Matter of Monahan
2008 NY Slip Op 31821(U)
June 30, 2008
Surrogate's Court, Nassau County
Docket Number: 0272904/2008
Judge: John B. Riordan
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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU
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In the Matter of the Estate of

File No. 272904

JOSEPH MICHAEL MONAHAN,

Dec. No. 251

Deceased,

compelling the trustees of the trust under the will of the decedent to make payments pursuant to the terms of the trust and compelling the trustees to reverse mortgage property belonging to the trust.
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Before the court is a petition brought by Mary Monahan, the surviving spouse of Joseph Michael Monahan. Mary is the lifetime beneficiary of a credit shelter trust created under decedent's last will and testament, and she and the trust share a tenancy in common in the residential real property in which petitioner resides. Petitioner asks that her children, Margaret Smith and James Monahan, as co-trustees of the trust, be compelled to distribute funds pursuant to the terms of the trust. Petitioner also asks that the court direct the trustees to pay petitioner's claims for reimbursement of expenditures which she made in connection with the real property, and the cost of her home health companions. Petitioner also seeks an order compelling the trustees to enter into a reverse mortgage on the real property. Margaret, in her capacity as co-trustee, has indicated her willingness to provide the relief requested in the petition, but has been unable to do so without the cooperation of her co-trustee, James. Petitioner asks the court to remove James as co-trustee if he continues to refuse to provide petitioner with the relief she is

seeking, and to charge James with costs and legal fees incurred in connection with this proceeding.

Procedural History

Joseph Michael Monahan died on September 2, 1991, leaving a last will and testament dated April 18, 1991. He was survived by his wife, Mary, and their five adult children, Margaret, James, Mary Jayne Miller, Joseph Monahan and John Monahan. The will was admitted to probate and letters were issued to Mary as executor on November 19, 1991. On May 12, 1992, letters issued to Margaret and James as co-trustees of the credit shelter trust created under Article Second of decedent's will.

Under the terms of Article Second (1) of the will, Mary is to receive (i) all of the income from the trust at least quarter-annually, (ii) the greater of five thousand dollars or five percent of the aggregate value of principal annually if requested by Mary in writing (a "five and five demand"), and (iii) such amounts of principal as the co-trustees shall determine would be necessary for Mary's health, education, maintenance or support. Upon Mary's death, the corpus will be subdivided for the benefit of decedent's children in accordance with complex directions set forth in decedent's will. The decedent's interest in the tenancy in common was transferred to the trust, along with some securities and cash.

Companion proceedings have been filed with this court by petitioner and each of the co-trustees. In the context of these related matters, the parties executed two stipulations, parts of which are pertinent to the present matter. The first stipulation was signed by each of the two co-trustees and so ordered by the Surrogate on June 6, 2007. A second stipulation was signed on

January 8, 2008 by each party's attorney. A copy of this 2008 agreement was provided to the court by James, as an exhibit to his verified answer to the petition now before the court.

Issues Presented

The petition names both co-trustees as respondents, but the documents reflect Margaret's willingness to provide her mother with the relief requested. The court must determine whether James should be:

I. compelled to make distributions from the credit shelter trust

(A) pursuant to Mary's exercise of her five and five demand,

(B) in reimbursement of expenditures made by Mary which benefited the trust's interest in the real estate, and

(C) to repay Mary for payments made to her home health companions;

II. compelled to enter into a reverse mortgage on the real property;

III. removed as co-trustee if he refuses to make distributions and reimbursements or cooperate in obtaining a reverse mortgage; and

IV. charged with costs and legal fees incurred in connection with this action.

Analysis

Application of the Stipulations

The petition before the court, which was filed on July 25, 2007, includes prayers for relief which were addressed in part by the June 2007 and January 2008 stipulations. Thus, before addressing the specific issues listed above, the court must determine whether these agreements, insofar as they are pertinent to Mary's petition, are binding on the parties.

Paragraph 8 of the June 2007 stipulation, which was "so ordered" by the court, provides that "[u]pon provision of a bill, receipt, invoice or other statement verifying payment to the (home health) companions (for Mary Monahan), reimbursement shall be made to the payor, Margaret Monahan Smith or Mary Monahan, forthwith."

In the June 2008 stipulation, James agreed to take all steps necessary to obtain a home equity loan on the real property in the amount of $296,000. One-half of the loan proceeds were to be paid to Mary, individually, and one-half were to be paid to the co-trustees on behalf of the trust. The papers submitted by James indicate that this provision of the stipulation was performed.

