

Matter of Gerard (Peluso)

2024 NY Slip Op 33839(U)

May 8, 2024

Surrogate's Court, Albany County

Docket Number: File No. 2017-398/D

Judge: Stacy L. Pettit

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State of New York

Surrogate's Court, Albany County

In the Matter of the Petition of LOUISE GERARD, as Administrator of the Estate of MICHAEL PELUSO, Deceased, to Judicially Settle the Account of the Administrator.

DECISION AND ORDER

File No. 2017-398/D

Appearances:

Gerard Parisi, Attorney for Petitioner Louise Gerard, Parisi, Coan & Saccocio, PLLC, Schenectady

John R. McFadden, Attorney for Respondent Dolores Peluso, Rhoades, Cunningham, & McFadden, PLLC, Albany

Albert F. Dingley, Attorney for Respondent Albany County Department of Social Services, Albany

Pettit, S.,

Pending before this Court is a motion by Gerard Parisi, as attorney for petitioner Louise Gerard (hereinafter petitioner), the administrator of the estate of Michael Peluso (hereinafter decedent), for an order fixing compensation for the estate attorney in the amount of \$134,249.88. Respondent Albany County Department of Social Services (hereinafter ACDSS), as creditor of the estate, and respondent Dolores Peluso (hereinafter Peluso), as beneficiary of the estate, have opposed the motion and it has been submitted for decision.

Decedent died intestate a resident of Albany County on March 18, 2017, survived by his siblings: petitioner, Peluso, and Louis Peluso.¹ On July 18, 2017, this Court issued letters of administration to petitioner, upon her obtaining a bond in the amount of \$167,000 from NGM Insurance Company. In October 2017, a notice of claim was presented to petitioner for \$591,810.99 by claimant Department of Health (hereinafter DOH), for Medicaid paid for medical assistance provided to decedent. Petitioner promptly rejected the claim, and no action or proceeding was initiated by the claimant thereafter. Petitioner's rejection was allegedly based upon her belief that decedent received the Medicaid payments under a distinct Social Security Disability plan that was designed for disabled workers who continue to work full time, and that the program allowed for Medicaid coverage for personal care aides to assist the full-time worker and need not be repaid.

In September 2021, petitioner commenced an accounting proceeding for decedent's estate, citing Peluso, the estate of Louis Peluso, DOH and NGM Insurance Company. Prior to the return date, petitioner and Peluso stipulated that the filing of objections to the accounting by Peluso could be delayed until a determination was made as to the claim. ACDSS, who has authority to pursue DOH's claim under the Social Services law, did not appear on the return date of the accounting citation but subsequently filed objections to the accounting. In April 2022, petitioner commenced a proceeding pursuant to SCPA 1809 to determine the validity and enforceability of the claim, requesting that the claim be disallowed. Therein, petitioner asserted that the claim should be dismissed due to ACDSS's failure to timely answer the accounting petition. Petitioner further argued that the validity and enforceability of the claim should be determined before the accounting proceeding continued, as, due to the size of the claim, all the remaining resources of the estate on

¹ Louis Peluso post-deceased decedent, survived by his spouse, Maria Peluso.

hand are at stake in the present claim (see SCPA 1809 [3]).² ACDSS timely answered the petition and disputed its default in the accounting, arguing that service of the accounting citation was improperly made on DOH. Peluso appeared in the SCPA 1809 proceeding in support of petitioner's position. The estate of Louis Peluso and the NGM Insurance Company were both served with the citation but failed to appear. The parties engaged in discovery on the issue of ACDSS's claim, then ACDSS moved the Court for an order under CPLR 3212 for summary judgment on its claim, which motion was granted.

