

Matter of Torgersen
2013 NY Slip Op 33574(U)
December 24, 2013
Surrogate's Court, Nassau County
Docket Number: 2012-370757
Judge: Edward W. McCarty III
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

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

-----X
 In the Matter of the Application of Ian Torgersen,
 To Compel Production and Filing of
 a certain Will(s) of

File No. 2012-370757
 Dec. No. 29246

EDITH TORGERSEN,

File No. 2012-370757/A
 Dec. No. 29247

Deceased.

-----X

This court issued an order on July 26, 2012, for Carol J. Leidig (“Leidig”) to appear and be examined and to compel her production of the will of Edith Torgersen. Although Leidig was personally served with the order and the witness fee on September 11, 2012, she failed to appear in court on the return date of October 10, 2012. The court issued an order to show cause to punish for contempt on December 19, 2012 and it was returnable on January 16, 2013; Leidig again failed to appear.

In two decisions rendered on March 21, 2013 (Dec. Nos. 28454 and 28456), this court found Leidig in contempt pursuant to Judiciary Law 753 for her failure to obey an order to attend and be examined and to compel production of the will. Leidig’s conduct constituted civil contempt because she impaired and prejudiced the rights of the other parties to these proceedings, the beneficiaries named in decedent’s will (*see Clinton Corner H.D.F.C. v Lavergne*, 279 AD2d 339 [1st Dept 2001]). The court afforded Leidig the opportunity to telephone the court and request that a conference be scheduled with a member of the law department, but she failed to do so. The court further afforded Leidig until April 30, 2013 to purge herself of such contempt by filing decedent’s last will and testament with this court or by delivering it to counsel for petitioner, but she failed to do so.

The decisions directed that in the event Leidig failed to purge herself of contempt, the

court would impose a fine upon her, in an amount to be determined by the court, plus the cost of the fees and disbursements incurred by petitioner's attorney in connection with the proceeding to compel production and filing of decedent's will. Counsel for the petitioner served copies of the March 21, 2013 decisions by ordinary mail and certified mail, return receipt requested, upon Leidig, and also filed an attorney's affirmation as to the amount of attorneys' fees and disbursements incurred in making this petition.

Thus, the court must now determine the amount of the fine for contempt and the legal fees of petitioner's counsel which are payable by Leidig.

BACKGROUND

As discussed in this court's prior decisions, Leidig was a friend of Edith Torgersen (the "decedent"), who died on January 20, 2011. Leidig was nominated as executor under decedent's will, dated November 9, 2009, and as successor trustee under the Edith Torgersen Revocable Trust, executed on the same day. Decedent was survived by her four grandchildren, Ian Torgersen (the petitioner in these proceedings), Jesse Torgersen, Heather Schiera and Katja Torgersen. The attorney draftsman of the documents, Christopher J. Ridini, Esq., provided photocopies of the decedent's will and trust and advised counsel for petitioner that Leidig holds the original, executed documents. Leidig did not file the will for probate and was unresponsive to attempts to contact her.

FINE

The power of courts to punish for civil contempt is governed by Judiciary Law 753, which provides, in relevant part, that a court of record has the power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or

remedy of a party to a civil action pending in the court may be defeated, impaired, impeded, or prejudiced (Judiciary Law § 753).

FEES

The affirmation of services submitted by counsel for the petitioner indicates that he was retained by Ian Torgersen and Jesse Torgersen on February 28, 2012 to commence a proceeding to compel production of the original will of Edith Torgersen. The services provided by counsel included: preparation of orders to show cause; preparation of an administration proceeding; preparation of a proceeding for the removal of a trustee and the appointment of a successor trustee; court appearances and attendance at and participation in court conferences, all on behalf of Ian Torgersen. Counsel provided 46.40 hours of legal services, as shown in the statement annexed as Exhibit (A) to the affirmation, dated June 12, 2013, in the amount of \$17,300.00. The statement also reflects disbursements totaling \$1,363.44, bringing the total bill to \$18,633.44. Counsel further annexed as Exhibit (B) to the affirmation photocopies of receipts for expenses and disbursements incurred by decedent's estate which counsel alleges were incurred solely as a result of Leidig's failure to act as successor trustee of the Edith Torgersen Revocable Trust. These disbursements include \$8,020.00 in maintenance charges and late fees incurred on the decedent's residence until it was sold on April 2, 2013; \$1,100.00 for the removal and storage for personalty remaining in decedent's apartment; \$543.07 for the replacement of decedent's refrigerator; \$1,095.57 for the balance of decedent's funeral bill, which had been sent to Leidig; \$50.00 for a missing clubhouse key and \$100.00 for a missing prospectus, both of which counsel asserts are in Leidig's possession. Counsel notes that there may be other administration expenses attributable to Leidig's failure to act, and that an additional petition may

subsequently be filed with this court.

The court has carefully reviewed the affirmation of services submitted by counsel, and notes that it includes time spent in telephone conversations with a representative of the storage facility (\$131.25) and a representative of the funeral home, as well as correspondence with the funeral home (\$56.25). The statement includes \$1,387.50 for preparation for and attendance at the real estate closing and \$337.50 for arranging wire transfers. The charges also include various other charges which pertain to correspondence and to the administration petition; these charges, too, may not be charged against Leidig, as none of these charges pertain directly to the proceeding to compel production of the will or the proceeding for contempt. The affirmation also reflects charges of \$412.50 for the preparation of counsel's affirmation and the annexed exhibits. Time spent in preparation of an affidavit of legal services is not compensable (*Matter of Marshak*, NYLJ, Apr. 30, 1996, at 26, col 6 [Sur Ct, New York County; *Wynyard v Beiny*, NYLJ, Nov. 25, 1994, at 30, col 5[Sur Ct, New York County]).

Moreover, the contempt proceeding relates only to Leidig's failure to: (1) appear; (2) be examined; and (3) produce decedent's will, and most of the legal fees and charges are not directly related to this proceeding. Additionally, this proceeding is not the proper forum in which to charge Leidig with estate administration expenses allegedly incurred as a result of her failure to act as successor trustee of the Edith Torgersen Revocable Trust. The administrator can raise these issues in the context of a future accounting proceeding, if he be so advised.

The order to show cause to punish respondent for contempt, signed by the Surrogate on December 19, 2012, requested an award of counsel fees in the amount of \$3,500.00 for the necessity of bringing the application for contempt. The court fixes the legal fee payable by

Leidig in the amount of \$3,500.00 and imposes a fine of \$500.00 on Leidig for contempt. “Civil contempt fines are aimed, not at deterrence, but at compensating or indemnifying the complainant” (*Frenkel v Frenkel*, 111 AD2d 447, 448 [3d Dept 1985]). Accordingly, the fine of \$500.00 is payable to the beneficiaries of decedent’s will.

This constitutes the decision and order of this court.

Dated: December 24, 2013

EDWARD W. MCCARTY III
Judge of the
Surrogate’s Court