

**Matter of Antin**

2019 NY Slip Op 31079(U)

April 19, 2019

Surrogate's Court, New York County

Docket Number: 2002-0111

Judge: Nora S. Anderson

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SURROGATE'S COURT : NEW YORK COUNTY  
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Accounting Proceeding, Estate of

New York County Surrogate's Court

Date: APRIL 19, 2019

HAROLD ANTIN,

File No. 2002-0111

Deceased.  
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A N D E R S O N , S .

The only issue remaining in this highly-litigated estate concerns the allocation of responsibility for payment of outstanding estate liabilities, including unpaid legal fees.<sup>1</sup> There are insufficient funds on hand to make such payment as a result of prior over-distribution of estate assets to the beneficiaries, decedent's son (the executor) and daughter, before acrimony between them broke out into costly contested litigation.

The executor was represented by two different attorneys in the course of the estate administration, and the issue of legal fees was presented to the court in two separate proceedings. The executor's first attorney, who was discharged in the midst of litigation, brought a proceeding pursuant to SCPA 2110 to have his fee fixed. That proceeding was held in abeyance pending the resolution of this accounting proceeding, in which the executor

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<sup>1</sup>Other issues between the executor and his sister, who were the sole beneficiaries of the estate, were resolved by a series of court decisions (*Matter of Antin*, NYLJ Jan. 7, 2013, at 20, col 4, 2013 NYLJ LEXIS 777; *Matter of Antin*, NYLJ Feb 1, 2013, at 38, 2013 NYLJ LEXIS 2601; *Matter of Antin*, NYLJ Feb 1, 2013, at 22, col 4, NYLJ LEXIS 2260), or by stipulation filed with the court on June 2, 2014.

requested permission to reimburse himself for legal fees and disbursements of his second attorney, which he had paid from his personal funds pursuant to their retainer agreement. The court ultimately fixed legal fees for both attorneys (*Matter of Antin*, NYLJ April 11, 2016, at 21, col 4, 2016 NY Misc LEXIS 1119 and 2443; *on rearg*, *Matter of Antin*, NYLJ Dec 19, 2016 at 22, col 14, 2017 NYLJ LEXIS 4135) and entered a decree on the first attorney's 2110 proceeding, which decree imposed interest at 9% per annum from the date of the decision fixing fees.

The executor's account, as supplemented and ultimately brought down to date, showed only \$65.07 on hand with which to defray liabilities of \$95,344.45 plus interest owed to the first attorney and \$66,246.08 owed to the executor as reimbursement for administration expenses which he had paid out of his own pocket, including a portion of the legal fees of the second attorney.

The decree in the 2110 proceeding provides that, "to the extent that there are insufficient funds remaining in the estate to satisfy this Decree, [the beneficiaries] be, and hereby are, held individually liable, in equal portions, for any amounts due hereunder, to the extent of distributions already made to them" (Decree, December 15, 2016). The direction that responsibility for payment be apportioned equally between the decedent's children was in response to arguments each of them had made that the other should be held wholly responsible for any fees awarded.

The court rejected the arguments of both children, finding that "each [of them] had contributed to needless complication and prolongation of the litigation" and that legal fees should thus be "equally apportioned" between them (*Matter of Antin*, Decision, April 5, 2018, NYLJ April 11, 2016, at 21, col 4).

The executor has now settled a proposed accounting decree which would direct payment of the outstanding legal fees owing to the first attorney as follows: \$65.07 remaining on hand to be paid from the estate; \$78,295.26 (plus interest) to be paid by the daughter; and \$11,984.12 (plus interest) to be paid by the executor individually (in addition to \$5,000 he has already paid). This repayment scheme would make the daughter responsible for the equivalent of the amount the executor is out-of-pocket before dividing responsibility for the remainder of the outstanding fee equally between them.

The first attorney objects to the proposed decree for two reasons: first, because it would shift the burden and risk of collection from the daughter to him in lieu of the executor; and, second, because it in effect would absolve the executor from the consequences of his having over-distributed the estate assets and paid other administration expenses without making any provisions for the first attorney's fee.

This is not a case where the estate is insolvent, which would entitle the various claimants only to a pro rata share of

the available funds. Here, the fact that there are insufficient funds to pay the outstanding expenses in full is directly attributable to the executor's premature distributions to himself and the daughter.

The executor's proposed decree quotes the portion of paragraph 27[c] of the stipulation between the children which settled the remaining issues between them. The paragraph provides that, in the event disgorgement of distributions is necessary, neither of the parties assumes liability for repayment or refunding of the other party's share. It appears that the executor relies on this provision as justification for his proposed repayment scheme. The court has considered the language of the stipulation and concludes that it does not reflect an intention to insulate the executor from appropriate surcharges and thus further concludes that it is not determinative of the executor's responsibility for the premature distributions and, therefore, is immaterial to the court's determination.

Accordingly, each beneficiary is ordered to refund to the estate the amount by which the total distributions to such beneficiary exceeded his or her share of the estate as finally determined. If the amount refunded is insufficient to satisfy the outstanding legal fees due to the first attorney, the executor, in his fiduciary capacity, is surcharged in the amount needed for payment of the total unpaid legal fees as fixed and

determined by the decision dated April 11, 2016, and the executor is directed to pay such fees to the full extent that they are to date unpaid in satisfaction of the first attorney's legal fee. To the extent that the executor's surcharge exceeds the amount that he as a beneficiary is directed to refund to the estate, the order directing a refund from the other beneficiary is enforceable by the executor in both his fiduciary and individual capacities.

Decree signed.

Dated: April 19, 2019, 2019

  
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S U R R O G A T E