

Matter of Kornicki

2010 NY Slip Op 33068(U)

September 30, 2010

Surrogate's Court, Nassau County

Docket Number: 342334

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

MANNY KORNICKI
a/k/a MANES KORNICKI,

File No. 342334

Dec. No. 26621

Deceased.
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In this contested probate proceeding, the decedent Manny Kornicki died on May 7, 2006, survived by his wife Bertha and their two children, the proponent Marian G. Kornicki and the objectant Terri Kornicki Kaminer. Bertha suffers from Alzheimer's disease. Her cousin Rubin Shur and an attorney, Ellyn S. Kravitz, Esq., were appointed her guardians pursuant to Article 81 of the Mental Hygiene Law and they have appeared for her in this proceeding. They filed a notice of election on her behalf.

Marian filed the petition for probate on June 6, 2006 and jurisdiction was obtained over all necessary parties on August 30, 2006. The propounded will leaves nothing to objectant, allegedly because the decedent believed that she had converted assets worth \$3 million from him and from Bertha by use of a power of attorney they had given her. In fact, he pressed criminal charges against her which resulted in her plea of guilty to a Class A misdemeanor. Terri filed objections to probate dated March 16, 2007; however, she never appeared for her deposition in this proceeding, nor did she ever produce any documents demanded by petitioner. Her initial reason for seeking to delay her deposition was that doing so would violate her Fifth Amendment right against self-incrimination. However, she never appeared for deposition even after the conclusion of the criminal matter when she no longer had a claim of constitutional privilege. She then averred that she was suffering from a psychological condition which prevented her from

being deposited. Being unconvinced of that contention, the court, by decision and order dated February 4, 2008, granted Marion's summary judgment motion to the extent that Terri's objections of fraud and undue influence, upon which the objectant bears the burden of proof, were dismissed.

Thereafter, Marion moved for summary judgment dismissing the remaining objections of lack of testamentary capacity and due execution; Terri failed to oppose the motion and it was submitted for decision on March 29, 2009. By motion filed March 24, 2009, returnable April 29, 2009, Marshall Kaminer, husband of Terri Kornicki Kaminer, moved as guardian of the property of his infant children for permission to file late objections to the propounded instrument. On May 27, 2009, three prior wills of the decedent were filed in the court, in which Terri and Marshall's children, the decedent's grandchildren, were named as contingent beneficiaries. By decision and order dated June 15, 2009, the court directed the issuance of supplemental citation and service thereof upon the children and any other persons named in the prior wills who would be adversely effected by the admission to probate of the propounded instrument. Jurisdiction was properly obtained over all necessary parties and an independent guardian ad litem was appointed to represent the interests of the Kaminer children. After the guardian ad litem's investigation of the case, review of the transcript of the SCPA 1404 examinations of the attesting witnesses, and interview of several parties and non-parties, including representatives of the District Attorney's office involved in Terri's criminal matter, negotiations ensued between the petitioner's counsel and the guardian ad litem which resulted in a proposed settlement of the probate proceeding which would permit the admission to probate of the propounded instrument and payment to the Kaminer children in the sum of \$25,000.00 each. The guardian ad litem has

filed his report wherein he opines that there is no basis upon which to object to the propounded instrument, and recommends approval of the proposed settlement, wherein he also indicates his opposition to the motion by Mr. Kaminer for permission to file objections on behalf of the grandchildren.

Marshall Kaminer's attorney has filed a 15-page objection to the report and recommendation of the guardian ad litem in which he belittles the guardian ad litem's efforts on behalf of his wards, Mr. Kaminer's own children, and characterizes the proposed settlement as the result of the guardian ad litem's haste to accept a nuisance offer based primarily on the criminal charges that were filed against Terri. The court does not share counsel's view of the guardian ad litem's work, but rather, considers counsel's objections and Mr. Kaminer's affidavit in support thereof, to be a continuation of Terri's efforts to obfuscate the issues in this case and delay its ultimate resolution.

Regarding petitioner's motion for summary judgment, the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557, 562). Summary judgment in contested probate proceedings is appropriate where a contestant fails to raise any issues of fact

regarding execution of the Will, testamentary capacity, undue influence or fraud (*see, e.g., Matter of DeMarinis*, 294 AD2d 436; *Matter of Rosen*, 291 AD2d 562; *Matter of Bustanoby*, 262 AD2d 407).

