

Matter of Kapchan

2010 NY Slip Op 33692(U)

December 9, 2010

Sur Ct, Nassau County

Docket Number: 26793

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. 353190

ZELDA K. KAPCHAN
a/k/a ZELDA KAPCHAN,

Dec. No. 26793

Deceased.

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In this probate proceeding, the decedent was survived by her husband Murray Kapchan, and her three adult children, Jordan, Brian, and Scott. The propounded instrument nominates all three sons as co-executors and bequeaths the entire estate to them, to the exclusion of her husband. Murray is a person under disability and a guardian ad litem was appointed to represent his interests in this proceeding. Although no objections were filed, settlement negotiations between the guardian ad litem and the three brothers proceeded for some time without success. Ultimately, the guardian ad litem filed his report wherein he indicates that he has no objection to the will’s admission to probate, but seeks the court’s permission to file a notice of election on behalf of his ward. He also opines that due to the hostility displayed by the brothers against one another, the best interests of the estate would be served by the appointment of an independent party to administer the estate.

Scott Kapchan has not filed any objection to the recommendations made by the guardian ad litem. The court notes that Scott has been living in the decedent’s former residence at least since the time of the decedent’s death, and by his own admission has been living there without either heat or electricity for many months. His suitability as a fiduciary is therefore greatly suspect.

Jordan Kapchan, an attorney, has filed objections to the report of the guardian ad litem in which he threatens to immediately commence a Supreme Court action to block the appointment of an independent fiduciary, asserting he will “not stand idly by while some two-bit money hungry shyster is appointed to serve as Executor instead of your affirmant and/or Brian and/or Scott.” Jordan also threatens to move for a change of venue, fearing a conspiracy exists between the court and Brian’s attorney based on the fact that Brian’s attorney, as a law student, served as an intern in this court during the summer of 1996. The court also notes that at the last conference on July 21, 2010, Jordan had to be removed from the court’s conference room by a court officer because of his extremely abusive and hostile manner directed toward his siblings and Brian’s attorney.

Jordan does make a meaningful argument, however, which is echoed by Brian’s attorney, in opposition to the guardian ad litem’s request for permission to file a notice of election on behalf of his ward. Murray Kapchan is evidently quite disabled. The parties and the guardian ad litem also seem to agree that there is a substantial money judgment against Murray which remains unsatisfied. As a veteran and a resident at the New York State Veteran’s Nursing Home in Jamaica, New York, all of Murray’s needs are met by the Veteran’s Administration and, unlike benefits provided by Medicaid, there is no requirement to repay the Veteran’s Administration for those benefits. Although not entirely clear from the papers, it appears that all or most of any elective share recovery would be subject to the claim of Murray’s judgment creditor. Often, one of the criteria used to determine whether to permit a guardian ad litem to file a notice of election on behalf of the ward is whether the ward would have exercised the right of election on his own behalf, were he competent to do so (*see Matter of Howard*, NYLJ, March 24, 1998, 29, col 2

[Sur Ct, Nassau County]). Here, it appears unlikely that Murray would exercise his right of election which would have the effect of paying a creditor rather than permitting the estate to be distributed to his own sons, particularly where the failure to elect will have no impact on his eligibility for the benefits he is receiving and the election is not likely to effect his quality of life. The guardian ad litem's request for permission to file a notice of election on behalf of his ward, while clearly made with the best of intentions, is therefore denied.

Accordingly, there being no objection to the will's admission to probate and the court being satisfied of its genuineness and validity (SCPA 1408), the propounded instrument will be admitted to probate.

While the court recognizes the fact that all three of the decedent's sons are nominated as executors and that a testator's choice of executor is generally to be given great deference (*Matter of Leland*, 219 NY 387, 393 [1916]; *Matter of Hunter*, 6 AD3d 117 [2d Dept 2004], *aff'd* 4 NY3d 260 [2005]), nevertheless, the court has the power to deny letters to one otherwise entitled thereto where the hostility exhibited between siblings is so great as to effect the proper and efficient administration of the estate (*Matter of Sadowski*, 21 AD3d 1034 [2d Dept 2005]). Here, while Brian has been the object of hostility, especially from Jordan, he has not exhibited any toward his brothers. And, as noted above, in Jordan's objection to the guardian ad litem's recommendation to appoint an independent fiduciary, Jordan indicated that he would oppose the appointment of anyone other than himself "and/or Brian and/or Scott" which is at least some indication that he would accede to the appointment of either of his brothers as sole executor, but not to the appointment of an outsider.

Under the circumstances, upon the will's admission to probate, letters testamentary shall issue solely to Brian Kapchan.

Finally, the court has reviewed the affirmation of legal services submitted by the guardian ad litem appointed to represent the interests of the decedent's surviving spouse. The guardian ad litem avers that he spent 19.5 hours on this proceeding and that his customary billing rate is \$350.00 per hour. The court is aware that the guardian ad litem expended substantial effort in trying to resolve this matter in the best interests of his wards but that his efforts were ultimately frustrated by the siblings inability to agree on the terms of a settlement. The court is aware that 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]). Furthermore, these criteria apply equally to the services of a 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, col 5 [Sur Ct, Nassau County]).

Considering all of the foregoing, the court fixes the fee of the guardian ad litem in the sum of \$6,825.00, which shall be paid within thirty (30) days after entry of the decree or after the executor marshals sufficient estate assets, whichever is later.

Settle decree.

Dated: December 9, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court