Kern
2013 NY Slip Op 33572(U)
December 11, 2013
Surrogate's Court, Nassau County
Docket Number: 351502/B
Judge: Edward W. McCarty III

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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Proceeding to Settle the Accounts
of Jeffrey E. DeLuca, Public Administrator of Nassau
County, as Temporary Administrator of the Estate of

DENISE RANNOU KERN,

Deceased.

File No. 351502/B

Dec. No. 29283

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Before the court is the first and final account of the Public Administrator for the estate of Denise Rannou Kern who died a resident of Nassau County, on May 5, 2008. Letters of temporary administration issued to the Public Administrator on May 30, 2008. A guardian ad litem was appointed by the court to represent the interests of the decedent's unknown heirs. She has filed her report.

The Public Administrator filed his account which shows the receipt of $1,621,800.50 of principal and income. This amount was reduced by administration expenses and creditor's claims in the amount of $225,431.65 leaving a balance of $1,396,368.85 on hand. The Public Administrator seeks approval of the accounting, approval of commissions, the fixing of fees for the services of the attorneys and accountant and authorization to distribute the net estate. In addition, the court must address the outcome of the kinship hearings, set the fee for the court appointed guardian ad litem and release the administrator from the surety bond.

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 which they take (*Matter of Morrow*, NYLJ, April 12, 2001 at 23, col 1 [Sur Ct, Bronx County]; 2 Harris, New York Estates, 27:3 at 694 [2013]). 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, Denise Rannou Kern, died intestate on May 5, 2008, and letters of administration were issued to the Public Administrator on May 30, 2008.

2. The decedent, Denise Rannou Kern, was married to Elston Kern who predeceased the decedent. The decedent's marriage to Elston Kern occurred when she was sixty-eight years old. Denise Rannou Kern did not have any issue, adopted or otherwise.

3. The decedent's mother was Josephe-Marie Rannou. She predeceased the decedent. Approximately fifteen years after the birth of the decedent, Joseph-Marie Rannou married Fred Ferdinand Ciabattini. Josephe-Marie Rannou and Fred Ciabattini had one child, Robert Ciabattini, who predeceased the decedent, dying at the age of seven in 1944. Although the decedent sometimes used the name Ciabattini as her surname, Fred Ciabattini did not adopt her. The decedent's mother had no other issue, adopted or otherwise, other than the decedent and

Robert Ciabattini.

4. The decedent's father was Maurice Peron/Perron. He predeceased the decedent. Although he was not wed to the decedent's mother, his name was listed on documents the decedent filled out with regard to her application for Social Security and her license and affidavit to marry. The evidence presented established that Maurice Peron/Perron openly acknowledged that he was the father of five children, one of whom was born out of wedlock. Testimony was taken that Maurice Peron/Perron told other relatives of his generation about the decedent and his relationship to her. The court finds that Maurice Peron/Perron of Langonnet, France was the father of the decedent and that he openly acknowledged her. Maurice Peron/Perron had four children, who were half-siblings of the decedent; Marie-Therese Peron , who predeceased the decedent and was survived by Roger Maurice Royer, Maurice Yves Jose Royer, and Alain Joseph Roye.; Anastasie Francoise Peron who survived the decedent; Maurice Yves Julien Peron who predeceased the decedent and had no issue; and Albertine Eleonore Peron who survived the decedent.

10. Thus, the court finds that the decedent was survived by two half siblings, Anastasie Francoise Peron and Albertine Eleonore Peron and three nephews, Roger Maurice Royer, Maurice Yves Jose Royer and Alain Joseph Royer. In accordance with EPTL 4-1.1(a)(5) the whole of the estate shall be distributed to the issue of the decedent's father by representation.

With respect to the issue of attorneys' fees, 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 (*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 (*Matter of Kelly*, 187 AD2d 718 [2d Dept 1992]); the complexity of the questions involved (*Matter of Coughlin*, 221 AD2d 676 [3d Dept 1995]); the nature of the services provided (*Matter of Von Hofe*, 145 AD2d 424 [2d Dept 1988]); the amount of litigation required (*Matter of Sabatino*, 66 AD2d 937 [3d Dept 1978]); the amounts involved and the benefit resulting from the execution of such services (*Matter of Shalman*, 68 AD2d 940 [3d Dept 1979]); the lawyer's experience and reputation (*Matter of Brehm*, 37 AD2d 95 [4th Dept 1971]); and the customary fee charged by the Bar for similar 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]; *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 (*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 (*Martin v Phipps*, 21 AD2d 646 [1st Dept 1964], *affd* 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 (*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]). Contemporaneous records of legal time spent on estate matters are important to the court in determining whether the amount of time spent was reasonable for the various tasks performed (*Matter of Von Hofe,* 145 AD2d 424 [2d Dept 1988]; *Matter of Phelan*, 173 AD2d 621 [2d Dept 1991]).

These factors apply equally to an attorney retained by a fiduciary or to a court-appointed guardian ad litem (*Matter of Burk*, 6 AD2d 429 [1st Dept 1958]; *Matter of Berkman*, 93 Misc 2d 423 [Sur Ct, Bronx County 1978]; *Matter of Reisman*, NYLJ, May 18, 2000, at 35, col 4 [Sur Ct, Nassau County]). Moreover, the nature of the role played by the guardian ad litem is an additional consideration in determining his or her fee (*Matter of Ziegler*, 184 AD2d 201 [1st Dept 1992]).