Petitioner's counsel, Gerard Parisi, now moves this Court under SCPA 2110 for an order approving his compensation in the amount of \$134,429.88, which includes legal fees of \$131,193.25 and disbursements of \$3,236.63. The Court takes into consideration a number of factors when determining and fixing counsel fees, including but not limited to the "time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented; the lawyer's experience, ability and reputation; the amount involved and benefit resulting to the client from the services; the customary fee charged by the Bar for similar services; the contingency or certainty of compensation; the results obtained; and the responsibility involved" (*Matter of Freeman*, 34 NY2d 1, 9 [1974], citing *Matter of Potts*, 213 App Div 59, 62 [4th Dept 1925], *affd* 241 NY 593 [1925]; see *Matter of Von Hofe*, 145 AD2d 424, 425 [2d Dept 1988]). In determining the reasonableness of counsel fees in a particular case, a Surrogate is required to consider all the relevant factors (*see Matter of Patchin*, 106 AD2d 730, 732 [3d Dept 1984]), and "[t]he court may direct payment therefor from the estate generally or from the funds in the hands of the fiduciary belonging to any legatee, devisee, distributee or person interested" (SCPA 2110 [2]).

² According to the accounting, there was \$269,667.37 in estate assets on hand.

In support of his application, Parisi has submitted an affirmation of legal services, with contemporaneously-maintained billing records, and a memorandum of law. Parisi explains that he was retained by petitioner in May 2021 to represent her with respect to decedent's estate.³ Since that time, his office has expended 558.35 hours on this matter. Parisi states that he and petitioner reserve the right to apply the obligation for any of his fees approved by the court to the appropriate interested parties at the conclusion of all matters.⁴ The estate had gross assets of \$715,822.01, and currently has a balance on hand of \$269,667.37 consisting of approximately \$200,000 in cash on hand.⁵ Parisi notes that DSS has a valid claim in excess of \$500,000 and that the federal and state taxing authorities have claims against the estate in excess of \$200,000 combined.

Taking into consideration the relevant factors, the Court observes that Parisi has been counsel to the estate fiduciary for approximately three years and his office has spent over 550 hours working on this estate. During that time, he has prepared a formal judicial accounting and commenced and concluded a proceeding to determine the validity of ACDSS's claim. The judicial accounting covered more than four years of estate transactions which were conducted prior to Parisi's engagement in this matter. In addition, Parisi had to prepare and file income tax returns that were due five years earlier. This estate has been litigated since its commencement, with both Peluso and ACDSS participating in the litigation. Several motions have been filed and several decisions have been issued by the Court during the time that Parisi has been involved. The Court notes that ACDSS filed four notices of motion between May 2022 and April 2023, thus

³ Petitioner was represented by attorney Marvin Schiff from 2017 through 2021.

⁴ Parisi notes that petitioner has been consulted as to the fees being requested but has not responded to his request.

⁵ It is noted that the accounting states that approximately \$100,000 was held in the escrow account of petitioner's prior counsel Marvin Schiff from the sale of certain real property that decedent had an interest in, and such amount should be distributed to the estate. Schiff died in November 2021, and the status of those funds is unclear.

contributing to the substantial litigation that has occurred. There have also been multiple court appearances, including citation return dates and conferences. Parisi is an experienced attorney who concentrates his practice in the area of trusts and estates law, including administration and litigation matters. He is a member of the Schenectady County Bar Association's Estate Planning and Elder Law Committee and he has lectured for continuing legal education programs sponsored by the New York State Bar Association. Parisi is a reputable attorney in this field and his hourly rate is in line with that charged by other estate litigators in this area.

ACDSS and Peluso have both opposed Parisi's application. Peluso concedes that Parisi performed the services listed and is an experienced attorney in this area of law. Peluso argues, however, that Parisi should not be paid legal fees until after she receives reimbursement from the estate for payment of certain funeral expenses. The Court rejects Peluso's argument. Administration expenses, including legal fees, are priority claims against the estate before funeral expenses (*see* SCPA 1811 [1]; *Matter of Jewett*, 145 AD3d 1114, 1119-1120 [3d Dept 2016]; *see also* SCPA 2102 [3]; SCPA 2213 [1] ["the claim for funeral expenses . . . shall not be paid before the expenses of administration are paid"]). Furthermore, the Court notes some irregularities with respect to Peluso's claim for funeral expenses. Peluso states that, as executor of the estate of Dorothy Peluso (the mother of decedent, petitioner and Peluso), she paid a total of \$16,388.17 for decedent's funeral service and burial plot. Accordingly, Peluso timely served a claim for that amount on petitioner but petitioner, as administrator, has not reimbursed Peluso, as executor. Peluso's claim includes an invoice for a burial plot expense of \$10,205; the invoice indicates, however, that the burial plot is a crypt space for both decedent and petitioner. Therefore, it does not seem that decedent's estate would be responsible for the full expense of the crypt. As for the funeral services, the paid funeral bill submitted with the claim indicates that the total sum of

