

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

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Probate Proceeding, Will of

DECISION & ORDER

NANCY FELDMAN,

File No. 2022-216

Dec. No. 40576

Deceased.

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PRESENT: HON. MARGARET C. REILLY

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

Petition for Probate	1
Waivers and Consents	2
Citation with Proof of Service	3
Last Will and Testament	4
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Before the court is a proceeding by Nancy DiRocco and Joseph DiRocco (petitioners) to admit the last will and testament of Nancy Feldman (decedent) to probate. A guardian ad litem was appointed to represent two minor distributees. The guardian ad litem filed his report and the court must fix his fee.

The decedent died on October 23, 2021, a resident of Nassau County, New York. She was survived by her daughter, Nancy DiRocco, and two children of a predeceased daughter. The decedent’s last will and testament dated July 15, 2021 provides in Article FOURTH for specific bequests to her brother and sisters as well as \$10,000.00 to each of the decedent’s grandchildren. Pursuant to Article SIXTH, the decedent set aside \$250,000.00 in a separate

trust for each of her grandchildren. The balance of her estate is to be set aside in a trust for the benefit of Nancy DiRocco.

According to the guardian ad litem, the decedent temporarily resided in Maryland when she executed her will. The execution of the will was done remotely, which was allowed by Maryland law. EPTL 3-5.1 (c) provides:

“A will disposing of personal property, wherever situated, or real property situated in this state, made within or without this state by a domiciliary or non-domiciliary thereof, is formally valid and admissible to probate in this state, if it is in writing and signed by the testator, and otherwise executed and attested in accordance with the local law of:

(1) This state;

(2) The jurisdiction in which the will was executed, at the time of execution; or

(3) The jurisdiction in which the testator was domiciled, either at the time of execution or of death.”

At the time of the execution of the will in Maryland, the Governor of the State of Maryland had by Order Number 20-04-10-01 (47-9 Md. Reg. 469) dated April 24, 2020 and extended by Order Number 21-06-15-01 (48-14 Md. Reg. 533) dated July 2, 2021, authorized the remote witnessing and electronic signing of certain documents, including wills. The order regarding remote witnessing terminated effective August 15, 2021. The Order provided the following with regard to the execution of a will:

“III. Conditions. The execution of a will . . . may be Remotely Witnessed, provided that the following conditions are satisfied:

- a. The witness shall be in the Electronic Presence of the Signer;
- b. The witness shall be a resident of the State of Maryland and be physically located in the United States at the time the execution of the Document is witnessed;

- c. The Signer and all witnesses shall be in the physical presence or Electronic Presence of one another and a Supervising Attorney, who shall not be one of the witnesses;
- d. The Signer and all witnesses physically shall sign one or more counterparts of the same Document, or affix their Electronic Signatures to it; and
- e. The Supervising Attorney shall create a certified copy of the Document, which shall be deemed to be the original of the Document, and shall contain all pages of the Document, the original signatures or Electronic Signatures of the Signer and all witnesses, and a certification of the Supervising Attorney stating that:
 - i. The Supervising Attorney took reasonable steps to verify:
 - 1. That the copy of the Document is true, complete, and accurate copy of the Document signed by the Signer;
 - 2. That the signatures contained in the copy are either the original signatures or Electronic Signatures of the Signer and each of the witnesses;
 - 3. The identity of the Signer, and that the Signer was a resident or domiciliary of, or was physically located in, this State at the time the Signer signed the document; and
 - 4. The identity of each witness, and that the witness was a resident of this State at the time the witness signed the Document; and
 - ii. The Document was remotely witnessed in reliance on the Order of the Governor of the State of Maryland Number 20-04-10-01, dated April 10, 2020, Authorizing Remote Witnessing and Electronic Signing of Certain Documents.”

In the instant proceeding, the will was remotely witnessed by Michaela C. Muffoletto, the attorney who drafted the decedent’s will, and Kristie C. Madison. Shlomo Kanner, an attorney admitted to practice in the State of Maryland, attached a Certification of Remotely Executed Last Will and Testament in accordance with the Governor’s Order. Both witnesses

signed an affidavit wherein they declared that the decedent signed and executed the will and that she signed it willingly in their presence and to the best of their knowledge the decedent was 18 years or older and of sound mind and under no constraint or undue influence. Michaela C. Muffoletto also signed an affidavit of attesting witness pursuant to SCPA 1406.

The petitioners seek to dispense with the testimony of the other attesting witness, Kristie C. Madison, who they allege cannot be located. Pursuant to SCPA 1405, the testimony of an attesting witness may be dispensed with when he or she cannot with due diligence be found within the state. The court is satisfied that the facts presented in support of the application to dispense with the witnesses show due diligence (*see Matter of Jones*, 47 AD3d 931 [AD2d 2008]; *Matter of Keene*, NYLJ, May 4, 2015 at 26 [Sur Ct., Queens County]).

The court is satisfied that jurisdiction has been obtained over the necessary parties and that the propounded instruments were executed with the requisite statutory formalities. Further, the court is satisfied that the decedent was competent to make a will and codicil and was not under duress or subject to undue influence. Accordingly, the propounded will dated July 15, 2021 is admitted to probate.

FEES

“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” (*Matter of Goliger*, 58 AD3d 732, 732 [2d Dept 2008] [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]). In determining what constitutes a reasonable attorney's fee, the court may consider factors such as "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 Szkambara*, 53 AD3d 502, 502-503 [2d Dept 2008] [citations omitted]; *see Matter of Freeman*, 34 NY2d 1 [1974]). "In addition, the size of the net estate operates as a limitation in fixing the full value of the services rendered" (*Matter of Morris*, 57 AD3d 674, 675 [2d Dept 2008]). These factors apply equally to an attorney retained by a fiduciary or to a court-appointed guardian ad litem (*Matter of Morris*, 57 AD3d 674 [2d Dept 2008]). Moreover, the nature of the role played by the guardian ad litem is an additional consideration in determining an appropriate fee (*Matter of Ziegler*, 184 AD2d 201 [1st Dept 992]).

Fee of Guardian ad Litem


The guardian ad litem filed his report and affidavit of services. He recommends that the decedent's will be admitted to probate. He estimates that he spent approximately 5.0 hours on the matter. He performed the following services: conducted telephone interviews; drafted his report; conducted research; and reviewed and revised his report. Considering all of the factors as set forth above, the court sets the fee of the guardian ad litem in the sum of \$2,000.00.

The petition is **GRANTED**.

Settle decree within sixty (60) days of the date of this decision. Failure to settle the decree as directed may result in the proceeding being deemed as abandoned (*see* 22 NYCRR 207.37).

Dated: July 7, 2023
Mineola, New York

ENTER:



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

cc: Evan M. Newman, Esq.
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