

Matter of Insolera

2007 NY Slip Op 31763(U)

June 15, 2007

Surrogate's Court, Nassau County

Docket Number: 0328703/2007

Judge: John B. Riordan

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

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 Probate Proceeding, Will of

File No. 328703

ROBERTO INSOLERA,

Dec. No. 262

Deceased.

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In this uncontested probate proceeding, the decedent's will bequeaths the entire estate to Donald Israel, an attorney who has no familial relationship to the decedent. Eleven cousins of the decedent have been identified as his distributees; none has interposed any objection to the probate of the propounded instrument.

Where a beneficiary under a will was in a confidential relationship with the decedent and involved in the drafting of the will, there is an obligation on the part of the beneficiary to explain the circumstances of the bequest (*Matter of Putnam*, 257 NY 140 [1931]; *Matter of Bartel*, 161 Misc 2d 455 [Sur Ct, New York County 1994], *affd* 214 AD 2d 476 [1st Dept 1993]). There are a number of relationships that are confidential as a matter of law such as attorney-client (*Matter of Henderson*, 80 NY 2d 388 [1992]) and pastor/parishioner (*Matter of Eckert*, 93 Misc 2d 677 [Sur Ct, New York County 1978], *affd* 70 AD 2d 801 [1st Dept 1979]; *Matter of Patton*, NYLJ, May 6, 1994, at 30 [Sur Ct, New York County]). These confidential relationships, however, do not of themselves require an explanation where there is no involvement by the beneficiary in the drafting of the will (*Matter of Henderson*, 80 NY 2d 388 [1992]; *Matter of Bustanoby*, NYLJ, December 30, 1997, at 28, [Sur Ct, Nassau County]; *Matter of Bertel*, NYLJ, April 7, 1994, at 26, [Sur Ct, New York County]).

Here, the attorney who drafted the will was Arthur Arnow, who is now deceased. In the beneficiary's affirmation submitted to the court, Mr. Israel avers that he was the decedent's friend and tax attorney for over thirty years and maintained a long-distance relationship with the decedent after Mr. Israel relocated to the State of Georgia. He also avers that when the decedent advised Mr. Israel that he intended to bequeath his entire estate to him, Mr. Israel advised the decedent to obtain independent counsel to prepare the will. In his sworn affirmation, he advises the court that he did not refer the decedent to the attorney who drafted the will, and that he had no personal or professional relationship with the attorney/draftsman.

Therefore, there being no evidence to suggest that Mr. Israel had any part in the preparation or execution of the decedent's will, no further explanation is required and the decedent's will will be admitted to probate.

The court is also considering the reasonableness of the fee sought by the guardian ad litem appointed to represent the interest of missing or unknown distributees. As with any request for a fee, 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 fees 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 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], *aff'd* 213 App Div 59 [4th Dept 1925], *aff'd* 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], *aff'd* 213 App Div 59 [4th Dept 1925], *aff'd* 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], *aff'd* 23 NY2d 700 [1968]; *Martin v Phipps*, 21 AD2d 646 [1st Dept 1964], *aff'd* 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]). Moreover, the size of the estate can operate as a limitation on the fees payable (*Matter of McCranor*, 176 AD2d 1026 [3d Dept 1991]; *Matter of*

Kaufmann, 26 AD2d 818 [1st Dept 1966], *aff'd* 23 NY2d 700 [1968]), without constituting an adverse reflection on the services provided.

Here, the guardian ad litem has submitted an affirmation of legal services wherein he avers that he spent 16 hours on this matter and requests a fee of \$4,000.00, calculated at his usual hourly rate of \$250.00. The guardian ad litem performed a very valuable function in this proceeding and his efforts resulted in the identification of additional distributees of the decedent. Accordingly, the court fixes the fee of the guardian ad litem in the sum of \$4,000.00, which shall be paid within 30 days of the date hereof.

Settle decree.

Dated: June 15, 2007

JOHN B. RIORDAN
Judge of the
Surrogate's Court