With respect to disbursements, the tradition in Surrogate's Court practice is that the attorney may not be reimbursed for expenses that the court normally considers to be part of

overhead, such as photocopying, postage, telephone calls, and other items of the same matter (*Matter of Graham*, 238 AD2d 682 [3d Dept 1997]; *Matter of Diamond*, 219 AD2d 717 [2d Dept 1995]; Warren's Heaton on Surrogate's Court Practice §106.02 [2] [a] [7th ed]). In *Matter of Corwith* (NYLJ, May 3, 1995, at 35, col 2 [Sur Ct, Nassau County]), this court discussed the allowance of charges for photocopies, telephone calls, postage, messengers and couriers, express deliveries and computer-assisted legal research. The court concluded that it would permit reimbursement for such disbursements only if they involved payment to an outside supplier of goods and services, adopting the standards set forth in *Matter of Herlinger* (NYLJ, Apr. 28, 1994, at 28, col 6 [Sur Ct, New York County]). The court prohibited reimbursement for ordinary postage and telephone charges other than long distance.

With respect to accountants' fees, normally, an accountant's services are not compensable out of estate assets unless there exist unusual circumstances that require the expertise of an accountant (*Matter of Meranus*, NYLJ, Mar. 31, 1994, at 37 [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 AD 765 [1938]). "[T]he 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)" (Warren's Heaton on Surrogate's Court Practice §93.08 [7th ed]).

In this case, there were two different attorneys employed by the Public Administrator. Each has submitted an affirmation of legal services and each application will be treated separately. The first attorney supplied the court with an affidavit of legal services and it shows

that the attorney rendered more than five hundred and twenty-three (523) hours of legal services of a partner, associate and paralegal at various hourly rates. The attorneys for the Public Adminstrator performed the following services: prepared and filed the petition for letters of administration; obtained and secured the bond; held conversations with alleged relatives of the decedent; engaged in multiple conversations and correspondence with the attorney for the objectants; held multiple conversations with the decedent's tenants; investigated the decedent's potential ownership of property in France; reviewed the decedent's income tax transcripts; identified and collected the decedent's assets; engaged in discussions with the genealogical review company; reviewed creditors' claims; prepared the decedent's New York State estate tax return; prepared a petition to recover possession of real property; and prepared and filed the final account. The attorney requests that the court set the fee in the amount of $91,500.00 of which $90,614.45 has been paid and $885.00 in disbursements which has not been paid. Under the circumstances, the court fixes the fee and costs of disbursements of Brosnan & Hegler, counsel for the Public Administrator, in the amount paid of $90,614.45.

The Public Administrator also employed an additional law firm. The attorney filed an affirmation of legal services in which he affirms that he and members of his firm spent over seventy-three (73) hours on this matter and performed the following services: opened a file; engaged in multiple conferences; prepared the inventory of assets; prepared the petition to extend letters of administration; reviewed deposition notices; engaged in phone calls with attorneys from Florida regarding the estate of John Rannou; conducted research regarding kinship; reviewed documents for three kinship hearings; reviewed transcripts; researched EPTL regarding paternity; telephone calls regarding Florida real property; and phone calls with the

various attorneys regarding the kinship proceeding and accounting. The attorney also affirms that he incurred fees for disbursements in the amount of $360.00. In light of all of the foregoing factors, the court fixes the fee of Ruskin Moscou Faltischek, P.C. in the amount of $21,000.00 and disbursements in the amount of $360.00.

The guardian ad litem has submitted an affirmation of legal services. The guardian ad litem affirms that she spent over twenty (20) hours on this matter. She reviewed the file, prepared for multiple kinship hearings, reviewed the transcripts, engaged in conferences and conversations with all of the attorneys on the matter and prepared a report and supplemental report. The attorney also asks that her disbursements in the amount of $1,401.25 be approved. This amount was used by the guardian ad litem to hire an investigator to assist her. The court will allow the reimbursement as it appears the amount is not unreasonable, but the guardian ad litem should be aware that the better practice is to seek court approval in advance before retaining any experts or investigators (*see Matter of Stralem*, NYLJ, Aug. 22, 1995, at 21, col 1 [Sur Ct, Nassau County]). In light of the foregoing factors, the court sets the fees of the guardian ad litem in the amount of $7,000.00.

Concerning the accountant's fee, the accountant requested a fee of $4,875.00 of which $3,725.00 has been paid and $1,150.00 remains unpaid. The accountant prepared the federal and state income tax returns as well federal and state fiduciary income tax returns for several years. The work performed by the accountant was not duplicative of the services rendered by the attorney and the requested amount of these services is reasonable. Thus, the court approves the fee in the amount of $4,875.00, of which $1,150.00 remains unpaid.

Finally, the commission of the Public Administrator is approved subject to audit. The

Public Administrator is directed to bring the account down to date within 45 days of the date hereof.

The decree shall discharge the surety.

Settle decree.

Dated: December 11, 2013

EDWARD W. McCARTY III
Judge of the
Surrogate's Court