

Matter of Berzins

2015 NY Slip Op 31189(U)

July 13, 2015

Surrogate's Court, New York County

Docket Number: 2014-2144/B

Judge: Rita M. Mella

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This opinion is uncorrected and not selected for official publication.

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

New York County Surrogate's Court
MISCELLANEOUS DEPT.
JUL 13 2015
FILED
Clerk _____

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Application of Ivars Berzins as Fiduciary of the Last Will
and Testament of

MARIA T. SMULYAN,

Deceased,

DECISION
File No.: 2014-2144/B

For Permission to Pay a Debt Owed to Him by the Decedent,
Pursuant to SCPA 1805(2).

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M E L L A, S.

In this proceeding commenced by Ivars Berzins ("Petitioner"), as preliminary executor of Maria T. Smulyan's estate,¹ Petitioner seeks permission, pursuant to SCPA 1805[2], to pay himself from estate funds for services that he provided to Decedent during a six-year period as her attorney-in-fact. Two of the interested parties have consented to the relief sought by Petitioner. The guardian ad litem ("GAL") appointed to represent the interests of the remaining interested party opposed certain aspects of the relief sought. Petitioner and the GAL have agreed to the court's deciding this matter based on the parties' submissions and without a hearing.

The petition provides the following factual background, which is not challenged by the GAL. Petitioner first came to know Decedent when representing her husband in the early 1990s in efforts to recover property allegedly stolen during and following World War II. After Decedent's husband died in 1993, Petitioner represented Decedent in connection with her husband's estate. Over the years, Petitioner also helped Decedent with non-legal matters, such as preparing her tax returns and assisting with her personal banking. Petitioner alleges that, for all these services, he billed Decedent at his hourly rates for legal services.

¹Decedent's will has subsequently been admitted to probate, by decree dated June 5, 2015, with Letters Testamentary issuing to Petitioner.

On May 4, 2004, Decedent executed a will² under Petitioner's supervision, which nominates him executor and trustee of a testamentary trust. Also on that day, Decedent executed a power of attorney ("POA") appointing Petitioner her agent. The POA does not address compensation, if any, that Petitioner would receive for services performed as Decedent's agent.

According to Petitioner, in the fall of 2008, and at a time in which some ailments, including heart disease and Parkinson's, made her health more precarious, Decedent asked Petitioner to take over her care. For approximately six years (from 2008 to 2014) and pursuant to the POA, Petitioner supervised Decedent's care, as provided by Partners In Care, a company whose services he retained, and managed her finances, including the payment of her expenses. Petitioner also changed Decedent's checking account address to that of his office, he added himself as a signatory to the brokerage account, and opened a credit card account in his own name so that he could order medicine, food, and supplies for Decedent.

Decedent died on June 1, 2014, at the age of ninety-six, with a probate estate valued at approximately \$3,800,000. The instant proceeding—seeking permission to pay Petitioner this debt owed to him by Decedent for the services he provided—was commenced approximately three months after Petitioner filed the petition for preliminary letters and probate of the will of Decedent.

Acknowledging that he did not have an agreement with Decedent regarding his compensation under the POA, Petitioner proposes that he should be paid \$122,142.50 based on

² Decedent's sole distributee – a son named Bernd Schmitter, who lives with his father in Germany – is one of the primary beneficiaries under the will, as are two granddaughters of Decedent's late husband's cousin: Ayellet Rebecca Packin and Rachel Joy Packin. This Petition discloses that Mr. Schmitter is under a disability, and the previously mentioned GAL was appointed to represent his interests in this proceeding.

the 379.7 hours of services he provided to Decedent at his regular hourly rate of compensation for legal work during those years or, in the alternative, that he should be compensated as though he were her court-appointed guardian, pursuant to SCPA 2307, 2309, and the Mental Hygiene Law. The GAL opposes the relief sought and filed objections “to the extent that the Petition seeks compensation that is not reasonable for services rendered as attorney-in-fact.”

Under the current statute, an agent appointed by a power of attorney is not entitled to receive compensation from the assets of the principal unless the principal specifically provides for such compensation in the instrument (*see* General Obligations Law [“GOL”] § 5-1506[1]). This provision in the current statute, however, is the result of an amendment that became effective in 2009 and that is not applicable to this 2004 POA, as this particular section of the amendment does not apply retroactively (L.2008, c.644, § 21, amended by L.2009, c.4, § 1). Thus, as Petitioner contends, and the GAL agrees, even though the POA does not address the compensation to which Petitioner might be entitled for performance of his responsibilities, he may receive reasonable compensation for such services (*see Matter of Walsh*, NYLJ, Oct. 23, 2003, at 1 [Sur Ct, Suffolk County]; *see also* GOL § 5-1510[2][d]).

When awarding compensation to a fiduciary, the court “must consider many factors including the *nature* of the services rendered” (*Matter of Walsh, supra* [emphasis added]). Petitioner concedes the GAL’s assertion that the services Petitioner performed for Decedent during those six years—including supervising Decedent’s care, communicating with her doctors and home health aids, attending to maintenance and repairs as needed in her home, managing her finances and assuring that her bills were timely paid—were not legal in nature. Moreover, Petitioner provides no evidence that Decedent knowingly agreed to pay Petitioner any set hourly rate, in particular his regular hourly rate for legal services for these admittedly non-legal

responsibilities. In light of the foregoing, petitioner's reasonable compensation for the services he performed will not be calculated using the hourly rate he charges for legal services (*Matter of Wittenberg*, NYLJ, Mar. 16, 1994, at 25 [Sur Ct, Bronx County]; *Matter of Krastins*, NYLJ, July 25, 1990, at 23 [Sur Ct, Suffolk County]).³

Based on the submissions before the court, including time records spanning nearly six years and showing that Petitioner spent in excess of 379 hours performing services in his role as agent, and, after considering the respective values of the various levels of services that he provided in such role, the petition is granted to the extent that Petitioner's compensation for services rendered to Decedent pursuant to the POA is set at \$79,432.50⁴ (*see Matter of Wittenberg, supra*), and Petitioner may pay himself that sum from estate assets (SCPA 1805[2]).

Settle decree providing for compensation of the guardian ad litem.

Dated: July 13, 2015


SURROGATE

³Petitioner offers no authority for his alternate proposition that he could be compensated as a Mental Hygiene Law Article 81 guardian or under the SCPA provisions governing fiduciary commissions, and the court rejects that proposition.

⁴The court has deducted from the total compensation approved the \$6,000 that Petitioner paid himself from Decedent's assets in 2012 for preparing her tax returns during a four-year period.