\$5,906.85 was paid with a check by one Jason Gerard – not by Peluso. It is also noted that the sum of these two bills totals \$16,111.85, which is \$276.32 less than the amount that Peluso seeks in reimbursement. Petitioner rejected Peluso’s claim for funeral expenses in the accounting, stating that the crypt was purchased by a trust and should be distributed to petitioner and Peluso, as beneficiaries of the trust. Furthermore, if decedent’s funeral expenses were paid by Dorothy Peluso’s estate, decedent’s estate would ultimately be the recipient of half of the amount paid back to Dorothy Peluso’s estate, as decedent was a 50% beneficiary of that estate. Peluso’s claim, therefore, does not defeat Parisi’s right to compensation for his legal services.

Turning to ACDSS, it consents in part and objects in part to Parisi’s application for legal fees. ACDSS does not object to Parisi receiving payment for services provided from May 2021 through December 2021. Parisi calculates that this amount totals \$18,421.50. Accordingly, the remaining fees - \$112,771.75 – are for work in this estate during 2022 and the first half of 2023, according to the billing records submitted. ACDSS raises several arguments regarding the rest of Parisi’s legal fees.

ACDSS first takes issue with petitioner’s rejection of its claim and the ensuing litigation, including the proceeding to determine the validity of the claim. Based on the information presently available, the Court does not find that this is a basis to deny Parisi’s legal fees. Petitioner rejected the claim under the advice of her prior counsel, and Parisi continued to pursue the legal theory already raised by petitioner. Although those efforts were ultimately unsuccessful, Parisi raised good faith defenses to the claim, including issues of default, waiver, and the timeliness of ACDSS’s appearance. It is noted that the Medicaid lien in this estate was not the typical estate Medicaid lien based on payments for a nursing home; rather, it was for a unique program which provided aid to decedent while he lived at home and engaged in full time employment. In

Surrogate's Court, "where legal services have been rendered for the benefit of the estate which result in enlargement of the distributive shares of the estate beneficiaries, reasonable compensation should be granted out of the estate for such services" (*Matter of Baxter [Gaynor]*, 196 AD2d 186, 189-190 [4th Dept 1994], *lv denied* 84 NY2d 808 [1994], quoting *Matter of Graves*, 197 Misc 638, 639 [Sur Ct, Monroe County 1950]). Here, petitioner's attempts to invalidate the claim were for the benefit of the estate, as denial of the claim would have enlarged the beneficiaries' shares.

ACDSS next takes issue with petitioner not pursuing a claim for malpractice against the prior estate attorney. The Court finds that whether petitioner should have pursued a malpractice claim against her prior counsel is irrelevant to the present consideration of legal fees for the services Parisi has performed since 2021. It is also noted that the prior estate attorney died within six months of Parisi being retained in this matter. Furthermore, Parisi affirms that he consulted with another attorney regarding the potential malpractice claim and that attorney declined to accept the case, suggesting that the claim was not assured to be successful.

ACDSS also argues that the estate is not responsible for legal fees associated with nonstate assets, such as issues arising out the Dorothy Peluso estate and trust is also not persuasive. While it is generally true that legal fees can only be charged to an estate for services related to estate assets, that rule is not applicable to the circumstances here. Decedent was a 50% beneficiary of his mother's estate, along with Peluso. Petitioner, as administrator of decedent's estate, commenced a discovery proceeding in this Court to obtain assets belonging to decedent's estate that, petitioner argued, were in Peluso's possession and control. In addition, petitioner had a duty to ensure that decedent's estate received its rightful share from the estate of Dorothy Peluso. Accordingly, work performed by petitioner's counsel to bring assets into decedent's estate from the estate and trust of Dorothy Peluso were for the benefit of this estate and are properly charged to the estate.

