

<b>Matter of Merenstein</b>
2018 NY Slip Op 32498(U)
October 5, 2018
Surrogate's Court, New York County
Docket Number: 2016-3448/B
Judge: Rita M. Mella
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SURROGATE'S COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

New York County Surrogate's Court

Date: October 5, 2018

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Proceeding for the Construction of the Will of

LEWIS MERENSTEIN,

DECISION

File No.: 2016-3448/B

Deceased.

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M E L L A, S.:

At the call of the May 8, 2018 calendar, the court ruled on the petition of Emma Terese ("Emma") for a determination of whether the in terrorem clause under her father's will would be triggered by a series of contemplated proceedings against her sister Ilene Merenstein ("Ilene") as Executor of their father's estate. In particular, Emma seeks in this construction proceeding a determination of whether the in terrorem clause will be triggered by: a) her seeking relief pursuant to SCPA 2205 and 2206 in the event that Ilene fails to account; b) her filing a petition for limited letters of administration pursuant to SCPA 702 to be able to initiate and conduct a criminal investigation into numerous charges reflected in decedent's American Express credit cards which Emma suspects were made by Ilene and which, according to Emma, were deemed fraudulent by American Express; c) her filing a petition to suspend Ilene's letters during the investigation into the credit cards charges in order to prevent Ilene from interfering with the investigation; and d) her filing a petition to remove Ilene "in the event the Executor is found to have engaged in improper conduct with respect to decedent's assets" in relation to the credit card charges.

For the reasons explained below, the court determined that neither a petition for additional relief under SCPA 2205 and 2206 in a compulsory accounting proceeding, nor a petition for limited letters (SCPA 702) to commence a discovery proceeding against Ilene would

trigger forfeiture, but the petition to suspend her letters as described by Emma would.

Additionally, the court declined to resolve the hypothetical question of whether, if misconduct by Ilene were to be revealed in the discovery proceeding, a petition to revoke Ilene's letters (SCPA 711 ) would trigger the no contest clause.

Decedent Lewis Merenstein died in 2016. Under his will, duly admitted to probate in January 2017, decedent distributed his personal property equally to his two children, but left 73% of the residuary estate to Ilene and the balance to Emma. Article Thirteenth of decedent's will reads as follows:

"If any person in any manner, directly or indirectly, challenges the validity or adequacy of any bequest or devise to him or her in this Will, makes any other demand or claim against my estate, becomes a party to any proceeding to set aside, interfere with or modify any provision of this Will or of any trust established by me, or offers any objections to the probate hereof, such person and all of his or her descendants shall be deemed to have predeceased me, and accordingly they shall have no interest in this Will."

It is well settled that in terrorem clauses are enforceable in New York, but they are not favored and must be strictly construed (*Matter of Fairbairn*, 46 AD3d 973, 974 [3d Dept 2007]; see EPTL 3-3.5 [b]). Public policy precludes the in terrorem clause from being used as a weapon against those who seek to hold fiduciaries accountable for their actions or for their failure to act (*Matter of Robbins*, 144 Misc 2d 510 [Sur Ct, NY County 1989]; see EPTL 11-1.7 [a]). For instance, courts have determined that it would be against public policy for an in terrorem clause to preclude a beneficiary from seeking removal or suspension of a fiduciary based on breach of fiduciary duty (*Matter of Rimland*, 2003 NY Slip Op 50966[U] [Sur Ct, Bronx County 2003]), or from questioning the conduct of fiduciaries, demanding an accounting from fiduciaries, and filing objections thereto (*Matter of Lang*, 60 Misc 2d 232 [Sur Ct, Erie County 1969]; *Matter of*

*Egerer*, 30 Misc 3d 1229[A], 2006 NY Slip Op 52713[U] [Sur Ct, Suffolk County]).

As to the request for relief pursuant to SCPA 2205 and 2206, the court, by a Decision and Order dated March 9, 2018, resolving a prior proceeding commenced by Emma, directed Ilene to account as Executor. In light of the court's order, Ilene's failure to account would be a violation of her fiduciary duties (*see* SCPA 711 [12]) and the filing of a petition to suspend her letters for such failure and to appoint a successor fiduciary could not trigger forfeiture.

Because a petition for the issuance of limited letters of administration to pursue an investigation into whether there are assets of the estate in the possession of others, including someone who is also a fiduciary, does not seek to challenge the validity of the will or any of its provisions, the filing of such a petition and even a subsequent discovery or turnover proceeding will not cause Emma to forfeit her benefits under the will here (*see Matter of Rimland*, 2003 NY Slip Op 50966[U]).

On the other hand, seeking the suspension of Ilene's letters pending any investigation that Emma may pursue and in the absence of any allegation of misconduct by Ilene in her fiduciary capacity is akin to a challenge to the testator's choice of fiduciary as established under the will. The in terrorem clause in decedent's will disinherits a beneficiary who commences a proceeding to set aside any of the provisions of the will, and therefore, the filing of this type of petition, which does not fall within the safe harbor provisions of EPTL 3-3.5 (b), would result in forfeiture in this case (*Matter of Cohn*, 72 AD3d 616 [1st Dept 2010]).

Finally, it is not possible to determine at this time if the in terrorem clause of decedent's will would be triggered by the institution of a proceeding to remove Ilene if she is found to have engaged in the type of misconduct described in the petition. The actions of Ilene about which

Emma complains allegedly took place prior to decedent's death,<sup>1</sup> and therefore, prior to Ilene's appointment as fiduciary. At this point, the court declines to engage in a determination of the hypothetical situation presented by Emma.

Ilene's contention that Emma has violated the in terrorem clause by filing the instant petition is devoid of merit because this proceeding does not fall into any proscribed category of conduct and the safe harbor provisions of EPTL 3-3.5 (b) explicitly apply to the institution of a proceeding for the construction of a will (*see Matter of Rimland*, 2003 NY Slip Op 50966[U]). Additionally, a finding here, as requested by Ilene, that this petition seeks an advisory opinion as to the four determinations, would elevate form over substance and would require the executor to spend estate resources defending twice against the same claims. The court declines to make such a broad finding.

This decision, together with the transcript of May 8, 2018 proceedings, constitutes the order of the court.

Dated: October 5, 2018

  
S U R R O G A T E

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<sup>1</sup> The only exception might be four credit card charges made, according to Emma, on the date decedent died or the day after.