

Matter of Iacono

2014 NY Slip Op 30240(U)

January 24, 2014

Surrogate's Court, Nassau County

Docket Number: 2010-363187/A

Judge: Edward W. McCarty III

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

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In the Matter of the Account of Proceedings of
the Public Administrator of Nassau County,
as Administrator of the Estate of

File No. 2010-363187/A

Dec. No. 29449

ELEANORA M. IACONO,
a/k/a ELEANORA IACONO,
a/k/a ELEANOR IACONO,

Deceased.

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Before the court is the first and final account of the Public Administrator for the estate of Eleanora M. Iacono.

BACKGROUND

Eleanora M. Iacono (the "decedent") died intestate, a resident of North Massapequa, on June 8, 2010, survived by her three children, Edward Iacono, Michele Rympalski and Lawrence Iacono ("Edward," "Michele," and "Lawrence").

On December 9, 2010, Edward and his wife, Victoria Iacono, filed a petition for letters of administration of decedent's estate, but they were unable to obtain a surety bond. In connection with the administration proceeding, the court appointed a guardian ad litem to represent the interests of Lawrence, who was and remains incarcerated, and the guardian ad litem filed a report in which he recommended that the court appoint the Public Administrator to administer the decedent's estate. Letters issued to the Public Administrator on January 18, 2012. Michelle post-deceased on February 1, 2012; on March 3, 2013, this court appointed Edward as executor of Michele's estate.

The account of the Public Administrator was initially filed on June 11, 2013 and was

amended on July 15, 2013. The guardian ad litem who had represented Lawrence's interests in the administration proceeding was reappointed by the court on August 22, 2013 to represent Lawrence in the present accounting proceeding.

THE ACCOUNT

The account as brought down to date by the Public Administrator shows the receipt of \$290,673.69 of estate principal, which was supplemented by income collected totaling \$398.02. This resulted in total charges of \$291,071.71. This amount was reduced by administrative expenses through March 31, 2013 in the amount of \$45,561.33 and payment of creditors' claims in the amount of \$1,900.00, leaving a balance of \$243,610.38 on hand. The Public Administrator seeks approval of the accounting, approval of commissions, the fixing of fees for the services of the attorney and accountant, the release and discharge of the surety, and authorization to distribute the net estate to: (1) Edward in his individual capacity; (2) Edward in his capacity as executor of the estate of Michele; and (3) Lawrence. In addition, the court must set the fee for the guardian ad litem.

AFFIRMATION IN OPPOSITION

Although no objections to the account were filed, an affirmation in opposition was filed by counsel for Edward¹ on September 4, 2013. The affirmation asserts that (1) the account fails to provide a closing statement for the sale of decedent's real estate or documentary proof of the administrative expenses and fees claimed; (2) the account fails to provide an inventory of decedent's personalty; and (3) Edward is entitled to reimbursement for his payment of

¹Counsel filed a notice of appearance on August 20, 2013, on behalf of Edward in his individual capacity and in his capacity as the executor of Michele's estate.

\$12,625.00 for decedent's funeral expenses.

GUARDIAN AD LITEM REPORT

The guardian ad litem filed his report on September 26, 2013, in which he recommends the approval of the account, the legal and accounting fees, and the commissions. At the same time, the guardian ad litem asks the Public Administrator to consider Edward's claim for reimbursement of funeral expenses in the total amount of \$12,625.00, but recommends that Edward's "claim be allowed only if he provides the Court with proper proof as to how this payment was funded and such proof is satisfactory to the Court" The guardian ad litem also asks that his unpaid fee of \$2,000.00, for services rendered in connection with the administration proceeding and approved by this court in Dec. No. 27226, issued on June 9, 2011, be paid out of the estate, and he requests an additional fee of \$1,968.75 for services rendered in connection with the accounting proceeding.

ANALYSIS: AFFIRMATION IN OPPOSITION

While the affirmation in opposition filed by counsel raises three issues in connection with the account, it is procedurally defective as a pleading because it was filed as an affirmation by counsel rather than as an objection by a party to the proceeding. Parties entitled to file objections to an account are limited to (1) those entitled to process in the accounting proceeding and (2) those covered by CPLR 1012 (a), which governs intervention in an action (Turano & Radigan, New York Estate Administration § 6.03 [b] at 244-245 [2013 ed]). In addition, the required filing fee for an answer was not paid (SCPA 2402).

The court will allow Edward 20 days from the date of this decision in which to correct this procedural defect by filing objections with the requisite filing fee. The objections shall be

limited to any or all of the three issues previously raised by counsel on Edward's behalf; no additional objections may be filed. Should Edward choose not to file objections within the allotted time frame, the account of the Public Administrator will be promptly resubmitted for judicial settlement as an unopposed accounting proceeding.

FEES²

(1) Legal Fees

Regarding the fee of the attorney for the Public Administrator, 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

²The guardian ad litem and the distributees have not objected to the fees requested.

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]). 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]).

(A) Counsel for the Public Administrator

The Public Administrator has petitioned the court for approval of the payment of \$17,464.30 to the attorney for the Public Administrator in connection with the administration of the estate, of which \$4,068.75 has been paid and \$13,975.55 remains unpaid.

