

Matter of Leeds

2007 NY Slip Op 32820(U)

September 10, 2007

Surrogate's Court, Nassau County

Docket Number: 0310125/2007

Judge: John B. Riordan

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

-----X

In the Matter of the Settlement of Accounts of
Rodd H. Leeds as Executor of the Estate of

File No. 310125

Dec. No. 436

DAVID P. LEEDS,

Deceased.

-----X

In this contested accounting proceeding the issues to be determined are the ownership of a securities account and a savings account.

Decedent died on July 12, 1999 survived by three children: Rodd Leeds (executor of the estate) Eilene Brostoff and Richard Leeds. His will dated July 2, 1999, which was admitted to probate by a decree of this court, divides the estate into equal parts among the three children. Letters testamentary issued to Rodd Leeds on October 24, 2002.

On March 15, 2005 Rodd Leeds filed his account for the period July 12, 1999 through March 1, 2005. Richard Leeds and Eilene Brostoff filed objections to the account. Thereafter, the court granted a motion by the executor to amend his account to include a claim against Richard Leeds for the proceeds of a securities account (decision dated March 23, 2006) and objections were filed to the amended account by Eilene Brostoff and Richard Leeds.

A hearing was held to determine whether the proceeds previously deposited in account #05390048 at the Dime Savings Bank of New York, are an asset of the estate. Additionally, there is a question as to the existence and ownership of a “Capital Wit” account.

The following facts were established at the hearing. On September 15, 1995 decedent opened account ##05390048 at the Dime Savings Bank of New York (hereinafter “Dime account”). The account was opened in the name of the decedent alone. On November 21, 1995,

title to the accounts was changed to the names of David P. Leeds and Rodd Leeds. Although the notation on the back of the signature card (a photocopy of which is in evidence) states that the account was “made joint” no words of survivorship appear on the signature card. On January 14, 1997 title to the account was changed by the decedent to “David P. Leeds Revocable Trust, David P. Leeds, Trustee”.

On or about June 1, 1999 the decedent consulted with an attorney concerning an estate plan. The attorney advised the decedent to make gifts in order to reduce estate taxes. The attorney further advised decedent that the revocable trust was not necessary to achieve his estate planning objectives and might in any event be invalid. The decedent declined to follow the attorney’s advice to make gifts at that time. Decedent, however, executed a new will and a durable power of attorney designating Rodd Leeds as attorney-in-fact. Both were executed on July 2, 1999 when decedent was in the hospital. The statutory power of attorney authorized the making of gifts to “my spouse, children and more remote descendants and parents, not to exceed in the aggregate \$10,000 to each of such persons in any year.”

On July 7, 1999 Rodd Leeds, utilizing the power of attorney, changed the title of a Salomon Smith Barney securities account from the “David Leeds Irrevocable Trust” to “David Leeds” and made gifts from the account. On July 10, 1999 decedent was hospitalized and placed on a respirator. On July 12, 1999, pursuant to the instructions of the attorney and utilizing the power of attorney, Rodd Leeds retitled the Dime account to David P. Leeds and Rodd Leeds. From that account Rodd Leeds made gifts of slightly less than \$10,000 to each of his two children by creating two new bank accounts and the balance was placed in an account in the name of Rodd Leeds and David Leeds. Prior to distribution of the gifts, the account contained

approximately \$91,000. Objectants allege that the funds on deposit at the time of decedent's death are assets of the estate.

When the decedent retitled the Dime account on November 21, 1995, into the names of David P. Leeds and Rodd Leeds, he presumptively created a tenancy in common (EPTL 6-2.2). The best evidence of title to a bank account is the signature card (*Matter of Fenelon*, 262 NY 308[1933]). Here, the signature card does not contain words of survivorship; thus, the presumption of a joint tenancy afforded by Banking Law §675 does not apply (*Matter of Donahue*, 262 AD2d 840 [3d Dept 1999], *Matter of Klecar*, 207 AD2d 732 [1st Dept 1994]). The evidence adduced at the hearing did not establish that the decedent intended to create a common law joint tenancy (See *Matter of Butta*, 192 Misc 2d 614 [Surr Ct, Bronx County [2002]], nor was there even an allegation that the account was intended as a convenience account.

When the decedent retitled the Dime savings account to a revocable trust account, he essentially transferred his one-half interest in the tenancy in common and the one-half of Rodd Leeds to the new account. The transfer was only possible with the consent of Rodd Leeds or his ratification (*Matter of Collazuol*, NYLJ Sept. 22, 1989 p 22 col 3 [Surr Ct, Bronx County]). The testimony of Rodd Leeds indicates that he ratified the transfer.

Rodd Leeds was not authorized by the power of attorney to convert the revocable trust account back to a tenancy in common. If valid, the transfer would have constituted a gift of one-half of the funds to himself (*see Matter of Hoerter*, 15 Misc 3d 1101[A] [Surr Ct, Nassau County 2007]). In the absence of specific authorization from the decedent (*Marszal v Anderson*, 9 AD3d 711 [3rd Dept 2004]), Rodd Leeds could not make a gift to himself in excess of \$10,000.

In addition, any gift to Rodd Leeds or his children would be valid only if found to be in the best interests of the principal (General Obligations Law 5-1502 [1]; *Matter of Ferrara*, 7 NY3d 244 [2006]). Although it may have been in the best interests of the principal for the attorney-in-fact to implement the principal's estate plan, the attorney-in-fact could not favor himself or members of his family over other family members who were intended by the principal to be equal beneficiaries of the estate.

It is not clear from the record whether Rodd Leeds made two gifts of approximately \$10,000 to each of his children, one from the Salomon Smith Barney account and the second from the Dime account. In addition, the record does not detail the gifts made to family members from the Salomon Smith Barney account.

A determination as to whether the gifts from the Dime account were in the best interests of the decedent should be made in an accounting by the attorney-in-fact so that all of the transfers can be reviewed. The court is able to conclude, however, that the balance of the funds on deposit in the Dime account on July 10, 1999 in excess of the gifts to the children and a \$10,000 gift to Rodd Leeds revert back to their prior status as assets of the revocable trust. There is some discussion in the record indicating that the trust documents are lost and the precise terms of the trust unknown. It may be that these funds revert to the estate. Additional information is required for a determination on this issue.

Finally, the executor failed to establish his claim against Richard Leeds for conversion of decedent's funds from any account at WIT Capital.

Accordingly, the objection to the failure to include the Dime account as an asset of the estate is sustained to the extent that Rodd Leeds is not the owner of the balance exceeding the amount of the three gifts to himself and to his children. The court reserves decision as to the

validity of the three gifts pending an accounting by Rodd Leeds as attorney-in-fact. The objection to inclusion of the WIT account as a claim on behalf of the estate, is sustained.

This decision constitutes the order of the court.

This matter will appear on the court's calendar on October 2, 2007 for a conference.

Dated: September 10, 2007

JOHN B. RIORDAN
Judge of the
Surrogate's Court

