Matter of Kay
2018 NY Slip Op 31272(U)
May 24, 2018
Surrogate's Court, Nassau County
Docket Number: 2017-3018
Judge: Margaret C. Reilly

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

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Probate Proceeding, Estate of **DECISION**

File No. 2017-3018
MITCHELL N. KAY, **Dec. No. 34233**

Deceased.

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PRESENT: HON. MARGARET C. REILLY

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

In this pending probate proceeding, the parties have entered into a stipulation of settlement and consent to the probate of the decedent's will dated April 29, 2017. The petitioner seeks approval of the stipulation pursuant to SCPA § 2106 and a decree admitting the will to probate. The petitioner further seeks an order reforming the will after its admission to probate. The court must also fix the fee of the guardian ad litem.

The decedent died on July 29, 2017. He was survived his wife, Michelle Kay, and four children. One of the decedent's children is a minor for whom a guardian ad litem was appointed.

The decedent's will, dated April 29, 2017 has been offered for probate. Article First, 1.2 (a) of the will provides that if the decedent's wife survives, the sum of $4,000,000.00 reduced by the value of the Trans America annuity and the value of the Individual Retirement Accounts which pass to Michelle Kay by operation of law, shall be given to Stanley Leon

Gilbert and Michelle Kay, as co-trustees under Article Third of the Will. Article First, 1.2 (b) provides for the bequest of the decedent's law firm, which is operated in corporate form, to Stanley Leon Gilbert and Michelle Kay, as co-trustees of the Article Third Trust. The residuary is divided as follows: three percent to Stanley Leon Gilbert as trustee under Article Sixth for the benefit of the decedent's daughter Laurie Kay; ten percent outright to the decedent's son, Brian Kay; twelve percent to Stanley Leon Gilbert as trustee under Article Fifth for the benefit of the decedent's daughter, Sydney Paige Kay; and twenty-five percent to Stanley Leon Gilbert as trustee under Article Fourth for the benefit of the decedent's son, Harrison Kay. There is no other provision in the will which deals with the remaining fifty percent of the residuary. Article Second provides for the appointment of Stanley Leon Gilbert and Michelle Kay as co-executors and co-trustees of any trust established under the will. The fidiciaries are not required to file a bond.

The guardian ad litem filed an interim and final report. He reports that the will was validly executed and that the decedent possessed testamentary capacity and was under no duress or other undue influence. The guardian ad litem, however, does not believe that the will reflects the decedent's true intentions with regard to the disposition of his estate due to a scrivener's error. Specifically, the will only disposes of fifty percent of the residuary estate. The attorney drafter explained to the guardian ad litem that the decedent intended that the percentages provided to each child should be doubled, so that Laurie Kay would receive six percent; Brian Kay would receive twenty percent; Sydney Paige Kay would receive twenty-four percent and Harrison Kay would receive fifty percent. The guardian ad litem proposed that the error be rectified by reformation, after the will is admitted to probate. To this end, a stipulation was entered into by: Michelle Kay, Stanley Leon Gilbert, Brian Kay, Laurie Kay, Sydney Paige Kay and the guardian ad litem. The stipulation provides for the admission

of the decedent's will to probate; that letters testamentary issue to Michelle Kay and Stanley Leon Gilbert, without bond; that letters of trusteeship shall issue to Stanley Leon Gilbert and Michelle Kay for the benefit of Laurie Kay, Sydney Paige Kay and Harrison Kay, without bond; and that after admission of the will to probate, the will is reformed as follows:

> "1.3 If my daughter LAURIE survives me, I bequeath six (6%) percent of the residuary of my estate to STANLEY LEON GILBERT, as Trustee under Article Sixth of this Will, for the benefit of my daughter, LAURIE, to be administered as provided therein. If LAURIE shall not survive me, but my son BRIAN survives me, I bequeath the said six (6%) percent of my residuary estate to BRIAN outright. If LAURIE and BRIAN do not survive me, but any of BRIAN's descendants survive me, I bequeath the said six (6%) of my residuary estate to STANLEY LEON GILBERT, as Trustee under Article Seventh of this Will, for the benefit of BRIAN's descendants, to be administered as provided therein. If neither LAURIE, BRIAN, nor any descendants of BRIAN survive me, this bequest shall lapse.
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> 1.4 If my son BRIAN survives me, I bequeath to him twenty (20%) percent of my residuary estate outright. If BRIAN shall not survive me, but any of his descendants survive me, I bequeath the said twenty (20%) percent of my residuary estate estate to STANLEY LEON GILBERT, as Trustee under Article Seventh of this Will, for the benefit of BRIAN's descendants, to be administered as provided therein. If neither BRIAN nor any of his descendants survive me, but my daughter LAURIE survives, then I bequeath the said twenty (20%) percent of my residuary estate to STANLEY LEON GILBERT, as Trustee under Article Sixth of this Will, for the benefit of LAURIE, to be administered as provided therein. If neither BRIAN, any of his descendants, nor LAURIE survive me, then his bequest shall lapse.
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> 1.5 If my daughter SYDNEY PAIGE, or any of her descendants survive me, I bequeath twenty-four (24%) percent of my residuary estate to STANLEY LEON GILBERT, as Trustee under Article Fifth of this Will, for the benefit of my daughter SYDNEY PAIGE and her descendants, to be administered as provided therein. If

