

Matter of Robinson
2016 NY Slip Op 32063(U)
August 17, 2016
Surrogate's Court, Nassau County
Docket Number: 2015-386912A
Judge: Margaret C. Reilly
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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 Estate of

ERIC ROBINSON,
Deceased,

DECISION
File No. 2015-386912A
Dec. No. 31725

for a Determination of Effect of Right of Election

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PRESENT: HON. MARGARET C. REILLY

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

Petition for Determination and Effect of the Notice and Right of Election.....	1
Report of Guardian ad Litem for Infant Erica Robinson.	2
Affirmation by Counsel to the New York City Employees’ Retirement System....	3

Before the court is an unopposed petition for a determination concerning the right of election filed by Lidia Robinson in connection with the estate of her husband, Eric Robinson, who died intestate on June 25, 2015.

I. BACKGROUND

Lidia Robinson (the petitioner) and Eric Robinson (the decedent) were married on September 22, 1990 and subsequently divorced; they remarried each other on November 6, 1997 and were married at the time of the decedent’s death. The decedent was survived by his wife and their three daughters. The youngest daughter is an infant, and a guardian ad litem was appointed on her behalf.

The decedent left an account ending in xx275(7) (the decedent’s retirement account) with the New York City Employees Retirement System (NYCERS) that was created on November 8, 1993, during the period of time when the petitioner and the decedent were not

married. The decedent designated his eldest daughter, Jasmyne Robinson, who was his only child at the time, as the sole beneficiary of the account. The account currently has a lump-sum death benefit of \$336,500.00. The decedent also owned a house in Baldwin, together with the petitioner, in which he resided with his wife and daughters. Upon the death of the decedent, the house passed to the petitioner by operation of law.

II. PETITIONER'S RIGHT OF ELECTION

Pursuant to SCPA §1421, the petitioner filed a notice of election on November 16, 2015 and an order to show cause, signed by Surrogate Edward W. McCarty, III on November 19, 2015. A supplemental order to show cause was signed by Surrogate Margaret C. Reilly on January 11, 2016, restraining NYCERS from distributing the proceeds of the decedent's retirement account while this proceeding is pending. Counsel to NYCERS filed an affirmation stating that NYCERS is ready and willing to pay the decedent's death benefit to whomever the court determines is entitled to this benefit.

III. REPORT OF THE GUARDIAN AD LITEM

The guardian ad litem representing the interests of the decedent's youngest daughter filed her report on April 11, 2016. She recommends that the decedent's retirement account be distributed by NYCERS, with the spousal elective share paid to the petitioner and the balance paid to Jasmyne Robinson. It is the opinion of the guardian ad litem that the infant has no legal entitlement to a share of these funds. The guardian ad litem concludes that the distribution of the funds in the manner requested by the petitioner will benefit her ward.

IV. ANALYSIS

EPTL §5-1.1-A (b) (1) (G) grants a decedent's surviving spouse a personal right of election against a pensioner's death benefit, provided the beneficiary designation was made after September 1, 1992. "It is well settled that the pension death benefit is a testamentary substitute under EPTL §5-1.1-A(b)(1)(G)" (*Matter of Richardson*, 20 Misc 3d 1105 [A] [Sup Ct, Bronx County 2008] [citation omitted]). The statute permits all of the death benefit to be treated as a testamentary substitute, which must be included in the estate for purposes of calculating the elective share of the surviving spouse.

In applying EPTL §5-1.1-A, both the computation of the decedent's estate and the computation of the surviving spouse's elective share must account for all estate assets and testamentary substitutes, which include, but are not limited to, the decedent's retirement account, as well as the Baldwin house owned by the decedent and petitioner. Concerning the real property held by the decedent and the petitioner, the court notes that EPTL §5-1.1-A (b) (1) (D) provides that "where the surviving spouse is the other party to the transaction, it will be conclusively presumed that the proportion of the decedent's contribution is one-half." Thus, while the court recognizes the petitioner's exercise of her right of election, the actual portion of the decedent's retirement account, if any, that the petitioner would be entitled to claim cannot be determined on the papers currently before the court; the computation of the petitioner's right of election and its application to the decedent's retirement account will have to factor in the value of the decedent's interest in the Baldwin property which passed to the petitioner, and any other estate assets and testamentary substitutes received by the petitioner

or others. Depending upon the value of the Baldwin property, it is possible that the petitioner's elective share of the decedent's estate may already have been satisfied by her receipt of the decedent's interest in that asset.

V. FEE OF THE GUARDIAN AD LITEM

The guardian ad litem has submitted time records showing that she devoted 3.25 hours to the representation of her ward, and that her usual billing rate is \$350.00 per hour. Regarding the fee of the attorney for the estate, 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 (*see 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" (*see Matter of Brehm*, 37 AD2d 95, 97 [4th Dept 1971]; *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 (*see Matter of Kelly*, 187 AD2d 718 [2d Dept 1992]); the complexity of the questions involved (*see Matter of Coughlin*, 221 AD2d 676 [3d Dept 1995]); the nature of the services provided (*see Matter of Von Hofe*, 145 AD2d 424 [2d Dept 1988]); the amount of litigation required (*see Matter of Sabatino*, 66 AD2d 937 [3d Dept 1978]); the amounts involved and the benefit resulting from the execution of such services

(see *Matter of Shalman*, 68 AD2d 940 [3d Dept 1979]); the lawyer's experience and reputation (see *Matter of Brehm*, 37 AD2d 95 [4th Dept 1971]); and the customary fee charged by the Bar for similar services (see *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 (see *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], *aff'd* 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]). The burden with respect to establishing the reasonable value of legal services performed rests on the attorney performing those services (see *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]).

The guardian ad litem is entitled to a fee for services rendered (SCPA § 405). The factors cited above apply equally to an attorney retained by a fiduciary or to the court-appointed guardian ad litem (*see Matter of Graham*, 238 AD2d 682 [3d Dept 1997]; *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]).

The court fixes the fee of the guardian ad litem in the amount of \$1,137.00.

VI. CONCLUSION

VI. CONCLUSION

The unopposed petition is **GRANTED** to the extent that the court finds that the petitioner has validly exercised her right of election. However, unless and until the administrator files an account showing all administrable assets of the estate as well as the testamentary substitutes (EPTL §5-1.1-A [b][1][A]-[I]), the court is unable to calculate the surviving spouse's elective share. Alternatively, and to obviate the need to prepare and file an account, if the parties are able to reach agreement regarding the value of the surviving spouse's elective share and enter into a written stipulation of settlement so providing, an order could be settled incorporating the terms of the stipulation of settlement and vacating the previously entered restraining order (*See Matter of Johnson*, NYLJ Apr. 27, 2007 at 32, col 4 [Sur Ct, Bronx County]).

The guardian ad litem's fee is fixed in the amount of \$1,137.00, to be paid within 30 days of the distribution of the NYCERS funds, proportionally from the shares of Jasmyne

Robinson and Lidia Robinson, the only parties with a pecuniary interest in the outcome of this proceeding.

This decision constitutes the order of the court.

Dated: August 17, 2016
Mineola, New York

E N T E R:

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

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