In an affirmation of legal services, filed on November 26, 2013, the fee request is reduced to \$16,287.50, consisting of time expended to date totaling \$12,387.50 and anticipated time of \$3,900.00, plus reimbursements of \$167.00. In addition, Schedule C of the account reflects that

counsel was reimbursed \$242.00 on December 7, 2012.

The court has carefully reviewed the affirmation of services and the time records submitted to the court. 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]). The record shows that the attorneys and paralegals devoted 38 hours to this matter prior to September 30, 2013. The services provided included petitioning for letters of administration; identifying and collecting decedent's assets; dealing with squatters and trespassers on decedent's real property; and preparing the final accounting. The affirmation includes multiple entries which total in excess of \$2,500.00 for services rendered in connection with the sale of decedent's real property.

Counsel's affirmation of services includes a number of entries for services performed by a paralegal. While counsel may bill for the services of a paralegal who performs those services under the supervision of counsel, the paralegal's time may be billed only for legal services for which the attorney could have been compensated (SCPA 2110 [4]). Here, a portion of the time billed for the paralegal are for services which are secretarial in nature and are considered part of office overhead and not compensable (*Matter of Efstathiou*, 41 Misc 3d 1219A [Sur Ct, Nassau County 2013]; *Matter of Brannen*, 14 Misc 3d 1222A [Sur Ct, Dutchess County 2007]; *Matter of Gliosca*, NYLJ Jan. 5, 2006, at 20, col 1 [Sur Ct, Suffolk County]).

Considering all of the foregoing criteria, the court fixes the fee of counsel to the Public Administrator in the sum of \$11,500.00 plus \$875.00 for anticipated services required to conclude the estate administration, for a total of \$12,375.00, of which \$4,068.75 has been paid

and \$8,306.25 remains unpaid. The fee is inclusive of services rendered in connection with the sale of decedent's real property. In addition, counsel shall be reimbursed \$167.00 for unpaid disbursements.

In the event that Edward files objections within the 20 days allowed by this decision, causing additional legal services to be required on behalf of the Public Administrator, the court will allow counsel to file a supplemental affirmation of legal services and may set an additional legal fee.

(B) Fee of the Guardian ad Litem

(i) With respect to the fee of the guardian ad litem for services rendered in connection with the administration petition, fixed in the amount of \$2,000.00 by this court in Dec. No. 27226, issued on June 9, 2011, said amount shall be paid to the guardian ad litem within 30 days of the date of this decision.

(ii) With respect to the fee of the guardian ad litem in connection with accounting proceeding, the guardian ad litem has submitted his report; his affirmation of services reflects that he devoted 5.25 hours to this matter. The affirmation indicates that a small portion of this time reflects travel to and from the Surrogate's Court. The court must disallow local travel (*Matter of Trotman*, NYLJ, May 13, 1998 at 32, col 2 [Sur Ct, Nassau County]). The court fixes the fee of the guardian ad litem in the amount of \$1,800.00, to be paid within 30 days of the decree to be issued in connection with this account. In the event that Edward files objections within the 20 days allowed by this decision, and additional legal services and the filing of a supplemental report are required on behalf of the ward of the guardian ad litem, the court will allow the guardian ad litem to file a supplemental affirmation of legal services and may set an

additional fee for the guardian ad litem.

(2) The Fee of the Accountant

The court has also been asked to review the accountant's fees. Typically, an accountant's services are not compensable from estate assets unless there exist unusual circumstances that require the expertise of an accountant (*Matter of Meranus*, NYLJ, Mar. 31, 1994, at 28, col 2 [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 App Div 765 [2d Dept 1938]). The 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, col 2 [Sur Ct, New York County] [internal citation omitted]).

Although the petition and citation indicate the Public Administrator's expectation that the accountant's fees would be approximately \$1,025 .00, the accountant has submitted a final affidavit of services, dated November 29, 2013, requesting a fee of \$2,175.00, of which \$1,025.00 has been paid and \$1,150.00 remains unpaid. The billing records reflect that the accountant prepared the decedent's 2010 federal and New York State personal income tax returns (at a fee of \$450.00) and the estate's annual federal and state fiduciary income tax returns for the year ending May 31, 2013 (at a fee of \$575.00).³ The affidavit also includes a charge of \$1,150.00 for the anticipated filing of a fiduciary income tax return for the year ending May 31,

³There was insufficient income to warrant filing fiduciary returns for the years ending May 30, 2011 and May 30, 2012.

2014, and a final return.

The work performed by the accountant was not duplicative of the services rendered by the estate attorney, and the requested amount for the services provided to date is reasonable. The court approves the fee in the amount of \$1,600.00, which includes \$575.00 for the preparation of a final tax return. Of this amount, \$1,025.00 has been paid and \$575.00 remains unpaid. If the estate administration is not concluded prior to May 31, 2014, and an additional return is required, the court will allow the filing of a supplemental affirmation of accounting services and may set an additional fee for the accountant.

This constitutes the decision and order of the court.

Dated: January 24, 2014

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