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

.....X
Accounting by DAVID and MARY,
as Executors of the Estate of

SUSAN,

Deceased.
.....X

**REPORT OF
GUARDIAN-AD-LITEM**

File No. XXXX/01

VINCENT L. TEAHAN, an attorney at law in the State of New York, affirms and reports as follows:

1. By order of this Court dated October 31, 2002, I was appointed Guardian-ad-Litem for Margaret ("Margaret") in the captioned proceeding. Margaret is approximately 60 years old, and the representation is made in the petition by which this proceeding was commenced that Margaret is "an adult person who is mentally retarded".

2. I met with Margaret on November 13, 2002, in my office at 41 Front Street, Millbrook, New York. Margaret was accompanied by her sister (Petitioner, Mary), her brother-in-law (Petitioner, David) and their counsel, XXX XXXX, Esq. We had a meeting lasting 20-30 minutes, in which we discussed all relevant issues concerning the estate. I am satisfied that my Ward is in need of representation in this proceeding. She does not, however, appear to suffer from severe retardation and is able to converse socially, though nervously.

3. The financial affairs of the estate and of Margaret need to be reviewed.

a. Decedent left her entire estate in trust for Margaret (who is one of two stepdaughters of decedent). At the close of the Schedules of Account (October 1, 2002), cash

on hand was \$126,789.69. In addition tangibles on hand (an automobile and furniture and personal effects) are listed at an inventory value of \$2,500. After payment of expenses of the accounting and of the termination of the estate, there should be approximately \$100,000 in the trust for Margaret's benefit.

b. Article FOURTH of decedent's Will provides:

"My Trustees shall utilize ... the proceeds of such property for my daughter's upkeep, maintenance, support and well-being.... My said Trustees shall ... also have the power to invade the principal of such trust, if necessary, in addition to the interest or income thereon, for the purposes set forth herein."

c. On Margaret's death the balance of the funds that remain in the trust "shall be divided equally between my Trustees or the survivor". The Trustees are decedent's other stepdaughter, Mary, and Mary's husband, David.

d. It appears from the accounting papers that the estate has been illiquid for most of the time from decedent's death (July 6, 2001) through September 5, 2002 (the closing date of the sale of decedent's residence). It also appears from Schedule J of the Schedules of Account that the Executors (who are also the Trustees and the presumptive remaindermen of the trust) have advanced in excess of \$20,000 of funeral and administration expenses, and have reimbursed themselves out of the proceeds of sale.

e. It also appears from Schedule J of the Schedules of account that Margaret is receiving supplemental security income ("SSI") of \$734.00 per month, that Margaret resided with decedent while decedent was alive, and now resides with the Executors/Trustees.

4. All of this is necessary background for reviewing the charge of the Executors of \$1,980 as remuneration of the cost of travel (mileage) for trips between Jefferson,

New York to the Town of Clinton, New York (33 round trips of 200 miles each = 6,600 miles @ .30 per mile).

a. The question of whether Executors are to be paid from an estate for their expenses, or whether the expenses are to be absorbed by Executors out of their commissions, is a "gray" area of the law, which depends in part on the factual circumstances. For example, there is a line of cases holding that an Executor is responsible for the payment, out of commissions, of the costs of preparation of income tax returns for the decedent and the estate.

b. Absent extenuating circumstances, I would be constrained to object, on Margaret's behalf, to the payment of mileage cost to the Executors. They are each claiming a full Executor's commission of \$7,100 (total of \$14,200¹), which is more than 10% of the net probate estate. It is clear that they are each entitled to a full commission under SCPA 2307(5)(b), as the probate estate is between \$100,000 and \$300,000.²

c. I believe, however, there are extenuating circumstances here.

The Executors/Trustees/remaindermen have taken Margaret into their home, and have continued the care for her provided by decedent, which can only be partially quantified in dollars and cents terms. There does seem to be a good chance that the trust fund will be exhausted if Margaret survives for any period of time, and the burden of her care will have to be borne, at least in part,

¹ I note that the citation recites commissions of \$4,200, instead of \$14,200, but believe this is a harmless error.

² Ordinarily Executors are not entitled to commissions on real estate, since probate completes the chain of title, and real property vests by operation of law in the name of the beneficiary on probate, and does not pass through the hands of the Executors. In this estate, however, the Executors reduced the real property to their dominion and control, by selling it, and the proceeds are commissionable.

by petitioners. Accordingly, I have no objection to the payment of travel expenses to the Executors.

5. The petition also calls for approval of \$5,000 of legal fees, and I am required to comment on that request as well. In the ordinary course of an accounting, an affidavit of legal services might be required where legal fees are listed as unpaid, and where the Citation lists approval of payment of fees as part of the relief requested. Based on my review of estate transactions in connection with the accounting (including probate of decedent's Will, bookkeeping and accounting, sale of decedent's residence and the special problems of Margaret's incapacity), on my experience in more than two decades of administering estates, and on my discussion of the legal services rendered with Mr. XXXX, I believe the fee requested to be reasonable, and that no affidavit should be required of Mr. XXXX.

6. I have reviewed papers relating to the service of the citation in this proceeding, and believe jurisdiction is complete. I note that the Petition was filed in this Court on October 3, 2002. The filing date appears to have been before the expiration of the seven-month-from-letters period required for a voluntary accounting under SCPA Section 2208 1 (a), as Letters Testamentary were issued to Petitioners on March 11, 2002. But seven months have now so elapsed, and I ask this Court to treat any potential difficulties with the early filing of the Petition herein as being academic.

7. The account lists tangible personal property on hand of \$2,500, representing the decedent's automobile valued at \$2,000, and furniture and personal effects valued at \$500. Based on my meeting on November 13, I understand that the automobile has been transferred and is no longer part of the principal of the estate. I understand from my meeting that Margaret

wanted to keep the automobile, and to have the use of it, but, not having a driver's license, she transferred it to David. I regard the automobile, therefore, as having been distributed to Margaret, and then transferred by her to David. I have no objection to this.

8. On Margaret's behalf, I consent to the relief requested in this proceeding.

Dated: Millbrook, New York
November 19, 2002

Respectfully submitted,

Vincent L. Teahan

TO: Clerk, Dutchess County Surrogate's Court
Court House
10 Market Street
Poughkeepsie, New York 12601

XXX XXXX, Esq., Attorney for Petitioners

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