

**Matter of Zirinsky**

2009 NY Slip Op 32872(U)

December 4, 2009

Surrogate's Court, Nassau County

Docket Number: 206440/2009

Judge: John B. Riordan

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SURROGATE’S COURT: STATE OF NEW YORK  
COUNTY OF NASSAU

-----X  
In the Matter of the Application of Linda Zirinsky  
Gilbert and Jill Zirinsky Hirsch to remove Robert  
Zirinsky as trustee of the trust created under the  
Last Will and Testament of

RALPH ELLIOT ZIRINSKY,

Deceased,

and to revoke the letters of trusteeship hereto before  
issued to him

-----X  
ACCOUNTING by Robert Zirinsky, as the Executor of  
the Estate of Ruth Zirinsky, deceased executor of  
the Estate of Ralph Zirinsky, and Robert Zirinsky,  
as executor of the estate of

File No. 206440

RALPH ELLIOT ZIRINSKY,

Dec. No. 904

Deceased.

-----X  
ACCOUNTING by Robert Zirinsky, as the Executor of  
the Estate of Ruth Zirinsky, deceased co-trustee, and  
Robert Zirinsky, as co-trustee of the Trust created under  
Article 2(B)(I) of the Last Will and Testament of

RALPH ELLIOT ZIRINSKY,

Deceased.

-----X  
ACCOUNTING by Robert Zirinsky, as the Executor of  
The Estate of Ruth Zirinsky, deceased co-trustee, and  
Robert Zirinsky, as co-trustee of the Trust created under  
Article 2(B)(ii) of the Last Will and Testament of

RALPH ELLIOT ZIRINSKY,

Deceased.

-----X

-----X  
ACCOUNTING by Robert Zirinsky, as the Executor of the Estate of Ruth Zirinsky, deceased co-trustee, and Robert Zirinsky, as co-trustee of the Trust created under Article 2(B)(iii) of the Last Will and Testament of

RALPH ELLIOT ZIRINSKY,

Deceased.

-----X  
ACCOUNTING by Robert Zirinsky, as the Executor of the Estate of Ruth Zirinsky, deceased co-trustee, and Robert Zirinsky, as co-trustee of the Trust created for the benefit of Linda Gilbert under Article 3 of the Last Will and Testament of

RALPH ELLIOT ZIRINSKY,

Deceased.

-----X  
ACCOUNTING by Robert Zirinsky, as the Executor of the Estate of Ruth Zirinsky, deceased co-trustee, and Robert Zirinsky, as co-trustee of the Trust created for the benefit of Jill Hirsch under Article 3 of the Last Will and Testament of

RALPH ELLIOT ZIRINSKY,

Deceased.

-----X  
ACCOUNTING by Robert Zirinsky, as the Executor of the Estate of Ruth Zirinsky, deceased co-trustee, and Robert Zirinsky, as co-trustee of the Trust created for the benefit of Robert Zirinsky under Article 3 of the Last Will and Testament of

RALPH ELLIOT ZIRINSKY,

Deceased.

-----X

The instant petition is submitted by Edward A. McCoyd, as the (“guardian ad litem”) for an advance payment of legal fees, pursuant to SCPA 2111(1). The amount requested is

\$200,000.00 for services provided by the guardian ad litem, this being the fourth application for advance payment of fees pursuant to SCPA 2111. The guardian ad litem requests that forty-two (42) percent of the compensation so allowed be charged, in equal shares, to the three trusts created under Article SECOND (E) of Ralph Zirinsky's Will, and that fifty-eight (58) percent of such compensation be charged, in equal shares, to the three trusts created under Article THIRD of Ralph Zirinsky's Will.

There are seven accounting proceedings pending. The petitioner is the guardian ad litem for the infant children and unborn issue of Linda Zirinsky Gilbert and Jill Zirinsky Hirsch in these accountings as well as another proceeding to revoke letters of trusteeship issued to Robert Zirinsky. To date, the litigation has been contentious and the discovery demands extensive.

Ralph Zirinsky died a resident of Nassau County on June 29, 1980. His will was admitted to probate in this court and letters testamentary were issued on August 11, 1980, to his wife, Ruth Zirinsky, and his son, Robert Zirinsky. The will established several trusts and letters of trusteeship issued to Ruth Zirinsky, Robert Zirinsky, and the decedent's brother, Richard Zirinsky, as co-trustees. Ruth Zirinsky and Richard Zirinsky have since passed away. Robert Zirinsky is accounting as the executor of his father's estate and also as the surviving co-trustee of the six testamentary trusts.

The residuary of Ralph Zirinsky's estate is bequeathed pursuant to Articles SECOND and THIRD of his will. Article SECOND establishes three trusts, each to be equally funded from a sum of money that equals the amount that would satisfy the estate's marital deduction. The Article SECOND (B)(i), (B)(ii), and (B)(iii) trusts are identical in that Ruth is given a lifetime income interest together with discretionary access to principal. In each of the three Article SECOND trusts, Ruth is given a general testamentary power of appointment over the remainder.

