

Matter of Hecker

2007 NY Slip Op 30432(U)

March 22, 2007

Sur Ct, Nassau County

Docket Number: 0340930

Judge: John B. Riordan

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

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In the Matter of the Construction of the Last Will
and Testament of

GEORGINA M. HECKER
a/k/a GEORGINA HECKER,

File No. 340930

Decision No. 47

Deceased.

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This is a petition for construction of a Last Will and Testament.

Georgina M. Hecker died on January 10, 2006. Her Last Will and Testament dated January 9, 2006 was duly admitted to probate by a decree dated June 20, 2006 and letters testamentary issued to William A. Hecker, petitioner.

Article "THREE" Section "D" of the will provides:

"Stamp Collection & Private Foundation

Upon my death, I direct that my Executors sell my entire stamp collection as soon as practicable after my death and to distribute the entire net sales proceeds as set forth below in this Section D. My Executors are authorized to sell my stamp collection in whole or in parts, in a public sale, private sale or auction as my Executors shall determine in the exercise of their reasonable discretion. My Executors shall be able to set the terms of such sale and the determination of my Executors shall be absolute and binding on all parties.

My Executors shall distribute the entire net sales proceeds to either of the following two (2) types of charitable organizations: (i) a non-profit corporation which my Executors are authorized to form upon my death, under the Not-For-Profit Corporation Law of the State of New York, or under such other law of the State of New York as my Executors may deem appropriate, to be called **THE ARTHUR & GEORGINA M. HECKER FAMILY FOUNDATION, INC.**, or such other name as may be available and which my Executors may select. The said corporation (hereinafter referred to as the "Fund") shall be organized and supported exclusively for charitable, scientific and/or educational purposes. The Fund's purpose and powers shall be limited so that the disposition to it hereafter provided shall (i) qualify for an estate tax deduction, and (ii) all its income shall be exempt from federal income taxes. The officers and directors of the Fund are hereby directed to invest the net proceeds and receive the income therefrom and

to expend the income as well as the principal for the general purposes of the Fund. I direct that the initial officers and directors of the Fund be **PEGGY ANNE M. HECKER** and **WILLIAM A. HECKER** or (ii) to a donor advisory fund established through Citigroup Trust-Delaware Company, N.A. or the Long Island Community Foundation, Inc., or a similar organization or bank that will allow the disposition to qualify for an estate tax deduction and that all its income shall be exempt from federal income taxes.

Further, without limiting the discretion of my Executor, the Fund or such other entity, as the case may be, it is my desire that the following four (4) charities be considered as potential recipients on an annual basis: (i) **THE CHILDREN'S AID SOCIETY** located in New York, (ii) **THE AMERICAN CANCER SOCIETY** located in New York, (iii) **THE AMERICAN MUSEUM OF NATURAL HISTORY** located in New York and (iv) **THE PUBLIC BROADCASTING CORPORATION** located in New York.

The decision of choosing the appropriate charitable organization (i.e., foundation or donor advisory fund) shall be made by my Executor and the decision of my Executor shall be binding on all parties.”

Article “THREE” Section “E” of the will provides:

“Devise of Personal Residence

I give and devise all of my right, title and interest in my personal residence located at **37 Fox Run, Roslyn, New York** to **THE ARTHUR & GEORGINA M. HECKER FOUNDATION, INC.**, as set forth in Section D above. It is my desire that this residence be sold as soon as possible and the proceeds be used by the foundation for its general use and purposes.”

The executor states, that with the discretion conferred upon him he will elect not to create a foundation, as it will necessitate too great an expense. The executor plans, instead, to transfer the funds to Citigroup Trust-Delaware Company, N.A. or the Long Island Community Foundation. It is his understanding and the submissions confirm that the executor will thereby forfeit the authority to select the charitable beneficiaries of the fund.

In addition, the executor seeks to transfer the proceeds of the sale of the residence to one of these organizations. He thus proposes a construction of the will which would incorporate into Section “E” the provision relating to these organizations in Section “D”.

Section “E” of the will transfers the proceeds of decedent’s residence to the Arthur and Georgina M. Hecker Foundation as referred to in Section “D” for a description of the foundation. There is no mention of any alternate disposition. Had the testatrix intended to give the executor the same discretion with respect to the stamp collection and residence Section “D” and Section “E” could have been consolidated. As the will stands, Section “E” is an independent paragraph which expresses a separate intention.

It is the responsibility of the court to ascertain the intention of the testatrix from the language employed in her will (*Matter of Cord*, 58 NY2d 539 [1983]; *Matter of Fabbi*, 2 NY2d 236 [1957]).

The court cannot devise a new scheme or make a new will for the testatrix (*Legitt v Stevens*, 185 NY 70 [1906]) and cannot add a provision which creates a testamentary provision not express or necessarily implied (*Dreyer v Reisman*, 202 NY 476 [1911]).

When the court discerns a dominant purpose or plan of distribution, the individual parts of the will must be read in relation to that purpose (*Matter of Fabbi*, 2 NY2d 236 [1957]). Here, the dominant plan of the testatrix was to create a foundation and Section “E” provides no other disposition of the proceeds.

Parenthetically, even if the affidavit of the attorney-draftsman is taken into consideration, he has offered no explanation as to why, if alternate dispositions were intended, they were not added to Section “E”.

The court concludes, therefore, that the testatrix provided no alternate disposition in Section “E”. If, as the executor alleges, there are insufficient funds to create a foundation, or if the directors refuse to serve, the doctrine of cy pres would be applied to select an alternate disposition (EPTL 8-1.1).

The proceeds of the sale of the residence may be sufficient to establish a foundation. In addition, the executor has discretion to apply the funds from the sale of the stamp collection to the foundation.

The testatrix anticipated that a foundation would be created to perpetuate her name and she had a preference in the selection of charitable beneficiaries. It is the court's responsibility to carry out that intention to the extent possible.

A final determination on the construction is held in abeyance pending a conference. This matter will appear on the court's calendar on April 18, 2007 at 10:00 a.m. for a conference.

Proceed accordingly.

Dated: March 22, 2007

JOHN B. RIORDAN
Judge of the
Surrogate's Court