Matter of Hillary

2017 NY Slip Op 31263(U)

June 2, 2017

Surrogate's Court, Nassau County

Docket Number: 2015-383565

Judge: Margaret C. Reilly

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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU
--x
In the Matter of the Administration Proceeding,
Estate of

DECISION

TELESHA TAMARSHA HILLARY,

File No. 2015-383565
Dec. No. 33055

Deceased.
--x
PRESENT: HON. MARGARET C. REILLY

The following papers were considered in the preparation of this decision:

Petition. 1
Report and Recommendation of Guardian Ad Litem. 2
Supplemental Report and Recommendation of Guardian Ad Litem. 3
Partial Objection to Report and Supplemental Report
of Guardian Ad Litem. 4

In this proceeding for a determination of the effect and validity of the surviving spouse's notice of election, the petition seeks a decree permitting the late filing of the notice of election and a determination of its validity and effect (SCPA § 1421).

The decedent Telesha Tamarsha Hillary died on November 24, 2014, survived by her husband, the petitioner Robert N. Hillary and their two infant sons: John and William. Letters of administration issued to Robert N. Hillary on March 19, 2015. This petition for leave to file a late notice of election was filed on July 8, 2016. Pursuant to EPTL § 5-1.1-A (d) (1), a notice of election must be filed within 6 months from the date of issuance of letters but in no event more than two years after the date of the decedent's death, except as otherwise provided in subparagraph (2) EPTL § 5-1.1-A (d). Subparagraph (2), in turn, provides that

the time to make an election may be extended before expiration for an additional six months. If the spouse defaults in filing within the period set forth in subparagraph (1), the court may relieve the spouse from default provided that no decree has been entered settling the fiduciary's account and twelve months have not elapsed since the issuance of letters and two years have not elapsed since the decedent's date of death, except that the court, for good cause shown, may extend the time within which to make the election beyond such two year period.

Here, no decree settling the administrator's account has been entered and two years had not elapsed at the time the notice of election was filed. Although more than 12 months had elapsed since the issuance of letters, the petitioner faults his former attorneys with never advising him about the time frame within which to exercise his right of election nor that he even had a right of election. The guardian ad litem appointed to represent the interests of the infant distributees, the only other parties to the proceeding, has indicated his consent to the court accepting the late filing. The court also notes that law office failure has been recognized as satisfying the "reasonable cause" requirement in the statute (*Matter of Sylvester,* 170 AD3d 903 [2d Dept 2013] [holding that Surrogate's Court should have permitted late filing of notice of election even where petition was filed four and one-half years after date of death and approximately 3 years after issuance of letters based on law office failure]).

Accordingly, the court will accept the notice of election previously filed and, there being no allegation of fact challenging the validity of the notice of election, the court finds that it constitutes a valid exercise of the surviving spouse right of election.

Although the guardian ad litem has consented to the late filing of the notice of election, he and the attorney for the petitioner are unable to agree on the value of the surviving spouse's elective share. The assets comprising the estate include real and personal property as well as benefits from the New York City Teacher's Retirement System, of which the decedent was a member, and some of which name the decedent's children as beneficiaries.

Also, the court notes that the petitioner, as a fiduciary, has a duty to account to his children for his conduct as administrator (*Matter of Francis,* 19 Misc 3d 536, 543 [Sur Ct, Westchester County 2008]). As infants, they would be unable to consent to an informal accounting of the petitioner as the administrator of the estate (*see* SCPA § 401[4]). Although a guardian of their property could consent on their behalf, the petitioner is also the children's guardian and because of the obvious conflict of interest in consenting to his own accounting, he would be precluded from consenting on their behalf in his role as guardian of their property (SCPA § 402[2]).

It therefore appears to the court that it is in the best interests of the estate, as well as the petitioner and the infant distributees, to require the petitioner to judicially his account as administrator. The court is deferring a determination of the value of the elective share until the accounting proceeding (SCPA § 1421 [3]).

Accordingly, the court, on its own motion (SCPA 2205 [2]), directs the administrator to file his account as administrator on or before July 31, 2017, and to proceed with its judicial settlement.

Finally, the court must set a reasonable fee for the services provided by the guardian

ad litem. "The Surrogate's Court bears the ultimate responsibility for deciding what constitutes a reasonable attorney's fee, and the evaluation of what constitutes a reasonable attorney's fee is a matter within the sound discretion of the court. In evaluating what constitutes a reasonable attorney's fee, factors to be considered include the time and labor expended, the difficulty of the questions involved and the required skill to handle the problems presented, the attorney's experience, ability, and reputation, the amount involved, the customary fee charged for such services, and the results obtained" (*Matter of Goliger*, 58 AD3d 732, 732 [2d Dept 2008][internal quotation marks and citations omitted]; *accord, Matter of Freeman*, 34 NY2d 1, 9, [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]). The legal fee must bear a reasonable relationship to the size of the estate (*see 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]).

Considering the foregoing criteria, and noting that the affirmation of services indicates several hours of time spent on legal research which is not generally compensable, the court fixes the fee of the guardian ad litem in the sum of $5,000.00.

Settle decree.

Dated: June 2, 2017
Mineola, New York

E N T E R :

HON. MARGARET C. REILLY
Judge of the Surrogate's Court

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