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

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Probate Proceeding, Will of

JENNIFER LYNNE HANDLER
a/k/a JENNIFER HANDLER,

Deceased.

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File No. 342516

Dec. No. 104

In this probate proceeding, the guardian ad litem for the decedent's minor children has submitted a preliminary report wherein she recommends that the purported will be admitted to probate if construed and/or reformed as suggested in her report.

The decedent, Jennifer Lynne Handler, died on June 2, 2006, a resident of Nassau County. The decedent was survived by her husband, Frederick John Handler, and her two minor daughters. The will offered for probate is dated October 20, 2000. The will nominates the decedent's husband as executor. Preliminary letters testamentary issued to the decedent's husband on June 21, 2006. The gross testamentary estate is valued between $10,000,000 and $15,000,000.

The purported will disposes of the residuary estate in two parts, Fund A and Fund B. Fund A is given to a trust for the decedent's husband for his life with the remainder payable to the decedent's two children, or the survivor of them. Fund B, which is the balance of the residuary estate, is given to the decedent's husband outright. The proffered will directs that estate taxes, or similar death taxes, with respect to testamentary assets are to be paid out of Fund B. Article Third expresses the decedent's intention to take maximum advantage of the available tax benefits so that there will be no federal estate taxes due with respect to her estate.

The proffered will also provides for trusts for any daughter of the decedent who shall be

under the age of thirty (30) years at the time she becomes entitled to receive her bequest. The trust provides that if a daughter shall die prior to attaining the age of thirty (30), the balance of her trust shall be paid to her children per stirpes or, in default of such issue, to the decedent's surviving child or her trust, as the case may be, if she is under the age of thirty at such time.

The guardian ad litem's preliminary report concludes that jurisdiction has been obtained over all necessary parties. The guardian ad litem also concludes that the decedent had testamentary capacity and that the purported will was duly executed. The guardian ad litem, however, states that the language of the will does not accomplish the decedent's tax planning intention unless it is construed and/or reformed. Accordingly, she recommends that the propounded will be admitted to probate only if construed and/or reformed in accordance with the decedent's intention.

Specifically, the guardian ad litem identifies the following issues as problematic. The guardian ad litem argues that it is clear from the decedent's statement of intent in Article Third that she intended to have the trust under Fund A funded with the maximum amount that could pass free of federal estate tax by reason of the unified credit and for Fund B to be eligible for the marital deduction. According to the guardian ad litem, Article Third states that Fund A shall be that portion of the estate which is "equal to the Unified Credit against federal estate and gift taxes as contained in the Internal Revenue Code"; Article Third goes on to recite that the unified credit in 2000 was $675,000.00. The guardian ad litem correctly points out that the unified credit in 2000 was, in fact, $220,550.00 and the maximum amount that could pass free of estate tax by reason of the unified credit was actually $675,000.00. In the year of the decedent's death, the unified credit was $780,800.00 while the amount that could pass free of estate tax by reason of the unified credit was $2,000,000.00. The guardian ad litem recommends that the language of

Article Third be construed to provide that Fund A be funded with the maximum amount that can pass free and clear of federal estate tax by reason of the unified credit (applicable credit amount) after taking into account other dispositions during life and at death and any charges that reduce the amount of the decedent's available unified credit.

Second, the guardian ad litem argues that the language in Article Third which provides that Fund A should be reduced by "the value of all other property which shall pass under the provisions of this Will, or any Codicil to this Will, or which shall pass or shall have passed outside the provisions of this Will, which such property shall form a portion of the said Unified Credit ..." would actually result in the amount passing under Fund A being zero since the testamentary assets are calculated in the probate petition at over $10,000,000.00. The guardian ad litem suggests that, to give effect to the decedent's intent, the will should provide that Fund A should be calculated by taking into account the decedent's adjusted taxable gifts and property disposed of by previous articles of the decedent's will as well as property passing outside the will which is includable in the decedent's gross estate and does not qualify for the marital deduction and after taking into account charges that are not allowed as deductions in computing the federal estate tax.

