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

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Probate Proceeding, Will of

JOSEPHINE H. KEMPISTY,

Deceased.

File No. 356050

Dec. No. 26929

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In connection with a petition for probate, the court has before it for review a stipulation of settlement which was expertly negotiated and crafted by the guardian ad litem appointed to represent the interests of decedent's sister, Regina Karasinski. For the reasons set forth below, the agreement is approved.

Josephine Kempisty, a resident of New Hyde Park, Nassau County, died on February 15, 2009, leaving a last will and testament dated June 28, 2007. She was survived by 19 statutory distributees, including four siblings and the 15 children of four predeceased siblings.

The propounded instrument leaves all of decedent's property in three equal shares, two of which pass to decedent's sisters, Jane Welser and Evelyn Mueller. The will directs that the third equal share be paid over to decedent's niece, Barbara LoRusso, who is the nominated executor and the petitioner herein. It makes no mention of decedent's third surviving sister, Regina, who suffers from Alzheimer's Disease. Waivers of citation were filed on behalf of 15 distributees, and jurisdiction was obtained over the remaining three interested parties, including Regina. None of the distributees raised objections to the will. Preliminary letters issued to petitioner on May 19, 2009 and the letters have been extended upon application.

The court appointed a guardian ad litem on behalf of Regina. His report, dated November 19, 2010, reflects that the probate estate was valued at approximately $570,000.00 and that there

were non-testamentary assets of $292,000.00, including $200,000.00 held in joint accounts which named Barbara, the petitioner herein, as the joint tenant. The guardian ad litem also discovered that Barbara had established these joint accounts using a power of attorney executed by decedent. He further learned that the propounded will had been prepared on the basis of telephoned instructions from Barbara to an attorney, and that the will execution had not been supervised by an attorney. Additionally, based upon information uncovered by the guardian ad litem, which included medical records, serious questions were raised concerning decedent's competency at the time the will was executed.

The guardian ad litem communicated his potential probate objections to the attorney for petitioner and they then negotiated a settlement. The stipulation provides that petitioner will pay $90,125.00 out of her own personal funds to Regina; the propounded instrument will be admitted to probate. Since the agreement has no effect on distributions to be made under the will, the consent of the other legatees is unnecessary. The guardian ad litem's calculations reflect that the settlement amount payable to Regina closely mirrors her intestate share of decedent's probate and non-testamentary property, without consideration of the litigation expenses which would have been incurred by the estate had the matter not been successfully settled. Accordingly, the court approves the stipulation (SCPA 2106).

The court must also fix the fee of the guardian ad litem. Ultimate responsibility for approving legal fees that are charged to an estate lies with the court, which has the discretion to determine what constitutes reasonable compensation for legal services rendered in the course of the administration 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 [2d Dept 1991]). This remains true even in the event that the parties have consented to the requested fee (*Matter of Stortecky v Mazzone*, 85 NY2d 518, 525 [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:

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*, 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* (241 NY 593 [1925]), 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 and to the interest of the ward of the guardian ad litem (*Matter of McCranor*, 176 AD2d 1026 [3d Dept 1991]; *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 N.Y.2d 594 [1965]; *Matter of Ault*, 164 Misc 2d 272 [Sur Ct, New York County 1995]). Moreover, it is well-settled that time spent is, in fact, the least important factor considered by a court in fixing reasonable compensation (*see Matter of Snell*, 17 AD2d 490, 494 [3rd Dept 1962]; *Matter of Potts*, 213 App Div 59, 62 [4th Dept 1925], *affd* 241 NY 593 [1925]; *Matter of Kentana*, 170 Misc 663 [Sur Ct, Kings County 1939]). These factors 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 Burnett*, NYLJ, Aug. 31, 2006 at 31, col 5 [Sur Ct, Kings County]; *Matter of Reisman*, NYLJ, May 18, 2000, at 34, col 5 [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]). Normally, the fee of a guardian ad litem is an administration expense of an estate and is paid from estate assets.

A sizeable estate permits adequate compensation, but nothing beyond that (*Matter of*

Martin v Phipps, 21 AD2d 646 [1st Dept. 1964], *affd* 16 NY2d 594 [1965]; *Matter of Yancey*, NYLJ, Feb. 18, 1993, at 28, col 1 [Sur Ct, Westchester County]; *Matter of Reede*, NYLJ, Oct. 28, 1991, at 37, col 2 [Sur Ct, Nassau County]). A large estate does not, by itself, justify a large fee (*Matter of Young*, 52 Misc 2d 398 [Sur Ct, Suffolk County 1966]). 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*, 241 NY 593 [1925]; *see Matter of Spatt*, 32 NY2d 778 [1973]). Contemporaneous records of legal time spent on estate matters are important to the court in the determining whether the amount of time spent was reasonable for the various tasks performed (*Matter of Phelan*, 173 AD2d 621 [2d Dept 1991]; *Matter of Von Hofe*, 145 AD2d 424 [2d Dept 1988]). In the absence of contemporaneous time records, little weight is given to estimates of time after the services have been performed (*Matter of Phelan*, 173 AD2d 621 [2d Dept 1991]). This applies to the fee of a guardian ad litem *(Matter of Carbone*, NYLJ, Oct. 26, 1995, at 36, col 3 [Sur Ct, Suffolk County]).

The guardian ad litem has submitted a detailed affidavit of services and contemporaneous time records. These indicate that he devoted in excess of 41 hours to this matter. He examined the court record, conducted meetings in person and by telephone with the draftsperson of the will, requested, received and reviewed extensive documentation concerning decedent's financial records and health, searched the records of the Nassau County Clerk and the website of the New

York State Comptroller's Office, corresponded with his ward's children, corresponded with decedent's doctor, prepared HIPAA authorizations and obtained and reviewed medical records, conducted research regarding the valuation of decedent's assets, negotiated and prepared the stipulation filed with the court, and prepared his report. The guardian ad litem anticipates that this matter will require at least a few more hours of service to confirm compliance with the stipulation and receipt of his ward's funds and to prepare and file the required supplemental report with the court. The fee is fixed in the amount requested by the guardian ad litem, $17,000.00, which shall be paid out of the general assets of the estate within 30 days of the issuance of full letters of administration to petitioner. The court thanks the guardian ad litem for his fine work and the outstanding result achieved on behalf of his ward.

This is the decision and order of the court.

Dated: January 6, 2011

EDWARD W. McCARTY
Judge of the
Surrogate's Court