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

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Probate Proceeding, Will of

File No. 358919/B

ARTHUR M. HAYES
a/k/a ARTHUR M. HAYES, SR.,

Dec. No. 26948

Deceased.

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In this pending probate proceeding, the guardian ad litem asks the court's permission to consent to probate of a purported will dated January 27, 1982, and asks the court to set his fee.

The decedent, Arthur M. Hayes (a/k/a Arthur M. Hayes Sr.), died on December 10, 2009, a resident of Nassau County. The decedent was survived by his wife, Hilda Mae Hayes, and their three sons, Arthur, Dennis and Patrick. A guardian ad litem was appointed for Hilda Mae Hayes, who suffers from dementia. Arthur and Dennis were appointed as special co-guardians for Mrs. Hayes in an Article 81 proceeding in the Supreme Court of Nassau County.

Initially, in February 2010, Arthur and Dennis filed a petition for the probate of a purported will dated October 23, 1990 ("the 1990 purported will"). Thereafter, in May 2010, Arthur and Dennis filed a petition to probate a purported will dated January 27, 1982 ("the 1982 purported will") and asked that the 1990 purported will be denied probate.

The 1990 purported will provides as follows: under Article FIRST, the decedent bequeaths his tangible personal property to Mrs. Hayes; under Article SECOND, the decedent bequeaths his Exxon common stock and his limited partnership interest in Holyoke Tower Associates to his surviving issue, per stirpes. The 1990 purported will bequeaths the decedent's residuary estate to Mrs. Hayes and names Arthur and Dennis as executors.

The 1982 purported will bequeaths the decedent's tangible personal property and residential real estate to Mrs. Hayes. In Article THIRD, the decedent bequeaths the then applicable credit shelter amount to his issue. The 1982 purported will bequeaths the decedent's residuary estate to Mrs. Hayes, and she is named as executor and trustee of any trust created thereunder. Arthur and Patrick are named as successor executors and trustees.

The decedent was a tax attorney who spent much of his career at Exxon Mobil Corp. The principal asset of the estate is 96,586 shares of Exxon Mobil Corp. stock valued at $7,039,671.00. The non-probate assets consist of life insurance and a joint account totaling approximately $220,000.00, of which $210,000.00 is payable to Mrs. Hayes.

If the 1990 purported will is admitted to probate, Mrs. Hayes will be effectively disinherited because the Exxon stock is specifically bequeathed to the decedent's sons. According to the petitioners' projections, under the 1990 purported will, Mrs. Hayes will only receive $426,262.00, including the $210,000.00 in non-probate property. The federal estate tax payable if the 1990 testamentary scheme is followed is projected to be $1,547,943.00. Mrs. Hayes' guardians, Dennis and Arthur, have filed a protective notice of exercise of her right of election under EPTL 5-1.1-A against the 1990 purported will. If Mrs. Hayes receives her elective share, she will receive $2,355,045.00 and the federal estate tax will be $660,519.00 as a result of the marital deduction. However, if the 1982 purported will is admitted to probate, Mrs. Hayes would receive $4,857,638.00, and there would be zero federal estate tax. Mrs. Hayes, however, would receive her share in trust under the 1982 purported will.

Thus, the issue is whether the court can admit the 1982 purported will to probate, in the absence of a finding of invalidity of the 1990 purported will, if all of the parties consent. The

guardian ad litem for Mrs. Hayes has submitted his report. He asks the court's permission to allow him to consent to admission of the 1982 purported will to probate. The guardian ad litem points out that the relief sought for is similar to the relief granted by the court in *Matter of King* (74 Misc 2d 61 [Sur Ct, Orange County 1973]). In *Matter of King*, the court permitted the parties to consent to abandon a pending proceeding to probate a later instrument and consent to the probate of an earlier dated instrument. There, as is the case here, the later will did not provide the decedent's spouse with her minimum elective share amount. All of the persons in the later will consented to the probate of the prior will under which the spouse received at least her elective share.

Similarly, in *Matter of Von Ripper* (95 Misc 2d 952 [Sur Ct, New York County 1978]), the court granted letters of administration and allowed intestate distribution and did not require the probate of the decedent's will based upon the consent of all interested parties. The court was satisfied that no useful purpose would be served by requiring probate of the will. Likewise, in *Matter of Vale* (NYLJ, Feb. 3, 1997, at 28, col 5 [Sur Ct, New York County]), Surrogate Preminger, relying on *Matter of Von Ripper* (95 Misc2d 952 [Sur Ct, New York County 1978]), granted an application to deny probate to a later will and admit to probate an earlier will. The two wills were substantially similar, except for the named fiduciary. An affidavit was submitted raising questions as to the validity of the later will and all persons interested in both wills, including the fiduciary named in the later will, consented to the probate of the earlier will.

Here, the guardian ad litem recommends the denial of probate to the 1990 purported will and the admission to probate of the 1982 purported will. He believes that this would be in the best interest of his ward. According to the guardian ad litem, it is clear from the petition filed in

the Article 81 proceeding in Supreme Court that tax planning was very important to the decedent. Each year from l986 through the date of his death, with the exception of 1988, the decedent and his spouse made annual gifts to their children and their families. According to the guardian ad litem, the decedent's intention of minimizing his estate tax would not be carried out if the 1990 purported will is admitted to probate. The tremendous increase in the value of the decedent's Exxon Mobil stock since 1990 (473%) coupled with the transfer of other assets from his name has turned a carefully drawn tax plan into a taxable disaster. What would have been a non-taxable estate will be liable for more than $1,500,000.00 in federal estate tax if the 1990 purported will is admitted to probate.

Based upon the guardian ad litem's report and the cases discussed above, the court authorizes the guardian ad litem to consent to the probate of the 1982 purported will on his ward's behalf. Accordingly, once the guardian ad litem submits his consent to the 1982 purported will being admitted to probate, a decree should be settled on the guardian ad litem admitting the 1982 purported will to probate.

Concerning 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 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]).

The guardian ad litem has submitted an affidavit of legal services which shows that the guardian ad litem rendered 13.20 hours on this matter, which at his hourly rate would amount to a fee of $8,250.00. The services performed by the guardian ad litem included reviewing the court file, corresponding and communicating with petitioners' counsel, reviewing the wills and draft estate tax returns, reviewing gift tax returns, reviewing the Article 81 proceeding and conducting legal research. The services performed by the guardian ad litem were of the utmost quality.

Accordingly, the court approves a fee of $8,250.00 for the guardian ad litem, which shall be paid within thirty (30) days of the date of the decree to be entered herein.

Settle decree.

Dated: February 10, 2011

Edward W. McCarty III
Judge of the
Surrogate's Court