

Matter of Celinski (Nestor)
2018 NY Slip Op 33465(U)
December 20, 2018
Surrogate's Court, Nassau County
Docket Number: 2013-377334/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 by Denise Nestor as the Administrator of
the Estate of**

DECISION

**File No. 2013-377334/A
Dec. No. 35007**

VIRGINIA CELINSKI,

Deceased.

-----X
PRESENT: HON. MARGARET C. REILLY

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

Petition for Judicial Settlement of Account.	1
Accounting.	2
Affirmation	3
Affirmation of Legal Services (Holland).	4
Affirmation of Legal Services (Rittmaster).	5
Surety Indemnification Agreement.	6

Before the court is a petition by Denise Nestor (petitioner) as administrator of the estate of Virginia Celinski (decedent) requesting that the account of her proceedings be judicially settled and a decree issue (1) discharging and canceling the surety bond; (2) approving attorney's fees paid to Michael W. Holland, Esq. in the real estate transaction in the amount of \$2,500.00 and estate proceeding in the amount of \$3,750.00; (3) approving the payment of attorney's fees to Torre Lentz Gamell Gary & Rittmaster, LLP, as attorneys for the surety in the sum of \$2,565.00 in this accounting proceeding; (4) approving the payment of additional attorney's fees to Michael W. Holland, Esq. in the sum of \$5,000.00 in this accounting proceeding; (5) approving the fees for the certified mailing fees in the sum of \$20.99 for service upon the respondent, Julaine Celinski (respondent), in this accounting

proceeding; (6) approving the claim of RLI Surety in the sum of \$119.00; and (7) directing that the attorney's fees in the amount of \$2,565.00 payable to Torre Lentz Gamell Gary & Rittmaster, LLP, the attorney's fees payable to Michael W. Holland in the sum of \$5,000.00, the payment to RLI surety of bond premiums in the amount of \$2,250.00, the payment of a filing fee for the bond in the amount of \$30.00, the payment of the filing fee in the accounting proceeding of \$420.00, and additional certified mail fees in the sum of \$20.99 should be charged solely against the interest of respondent and be deducted solely from her share of the estate payable to her.

The decedent died on August 14, 2007. She was survived by petitioner and Al Celinski, who post-deceased the decedent. Respondent was appointed executor of the estate of Al Celinski. Letters of administration issued to the petitioner on May 13, 2014.

THE ACCOUNT

The petitioner filed an account and an amended account for the period of May 13, 2014 to April 30, 2018. The account shows the receipt of \$125,000.00. This amount was reduced by funeral and administrative expenses of \$97,949.29, leaving a balance of \$27,050.71 on hand.

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” (*Matter of Goliger*, 58 AD3d 732, 732

[2d Dept 2008] [citations omitted]; accord *Matter of Freeman*, 34 NY2d 1 [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]). In determining what constitutes a reasonable attorney's fee, the court may consider factors such as "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 Szkambara*, 53 AD3d 502, 502-503 [2d Dept 2008] [citations omitted]; see *Matter of Freeman*, 34 NY2d 1 [1974]). "In addition, the size of the net estate operates as a limitation in fixing the full value of the services rendered" (*Matter of Morris*, 57 AD3d 674, 675 [2d Dept 2008]).

Legal Fees - Attorney for Petitioner

The petitioner is seeking approval of the payment of legal fees and disbursements to Michael W. Holland, Esq. in the amount of \$2,500.00 for the real estate transaction and \$3,750.00 for estate work, both fees which were paid and an additional \$5,000.00 which remains unpaid. Mr. Holland filed an affirmation of legal services in which he states that he has spent over 52 hours on this matter, but due to the small size of the estate, has agreed to accept a reduced amount of an additional \$5,000.00 in fees, which remains unpaid. Mr. Holland affirms that he performed the following services: prepared the accounting documents; conferenced with the petitioner; prepared the amended petition and citation; reviewed letters from the surety; attended court conferences; reviewed orders of the court;

and prepared and served interrogatories. The court has carefully reviewed the affirmation of services and time records submitted to the court. The court approves the fees for legal services in the amount requested.

