

Matter of Kalish

2007 NY Slip Op 30708(U)

April 11, 2007

Surrogate's Court, Nassau County

Docket Number: 0345752/2007

Judge: John B. Riordan

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

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Probate Proceeding, Will of

File No. 345752

JANET W. KALISH,

Dec. No. 265

Deceased.

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In this uncontested probate proceeding, the court is asked to dispense with the filing of a bond by the nominated trustee due to a purported scrivener’s error in the will.

The decedent, Janet W. Kalish, died a resident of Nassau County on February 4, 2007. A will dated September 20, 2006 has been offered for probate by the nominated executor, Arthur Kalish. Arthur Kalish is the decedent’s husband. The decedent was also survived by two adult children, an adult grandchild and two minor grandchildren.

Article FOURTH of the will creates a trust to be funded with the “exemption amount.” The trust terminates upon Arthur’s death, and Arthur has a limited testamentary power of appointment over the trust principal. If or to the extent that Arthur fails to exercise the limited power of appointment, the remaining trust principal is payable to the Arthur Kalish 1993 Insurance Trust. The residuary estate is payable to Arthur. The will nominates Arthur as trustee and the decedent’s children as successor trustees.

Pursuant to paragraph (1) of Section N of Article NINTH of the will, “no bond or other security shall be required of any Executor for the faithful performance of such person’s fiduciary duties in any capacity.” The attorney-draftsman has submitted an affidavit wherein he avers that he inadvertently used the word “Executor” instead of “fiduciary.” Apparently, the decedent’s prior will dated April 2, 1993, which contained one trust, dispensed with a bond in the case of

any “fiduciary.” In March of 2006, the decedent’s estate planning documents were revised to provide for a simple will (“the draft will”) and a lifetime revocable trust. The draft will contained no trusts and poured the decedent’s estate over to the revocable trust. When preparing the draft will, the attorney-draftsman deleted all references to trusts and trustees that had appeared in the April 2, 1993 will. Accordingly, the draft will dispensed with a bond only in the case of an executor. The revocable trust, however, waived the bond requirement for trustees. The decedent never executed the draft will or the revocable trust and advised the draftsman that the trust provisions of the revocable trust should be incorporated into her will. When the attorney-draftsman revised the draft will in August 2006 to include the trust provisions, he modified the provisions to include references to trustees; however, the attorney-draftsman neglected to modify the provision waiving the bond requirement to include trustees. Accordingly, the petitioner asks that the court reform paragraph (1) of Section N of Article NINTH of the purported will to waive the bond requirement for both executors and trustees.

SCPA 806 mandates that a testamentary trustee post a bond unless the will provides otherwise. SCPA 801(c) provides that the bond filed by the testamentary trustee be “in such amount as the court directs.” “[T]he provisions of SCPA 806 as read in conjunction with the provision of SCPA 801(1)(c) should be interpreted as requiring a testamentary trustee to file a bond where the will does not exempt the trustee from this requirement unless clear and convincing reasons are presented to dispense with the bond or to fix it at a reduced amount Such clear and convincing reasons might be the consents provided for by SCPA 805 or a showing that the filing of a bond is not economically feasible.” (*Matter of Scheer*, 153 Misc 2d 545, 547-48 [Sur Ct, Bronx County 1992]). In *Matter of Scheer* (153 Misc 2d 545 [Sur Ct,

Bronx County 1992]), the court did not dispense with the filing of a bond by the trustee. The court reasoned that “a will is required to contain written directions as to a decedent’s intent and to be executed with certain formalities (*see* EPTL 3-2.1) to avoid speculation with regard to the last wishes of the decedent” (*Matter of Scheer*, 153 Misc 2d 545, 548 [Sur Ct, Bronx County 1992]). Although the court noted that it had no doubt that the decedent trusted the proposed trustee since he did in fact nominate him, it concluded that it could only speculate as to whether the decedent would have dispensed with a bond if he had known the cost. Moreover, the court declined to dispense with the bond based upon the consent of the income beneficiary . The court reasoned that if the income beneficiary failed to live until the trust terminated, there would be no bond to protect the interests of his issue, who were either too young to give their consent or were not yet in existence.

Here, the petitioner is the income beneficiary of the Article FOURTH trust. The trust terminates upon his death. He has a limited testamentary power of appointment over the trust principal which he may exercise in favor of the decedent’s descendants or a spouse of a child of the decedent. In the event he fails to exercise such power of appointment, the principal is payable to the Arthur Kalish 1993 Insurance Trust. The current trustee of that trust is Jane Levine. The Insurance Trust provides for continuing trusts for the decedent’s children and grandchildren.

Reformation of a will may occur simultaneously with a will’s admission to probate where the provision in question clearly makes no sense as drafted and appears to be the result of a scrivener’s error (*Matter of Adams*, NYLJ, Nov 20, 2006, at 32, col 1 [Sur Ct, New York County]); (*see also Matter of Long*, NYLJ, July 5, 2006, at 40, col 5 [Sur Ct, Westchester

County]; *Matter of McKenna*, NYLJ, Sept 22, 1998, at 24, col 5 [Sur Ct, Nassau County]).

“Generally, extrinsic evidence may not be used to show that a provision was inadvertently omitted from a will (*Matter of Koellner*, 121 AD2d 838), but [the court] should admit extrinsic evidence if there is an ambiguity on the face of the will (Warren’s Heaton on Surrogate’s Court Practice, see 187.01)” (*Matter of Clouse*, NYLJ, Aug. 28, 2003 at 22, col 6 [Sur Ct, Nassau County]).

Here, the bond provision is not unclear and does not appear on its face to be the obvious result of a scrivener’s error. Accordingly, the court declines to reform the will as requested. Nevertheless, based upon the attorney-draftsman’s affidavit, the court finds that clear and convincing reasons have been presented to dispense with the requirement of a bond by the trustee. The court will exercise its discretion under SCPA 806 and SCPA 801(c) to dispense with the filing of a bond by the nominated trustee upon submission of consents to the trustee serving without bond by the decedent’s children, their respective spouses, the decedent’s adult grandchild and the trustee of the 1993 Insurance trust.

This constitutes the decision and order of the court.

Decree.

Dated: April 11, 2007

JOHN B. RIORDAN
Judge of the
Surrogate’s Court