The 2008 stipulation further provided that the trustees would then utilize the trust's one-half portion of the loan proceeds to pay for Mary's home health companions and for any claim filed by Mary in exercise of her five and five demand in the year 2008. In addition, James agreed to immediately assist Mary in obtaining a reverse equity mortgage on the real property. The application for the reverse mortgage was to have been filed within ten days of the stipulation. The proceeds were to be used to repay the home equity loan and pay a monthly sum to Mary. One half of this monthly payment would be deemed a distribution from the trust for Mary's support and living expenses. It does not appear that these terms of the stipulation have been fulfilled.

It is well established that courts favor stipulations and will set them aside only where there are grounds which would be sufficient to invalidate a contract (*Hardenburgh v Hardenburgh*, 158 AD2d 585 [2nd Dept 1990]; *Daniels v Banks*, 136 AD2d 675,676 [2nd Dept

1988]). Such grounds would include fraud, mistake or deceit *(Daniels v Banks*, 136 AD2d 675,676 [2nd Dept 1988]). In reviewing each of the issues raised by Mary's petition, the court must consider the application of the stipulations, as well as the trustees' obligations under the will and applicable law.

Distributions Pursuant to the Exercise of Petitioner's Five and Five Demand

Paragraph SECOND (1)(ii) of decedent's will provides:

> "(ii) In each calendar year, including the calendar year in which my death shall occur, my said wife shall have the power, exercisable by an instrument in writing signed by her and delivered to my Trustees, to require my Trustees to pay to her or as she may designate out of the principal of such trust an amount not exceeding (a) Five Thousand ($5,000.00) Dollars or (b) five percent (5%) of the aggregate value of the principal of said trust at the time of the delivery of such instrument, whichever is greater.
>
> The power to require principal in any calendar year conferred upon my wife by this paragraph shall expire on the last day of each calendar year and shall not be cumulative."

On October 26, 2006, Mary submitted a written document to the trustees in exercise of her five and five demand. It included an appraisal of the real property by a licensed residential appraiser. This was followed by a second written claim on December 11, 2006, which included a concurrent valuation of the marketable securities held in the trust. Based on these valuations, Mary demanded the amount of $22,504.00. Mary made a written demand on June 21, 2007 in exercise of her five and five demand for 2007 in the amount of $21,279.24. This demand was based on the real estate appraisal and an updated brokerage statement reflecting the contemporary value of the securities held in the trust, a copy of which was provided to respondent's attorney.

Respondent trustee does not dispute that Mary has properly exercised this power for 2006 and 2007, nor does he offer any proof that the valuations are incorrect. Rather, James contends that he commenced a proceeding against his co-trustee to compel an accounting and has not been provided with all of the information sought. On this basis, James argues that he is unable to determine the amount of the distribution which should be paid to Mary.

The court notes that a petition for judicial settlement of account was filed by Margaret on January 2, 2007, followed by an amended petition and amended accounting filed on July 7, 2007. The accounting reflects cash and securities valued at $92,141.00 as of December 31, 2006, plus the trust's interest in the residential real estate. In addition to the formal accounting, James has been provided with competent and professional appraisals of the trust assets, as noted above. James does not indicate that he has made any independent effort to obtain an alternate valuation of the trust assets.

The trustees are obligated to fulfill the five and five demand payments to Mary pursuant to power granted to her by decedent and are ordered to do so. James will retain the right to object to the calculation of these payments in the course of the pending accounting proceeding.

Reimbursement of Funds Expended in Connection with Jointly Owned Real Estate

In her petition, Mary asks to be reimbursed for payment of two different real estate expenses, as set forth in a notice of claim filed on June 30, 2007: (1) the amount of $22,111.00, which represents half of the past real estate taxes, all of which were paid by petitioner, and (2) a claim for $10,520.00, which is half the cost of the removal and demolition of a room in the residence. "Ordinarily, a tenant in common is entitled to be reimbursed for the share of the taxes paid by him for the benefit of his cotenants . . ." (*Worthing v Cossar*, 93 AD2d 515 [4th Dept

1983]). "[G]enerally, a tenant in common may be allowed reimbursement for repairs which are necessary to protect or preserve the property . . . ." (*Wawrzusin v Wawrzusin*, 212 AD2d 779 [2nd Dept 1995]). Where a co-tenant has spent money in good faith on improvements and repairs, he may be reimbursed if he can show that the repairs were needed to preserve or protect the real estate (*Frater v Lavine*, 229 AD2d 564 [2d Dept. 1996]; *Worthing v Cossar* 93 AD2d 515 [4th Dept. 1983]). However, improvements which are not designed to restore or repair the property, and which were not made with the consent of the other parties, will not be charged against the other co-tenants (*Cytron v Malinowitz* 13 Misc3d 1218(A) [Sup Ct, Kings County]).