Legal Fees - Attorney for the Surety

The petitioner entered into an indemnification agreement with the surety whereby she agreed to “pay Surety all sums demanded by Surety to cover any liability, claim, suit or judgement (sic) against the bond, including any legal fees and expenses and a claim fee charge in the amount of \$119.40” The attorney for the surety filed an affirmation of legal services wherein he affirmed that he or members of his firm rendered 9.2 hours on this matter. The attorney reviewed the claim, communicated with the client, appeared at court conferences and communicated with outside counsel. The attorney seeks a fee of \$2,565.00. The court has carefully reviewed the affirmation of services and the time records submitted to the court. The court approves the fees for legal services in the amount requested.

Allocation of Fees

The petitioner seeks an order directing that the attorney’s fees in the amount of \$2,565.00 payable to Torre Lentz Gamell Gary & Rittmaster, LLP (attorneys for the surety), the attorney’s fees payable to Michael W. Holland in the sum of \$5,000.00, the payment to RLI surety of bond premiums in the amount of \$2,250.00, the payment of a filing fee for the bond in the amount of \$30.00, the payment of the filing fee in the accounting proceeding of \$420.00, and additional certified mail fees in the sum of \$20.99 should be charged solely

against the interest of respondent and be deducted solely from her share of the estate payable to her.

The petitioner argues that respondent indicated that she was going to file a claim against the petitioner and the surety for the allowing the decedent's real property to be "under sold." As a result, the surety was required to retain separate counsel. Multiple conferences ensued and the claim was ultimately discontinued. The petitioner, through her attorney, argues that as a result of the actions of respondent, the petitioner incurred multiple costs. As such, she now asks that those costs, as outlined above, be paid from any share due to respondent.

Pursuant to SCPA 2110 (1), the court is authorized to fix the compensation of the attorney for services rendered to a fiduciary. SCPA 2110 (2) provides that "[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." The factors to be considered are:

"(1) whether the objecting beneficiary acted solely in his or her own interest or in the common interest of the estate; (2) the possible benefits to individual beneficiaries from the outcome of the underlying proceeding; (3) the extent of an individual beneficiary's participation in the proceeding; (4) the good or bad faith of the objecting beneficiary; (5) whether there was justifiable doubt regarding the fiduciary's conduct; (6) the portions of interest in the estate held by the non-objecting beneficiaries relative to the objecting beneficiaries; and (7) the future interests that could be affected by reallocation of fees to individual beneficiaries instead of to the corpus of the estate generally" (*Matter of Hyde*, 15 NY3d 179, 186-187 [2010]).

None of the factors "should be determinative" (*id.* at 186).

In the instant proceeding, the real property was allegedly in bad condition. Comparable sales prices did not indicate the actual value, given its condition. Any successful actions by respondent would have increased the value of the estate to both beneficiaries. The petitioner has not shown bad faith on the part of respondent. Considering the foregoing, the actions of respondent in objecting to the sales price of the decedent's real property do not warrant the assessment of legal fees against her.

Costs can be assessed against any party pursuant to SCPA 2301 and are discretionary with the court (SCPA 2301 [2]). Costs may be made payable by any party personally or out of the share of the interest of any party (SCPA 2301 [4]). "Costs can be awarded against a losing party personally if it is shown that the individual interposes unfounded litigation against the decedent's estate" (*Matter of ACN*, 133 Misc 2d 1043, 1049 [Sur Ct, New York County 1986]). The court declines to assess costs in this proceeding. The application is therefore **DENIED**.

CONCLUSION

The surety is discharged.

The attorney's fees for the attorney for the petitioner and the attorney for the surety are fixed and determined in the amounts requested.

The fee for certified mailing in the amount of \$20.99 is approved.

The claim of RLI Surety in the sum of \$119.00 is approved.

Settle decree.

Dated: December 20, 2018
Mineola, New York

E N T E R:

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

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