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| Matter of DeLuca (Johnsen) |
| 2017 NY Slip Op 31644(U) |
| June 29, 2017 |
| Surrogate's Court, Nassau County |
| Docket Number: 2013-375685/A |
| Judge: Margaret C. Reilly |
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**SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

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Accounting of Jeffrey E. DeLuca, as Administrator DECISION
for the Estate of

BERNARD JOHNSEN,

File No. 2013-375685/A
Dec. No. 32811

Deceased.

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HON. MARGARET C. REILLY

The following papers were considered in the preparation of this decision:

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| The Account, Citation and Petition on Accounting | 1 |
| Report of Guardian Ad Litem | 2 |
| Objections | 3 |
| Transcript of Hearings | 4 |
| Exhibits 1through 32 | 5 |
| Affirmation of Legal Services..... | 6 |
| Affidavit of Tax Services..... | 7 |
| Stipulation dated August 19, 2016 | 8 |
| Affirmation Amending Petition..... | 9 |

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PROCEDURAL HISTORY

Submitted for review is an accounting filed by the Public Administrator in the estate of Bernard Johnsen.

II. BACKGROUND

The decedent, Bernard Johnsen, died a resident of Nassau County on August 29, 2012. Letters of administration issued to the Public Administrator on August 23, 2013. This accounting is the first and final accounting.

III. THE ACCOUNT

The account covers the period of August 23, 2013 through June 16, 2015. The summary statement shows charges to the accounting party of \$695,383.27 and credits in the total amount of \$106,327.47 leaving a balance of \$589,055.80. Objections were filed by Jean C. McCarron, Maureen Palmieri, Edward Gaffney, Richard Gaffney, Kathleen Seck and William Gaffney, all of whom are allege they are distributees of the decedent. A guardian ad litem was appointed to represent missing and unknown heirs. He filed his report and has no objections.

IV. RELIEF REQUESTED

The Public Administrator seeks the following relief: release and discharge of the Petitioner; allowing the commissions of the Petitioner in the amount of \$24,861.50 and reasonable and necessary expenses of the office in the amount of \$6,953.83; fixing and determining the attorneys' fees of Mahon, Mahon, Kerins & O'Brien, LLC in the amount of \$49,762.55; fixing the accounting fees of Rispoli & Co., CPA in the amount of \$5,112.50; approving reimbursement to William Gaffney in the amount of \$14,649.25 for payment of funeral expenses; approving the reimbursement to K&S Consulting Corp. in the amount of \$13,060.30 as payment of real estate taxes, \$209.00 for payment of homeowner's insurance and \$1,708.00 for payment of real estate taxes; rejecting the claim of K&S Consulting Corp. in the amount of \$79,870.45 as and for management fees; determining and apportioning the possible claim of William Gaffney in the amount of

\$135,000.00 for payment of estate taxes; and directing the net estate be paid to the New York State Comptroller on account of unknown kin. The court must also fix the fee of the guardian ad litem and address the outcome of the kinship hearing.

V. KINSHIP HEARING

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.

The following people testified at the hearing: Susan Langone, Maureen Gaffney, Jean McCarron, and Nancy Franco.

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 whom they take (*Matter of Morrow*, NYLJ, April 12, 2001 at 23, col 1 [Sur Ct, Bronx County]; 2 Harris, New York Estates, 27:3 [6th ed 2014]). 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 fact and conclusions of law:

1. The decedent Bernard Johnsen died on August 29, 2012 and letters of administration were issued to the Public Administrator on August 23, 2013.

2. The decedent Bernard Johnsen was never married and did not have any issue, adopted or otherwise.

3. The decedent's parents were Eileen Gaffney Johnsen and Frederick Johnsen. The decedent's parents predeceased him. They had two children: the decedent and Helena Johnsen. Helena Johnsen predeceased the decedent without issue.

4. The decedent's maternal grandparents were Helen Kelly Gaffney and John Gaffney. They predeceased the decedent and had four children: John Gaffney; Bernard Gaffney; Edward Gaffney and Eileen Gaffney Johnsen (the decedent's mother).

5. The first child, John Gaffney, predeceased the decedent and had two children: John Gaffney, Jr. and Jean Gaffney McCarron, both of whom survived the decedent and are claimants.

6. The second child, Bernard Gaffney, predeceased the decedent without issue.

7. The third child, Edward Gaffney, predeceased the decedent. He had five children: Richard Gaffney, William Gaffney, Maureen Gaffney Palmieri, Edward

Gaffney, Jr., and Kathleen Gaffney Seck, all of whom survived the decedent and are claimants.

8. The fourth child, Eileen Gaffney Johnsen, was the decedent's mother.

9. On the maternal side, the decedent was survived by seven first cousins: John Gaffney, Jr., Jean Gaffney McCarron, Richard Gaffney, William Gaffney, Maureen Gaffney Palmieri, Edward Gaffney, Jr., and Kathleen Gaffney Seck.

10. The decedent's paternal grandparents were Richard Johnsen and Tonny Larsen Johnsen. They predeceased the decedent and had two children, Frederick Johnsen (the decedent's father) and Robert E. Johnsen. Robert Johnsen predeceased the decedent and had no issue.

The court finds that the decedent was survived by seven first cousins on the maternal side who are: John Gaffney, Jr., Jean Gaffney McCarron, Richard Gaffney, William Gaffney, Maureen Gaffney Palmieri, Edward Gaffney, Jr., and Kathleen Gaffney Seck. In accordance with EPTL § 4-1.1(a) (6), the whole of the estate shall be distributed to the issue of the maternal grandparents by representation.