In the present case, there can be no question that the taxes paid by petitioner were necessary for the preservation of the property. On this basis, the trustees are directed to reimburse petitioner for one-half of the amounts paid by her in prior years for real estate taxes, as set forth in the claim filed with the court. Such payment may be reduced by any amount that was previously paid by the trustees to Mary in reimbursement of these expenditures.

As to the second real estate claim, factual questions remain as to whether the demolition work was necessary to preserve and protect the property, and whether James verbally agreed to the work, which Mary contends and James denies. If the court finds that the work was necessary to preserve and protect the property, or that James consented to the work in advance and agreed that the trust would pay one-half of the cost, as petitioner claims in her Notice of Claim and Affidavit attached as Exhibit C to her petition, then the trust will be charged. The parties must be given the opportunity to introduce evidence on these issues, even as the court notes that the party refusing to share in these expenses is the co-trustee of a trust which was created for the primary benefit of petitioner. Accordingly, this matter will appear on the court's calendar on

July 30, 2008 at 10:00 a.m. for a conference at which time a discovery order, if necessary, will be entered and a hearing date scheduled.

Repayment of Monies Disbursed for Home Health Companions

In his verified answer, James presents two arguments to support his refusal to reimburse Mary for the expense of her home health companions. The first is the change in Mary's financial circumstances since the petition was originally filed. In July of 2007, Mary stated that she lacked funds to pay for her basic living expenses. Subsequently, pursuant to the January 2008 stipulation, Mary received $148,000, which represents one-half of the proceeds of the home equity loan obtained by respondents. James argues that this alteration of Mary's financial circumstances negates the necessity of having Mary's petition entertained by the court.

Second, he argues that the only asset remaining in the trust is the trust's interest in the real property, the equity in which has been diminished by the recent home equity mortgage. If the equity is further depleted, there will be no funds with which to make future distributions to Mary. However, James' agreement in the 2007 stipulation to reimburse Mary for the cost of home health aides was "so ordered" and he has not taken any affirmative steps to be relieved of the terms thereof, and unless and until he successfully moves to modify or vacate the terms of the stipulation, it remains an order of this court.

Reverse Mortgage

Petitioner has asked the court to compel James to cooperate in obtaining a reverse mortgage on real property in which the trust and petitioner each hold a fifty percent interest. While such an action is not mandated by the terms of the instrument, it is well settled that in administering a trust, the trustees must look at the intent of the decedent (106 NY Jur 2d, Trusts

329). A review of Article Second of decedent's will indicates that decedent's primary intent was to provide for his wife, Mary, as evidenced by the fact that decedent bequeathed his entire estate to Mary, sheltering the available unified credit by placing a portion of the estate in trust for Mary's lifetime, and giving the balance to her outright. While Mary is alive she is the sole trust beneficiary, and she is to receive all of the income. The will directs the trustees to make distributions of principal to Mary as necessary for her health, education, maintenance or support.

More importantly, pursuant to the stipulation signed in January 2008, James agreed to assist in the application to obtain a reverse mortgage, which application was to have been filed prior to January 19, 2008. James is directed to assist Mary in applying for a reverse mortgage by executing any documents presented to him by Mary's attorney and returning them completed and signed within ten days of receipt.

Co-Trustee Removed and Charged with Costs and Legal Fees

It is premature to address petitioner's request that James be removed, as subsequent to the filing of this petition the parties agreed that all actions for removal would be merged in the pending accounting proceeding brought by Margaret.

Petitioner's request for costs and fees is denied without prejudice to renew.

Conclusions

The court grants those portions of the petition which ask that James be ordered to pay Mary's claims pursuant to her five and five demand, that James reimburse Mary for the trust's proportionate share of the real estate taxes, and that James be ordered to assist Mary in obtaining a reverse mortgage. The request for relief which concerns reimbursement of expenditures incurred in connection with the removal and demolition of a room in the residence and

repayment for cost of the home health aides will be held in abeyance pending the conference scheduled for July 30, 2008.

James has averred that as of March 25, 2008, all of the liquid assets of the trust have been depleted, leaving the tenancy in common as the sole trust asset. James has offered no explanation as to why the liquid assets have been so totally depleted as to render the trustees incapable of making payments pursuant to the five and five demand, particularly in view of the trust's receipt in January 2008 of $148,000, which represents one-half of the proceeds of the home equity loan. The court will appreciate counsel's explanation at the conference to be held on July 30, 2008 at 10:00 a.m..

This decision constitutes the order of the court and no additional order shall be submitted.

Dated: June 30, 2008

JOHN B. RIORDAN
Judge of the
Surrogate's Court