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

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In the Matter of the Application of JENNIFER MILLS BERLINGIERI, as Executrix of the Estate of

JOHN F. MILLS,

Deceased,

File No. 329732

Dec. No. 716

to Compel the Turnover of Property of the Estate pursuant to SCPA 2103.

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In the Matter of the Application of JENNIFER MILLS BERLINGIERI, as Executrix of the Estate of

JOHN F. MILLS,

Deceased,

for a Determination as to the Construction of the Will of said Decedent pursuant to SCPA 1420.

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This is a proceeding to construe the tax clause under the will of John F. Mills. The petitioner is the decedent's daughter, Jennifer Mills Berlingieri, who is the executor of the decedent's estate. In addition, Jennifer commenced a discovery proceeding against the decedent's spouse, Donna Mills, for the turnover of property pursuant to SCPA 2103.

The decedent, John F. Mills, died on August 15, 2003 leaving a will dated August 1, 2000, which was admitted to probate by this court on February 6, 2004. Letters testamentary issued to the decedent's daughter, Jennifer, on the same date. In addition to the decedent's wife, Donna, and the decedent's daughter, Jennifer, the decedent was survived by three other children, John Mills, Jr., Jacqueline Mills and Kevin L. Mills. Jennifer and John, Jr. are children of the decedent's prior marriage. Jacqueline and Kevin, who are both minors, are children of the decedent's marriage to Donna. John Jr. is a person under a disability.

Under Article SECOND (PART I) of his will, the decedent left one-third (1/3) of his testamentary estate to Donna and two-thirds (2/3) to his four children. The share of the decedent's estate to which John, Jr. is entitled is to be placed in a supplemental needs trust established for his lifetime benefit under Article THIRD (PART I). The decedent's other three children are the presumptive remaindermen of the trust for John, Jr. Jennifer is named as the trustee of the trust for John, Jr.

Under Article FOURTH (PART I) of his will, the decedent also directed that any share of his testamentary estate payable to a child under the age of twenty-one (21) years is to be held in trust for such child until he or she attains such age. Jacqueline and Kevin are both under the age of 21 years. Jennifer is named as the trustee of the trusts for their benefit.

The Discovery Proceeding

The petition alleges that, while the decedent was in the hospital more than a month prior to his death, Donna Mills, without the decedent's authorization, signed his name on checks on an account which was in the decedent's name alone. Petitioner specifically alleges that Donna Mills fraudulently diverted at least $290,000.00 from the decedent's individual account directly into accounts maintained either in Donna's name alone or in joint name with the decedent. The petitioner further alleges that Donna misappropriated a federal income tax refund due the decedent in the amount of $112,088.00.

The Construction Proceeding

Concerning the construction proceeding, the petitioner seeks a judicial construction of Article THIRD (Part II) of the will in order to determine whether or not the tax clause set forth therein exonerated property passing through the residuary estate from tax apportionment under

EPTL 2-1.8. More specifically, the petitioner asked for a construction of the will in order to determine whether Donna is responsible for paying a share of the estate taxes due with respect to the decedent's estate. A guardian ad litem was appointed in the construction proceeding on behalf of John Jr., Kevin and Jacqueline.

In Article THIRD (Part II) of his will, the decedent directed that estate taxes be paid as follows:

> "THIRD: I direct that all estate, transfer, succession, inheritance, legacy and similar taxes upon or with respect to any property required to be included in my gross estate under the provisions of any tax law and whether or not passing hereunder, or upon or with respect to any person with respect to any such property, shall be paid out of my general estate to [sic] an expense in the settlement of my estate and that there shall be no pro-ration of any such taxes."

EPTL 2-1.8(a) provides for equitable apportionment of estate tax among the persons interested in a testator's gross state, "except in a case where a testator otherwise directs in his will..." EPTL 2-1.8(c)(2) further provides that "[A]ny exemption or deduction allowed under the law imposing the tax by reason of the relationship of any person to the decedent, ... shall inure to the benefit of the person bearing such relationship...."

The guardian ad litem has filed his report wherein he points out that statutory apportionment is required absent a clear and unambiguous direction to the contrary in the will (*Matter of Shubert*, 10 NY2d 461 [1962]). In addition, there is a strong policy in favor of statutory apportionment and favoring the granting of full tax benefits, such as the marital deduction and charitable deduction (*Matter of Shubert*, 10 NY2d 461 [1962]; *Matter of Olson*, 77 Misc 2d 515 [Sur Ct, Kings County, 1974]; *Matter of McKinney*, 101 AD2d 477 [2d Dept 1984, app denied, 63 NY2d 607 [1984]). The guardian ad litem points out that if apportionment

applied in the instant case, all estate taxes would be payable out of the two-thirds (2/3) share of the decedent's residuary estate passing to the children, and none would be charged against Donna's marital share. In fact, the estate tax returns were prepared for the petitioner by her former attorney based on this assumption, and closing letters have been issued by the taxing authorities on this basis. On the other hand, if the court were to construe the language of the tax clause as a clear and unambiguous direction against apportionment, estate taxes would be deducted off the top of the residuary estate after the required interrelated calculation is made. Thus, the marital share would be paying estate tax, which would decrease the amount qualifying for the marital deduction. The result would be that the amount of estate tax would increase, the amount of Donna's marital share would decrease and the amount passing to the children would increase.

