

**Matter of Bauer**

2011 NY Slip Op 31357(U)

March 7, 2011

Sur Ct, Nassau County

Docket Number: 357911/A

Judge: III., Edward W. McCarty

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

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Petition for the Construction of the Last Will and  
Testament of

MARIE P. BAUER  
a/k/a MARIE BAUER,

File No. 357911/A

Dec. No. 26988

Deceased.

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This is a proceeding commenced by the executor of the estate for construction of a last will and testament.

The last will and testament of Maria Bauer, which was duly admitted to probate by a decree of this court dated October 20, 2009, provides in part:

“SECOND: I hereby direct that all my just unsecured debts and funeral expenses be paid as soon after my deceased [sic] as may be practicable provided same are not barred by the Statute of Limitations or operation of law.

THIRD: I give, devise and bequeath to my beloved friend, ROBERT AVERY, the sum of Fifteen Thousand (\$15,000.00) Dollars.

FOURTH; I give, devise and bequeath Two (2%) percent of the balance then remaining to my beloved friend, GIOVANNA AURIEMMA.

FIFTH: I give, devise and bequeath Five (5%) percent of the balance then remaining to my beloved friend, FRANCESCA PISANO.

SIXTH: I give, devise and bequeath Five (5%) percent of the balance then remaining to my beloved friend, ANTONIO PISANO.

SEVENTH: I give, devise and bequeath to my beloved friend, MARIA A. FORTE, all of the contents of my house, including but not limited to all collectibles, collections, stamp collection, albums, coin collections, porcelain objects, paintings, optical items, camera items, etc., including my diamond engagement ring, wedding ring and all my jewelry.

EIGHTH: All the rest, residue and remainder of my property, of every nature and description, real, personal and mixed, and wheresoever the same may be situated, and whether acquired before, or after the execution of this, my Last Will and Testament, and including any property over which at the time of my death I shall have any power of testamentary disposition, I direct my Executors to divide into four (4) equal parts or shares which I give, devise and bequeath as follows:

A. One of said equal part or share to my friend, MARIA A. FORTE, and if she should predecease me, then to her issue, in equal shares, and if there be no issue, then to my good friend, DAVID W. FORTE, or to his estate.

B. One of the said equal part or share to my cousin, FILIPPA SCARANTINO a/k/a Fina Licalsi a/ka Fina Scarantino and if she should predecease me, then to her issue, in equal shares, and if there be no issue, then to my good friend, MARIA AURIEMMA, or to her estate.

C. One of said equal part or share to my cousin, FEDERICO LICALSI, and if she [sic] should predecease me, then to his issue, in equal shares, and if there be no issue, then to my good friend, MARIA AURIEMMA, or to her estate.

D. One of said equal part or share to my niece, CONCETTA COWAN, and if she should predecease me, then to her issue, in equal shares, and if there be no issue, then to my good friend, MARIA AURIEMMA, or to her estate.”

The order of the bequests in this inartfully drawn will requires that the following questions be answered: 1) is the value of the property in Article “SEVENTH” included in the fund from which all other gifts are paid, and 2) are the bequests in Articles “FIFTH” and “SIXTH” reduced by all prior bequests.

The guardian ad litem for Francesca Pisano (an infant) has filed a report in response to the petition.

The intent of the testator is to be gleaned from the four corners of the instrument if possible (*Matter of McCord*, 58 NY2d 539[1983]) without resort to extrinsic evidence (*Matter of Knapp*, 119 AD2d 676 [2d Dept 1986]; *Matter of Wickwire*, 270 AD2d 659 [3rd Dept 2000]). Therefore, the court excludes from consideration the affidavit of the attorney-draftsman (*Matter of Pozarny*, 177 Misc2d 752 [Sur Ct, Erie County 1998]).

An analysis of the will must rest upon a common sense appraisal of probabilities and meanings (*Matter of Gallier*, 247 NY 195 [1928]). The court should employ a balance of reason and probabilities in a construction. (*Robinson v. Martin*, 200 NY 159 [1910]; *Weeks v Cromwell*, 104 NY 336 [1887]).

The bequests in Articles “FOURTH”, “FIFTH” and “SIXTH” are to be paid after payment of decedent’s debts and administration expenses and after the deduction of the \$15,000.00 bequest in Article “THIRD.”

The question presented is whether the testator intended the bequest in Article “FIFTH” to be deducted not only from the balance remaining after Articles “SECOND” and “THIRD” but from the balance remaining after the bequest in Article “FOURTH” and whether the bequest in Article “SIXTH” is the balance remaining after the bequests in Articles “THIRD”, “FOURTH” and “FIFTH”.

Generally, the word “balance” presupposes a prior reduction (*Dowdle v Richards*, 2 AD2d 486 [4th Dept 1956]). The question as to whether the reduction in this will is to be taken from the balance remaining after all antecedent bequests cannot be resolved by any of the standard rules of construction.

Here, the probabilities are that the testator did not intend to bequeath a de minimis part of the pre-residuary fund to the beneficiaries in Articles “FIFTH” and “SIXTH”, which would result from successive reductions.

The court therefore construes Articles “FOURTH” “FIFTH” and “SIXTH” to provide for bequests of 2%, 5% and 5%, respectively, from the residue, after payment of the debts and funeral expenses and the \$15,000 bequest in Article “THIRD”.

The guardian ad litem argues that the value of the property which is the subject of the bequest in Article “SEVENTH” should be included in the fund remaining after the payment described in Article “SECOND.” The executor, who is the beneficiary of Article “SEVENTH”, agrees to pay to the beneficiaries of Articles “FOURTH”, “FIFTH” and “SIXTH” the amounts they would receive if the will is so construed. The court approves the payment.

The guardian ad litem has submitted his affidavit of services. In evaluating the fee of the guardian ad litem, the court considers the following factors: 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 amounts involved; and the benefit resulting from the execution of such services (*Matter of Shalman*, 68 AD2d 940[3d Dept 1979])

The guardian ad litem states that he expended twelve hours in the review of the file and research. The fee of the guardian ad litem is fixed in the amount of \$3,000.00 to be paid from the assets of the estate (not solely from the infant's share).

Settle decree.

Dated: March 7, 2011

EDWARD W. MCCARTY III  
Judge of the  
Surrogate's Court