

Will of Pasternack
2012 NY Slip Op 31537(U)
April 30, 2012
Sup Ct, Nassau County
Docket Number: 2011-363838/B
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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In the Matter of a Construction Proceeding
of the Will of

File No. 2011-363838/B

ELIZABETH PASTERNAK,

Dec. No. 27898

Deceased.
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In this miscellaneous proceeding, the petitioners seek a determination that an interest in real property passes free from claims of creditors. The petition is granted in its entirety, without opposition.

The decedent, Elizabeth Pasternack, died on November 23, 2010, survived by her spouse, Jeffrey Pasternack. The decedent's last will and testament, dated March 31, 1991, was admitted to probate by decree dated February 15, 2011.

At the time of her death, the decedent was the sole owner of real property known as 43 Shore Park Road, Great Neck, New York (hereinafter, "the Premises"). Paragraph THIRD of the decedent's will provides that:

"If at the time of my death, I own any interest in my usual place of abode, (whether it be 43 Shore Park Road, Great Neck, N.Y. or any successor to it), I give and devise this property, including house and land, to my beloved husband, JEFFREY H. PASTERNAK, for his life, without liability for waste, and I further grant to my beloved husband, JEFFREY H. PASTERNAK, alone and in all events, the power to appoint by his will, the remainder of this property to one or more of the persons in the class comprised of my issue; but if he shall make no appointment, or if he shall predecease me, then I devise this property, in equal shares, per stirpes, to those of my issue who survive me."

The decedent's spouse, Jeffrey Pasternack, post-deceased on January 6, 2011. His last will and testament, dated December 15, 2010, was admitted to probate by decree dated February 1,

2011. Paragraph FOURTH of his will provides that:

“I hereby exercise the power of appointment given to me by my beloved late wife, ELIZABETH PASTERNAK, pursuant to her Last Will and Testament dated the 31st day of March, 1991, by directing that the remainder interest in the real property located at 34 [sic] Shore Park Road, Great Neck, NY 11023, be given as follows: three-quarters (3/4) to our son, JASON NEAL PASTERNAK, and one-quarter (1/4) to our granddaughter, HAILEE MARIE PASTERNAK, subject to the trust provisions of Article FIFTH, below. If either of the above-named beneficiaries does not survive me, then his/her share shall be given to the survivor between them, subject to the trust provisions of said Article FIFTH.”

The petitioners, Mark Pasternack and Anita Cohen, as trustees of Jason Neal Pasternack and Hailee Marie Pasternack, have entered into a contract to sell the Premises; however, they have been unable to insure title to the Premises absent a court determination that the Premises are not subject to the claims of creditors of the estate of Jeffrey Pasternack.

In a decision dated September 27, 2011 (Dec. No. 27482), this Court determined that since Hailee Marie Pasternack was a minor with an interest in the Premises clearly at stake, a guardian ad litem should be appointed to protect her interests, and that upon receipt of the guardian ad litem's report, the matter would be submitted for decision. A guardian ad litem was appointed by this court on September 28, 2011. The guardian ad litem filed a report on October 20, 2011 in which he concluded that the decedent's will granted a special power of appointment, not a general power of appointment, over the Premises to Jeffrey Pasternack, and therefore, the Premises is not subject to the claims of creditors of Jeffrey Pasternack.

In a decision dated December 13, 2011 (Dec. No. 27647), this Court noted that two persons who had filed claims against the estate were not given notice of the petition herein. The petitioners were directed to obtain jurisdiction over these two claimants, following which, the matter would be re-submitted for decision. The petitioners have obtained jurisdiction over the two

claimants, neither of whom has raised any objection to the relief sought by the petition. The guardian ad litem for Hailee Marie Pasternack submitted a supplemental report on March 8, 2012 in which he reiterates the conclusion reached in his earlier report, that the Premises is not subject to the claims of the creditors of Jeffrey Pasternack and it is in the best interest of his ward that the Premises be sold and the proceeds held in trust for her benefit.

If the holder of a power of appointment cannot exercise it in favor of himself, his estate, his creditors or the creditors of his estate, the power of appointment is special, not general (EPTL 10-3.2). Property covered by a special power of appointment is not subject to the claims of creditors of the donee, his estate or the expenses of administering his estate (EPTL 10-7.1).

By the terms of her last will and testament, the decedent conveyed a life estate in the Premises to Jeffrey Pasternack and conferred upon him a power of appointment with regard to the Premises, limiting his disposition of the Premises to the decedent's issue. By the terms of his will, Jeffrey Pasternack, as donee, properly exercised that power of appointment by giving the interest in the Premises to the decedent's issue, in trust. Given the limitation imposed by the decedent donor upon such power of appointment, it was a special power of appointment and, accordingly, the Premises which are the subject of such a special power of appointment cannot be reached by the creditors of Jeffrey Pasternack and may be sold free and clear of any such creditors' claims. The petition is therefore granted.

The guardian ad litem for Hailee Marie Pasternack is entitled to a fee for his services rendered (SCPA 405). 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 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]). 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 the 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*, 123 Misc 346 [Sur Ct, Columbia County 1924], *affd* 213 App Div 59 [4th Dept 1925], *affd* 241 NY 593 [1925]).

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]). Further, 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.

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]).

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 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 Phelan*, 173 AD2d 621 [2d Dept 1991]; *Matter of Von Hofe*, 145 AD2d 424 [2d Dept 1988])

The guardian ad litem appointed herein submitted an affidavit and supplemental affidavit of legal services in which he stated that he spent a total of 10.4 hours in this matter reviewing the file; speaking to the petitioners' attorney; and preparing his report. The guardian ad litem spent .8 hours preparing his affidavit of services, however, time spent in preparation of affidavits of services is not compensable (*Matter of Marshak*, NYLJ, April 30, 1996, at 1, col 6 [Sur Ct, New York County]; *Wynyard v Beiny*, NYLJ, Nov. 25, 1994, at 35, col 3 [Sur Ct, New York County]),

and therefore the time allotted to such services must be disallowed. The guardian ad litem requests an hourly fee of \$300.00 per hour. Given the size of the estate, the court finds a fee of \$2,880.00 to be reasonable and directs that such fee be paid within thirty days of the date of this order. The court thanks the guardian ad litem for his service in this matter.

This constitutes the decision and order of this court.

Dated: April 30, 2012

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