

Matter of Lewis

2016 NY Slip Op 32048(U)

June 21, 2016

Surrogate's Court, Nassau County

Docket Number: 2013-374377F

Judge: Margaret C. Reilly

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

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**Proceeding for Construction of the Last Will and
Testament of**

DECISION

WILLIAM S. LEWIS, JR.,

File No. 2013-374377F

Dec. No. 31639

Deceased.

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PRESENT: HON. MARGARET C. REILLY

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

Petition for Construction (as amended) with Exhibits	1
Answers (J.P. Morgan Chase Bank, Lewis, Campbell Costello, Walker, Nardini)	2
Memoranda of Law (Petitioner and Respondents).	3

This is a petition for construction of a last will and testament.

The last will and testament of the decedent, William S. Lewis, dated January 10, 2012, was admitted to probate by a decree of this court, dated May 28, 2015. The will was drafted by an attorney in Pennsylvania, executed in that state and recites that the decedent was a resident of Pennsylvania. It is undisputed that the decedent was domiciled in Garden City, New York at the time of his death.

The decedent was survived by a spouse, his son (petitioner), a sister (Laura Lewis Costello) and three half-siblings who are the issue of the second marriage of decedent’s mother (Cynthia Walker, Lavinia Smerconish and Lucas Nardini).

A trust agreement was executed by the decedent, as grantor, on May 9, 1975. The agreement granted a testamentary power of appointment to the decedent and provided for the disposition of certain assets in default of the exercise of the power of appointment. The question presented on this petition is whether the power of appointment was exercised by the decedent in his last will and testament.

Article “FIRST” subdivision (B) (2) of the trust agreement sets apart certain property and provides:

“(2) The balance of such property shall be paid over and distributed among a class of persons consisting of the wife (if any) of the Grantor and blood relatives of the Grantor in such shares, proportions and estates as the Grantor shall be (sic) his last Will and Testament, duly admitted to probate and specifically referring to this power of appointment, designate and appoint, provided, however that the power of the Grantor to appoint property to his wife shall be limited as follows . . . “

Article “FIRST” subdivision (B) (3) of the trust agreement provides:

(3) If the Grantor dies intestate or without validly or effectively exercising said power of appointment in whole or in part, then such property or such part thereof as may not have been validly or effectively appointed shall be divided into stirpital shares for the then surviving issue of the Grantor, and shall be disposed of as provided in Subdivision (6) below, but in default of such issue FIFTY PERCENT (50%) shall be disposed of as provided in Subdivision (4) and FIFTY PERCENT (50%) shall be disposed of as provided in Subdivision (5) below.”

Article “FOURTH” of the will provides in part:

“All the rest and residue of my estate, both real and personal, and wherever located, of which I may die seized or possessed, including all property over which I may have a power of appointment or testamentary

disposition, shall be divided into two (2) equal shares. One such share, to be known as the “Marital Trust”, and the other such share to be known as the “Family Trust”, shall each be held in trust, administered and distributed in accordance with the Articles that follows:”

The marital trust gives the spouse a limited testamentary power of appointment, in default of which the remainder of the trust is to be paid to the “family trust” (Article SIXTH).

The family trust is divided into equal shares for the benefit of decedent’s son (petitioner), Laura Costello, Cynthia Walker, Lavinia Smercornish and Lucas Nardini “per stirpes” with a provision for the payment of the corpus to the other trusts upon the death of the income beneficiary with no issue. Upon the death of the last of the original income beneficiaries, the remainder is to be distributed to the decedent’s living descendants “per stirpes.”

The executor of the estate and the trustee and all necessary parties have been cited in this proceeding. The petitioner is the beneficiary of the trust assets in default of the exercise of the power of appointment. Petitioner and the decedent’s sister and half-siblings are beneficiaries (under the family trust) if it is determined that the power of appointment was validly exercised. They have the same interest in this construction proceeding, as contingent remaindermen of the family trusts.

This construction proceeding is not academic as a determination is necessary as regards the administration of the decedent’s estate.

The executor argues that the validity of the exercise of the power of appointment should be determined under Pennsylvania law.

The applicable choice of law provision is EPTL 3-5.1 (g) (2) (B), which provides:

(g) Subject to paragraph (d), (e) and (f), the intrinsic validity, effect, revocation or alteration of a testamentary disposition by which a power of appointment over personal property is exercised and the question of whether such power has been exercised at all, are determined by:

(2) In the case of a general power of appointment exercisable by will alone or a special power of appointment . . .

(B) If such power was created by inter vivos disposition, the law of the jurisdiction which the donor of the power intended to govern such disposition.

Article “TWELFTH” of the trust provides that the agreement is governed by the laws of the State of New York.

EPTL 10-6.1 (b) provides “If the donor has expressly directed that no instrument shall be effective to exercise the power unless it contains a specific reference to the power, an instrument not containing such reference does not validly exercise the power.”

The provision in the will is a general reference to the power and does meet the statutory requirements for a specific reference to the trust instrument which created the power (*see Matter of Shenkman*, 290 AD2d 374 [1st Dept 2002]; *Matter of Dematteis*, 38 Misc 3d 1221 [A][Sur Ct, Queens County 2013]).

As there was a default in the exercise of the power of appointment, the property subject to the power of appointment is to be distributed pursuant to Article “FIRST”

subdivision (B) (3) of the trust agreement to William S. Lewis, III as the only surviving issue of the grantor.

Settle decree.

Dated: June 21, 2016
Mineola, New York

E N T E R:

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Judge of the Surrogate's Court

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