

Matter of Webster

2016 NY Slip Op 32053(U)

July 1, 2016

Surrogate's Court, Nassau County

Docket Number: 2014-379475A

Judge: Margaret C. Reilly

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

In the Matter of the Estate of

DECISION

SUSAN WEBSTER,

File No. 2014-379475A

Deceased,

Dec. No. 31613

to Enforce Contract Under a Will.

PRESENT: HON. MARGARET C. REILLY

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

Petition with Exhibits	1
Affirmation Amending Petition	2
Attorney Affirmation in Support	3
Verified Answer and Objections	4
Verified Reply	5

A proceeding was filed in the miscellaneous department of the Nassau County Surrogate’s Court, to enforce a purported contract under a will. The petition seeks the following relief: (a) The reciprocal will of Charles Webster and Susan Webster dated April 22, 1986 be established and proved as the last will of Charles Webster deceased, and be decreed to be valid and binding upon the estate of Susan Webster, deceased, and upon the Executor, Dean Fidel man; (b) the reciprocal wills be carried out in all respects as the will of Charles Webster, deceased, per the terms of its contractual obligation; (c) the instrument purporting to be the Will of Susan Webster dated May 15, 2013 and the Susan Webster Revocable Trust dated May 12, 1995, and the First Amendment to said Trust dated November 15, 2007, be declared to be null and void; (d) the Plaintiffs [sic-petitioners] receive the legacies, bequests, or devises and money or property given, devised, or

bequeathed to them respectively under the terms and provisions of the reciprocal wills dated April 22, 1986; (e) that the executor Dean Fidelman, be enjoined and restrained from assigning, transferring, selling, converting, disposing of, or removing any money or real or personal property of the estate to Susan Webster, until further order of this Court; (f) that the Court order specific performance of the contractual obligations as set forth in the contract between Susan Webster and Charles Webster dated April 22, 1986; and (g) the petitioners have such or further relief as the court deems proper, together with the costs and disbursements of this action.”

The decedent Susan Webster was married to Charles Webster until his death on November 25, 1987. Susan Webster died on March 18, 2014. Susan Webster and Charles Webster had no children together, but each had children from prior marriages. The petitioners in this proceeding are Charles Webster’s children; the respondents are Susan Webster’s children. The petitioners allege that Charles Webster and Susan Webster executed reciprocal wills on April 22, 1986 and that the wills created contractual rights and obligations. The petitioners’ attorney argues in his affirmation in support of the petition that by offering Charles Webster’s will for probate Susan Webster “was effectively acknowledging the language included therein whereby a contractual obligation on her part was created—which became irrevocable.”

The language petitioners rely on is in Article FIRST, paragraph C of Charles Webster’s will which provides as follows:

“I hereby declare that in consideration of my wife, SUSAN WEBSTER, and I executing Wills of even date, this Will shall be construed as a reciprocal Will creating a contractual obligation on my estate and may not be amended or altered in any manner without the consent of my said wife. It is my intent

that the execution of this Will satisfy the requirements set forth in Section 13-2.1 of the Estates, Powers, and Trust Law of the State of New York, or any successor statute.”

Charles Webster’s will contains a residuary clause leaving the residue to Susan Webster, but if she predeceased, then the residue was to be divided 50% to Charles Webster’s then living issue and 50% to Susan Webster’s then living issue. Petitioners contend that Susan Webster also executed a will on April 22, 1986 that also contained a reciprocal provision by which they would now be entitled to 50% of the residue of Susan Webster’s estate, Charles Webster having predeceased Susan Webster. However, on May 15, 2013, Susan Webster executed a new will leaving the residuary of her estate to her two children, to the exclusion of Charles Webster’s children. Susan Webster also executed a revocable lifetime trust in 1995. The 2013 will of Susan Webster was not offered for probate. Rather, a voluntary administration proceeding for estates not exceeding \$30,000.00 in value was commenced.

A contract to bequeath property or to make a testamentary provision is unenforceable unless contained in a writing and signed by the party to be charged (*see* EPTL 13-2.1[a][2]). Similarly, a promise to refrain from modifying or revoking an existing will must also be in writing to be enforceable (*see Blackmon v Estate of Battock*, 78 NY2d 735, 740 [1991]; *Matter of Morse*, 1 AD3d 516, 517 [2d Dept 2003]). However, even if the petitioner is able to satisfy these requirements, that has no effect on the validity of a later executed will. That is because “a document purporting to be a will may not be denied probate merely because the

testator ‘bound himself to a different disposition of [his] property by contract’ (*Matter of Higgins*, 264 NY 226, 229; see also, *Matter of Davis*, 182 NY 468)” (*Matter of Coffed*, 46 NY2d 514, 519 [1979]). The later will may be admitted to probate, but the estate of the second-to-die of the two testators may be subject to a claim by the disappointed beneficiaries for the enforcement of the terms of the prior will (*see Matter of Murray*, 84 AD3d 106, 116 [2d Dept 2011]).

At this point, the petitioners do not have Susan’s original April 22, 1986 will which purportedly contained the same language nor do they have a copy of any such will of Susan, either executed or unexecuted. In their answer and objections, Susan’s children deny that Susan ever executed such a will, despite the language in Charles’s will that he was executing his will in consideration of Susan also executing a similar will on that same date.

In any event, the factual assertions in the petition are disputed by the objectants. Therefore, the case cannot be decided on the papers and a hearing will be necessary (*see Matter of Sapanara*, 89 Misc2d 956 [Sur Ct, Queens County 1977]). The court also notes that petitioners’ attorney is the drafter of the purported will of Susan and his testimony will likely be critical to the outcome of the case. This matter will appear on the court’s calendar for conference on September 15, 2016, at 10:00 a.m., to enter a discovery order.

Dated: July 1, 2016
Mineola, New York

E N T E R:

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Judge of the Surrogate’s Court

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