neither SYDNEY PAIGE, nor any of her descendants survive me, but my son HARRISON or any of his descendants survive me, I bequeath the said twenty-four (24%) percent of my residuary estate to STANLEY LEON GILBERT, as Trustee under Article Fourth of this Will, for the benefit of my son HARRISON and his descendants, to be administered as provided therein. If neither my daughter SYDNEY PAIGE, any of her descendants, nor my son HARRISON, nor any of his descendants survive me, this bequest shall lapse.

1.6 If my son HARRISON, or any of his descendants survive me, I bequeath fifty (50%) percent of my residuary estate to STANLEY LEON GILBERT, as Trustee under Article Fourth of this Will, for the benefit of my son HARRISON and his descendants, to be administered as provided therein. If neither HARRISON nor any of his descendants survive me, I bequeath the said fifty (50%) percent of my residuary estate as follows:

(a) Twenty (20%) to my Trustee under Article Third of this Will, for the benefit of my wife, MICHELLE, if she survives me, to be administered as provided therein;

(b) Ten percent (10%) to my Trustee under Article Fifth of this Will, for the benefit of my daughter SYDNEY PAIGE and her descendants, if any of them survive me, to be administered as provided therein;

(c) Ten percent (10%) to my Trustee under Article Sixth of this Will, for the benefit of my daughter LAURIE, If she survives me, to be administered as provided therein;

(d) Ten percent (10%) to my son BRIAN, outright, and if he does not survive me, but any of his descendants survive me, to my Trustee under Article Seventh of this Will, for the benefit of the descendants of BRIAN, to be administered as provided therein;

(e) Any legacy which lapses under paragraphs 1.6(a)-(d) shall be divided among the beneficiaries of paragraphs

> 1.6 (a) - (d) who survive me in the proportion to their share of the fifty (50%) percent."

The guardian ad litem seeks the court's permission to enter into the stipulation of settlement pursuant to SCPA § 2106 [2], which sets forth that a person under a disability is a necessary party and shall be represented by a guardian ad litem. The guardian ad litem may execute in behalf of the person for whom he appears all proper instruments necessary to effect any compromise approved by the court.

An agreement to compromise pursuant to SCPA § 2106 (4) is addressed to the discretion of the Surrogate and "if found by the court to be just and reasonable, shall be valid and binding upon the interests of persons under disability, persons not in being and all parties to the agreement" (SCPA § 2106 [4]; *Matter of Calascione*, 35 AD2d 568, 569 [2d Dept 1970]).

There being no objection to the will, the court finds that the instrument offered for probate was duly executed in conformity with the requirements for a will pursuant to EPTL 3-2.1 and that the decedent was in all respects competent to make a will and free of restraint. Accordingly, the petition is granted and the will is admitted to probate.

With regard to the proposed reformation, "[i]t is said that every presumption is against intestacy, and the courts will not find that testator did not intend to dispose of all of his property if such result can possibly be avoided" (4 Page on Wills § 30.14). Where faced with the question of whether shares of remaining beneficiaries should be increased to 100 %, at least one court found "[i]t is of no consequence that the percentages in this case must be increased. . . .The principle is the same; the court should reallocate the distributive shares to carry out the manifest intent of the testatrix to dispose of her entire estate" (*Matter of Steflik,*

9 Misc 3d 354,356 [Sur Ct, Broome County 2005]). With this principle in mind, the court approves the proposed reformation.

The court has reviewed the stipulation and approves of it as just and reasonable and in the best interests of the infant. Petitioners are entitled to a decree directing the admission of the original will of the testator to probate, subject to the conditions set forth in the stipulation.

The fees of a guardian ad litem are determined on the same basis as those of counsel (*see Matter of Burk*, 6 AD2d 429 [1st Dept 1958]; *Matter of Berkman*, 93 Misc 2d 423 [Sur Ct, Bronx County 1978]; *Matter of Reisman*, NYLJ, May 18, 2000, at 35, col 4 [Sur Ct, Nassau County]). "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 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 [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 Kaufman*, 26 AD 2d 818 [1st Dept 1966], *affd* 23 NY2d 700 [1968]).

The guardian ad litem filed an affirmation of legal services. He performed 28 hours of legal services. The guardian ad litem reviewed the court file; talked with the attorney

drafter; spoke with the decedent's spouse; drafted the proposed stipulation and prepared an interim report as well as a final report. His efforts were clearly beneficial to his ward.

Accordingly, considering all of the foregoing, the court awards the guardian ad litem a fee in the requested amount of $9,800.00. The guardian ad litem fee shall be paid within sixty (60) days of entry of the decree.

Settle decree.

Dated: May 24, 2018
Mineola, New York

E N T E R:

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

cc: Christopher P. Ronan, Esq.
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