The Court does agree with ACDSS that petitioner’s handling of this estate may warrant a finding that she should be individually responsible for some of Parisi’s legal fees. “Normally, the fiduciary’s attorneys will be paid from the assets of the estate, unless the services were rendered for the fiduciary personally (rather than in his fiduciary capacity) or were necessitated by the misconduct of the fiduciary. In such instances, the fees must be paid by the fiduciary personally.” (8 Warren’s Heaton on Surrogate’s Court Practice § 106.04 [2024]; see *Matter of Rose BB.*, 35 AD3d 1044, 1045 [3d Dept 2006], *appeal dismissed* 8 NY3d 936 [2007]). Where “a fiduciary is charged with a breach of his [or her] fiduciary duties, it is the outcome of the proceedings on these charges which determines whether the legal expenses incurred by the fiduciary in defending against the charges can be properly assessed against the estate, and payment for services in the defense of such charges should not be authorized on an interim basis until the charges have been resolved” (*Matter of Birnbaum*, 113 AD2d 1032, 779 [4th Dept 1985] [internal citations omitted]).

Here, the accounting proceeding is still pending, with objections having been filed against petitioner for, among other things, distributions to herself and Louis Peluso,⁶ and for unreasonable attorneys’ fees, including those of her prior counsel. Accordingly, the Court reserves decision on Parisi’s remaining attorney’s fees in the amount of \$112,771.75 with respect to whether that amount should be charged against petitioner’s share, as opposed to the estate as a whole. A final determination on the payment of those fees shall be made upon the conclusion of the accounting proceeding by petitioner, after the Court has determined whether petitioner has breached her fiduciary duty and acted against the interests of the estate. Accordingly, the application for attorneys’ fees is partially denied without prejudice to renewal at the appropriate time.


⁶ It is noted that the administrator will be personally liable to a creditor where she distributed estate assets with knowledge of the claim. Here, petitioner made significant distributions from this estate despite having not resolved the claims of ACDSS and Peluso. She distributed \$65,000 to Louis Peluso in 2017 and 2019. She distributed \$235,497.55 to herself from 2017 through 2021.

Parisi shall be permitted to immediately receive payment from the estate in the amount of \$18,421.50 for legal fees and \$3,236.63 for disbursements. It is hereby

ORDERED that Gerard Parisi's motion to fix compensation for attorney's fees is granted in part and denied in part as set forth above.

This constitutes the decision and order of the Court. You are hereby notified that this order has been entered this date in the office of the Clerk of Albany County Surrogate's Court. At the time of the filing of this decision and order, NYSCEF shall transmit by e-mail to the e-mail service addresses of record a notification that the decision and order has been filed and is accessible through NYSCEF. Such notice shall not constitute service of notice of filing or entry by any party (*see* 22 NYCRR 207.4a [h]).

Dated and Entered: May 8, 2024



Hon. Stacy L. Pettit, Surrogate

Papers Considered:

- 1) Notice of Motion to Fix Compensation for Attorney's Fees Pursuant to SCPA 2110 dated January 29, 2024; Attorney Affirmation in Support of Motion of Gerard F. Parisi, Esq., dated January 29, 2024, and exhibits A-B; and Memorandum of Law in Support of Gerard F. Parisi, Esq., dated January 29, 2024.
- 2) Attorney Affirmation in Opposition of Albert F. Dingley, Esq., dated February 27, 2024;
- 3) Attorney Affirmation in Opposition of John R. McFadden, Esq., dated February 29, 2024, with exhibits A-D.
- 4) Attorney Affirmation in Opposition to Request for Payment of Funeral Expenses of Albert F. Dingley, Esq., dated March 5, 2024;
- 5) Reply Attorney Affirmation in Support of Motion of Gerard F. Parisi, Esq., dated March 7, 2024; and Reply Memorandum of Law in Support of Gerard F. Parisi, Esq., dated March 7, 2024.