

**Matter of Hirschler**

2011 NY Slip Op 31585(U)

June 9, 2011

Sur Ct, Nassau County

Docket Number: 2010-361774

Judge: III., Edward W. McCarty

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

----- X  
Probate Proceeding, Lost Will of

File No. 2010-361774

CINDEE HIRCHLER,

Dec. No. 27285

Deceased.

----- X

By this proceeding, the petitioner, Jeffrey Alan Hardoon, the nominated fiduciary, seeks to admit to probate a copy of the last will of Cindy Hirschler, the original not being found after the death of the testator. The decedent’s will was executed on July 28, 2009.

The decedent was survived by her husband, Bezalel Hirschler, and three children, two of whom are minors. A guardian ad litem was appointed for the minor children and has filed a report in which he recommends that the lost will be admitted to probate and that the court approve a stipulation of settlement providing the same. The decedent’s will provides for the distribution of her assets to her children. The will provides in Article Fifth (b) that the decedent leaves no portion of the residue to her husband, not because of any lack of affection for him, but because he is the sole beneficiary of a life insurance policy in the face amount of \$1,000,000 and he will also become the sole owner of their home in Woodmere as well as a condominium in Florida. The decedent’s husband filed objections to the lost will being admitted to probate which were later withdrawn by the proposed stipulation of settlement.

In order to have the copy of the will probated, petitioner relies on the provisions of SCPA 1407 which provide:

A lost or destroyed will may be admitted to probate only if:

1. It is established that the will has not been revoked, and

2. Execution of the will is proved in the manner required for the probate of an existing will, and
3. All of the provisions of the will are clearly and distinctly proved by each of at least two credible witnesses or by a copy or draft of the will proved to be true and complete.

Considering first the requirement that the execution of the will be proved in the manner required for probate of an existing will, the court is satisfied that petitioner has established that the will was executed in compliance with EPTL 3-2.1. The execution of the original instrument was supervised by an attorney, permitting the inference that the statutory requirements were met (*Matter of Spinello*, 291 AD2d 406 [2d Dept 2002]). The court is satisfied that the execution was in compliance with the statutory formalities.

All of the provisions of the will were clearly and distinctly proven by the copy of the will offered for probate which was satisfactorily proven to be true and complete by the affidavit of the attorney draftsman who states that the subject document is a true copy of the original will.

As to revocation, it is well established that where a will cannot be found after the death of the testator, there is a strong presumption that it was destroyed with the intent to revoke it (*Matter of Evans*, 264 AD2d 482 [2d Dept 1999]; *Matter of Passuello*, 169 AD2d 1007 [3d Dept 1991]). However, this presumption may be rebutted by facts and circumstances showing that the will was accidentally lost (*Matter of Fox*, 9 NY2d 400 [1961]; *Matter of Philbrook*, 185 AD2d 550 [3d Dept 1992]).

Under the circumstances, the evidence is sufficient to show that it is unlikely the decedent intentionally revoked her will dated July 28, 2009. The court is satisfied that the original instrument was either accidentally destroyed or lost and not revoked by decedent during her lifetime (SCPA 1407[1]). The court further finds that the stipulation of settlement, which

provides for the probate of said will, is in the best interest of the decedent's minor children and is approved.

The court has reviewed the affidavit of services of the guardian ad litem. The guardian ad litem for the infants performed 15 hours of service. The guardian ad litem performed the following services on behalf of his wards: reviewed the file; telephone calls with the attorneys involved in the case; telephone calls with the attorney/draftsman; attended conferences at the Surrogate's Court; reviewed the proposed stipulation of settlement; telephone calls regarding the draft of the stipulation; prepared his report; and communicated status of proceeding to the court.

As with any request for a 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 fees 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]). 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 [2d Dept 1991]). Here, there has been no opposition to the affidavit of services filed by the guardian ad litem. 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 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, Broome 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]).

Considering all of the factors as set forth above, the fee of the guardian ad litem is fixed in the amount of \$3,500.00. Said fee shall be paid within thirty (30) days of the entry of a decree herein.

Settle decree.

Dated: June 9, 2011

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