V. FEES

The Surrogate's Court bears the ultimate responsibility for deciding what constitutes a reasonable attorney's fee, and the evaluation of what constitutes a reasonable attorney's fee is a matter within the sound discretion of the court. In evaluating what constitutes a reasonable attorney's fee, factors to be considered include the time and labor

expended, the difficulty of the questions involved and the required skill to handle the problems presented, the attorney's experience, ability, and reputation, the amount involved, the customary fee charged for such services, and the results obtained" (*Matter of Goliger*, 58 AD3d 732, 732 [2d Dept 2008][internal quotation marks and citations omitted]; *accord*, *Matter of Freeman*, 34 NY2d 1, 9 [1974]; *Matter of Potts*, 123 Misc 346 [Sur Ct, Columbia County 1924], *affd* 213 App Div 59 [4th Dept 1925], *affd* 241 NY 593 [1925]). The legal fee must bear a reasonable relationship to the size of the estate (*see Matter of Kaufmann*, 26 AD2d 818 [1st Dept 1966], *affd* 23 NY2d 700 [1968]).

A. Fee of the Attorney for the Fiduciary

In this case, the attorney employed by the Public Administrator filed an affirmation of legal services and annexed a copy of his time records to the affirmation. The attorney for the Public Administrator affirmed that his firm rendered 94.67 hours of legal services to date, at various hourly rates. The attorney for the Public Administrator performed the following services: opened and reviewed the file; prepared the petition for letters of administration; prepared the bond application; reviewed real estate appraisals; participated in the auction of the real property; prepared and reviewed documents in connection with the closing of the real property; prepared correspondence; prepared the accounting and petition; appeared in court on the return date of the accounting citation; prepared for and attended kinship hearings; reviewed exhibits and transcripts; engaged in conversations with the court appointed guardian ad litem; and reviewed the report of the

guardian ad litem.

The attorney further anticipates that in order for him to finalize the proceeding he will have to spend approximately 13 hours of time of both a partner and paralegal. The attorney affirms that he will have to review the decisions of the Court; bring the account current; prepare closing documents for the Public Administrator; and settle the decree. Although the citation asks the court to fix the fee of the attorneys in the amount of \$49,762.55, in his affirmation of legal services, the attorney asks the court to set the fee in the total amount of \$38,358.38. In light of the foregoing factors, the Court sets the fee of Mahon, Mahon, Kerins and O'Brien in the amount of \$38,358.38 for all services rendered or to be rendered.

B. Fee of the Guardian ad Litem

The guardian ad litem submitted a final report in which he reported that he spent a total of 20.5 hours on this matter which included reviewing the records of the Public Administrator to reconcile the accounts; reviewing all necessary pleadings and documentation; visiting the court to file all necessary documents; participating at the kinship hearings; reviewing and analyzing the documentary evidence and testimony of the witnesses; and preparing his report. The guardian ad litem stated his normal billing rate is \$375 per hour. Upon a review of all of the factors, the fee of the guardian ad litem is fixed in the amount of \$6,000.00.

C. Fee of the Accountant

The account and citation show accounting fees in the amount of \$5,112.50. The accountant, however, filed an affidavit of tax services in which she requests a total fee of \$6,550.00. The accountant avers that she prepared the decedent's individual tax return for 2012 as well as fiduciary returns from 2014 and 2015. She must still prepare a fiduciary tax return for 2016 as well as a final return, for which she requests an additional fee of \$1,250.00. Where the legal fees do not include compensation for services rendered by an accountant, and if there is no duplication of services, the fee of the accountant may be a proper charge against the estate (*see generally Matter of Schoonheim*, 159 AD2d 183 [1st Dept 1990] and *Matter of Tortora*, NYLJ, July 19, 1995, at 26 col 2 [Sur Ct, New York County]).

The work performed by the accountant was not duplicative of the services rendered by the attorney for the estate. The court approves the fee in the amount of \$6,550.00.00.

VI. CONCLUSION

The application to fix the commissions of the Petitioner in the amount of \$24,861.50 and reasonable and necessary expenses of the office in the amount of \$6,953.83 is **GRANTED**, subject to audit; the application to fix and determine the attorneys' fees of Mahon, Mahon, Kerins & O'Brien, LLC is **GRANTED** in the amount of \$38,358.38; the application to fix the accounting fees of Rispoli & Co., CPA in the

amount of \$6,550.00 is **GRANTED**; the application to approve reimbursement to William Gaffney in the amount of \$14,649.25 for payment of funeral expenses is **GRANTED**; the application to reimburse K&S Consulting Corp. in the amount of \$13,060.30 as payment of real estate taxes, \$209.00 for payment of homeowner's insurance and \$1,708.00 for payment of real estate taxes is **GRANTED**; AND the application to reject the claim of K&S Consulting Corp. in the amount of \$79,870.45 as and for management fees is **GRANTED** upon the default of K&S Consulting Corp.

With regard to the application to determine and apportion the possible claim of William Gaffney in the amount of \$135,000.00 for payment of estate taxes, the application is **GRANTED** in accordance with the stipulation dated August 19, 2016. The decedent was the owner of a number of non-testamentary accounts which were paid directly to the named beneficiaries. The estate taxes apportioned to these accounts was paid by William Gaffney. The beneficiaries of the non-testamentary assets entered into a stipulation on August 19, 2016 which allocated to each beneficiary his or her share of the estate taxes.

The net estate shall be paid in accordance with this decision.

Settle decree.

Dated: June 29, 2017
Mineola, New York

E N T E R :

HON. MARGARET C. REILLY
Judge of the Surrogate's Court

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