Matter of Abt

2004 NY Slip Op 30409(U)

October 18, 2004

Surrogate's Court, New York County

Docket Number: File No. 3127-2003

Judge: S. Preminger

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

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In the Matter of the Will of

VITA BARSKY ABT,
a/k/a VITA BARSKY

File No. 3127-2003

Deceased.

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PREMINGER, S.

The proponent of the will and codicil of Vita Barsky Abt requests that objections to probate be dismissed on the ground that the objectant, The Fund for the Advancement of Socialism II ("Fund II"), lacks standing. For the reasons set forth below, proponent's motion is granted.

The decedent had a power of appointment over a trust created under the will of her predeceased husband, John J. Abt. It is the property comprising this trust that is at the center of the current dispute. In default of decedent's exercise of her power,[1] the appointive property was to pass in equal shares to The Amended Fund for the Advancement of Socialism ("Fund I") and four other organizations, unless any of such organizations had ceased to exist or to function, in which case such share would be divided equally among the remaining organizations.

Fund I was a trust that was established on December 20, 1982 by Henry Winston, Elizabeth Hall, Helen Winter, Simon W. Gerson and Sidney Taylor. The terms of the trust instrument state that the trustees "shall dispose of all of the assets of [Fund I] not later than December 29, 2001, and upon such disposition, the trust shall terminate." In accordance with

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[1]Proponent claims that the decedent validly exercised her power of appointment over the John J. Abt appointive property in favor of specified individuals and charities. Fund II claims to be the successor to Fund I and thus to have standing as a taker in default of an exercise of the power of appointment.

this power, the trustees of Fund I executed the Fund II trust agreement and transferred the assets of Fund I to Fund II. The Fund II trust agreement states in its preamble that "[Fund II] shall serve as the successor trust to [Fund I]." Fund II has a similar purpose to Fund I, namely, "to encourage and promote the study and practice of scientific socialism." Fund II, but not Fund I, also states that it is "intended that this trust qualify as a charitable trust under New York Estates, Powers & Trusts Law § 8-1.1."

In accordance with Article Fourth, paragraph C, of John J. Abt's will, the determination as to whether or not an organization named as a beneficiary under the will has ceased to exist or function is to be made by Jeffrey Schwartz "in his sole discretion." On May 17, 2004 Jeffrey Schwartz notified this court of his determination that Fund I had ceased to exist or to function at the time of the termination of the trust under the will of John J. Abt. Nevertheless, Fund II now contends that it is the legal successor to Fund I for the purpose of securing standing to object to the probate of the decedent's will and codicil.

Fund II's claim that it is the successor to Fund I must fail. First, an intention memorialized in a trust agreement to have a new trust serve as a "successor trust," even when combined with a similarity of purpose and a distribution of assets, is not sufficient to create a legal relationship between the trusts. Rather, Fund I and Fund II are distinct legal entities with different grantors and different terms.

Second, charitable corporation case law cited by Fund II in support of its argument that it is the successor to Fund I is unavailing. Such case law, codified by New York Not-For-Profit Corporation Law § 1005(a)(3)(A), is inapplicable here as neither Fund I nor Fund II is a charitable corporation and Fund I was not even a charitable entity. Indeed, the trust agreement

itself shows that Fund I was not a qualified charitable trust due to its political component.[2] Because neither Fund II nor Fund I is a corporation, and because Fund I was not a charitable entity, the statute, its foundations, and the body of law concerning successor or merged charitable entities has no application to the transfer of assets here.

Fund I also claims that the doctrine of *cy pres* applies so that the bequest to Fund I should be given to Fund II. The *cy pres* doctrine under EPTL § 8-1.1(c)(1) allows the court to prevent a gift to charity from failing if literal compliance with the decedent's intended gift is impractical or impossible to fulfill. The doctrine permits the court to reform the original charitable gift by directing it to be paid over to such other charity as will accomplish the testator's general charitable intentions.

Here, the court cannot apply the doctrine of *cy pres* because the original gift to Fund I was not to a charity. For the same reason, the testator, John J. Abt, cannot be said to have had a general charitable intent.[3] Additionally, the gift over provision in John J. Abt's will is further proof that he lacked the requisite general charitable intent. *See e.g. In re Dunton's Will*, 28 Misc2d 939. At any rate, the doctrine of *cy pres* cannot not be applied to confer standing upon a party that would - - in the absence of the application of the doctrine - - lack status to object to the

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[2] The Fund I trust agreement states, "The purpose of this trust is to encourage and promote the study and practice of scientific socialism." The default income beneficiaries of Fund I are not charitable organizations and Fund I trustees are not restricted to making distributions for qualifying charitable uses. Trusts created for the advancement of political purposes are not valid charitable trusts. *See Killen's Will*, 124 Misc 720.

[3] In order for the court to apply the *cy pres* doctrine (1) the gift must be charitable in nature, (2) the testator must have demonstrated a general, as opposed to a specific, charitable intent, and (3) it must be determined to the court's satisfaction that the particular purpose for which the gift was created has failed, or has become impractical or impossible to achieve. *See e.g. In re Estate of Othmer*, 185 Misc2d 122.

probate of a will.

Finally, it has been determined by Mr. Schwartz, in accordence with the authority granted to him under Article Fourth paragraph C of John J. Abt's will, that Fund I had ceased to exist or function at the time of the termination of the trust. Therefore, even if Fund II's objections were substantiated, Fund II would still not be entitled to a distribution from the trust absent proof that the determination was arbitrary or made in bad faith. *See e.g. Estate of DiDonato*, NYLJ, Aug 14, 1990, at 19, col 2; *In re Butler's Trust*, 29 Misc2d 225. No such allegation has been made by Fund II.

Accordingly, petitioner's motion to dismiss the objections to the probate of the will and codicil is hereby granted, the will and codicil are hereby admitted to probate, and Letters Testamentary shall be issued to Angela Barsky Mortarotti.

Settle decree.

SURROGATE

Dated: October 18, 2004