The three trusts differ in that each has a different taker in default of the exercise of the power of appointment, Robert, Linda, and Jill, respectively. The will of Ruth Zirinsky, which was previously the subject of a probate contest, exercised the aforementioned power of appointment to distribute the remainders of the three Article SECOND trusts in continuing trusts in the following percentages: two-thirds for Robert's trust, one-sixth for Linda's trust, and one-sixth for Jill's trust.

Article THIRD of Ralph Zirinsky's will distributes the balance of the residuary after deduction of the Article SECOND marital deduction trusts. The Article THIRD trust is divided into three sub-trusts each for the income benefit of one of Ralph's Zirinsky's children as well as the income benefit of Ruth Zirinsky, with discretionary access to principal. The remainder of each of these subtrusts (THIRD (B) [Robert], THIRD (B) [Jill], and THIRD (B) [Linda]) passes to the issue of each of Ralph's children upon the expiration of twenty-one years from the death of Ruth and all three children of the decedent.

Edward A. McCoyd, as guardian ad litem for the infant children and unborn issue of Linda Zirinsky Gilbert and Jill Zirinsky Hirsch has submitted an affidavit in support of a fourth interim allowance of fees. The affidavit requests payment, as indicated above, in the amount of \$200,000 or approximately ninety five (95%) percent of his office's uncompensated time in the amount of \$209,192.50 (McCoyd's aff. ¶35). Mr. McCoyd notes in his affidavit that this fourth petition for interim guardian ad litem fees is necessary in order to complete his work over the next eight months in preparation for the pending trial, and during the trial itself (McCoyd's aff. ¶35).

It is useful to keep in mind that in evaluating the cost of legal services, the court may consider a number of factors. These include:

1. the time spent (*Matter of Kelly*, 187 AD2d 718 [2d Dept 1992]);
2. the complexity of the questions involved (*Matter of Coughlin*, 221 AD2d 676 [3d Dept 1995]);
3. the nature of the services provided (*Matter of Von Hofe*, 145 AD2d 424 [2d Dept 1988]);
4. the amount and complexity of litigation required (*Matter of Sabatino*, 66 AD2d 937 [3d Dept 1978]);
5. the amounts involved and the benefit resulting from the execution of such services (*Matter of Shalman*, 68 AD2d 940 [3d Dept 1979]);
6. the lawyer's experience and reputation (*Matter of Brehm*, 37 AD2d 95 [4th Dept 1971]);  
and
7. the customary fee charged by the Bar for similar services (*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 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* (213 App Div 59 [4th Dept 1925], *affd* 241 NY 593 [1925]), as re-enunciated in *Matter of Freeman* (34 N.Y.2d 1 [1974]) *see Matter of Berkman*, 93 Misc 2d 423 [Sur Ct, Bronx County 1978]). Furthermore, the legal fee must bear a reasonable relationship to the size of the estate and to the interest of the ward of the guardian ad litem (*Matter of McCranor*, 176 AD2d 1026 [3d Dept 1991]; *Matter of Kaufman*, 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], *Matter of Ault*, 164 Misc2d 272 [Sur Ct, New York County 1995]).

The guardian ad litem is entitled to a fee for his or her services rendered pursuant to (SCPA 405). The factors listed above apply equally to an attorney retained by a fiduciary or to the court-appointed guardian ad litem (*Matter of Graham*, 238 AD2d 682 [3d Dept 1997]; *Matter of Burk*, 6 AD2d 429 [1st Dept 1958]; *Matter of Ault*, 164 Misc 2d 272 [Sur Ct, New York County 1995]; *Matter of Berkman*, 93 Misc. 2d 423 [Sur Ct, Bronx County 1978]; *Matter of Reisman*, NYLJ, May 18, 2000, at 34 [Sur Ct, Nassau County]). Additionally, 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]).

Based upon the foregoing, this Court approves the interim fees in the amount requested by the guardian ad litem. Taking into consideration the size of the estate at issue in the case, the potential benefit to the guardian's wards as a result of his representation, and the highly contentious nature of these proceedings to date, these factors weigh heavily in favor of the granting the fees requested by the guardian ad litem. The guardian ad litem has made three prior requests for interim fees, all of which have been granted, totaling \$400,000. The fee allowed by this decision will bring the guardian ad litem's compensation to date to the sum of \$600,000. It should be noted, however, that this Court will not approve payment of fees for services rendered which are duplicative in nature. It is further noted, that the payment of interim fees will be subject to a re-examination at the end of this litigation to ensure that the fees paid are reasonable in light of the nature of these proceedings and the extent of services provided for such fees.

This is a decision and order of the court.

Dated: December 4, 2009

JOHN B. RIORDAN  
Judge of the  
Surrogate's Court

