

**Matter of Parrish**

2008 NY Slip Op 33733(U)

September 9, 2008

Surrogate's Court, Suffolk County

Docket Number: 28581

Judge: John M. Czygier, Jr.

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Estate of James C. Parrish, Deceased.

Discussion and Applicable Law

SCPA 1420 authorizes the Surrogate to determine the validity, construction or effect of any provision of a will and to take such proof and make such decisions as justice requires. The paramount objective in interpreting a will is to determine the intention of the testator from a sympathetic reading of the will, in its entirety, in view of all relevant facts and circumstances (see *Matter of Larkin*, 9 NY2d 88).

Where possible, testamentary intent is to be gleaned from within the four corners of the instrument, without resort to extrinsic evidence (see *Matter of Cord*, 58 NY2d 539).

Pursuant to Article FOURTH (b) of his will, the trustees were to pay or apply the income from the trust to the use of Helen during her lifetime. Upon her death, if Helen died issue surviving, the trustees were to hold the principal in further trust for the benefit of these issue. Helen died in 1932 survived by five children. The trust for the benefit of Helen and her issue was to continue until the death of Helen's youngest child, Robert P. Brown, or her last surviving child, whichever event occurred first. As the laws of probability would suggest, Robert, the last surviving child of Helen, died on November 19, 2006, thereby satisfying both conditions simultaneously.

Now that Robert has died, pursuant to the terms of decedent's will, the trust terminates, with the principal being distributed among several individuals. Although petitioners do not disagree as to the number of individuals who ultimately share in the trust corpus, namely fourteen, each presents a different interpretation of the allocation of principal among them.

With respect to the termination of the trust, decedent's will provides as follows:

... said trust shall terminate upon the death of the said youngest child or upon the death of the last surviving issue of my said daughter whichever event shall first occur. Upon the termination of said trust said Trustees or the survivor thereof shall distribute the principal of

Estate of James C. Parrish, Deceased.

said part to and among the then surviving issue of said daughter in equal shares per stirpes, and in default of such issue to and among my issue then surviving in equal shares per stirpes.

One of the petitioners, Hope C. Tetrault, interprets the above language, when read in conjunction with the remainder of decedent's will, as providing that distribution be determined on the same basis as income distribution as of Helen's death. Under this interpretation, the trust would be divided into five equal shares representing one share for each of Helen's then surviving children. Under this scenario, twenty percent of the trust's principal would be allocated to the issue of each of Helen's children, *per stirpes*.

The other petitioner, Helen P. Brown, posits a different interpretation. She contends that the trust principal is to be divided into thirteen shares, as these individuals constitute the nearest generation to Helen containing surviving issue when the trust terminated. One of these thirteen shares would be allocated to each great grandchild, *per stirpes*, which results ultimately in fourteen beneficiaries.

With these differing interpretations of the language in question, construction, if necessary, becomes an attempt by undersigned to harmonize the intent of this decedent with the imperfect language employed (see *Matter of Lummis*, 101 Misc 258). But, generally, we take wills as we find them and unless contrary to some statute or public policy give them effect as written (see *In re Watson*, 262 NY 284), ever mindful that construction and the rules employed in ascertaining the intent of the testator are to be used where the decedent's intent remains in doubt after reading his will in its entirety and not a mechanism for finding an intention contrary to the express language contained therein (see *In re Eustis' Will*, 140 Misc 344). In this regard, the court is guided by the rules that words should be given their ordinary meaning and that meaning consistently applied (see *Matter of Gustafson*, 74 NY2d 448), including that where a class gift requires survivorship after the death of the life tenant, the class is generally ascertained at the time of distribution (see *In re Astor's Will*, 5 Misc2d 722).

Estate of James C. Parrish, Deceased.

From a reading of decedent's will in its entirety, the court agrees with the interpretation of Helen P. Brown that the principal is to be shared equally among decedent's great grandchildren. Indeed, broadly speaking, the underlying theme throughout the will as a whole evinces a desire by the decedent to insure an equality of treatment of the beneficiaries. Decedent created this trust for the lifetime benefit of his daughter Helen Parrish Brown. Upon his daughter's death, decedent's intent was to provide income for her issue then surviving during their lifetimes. At each relevant point in time, decedent required that the beneficiary(ies) be ascertained at the time their interests vested. Upon Helen Parrish Brown's death, decedent directed that the succeeding class of income beneficiaries be comprised of those issue of Helen surviving. Once ascertained, the trustees were to continue to make distribution on a *per stirpital* basis to those individuals. Likewise with respect to the issue presently before the court, when the trust terminated, decedent's directive to the trustees was to distribute the principal "to and among the then surviving issue of my said daughter in equal shares *per stirpes* and in default of such issue to and among my issue then surviving in equal shares *per stirpes*." Clearly, the class of remaindermen could not be determined until their interests could vest, since only Helen's then surviving issue or decedent's issue then surviving could comprise the class.

Notably, for purposes of final distribution, decedent provided for two probable outcomes. The first being in the event that Helen died leaving issue surviving. Pursuant to the terms of the trust, if Robert, the youngest child of Helen, died leaving siblings surviving, the trust would terminate and the class of remaindermen would be determined pursuant to the language "to and among the then surviving issue of my said daughter in equal shares *per stirpes*," namely, Helen's children. In that instance, distribution would be made among decedent's grandchildren, *per stirpes*, with the principal being divided into five equal shares. This is entirely consistent with decedent's intent as expressed in his will of providing for his then living and surviving grandchildren *per stirpes*. For example, if Robert died with two siblings surviving, the trust would terminate and each of the surviving siblings would receive twenty percent of the corpus. The remaining sixty percent would be distributed in a manner consistent with petitioner Tetrault's position, twenty percent of the principal being shared

Estate of James C. Parrish, Deceased.

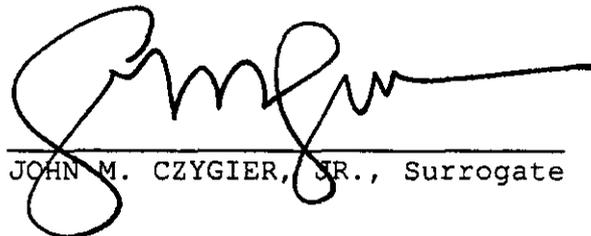
by the issue of each of Helen's predeceased children.

The alternative distribution scheme addresses the situation which came to fruition, which is that the trust terminated upon the death of Helen's youngest child, Robert. Here, decedent provided that if the trust terminated and there were no surviving children of Helen, to wit: "in default of such issue," distribution was to be made "to and among my issue then surviving in equal shares per stirpes" (emphasis added). Thus, decedent perceived a distinction between distribution in each of these instances. Furthermore, it is consistent with his intent to provide income to his grandchildren and great grandchildren, *per stirpes*, depending upon the circumstances, because their respective classes were subject to change, whether by birth or death. Upon the death of Robert, which again satisfied both criteria for termination, the classes were closed for distribution purposes and final distribution of the corpus could be made equally among all of the beneficiaries.

Conclusion

Accordingly, the court construes Article FOURTH (b) of decedent's will for purposes of distribution of the principal of this trust upon termination as requiring the trustees to ascertain the appropriate number of surviving great grandchildren of decedent and allocating one share to each.

Submit decree.



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Decision

Page 6

Estate of James C. Parrish, Deceased.

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