February 25, 2013:

\$3,200.00 to counsel for the Public Administrator; and

\$4,600.00 to the guardian ad litem for the unknown heirs of the decedent; and it is further

ORDERED that the net funds remaining after payment of the above fees be paid over and delivered in three equal shares to: (1) Lenore Herman; (2) the personal representative of the estate of Doreen Sommer; and (3) William Sommers. This is the decision and order

of the court.

Dated: September 5, 2017
Mineola, New York

E N T E R :

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Acting Surrogate

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