

Matter of Pardi

2008 NY Slip Op 33502(U)

December 24, 2008

Surrogate's Court, Nassau County

Docket Number: 174034

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 Estate of

File No. 174034

JOHN PARDI,

Dec. No. 638

Deceased.

-----X

This is a motion in a pending construction proceeding to stay the decedent’s son, Richard Pardi, from proceeding with a petition for construction of the decedent’s wife’s will or for revocation of the decree of probate in Florida. The main issue before the court in both Florida and New York is whether the decedent’s wife validly exercised a power of appointment. The movants in the instant proceeding are the six children of a predeceased son of the decedent. The motion is opposed by Richard Pardi.

The decedent, John Pardi, died on March 18, 1975. He was survived by his wife, Violet Pardi, and his two sons, Richard Pardi and Edward Pardi. Edward Pardi died in 1999 and was survived by six (6) children. John Pardi’s last will and testament dated November 23, 1974 created a marital trust for the benefit of Violet Pardi. Richard Pardi was named co-trustee of the marital trust along with Bank of America (successor to U.S. Trust Company). The marital trust is administered in New York. Under Article FOURTH of the decedent’s will, the trustees are directed to pay the income to Violet Pardi during her life and upon her death,

“to transfer, convey and pay over the principal of the trust to or for the benefit of such one or members of a class consisting of any person or persons, any corporation or corporations, the estate of my wife and the creditors of her estate, in such amounts or proportions, and in such lawful interests or estates, whether absolute or in trust, *as my wife, VIOLET A. PARDI, may, by her Last Will and Testament, appoint by a specific reference to this power.* If the power of appointment is, for any reason not validly exercised, in whole or in part, by my wife, VIOLET A. PARDI, the principal of the trust, to the extent not validly appointed by her (hereinafter referred to as the “unappointed property”), shall, upon her death, be disposed of as provided in Article FIFTH hereof.”

If Violet Pardi failed to exercise the power, then pursuant to Article FIFTH the remainder of the marital trust would be divided equally between Richard Pardi and Edward Pardi, or their issue, if either predeceased Violet Pardi.

In 1990, Violet Pardi moved to Florida and remained domiciled there until her death. While domiciled in Florida, Violet Pardi allegedly executed a series of wills. In the wills executed in 2000, 2004 and 2005, Violet Pardi purportedly exercised the power of appointment. Violet Pardi's final last will and testament dated January 10, 2007 provides in Item II that the residue be given to a revocable trust also dated January 10, 2007. The last sentence of Item II states "[i]f necessary to give effect to this Item, but not otherwise, said Revocable Trust Agreement is incorporated herein by reference." The will is silent regarding the exercise of the power of appointment. The revocable trust, however, purports to exercise the power of appointment and directs various distributions with the balance being distributed to a trust for the benefit of Richard Pardi and, upon his death, to his descendants.

Violet Pardi died on April 14, 2008. On June 9, 2008, Violet Pardi's 2007 will was admitted to probate in Florida. Richard Pardi was appointed representative of his mother's estate.

Co-trustee, Bank of America, by petition dated August 6, 2008, asked this court to decide whether the power of appointment under John Pardi's will dated November 23, 1974 was validly exercised by Violet Pardi. On August 29, 2008, Richard Pardi petitioned the Florida probate court "for a declaration that Violet A. Pardi's Last Will and Revocable Trust Agreement dated January 10, 2007, effectively exercised her general Power of Appointment over the residue of a Marital Trust for her benefit or, in the alternative, an order revoking probate of Violet A. Pardi's

Last Will dated January 10, 2007 and admitting to probate Violet A. Pardi's immediate and previous Last Will dated January 20, 2005."

Violet Pardi is the donee of the power of appointment. The question of whether a donee has validly exercised a power of appointment where the power is created by will is determined by the law of the jurisdiction in which the donor of the power was domiciled at the time of death (EPTL 3-5.1[g][2][A]). The validity of an exercise has always been governed by the residence of the donor as the "property being disposed of is that of the donor of the power, not the donee" (*Matter of Deane*, 4 NY2d 326, 331 [1958]; see also *Matter of Philbrick*, 209 NY 585 [1913]). Clearly, the question of whether Violet Pardi validly exercised the power of appointment is properly before this court and the Florida court lacks jurisdiction to decide this issue. In *Matter of Acheson* (28 NY2d 155, 164 [1971]), the Court found that there was no basis for determining that an order of a California court was jurisdictionally infirm as the court did not decide the issue of whether a power of appointment was validly exercised. The Court continued, "It is quite true...that the validity of the power's exercise is a question to be determined solely by the courts of this state."

Before the Florida court, however, are two applications; the first to determine the validity of the exercise of the power of appointment and the second to revoke Violet Pardi's 2007 will which was admitted to probate by the Circuit Court for Palm Beach County. EPTL 3-5.1(g)(3) provides that the "formal validity of a will by which any power of appointment over personal property is exercised is determined in accordance with paragraph (c) [whether a will is executed and attested in accordance with the local laws of the jurisdiction where the testator/donee was executed or domiciled] on the basis that the testator referred to therein is the donee of such power." The question of whether Violet Pardi's 2007 will was validly executed is a question for

the courts in Florida. If the Florida court grants the application to revoke Violet Pardi's will, the New York proceeding to determine the validity of the exercise of the power of appointment will be moot, at least until such time as any of Violet Pardi's prior wills are admitted to probate.

Edward Pardi's children now move for an order pursuant to CPLR 2201 staying Richard's prosecution of the Florida proceeding pending the final disposition in this court of the earlier filed construction proceeding by Bank of America. CPLR 2201 provides that "[e]xcept where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just." The general rule is that a court's power to grant a stay is limited to proceedings in an action pending in that court (4 Weinstein-Korn-Miller, *New York Civil Practice*, ¶2201.04, p. 22-14). In *Modernismo Publications, Ltd. v Tenney* (104 AD2d 721, 721 [3d Dept 1984]), the court stated "the practice of applying in one action to stay the proceedings in another action, pending in a different jurisdiction, is unauthorized" (*Accord Church Mut. Ins. Co. v People*, 251 AD2d 1014 [4th Dept 1998]; *Fourth Fed. Sav. & Loan Assn. v Garber*, 172 AD2d 399 [1st Dept 1991]; *Safier v Cohl*, 95 AD2d 933 [3d Dept 1983]).

The relief sought here, however, is not an order staying the Florida court, but rather staying Richard from prosecuting the construction proceeding in Florida. This court has the power to enjoin a fiduciary it has appointed from acting (1 Warren's Heaton on Surrogate's Court Practice, §2.26[4]). However, Richard's proceeding in Florida was not commenced in his capacity as trustee of the New York trust, but as the legal representative of Violet Pardi's estate, appointed as such by the Florida court. The motion to stay Richard from proceeding with the Florida construction is accordingly denied, although, as indicated above, it is the considered

decision of this court that the determination of the validity of Violet Pardi's purported exercise of the power of appointment is a question for this court, not the Florida court to decide.

The basis for Richard's petition in Florida to vacate the probate decree is that the attorney-draftsman assured Violet Pardi that execution of the pour-over will and lifetime trust would be an effective exercise of the power of appointment, as Florida law provides that a will procured by mistake is void (Fla. Stat. §732.5156). However, until this court determines whether the exercise of the power was effective, there can be no determination that the draftsman's advice was erroneous to that end. The construction proceeding in this court is scheduled to be submitted for decision on January 14, 2009 and a decision thereon will issue in due course.

This decision constitutes the order of the court.

Dated: December 24, 2008

JOHN B. RIORDAN
Judge of the
Surrogate's Court