The guardian ad litem's report notes that there are, however, several complicating factors. First, the estate tax returns were filed and the estate was administered as if apportionment did in fact apply. Second, Donna Mills claims that since she was led to believe that apportionment did apply, she missed the opportunity to exercise her right of election. Accordingly, Donna argues that the petitioner should be estopped from changing her original position that apportionment applied.

As a result of these complications, the parties have entered into a stipulation of settlement. The guardian ad litem asks for authority to enter into the stipulation of settlement on behalf of his wards. The stipulation resolves both the construction proceeding and the discovery proceeding. The stipulation provides, in pertinent part, for an immediate distribution of $2,000,000 from the estate with an adjustment of $106,000 for each child and a corresponding reduction of $424,000 to Donna's share of the distribution. Donna Mills will also contribute

from her own funds $4,000.00 to the petitioner and $18,000.00 to each of the trusts for the guardian ad litem's wards. In addition, petitioner will pay $27,184.00 to each of three inter vivos trusts created by the decedent for the guardian ad litem's wards. The guardian ad litem believes that the stipulation will benefit his wards in that it gives them similar relief to what could have been obtained had litigation proceeded to a conclusion.

Being satisfied that the terms of the stipulation are fair and further the wards' best interests, the court authorizes the guardian ad litem to execute the stipulation of settlement on behalf of his wards (SCPA 2106).

With respect to the guardian ad litem's 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.

The burden with respect to establishing the reasonable value of legal services performed rests on the attorney performing those 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]; *see e.g.*, *Matter of Spatt*, 32 NY2d 778 [1973]). Contemporaneous records of legal time spent on estate matters are important to the court in determining whether the amount of time spent was reasonable for

the various tasks performed (*Matter of Von Hofe,* 145 AD2d 424 [2d Dept 1988]; *Matter of Phelan*, 173 AD2d 621 [2d Dept 1991]).

These factors apply equally to an attorney retained by a fiduciary or to a court-appointed guardian ad litem (*Matter of Burk*, 6 AD2d 429 [1st Dept 1958]; *Matter of Berkman*, 93 Misc2d 423 [Sur Ct, Bronx County 1978]; *Matter of Reisman*, NYLJ, May 18, 2000, at 34[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]).

With respect to disbursements, the tradition in Surrogate's Court practice is that the attorney may not be reimbursed for expenses that the court normally considers to be part of overhead, such as photocopying, postage, telephone calls, and other items of the same matter (*Matter of Graham*, 238 AD2d 682 [3d Dept 1997]; *Matter of Diamond*, 219 AD2d 717 [2d Dept 1995]; Warren's Heaton on Surrogate's Court Practice §106.02 [2][a][7th ed.]). In *Matter of Corwith* (NYLJ, May 3, 1995, at 35 [Sur Ct, Nassau County]), this court discussed the allowance of charges for photocopies, telephone calls, postage, messengers and couriers, express deliveries and computer-assisted legal research. The court concluded that it would permit reimbursement for such disbursements only if they involved payment to an outside supplier of goods and services, adopting the standards set forth in *Matter of Herlinger* (NYLJ, Apr. 28, 1994, at 28 [Sur Ct, New York County]). The court prohibited reimbursement for ordinary postage and telephone charges other than long distance.

The guardian ad litem has submitted an affirmation of legal services and it shows that the guardian ad litem rendered 54.9 hours on this matter through September 7, 2007. The guardian ad litem's hourly rate was $375.00 per hour in 2006 and $385.00 per hour in 2007. The guardian

ad litem's fee amounts to $20,777.41. In addition, the guardian ad litem incurred out-of-pocket disbursements of $25.91. There is no objection to the fee requested. Considering all of the factors the court must ordinarily assess in fixing compensation and the exemplary services rendered by the guardian ad litem on behalf of his wards, the court fixes and allows the fee of the guardian ad litem in the amount of $20,777.41. Disbursements in the amount of $25.91 for photocopies and postage are disallowed. The guardian ad litem's fee shall be paid within 30 days of this decision.

This constitutes the decision and order of the court.

Dated: October 3, 2007

JOHN B. RIORDAN
Judge of the
Surrogate's Court

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