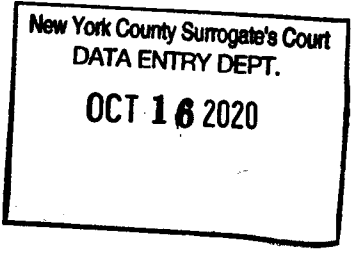


Matter of Frock-Rohrbeck (Warehime)
2020 NY Slip Op 33604(U)
October 16, 2020
Surrogate's Court, New York County
Docket Number: 2013-1953/J
Judge: Rita M. Mella
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SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK



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ACCOUNT STATED by RUSSELL WAREHIME, as
Administrator D.B.N. of the Estate of

LINDA S. FROCK-ROHRBECK,
Deceased,

DECISION
File No.: 2013-1953/J

As and for the Account of Former Administrator Jean K.
Herman Pursuant to SCPA 2206 (4) and Related Relief.

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M E L L A, S.:

In this proceeding pursuant to SCPA 2206 (4), Russell Warehime (“Warehime” or “petitioner”) petitions to have the court take and state the account of Jean K. Herman (“Herman”) as former administrator of the estate of decedent Linda Frock-Rohrbeck for the period of May 13, 2013 through December 23, 2017.¹ Warehime also asks the court to impose a surcharge in the amount of \$617,116.03, plus 9% interest from January 11, 2018, the date Herman’s Letters of Administration were revoked.

Decedent, a widow, died intestate on May 13, 2013, survived by Herman (decedent’s sister), one niece and four nephews, issue of decedent’s predeceased brother Russell Frock. According to Schedule A of the stated account, Decedent’s assets were valued at more than \$9 million at the time of her death. The main asset was a townhouse located on East 62nd Street in the borough of Manhattan. Decedent also had investments accounts valued at \$2.8 million.

In February 2015, Daniel Frock (“Frock”), decedent’s nephew and distributee, commenced a proceeding to compel Herman to account. Herman opposed the petition on the ground that she had made an adequate informal account available to the other distributees.

¹ Letters of Administration issued to Herman on July 18, 2013. She was not required to post a bond.

After a conference with the court, however, the distributees were not satisfied with Herman's records. In a Decision and Order dated October 21, 2015, this court directed Herman to file an account of her proceedings as administrator and to petition for its judicial settlement (*see Matter of Frock-Rohrbeck*, NYLJ, Oct. 26, 2015 at 22, col 3 [Sur Ct, NY County]). The October 21, 2015 Decision and Order was served on Herman with Notice of Entry, as directed, but Herman failed to account.

In February 2017, Frock petitioned for Herman's removal as fiduciary. On the May 23, 2017 return date of the citation, Herman failed to appear, and the court removed her as administrator (*see Matter of Frockrohbrbeck* [sic], May 26, 2017, at 22, col 5 [Sur Ct, NY County 2017]). The May 2017 decision was later modified to grant letters of administration d.b.n. to Warehime instead of Frock since Frock no longer wished to serve as successor fiduciary.² On January 11, 2018, a Decree granting Letters of Administration d.b.n. to Warehime was entered. The Decree directed Herman to "turn over all assets and records of the estate to Russell Warehime within 20 days after the issuance of Letters of Administration d.b.n. to him."

On December 20, 2018, Warehime filed the instant "take and state" account. A citation issued, returnable September 17, 2019, to Herman and the other distributees of decedent's estate, directing them to show cause why the stated account should not be judicially settled. The citation also gave Herman notice that Warehime was seeking a surcharge, as above-mentioned. Jurisdiction was deemed complete and, once again, Herman failed to appear or oppose the application. The accounting petition was later supplemented, at the request of the court, by the filing of an Affirmation by petitioner's counsel.

² Letters of Administration d.b.n. had never been issued to Frock.

This court may take and state the accounts of errant fiduciaries, and may, in doing so, make findings of fact as to receipts and disbursements. Any decree entered upon those findings is binding on those fiduciaries (*see* SCPA 2206 [4]; *Matter of Wilkinson*, 152 AD2d 585 [2d Dept 1989]; *lv denied* 75 NY2d 702 [1989]; *Matter of Karp*, NYLJ, Dec. 2, 1998, at 28, col 4 [Sur Ct, Nassau County]). Where a fiduciary has ignored an order to account and there are doubts concerning the facts, those doubts will be resolved against the recalcitrant fiduciary (*Matter of Karp, supra*; *Vinlis Constr. Co v Roreck*, 30 AD2d 668 [2d Dept 1968], *mod'd* 27 NY2d 687 [1970], *rearg denied* 27 NY2d 1006 [1970]; *Matter of Reckford*, 307 NY 165 [1954], *rearg denied* 307 NY 842 [1954]; *see also Matter of Shulsky*, 34 AD2d 545 [2d Dept 1970], *lv dismissed* 27 NY2d 743 [1970]).

The duties of a fiduciary are primarily and generally to settle and distribute the estate of the deceased (*see Matter of Kohler*, 231 NY 353, 365 [1921]). As shown by the account stated by Warehime, Herman is charged in the amount of \$9,234,072.47, with an equal amount of credits, thus yielding a zero balance on hand as of December 23, 2017, as shown on Schedule G. Therefore, it appears that Herman had fully administered the estate before the revocation of her letters and the appointment of a successor fiduciary on January 11, 2018.

Petitioner's request to surcharge Herman in an amount equal to 50 percent of the "estate expenses" is granted. Herman failed to account despite this court's order and, additionally, failed to controvert the allegations in the stated account that she did not provide any proof to support these disbursements. Those uncontroverted allegations are deemed due proof of the facts alleged (SCPA 509). Herman is surcharged in the amount of \$60,116.03, and she must pay interest on that amount at the rate of 9% from January 11, 2018.

However, the request for the imposition of a surcharge on Herman in the amount of the “wrongfully computed” commissions that she allegedly paid herself (\$557,000) is denied without prejudice to petitioner’s supplementing or amending the accounting by affidavit and exhibits setting forth facts that would make such surcharge warranted. Schedules C and I of the stated account do not reflect that Herman paid herself any commissions. Any additional submission must be filed with the court no later than November 13, 2020. If no submission is received by this deadline, the court will proceed to issue a decree settling Herman’s account as stated, in accordance with the findings and conclusions reflected in this decision.³

This decision constitutes the order of the court.

Clerk to Notify.

Dated: October 16, 2020



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³ A proposed decree was settled by petitioner on notice to Herman and the other distributees in December 2019.