The guardian ad litem also states that the language in Article Third that directs that there shall not be allocated to the unified credit any asset that does not qualify for inclusion therein is generally used in connection with the marital deduction provisions of a will and not the unified credit provisions of a will. The guardian ad litem asks that this language be given effect as applying to the marital deduction portion of the will as opposed to the credit shelter portion. Similarly, the guardian ad litem opines that the language in Article Third that directs that any provision in the will that would prevent the allowance of the unified credit with respect to Fund

A should be read as not existing should, in fact, apply to the marital deduction provisions of the will and not the unified credit provisions of the will.

The guardian ad litem also notes that the purported will provides that, upon termination of the Fund A trust, i.e., upon the death of her husband, if either of the decedent's daughters is not living, such deceased daughter's share shall be distributable to the decedent's surviving daughter. Conversely, the will provides that if a daughter survives the decedent's husband but then dies prior to age 30, the balance of such daughter's trust shall be paid first to that daughter's issue per stirpes and, only in default of such issue, to the decedent's other daughter. The guardian ad litem argues that the decedent could not have intended such inconsistent dispositions. The guardian ad litem recommends that these provisions should be construed and/or reformed to provide that in all circumstances the child or children of a deceased daughter, if any, would first receive the share that the deceased daughter would have been entitled to receive. In addition, the guardian ad litem argues that the language which provides that upon the death of a daughter prior to attaining age 30 the property would pass to such deceased daughter's "children, per stirpes, or in default of issue" to the decedent's surviving daughter must be construed or reformed to mean "in default of then living issue." Lastly, the guardian ad litem argues that the term "bequest" used with respect to a daughter under the age of thirty should be construed and reformed to mean "share."

The petitioner's counsel has submitted a reply in response to the guardian ad litem's report wherein she argues that any ambiguities or inconsistencies in the language of the will or superfluous clauses have no bearing on the decedent's intent and are wholly cured by the savings clause in Article Third. Counsel agrees that the Fund A trust should be funded with the maximum amount that can pass free of federal estate tax by reason of the unified credit available

at decedent's death; she disagrees that a construction is necessary to achieve that result. Petitioner concedes, however, that a construction or reformation must be made to rectify the inconsistency regarding the distribution upon termination of the Fund A trust. The petitioner intends once the will has been admitted to probate to bring such a proceeding to provide that distributions are made per stirpes.

The Court of Appeals has held that "[p]robate logically precedes construction for otherwise there is no will to construe." (Matter of Davis, 182 NY 468, 475 [1905]) (*see also Matter of Martin*, 17 AD3d 598 [2d Dept 2005]); *Matter of Shear*, 182 Misc 2d 684 [Sur Ct, Allegany County 1999]; *Matter of Webb*, 122 Misc 129, 133 [Sur Ct, New York County 1923] ("[t]he writing must first be proved as a lawfully executed will before there can be any investigation of the legal effect of its terms") *affd wo/op* 208 App Div 793 [1st Dept 1924]; *Matter of Tremain*, 169 Misc 549, 552 [Sur Ct, Westchester County 1938] ("[t]he other issues ... relate to questions of construction only and may not be considered until said paper writing has first been admitted to probate"), *affd* 257 AD996 [2d Dept 1939], *affd* 282 NY 485 [1940]). In *Matter of Davis* (182 NY 468, 475-476 [1905]), the Court of Appeals reasoned that "[i]f the only disposing clause of a will should devise and bequeath all the property of the testator to a trustee for 100 years, the surrogate could not refuse to admit it to probate because the gift was void under our statutes, although it would be apparent upon the face of the instrument. It would be his duty to admit the will to probate upon due proof of the statute requirements, and, if asked to construe it, to pass upon the validity of the gift afterward."

Here, the guardian ad litem has done a thorough and comprehensive review of the purported will. She has concluded that there is no basis not to admit the will to probate, yet she also concludes that the provisions of the will as drafted may not effectuate the decedent's intent,

as stated in Article Third of the will, to minimize estate taxes. The court, based on *Matter of Davis* (182 NY 468 [1905]) and its progeny, declines to construe and/or reform the purported will until it has been admitted to probate and the court is requested to construe it. The court also is of the opinion that the guardian ad litem's report, although denominated as a preliminary report, is comprehensive and may be considered a final report. Accordingly, the will shall be admitted to probate. The guardian ad litem is directed to submit an affidavit of services within twenty (20) days of the date of this decision.

Settle decree.

Dated: March 28, 2007

JOHN B. RIORDAN
Judge of the
Surrogate's Court