Due Execution and Testamentary Capacity

The proponent of a Will offered for probate has the burden of proving, by a fair preponderance of the credible evidence, that the instrument was properly executed and that the testatrix was mentally competent. All testators enjoy a presumption of competence and the mental capacity required for Wills is less than that required for any other legal instrument (*Matter of Coddington*, 281 App Div 143, *affd* 307 NY 181). The supervision of a Will's execution by an attorney will give rise to an inference of due execution (*see, e.g., Matter of Finocchio*, 270 AD2d 418; *Matter of Hedges*, 100 AD2d 846). The elements of due execution are that the testator's signature should be at the end of the Will, the attesting witnesses must know that the signature is the testator's, the attesting witnesses must know that it is the testator's Will and the attesting witnesses must sign within a thirty-day period (EPTL 3-2.1). The SCPA 1404 testimony of the attesting witnesses and the attorney draftsman unequivocally establish that the execution of the instrument was in conformity with the statutory requirements and there is no evidence to the contrary.

The proponent also has the burden of proving testamentary capacity. It is essential that a testator understand in a general way the scope and meaning of the provisions of his will, the nature and condition of his property and his relation to the persons who ordinarily would be the natural objects of his bounty (*see Matter of Kumstar*, 66 NY2d 691; *Matter of Bustanoby*, 262 AD2d 407). A testator must understand the plan and effect of the will and, as noted, less mental

faculty is required to execute a will than any other instrument (*see Matter of Coddington*, 281 App Div 143, *affd* 307 NY 181). Mere proof that the decedent suffered from old age, physical infirmity and progressive dementia is not necessarily inconsistent with testamentary capacity and do not preclude a finding thereof (*see Matter of Fiumara*, 47 NY2d 845, 847; *Matter of Hedges*, 100 AD2d 846) as the relevant inquiry is whether the decedent was lucid and rational at the time the will was made (*see Matter of Hedges*, 100 AD2d 846). Here, again the evidence clearly establishes that at the time of the execution of the propounded instrument, the testator was of sound mind and memory and fully competent to execute a will. The testator advised the attorney draftsman that he was disinheriting Terri in favor of Marion. He also described his substantial financial assets and how those assets were titled from memory without prompting, notes, or other documentation. Kaminer's affidavit, and the others submitted in support thereof, do not raise a triable issue of fact regarding the testator's capacity on the date the will was executed.

The objectant in a probate proceeding bears the burden of proof on the issues of fraud and undue influence (*see Matter of Gross*, 242 AD2d 333; *Matter of Burke*, 82 AD2d 260). To prove fraud, the contestants must show by clear and convincing evidence that a false statement was made to the testator that induced him to make a will disposing of his property differently than he would have if he had not heard the fraudulent statement (*see Matter of Gross*, 242 AD2d 333). There is simply no evidence adduced that the will was the product of fraudulent conduct.

In order to prove undue influence, an objectant must show: (1) the existence and exertion of an influence; (2) the effective operation of such influence as to subvert the mind of the testator at the time of the execution of the will; and (3) the execution of a will, that, but for undue influence, would not have been executed (*cf.*, *Matter of Walther*, 6 NY2d 49). Without a

showing that undue influence was actually exerted upon the decedent, mere speculation that opportunity and motive to exert such influence existed is insufficient (*see Matter of Chiurazzi*, 296 AD2d 406, *Matter of Herman*, 289 AD2d 239). Mere speculation is an apt characterization of the extent of Kaminer's evidence that petitioner in any way influenced the decedent to execute the propounded instrument. As petitioner's counsel observes, it was Terri's conduct which most directly influenced the testator to disinherit her branch of the family from his estate plan.

Based on the foregoing, the court finds that the best interests of the decedent's estate and the infant grandchildren will be promoted by approving the settlement negotiated by the petitioner's counsel and the guardian ad litem; the guardian ad litem's request for permission to enter into the settlement on behalf of his wards is granted.

The petitioner's motion to dismiss Terri Kornicki's remaining objections to the will's admission to probate is granted. As the court has determined that there are no triable issues of fact, Marshall Kaminer's motion for permission to file objections on behalf of his children is denied.

The court has also reviewed the affirmation and supplemental affirmation of legal services submitted by the guardian ad litem. With respect to the issue of attorney fees, 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 (*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], *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 (*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], *affd* 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], *affd* 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], *affd* 213 App Div 59 [4th Dept 1925], *affd* 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]).

Here, the guardian ad litem was directly responsible for the ultimate resolution of this case. His efforts included review of the probate file and the transcript of the SCPA 1404 examinations of the attesting witnesses and the attorney draftsman. In addition, he interviewed at least eight parties and non-party witnesses before concluding there was no good-faith basis upon which to oppose the will's admission to probate and recommending the resolution he negotiated

on behalf of his ward's with the petitioner's counsel. Considering all of the foregoing, the court fixes the fee of the guardian ad litem in the sum of \$15,000.00, payable from the general estate within 30 days of entry of the probate decree.

To reiterate, the guardian ad litem's request for permission to enter into the settlement on behalf of his wards is granted; the petitioner's motion to dismiss Terri Kornicki's remaining objections to the will's admission to probate is also granted; and Marshall Kaminer's motion for permission to file objections on behalf of his two children is denied.

Settle decree.

Dated: September 30, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court