Matter of Murray

2009 NY Slip Op 30574(U)

March 17, 2009

Surrogate's Court, Nassau County

Docket Number: 318196

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

SANDRA MURRAY,

Deceased.

File No. 318196

Dec. No. 774

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In the Matter of the Application of Jerome Murray, as Preliminary Executor of Estate of

SANDRA MURRAY,

Deceased,

Dec. No. 775

For the Turnover of Property Withheld and Belong to Decedent,

-against-

Karen B. Murray Kline, Ivan G. Kline, Clifford Paul Murray, Lynn Murray Cooper and Debra S. Murray Wolther,

Respondents.

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Before the court are a probate proceeding and a discovery proceeding (SCPA 2103).

BACKGROUND

The decedent, Sandra Murray, died on June 14, 2008 a resident of Nassau County, survived by her four adult children, Clifford Murray, Karen Kline, Lynn Cooper and Debra Wolther. Decedent had been married to Jerome Murray for fifty (50) years. The Murrays divorced in April 2001. At the time of her death, decedent resided in property located at 55 Chestnut Hill, Roslyn, New York.

These proceedings arise out of the same facts and involve four (4) documents.

Decedent and Jerome executed a joint will dated December 20, 1993. The joint will provided in relevant part the following:

> SECOND. Upon the death of one of us, leaving the other of us surviving, the entire estate of the one dying first and all property of which she or he has power of disposal, whether owned jointly or severally, is hereby given to the survivor, upon the condition, however, that whatever remains of the above estate after the death of the survivor shall be given as set forth herein Paragraph Fourth hereof.

Paragraph FOURTH created a trust for the benefit of the testator's grandchildren and an outright bequest to Karen Kline. The will further provided:

> FIFTH: We have mutually agreed upon the foregoing disposition of our property, and, in consideration thereof, it is further mutually agreed by both of us that this Will shall be forever binding upon both of us and upon the estate of each of us, and shall bind our legatees, distributes (sic) and representatives. We further mutually agree that this Will shall be irrevocable and shall not be modified or revoked by either of us or by the survivor of us, except that it may be revoked or modified only by a writing subscribed by both of us and executed by both of us with the formality of a Will.
>
> SEVENTH: Upon the death of one of us leaving the other surviving, the survivor is hereby appointed executor or executrix of the estate of the one dying first; and upon the death of both of us, our daughter Karen Beth Kline is hereby appointed Executrix, and our daughter Karen Beth Kline and our son Clifford Paul Murray and our daughter Debra Sue Murray are hereby appointed joint Trustees of this our Joint Will, and of our respective Wills as herein expressed, but if our daughter Karen Beth Kline is unable or refuses to so serve as Executrix or Trustee or if our son Clifford or our daughter Debra is unable or refuses to serve as Joint Trustees, we hereby appoint our daughter-in-law Karen Ann Murray and our son-in-law Ivan Kline to serve as Joint substitute or successor Executors and/or Trustees. In the event of the death of or incapacity of Jerome Murray, we mutually appoint our son-in-law Ivan Kline, to serve as attorney for our joint and several estates.

Decedent and Jerome entered into a Marital Settlement Agreement in January 2001 which provided, in part, that:

> 7. The Husband and Wife have heretofore executed a Joint Irrevocable Last Will and Testament in New York, which is again reaffirmed by the parties as their Last Will and Testament, and both parties agree to maintain and support the

obligation and covenants made therein and further agree not to attempt to Revoke such Last Will and Testament.

Decedent and Jerome owned two residences; one was a condominium in Boca Raton, Florida, the other, a condominium in Roslyn, New York. The Marital Settlement Agreement provided that Jerome acquired title to the Florida property and the decedent acquired the Roslyn property.

On June 2, 2006, decedent established the Sandra Murray 2006 Irrevocable Trust. Decedent and her son-in-law, Ivan Kline, served as co-trustees of the trust. Upon creating the trust, decedent transferred to it some of her property, including the Roslyn property. The trust provided in pertinent part as follows:

ARTICLE I
Trust Name

This Agreement and the trust hereunder may be referred to as Sandra Murray 2006 Irrevocable Trust.

ARTICLE II
Lifetime Trust

B. End of Lifetime Trust. Upon the Grantor's death, the trust property shall be disposed of as follows:

1. Any principal, and any income attributable thereto, shall upon the Grantor's death be distributed to such one or more persons out of a class composed of the Grantor's former husband, Jerome Murray, and the Grantor's descendants and spouses of the Grantor's descendants on such terms as the Grantor may appoint by a Will hereafter executed specifically referring to this power of appointment.

2. In default of appointment or insofar as an appointment is not effective pursuant to the foregoing provisions of this Article, then the trust property shall be disposed of as follows:

a. If the Grantor is survived by Jerome Murray, the trust property

> shall upon the Grantor's death be distributed to the Trustee of the Jerome Murray Trust under this Agreement, to be disposed of under the terms of the Jerome Murray Trust.
>
> b. If the Grantor is not survived by Jerome Murray, the Trustee shall distribute the trust property to the Grantor's descendants then living, per stirpes.

On September 5, 2007, the decedent executed a will which purports only to exercise the power of appointment contained in the Sandra Murray 2006 Irrevocable Trust. The instrument expressly declares that it is not intended to modify or revoke the 1993 joint will. The instrument provides:

> ARTICLE I
> Power of Appointment
>
> This Article exercises the power of appointment of Sandra Murray over all property held in the Lifetime Trust under Article II B of the Sandra Murray 2006 Irrevocable Trust dated June 2, 2006, all of which property is hereby directed to be distributed in equal shares to Clifford Murray, Karen Kline, Debra Wolther, and Lynn Cooper; provided, however, that if any such person does not survive Sandra Murray but leaves a descendant or descendants who are living at his or her death, the share that would otherwise be distributed to such person shall instead be distributed to such person's descendants, per stirpes.

THE PROCEEDINGS

Jerome, as nominated executor, filed a petition propounding the December 20, 1993 joint will for admission to probate. Objections to Jerome serving as executor were filed by Karen and Ivan (the Klines). Preliminary letters issued to Jerome on July 15, 2008.

Jerome commenced a discovery proceeding pursuant to SCPA 2103 seeking, among other things, a direction that Ivan, as trustee of the trust, convey the Roslyn property back to the estate. The Klines filed an answer to the petition asserting the decedent "exercised her unfettered authority to dispose of her property during her lifetime, by irrevocably transferring a portion

thereof to the Trust and making gifts to her children."

Ivan, as co-trustee, filed a petition propounding the September 5, 2007 instrument for admission to probate. The Klines do not object to the admission to probate of the December 20, 1993 instrument. Objections were filed by Jerome to the admission to probate of the September 5, 2007 instrument.

THE MOTIONS

There are two motions before the court involving the four (4) referenced documents.

The Klines move for an order under CPLR 3212 (1) dismissing the SCPA 2103 proceeding as against them; (2) dismissing the objections of Jerome to Ivan's petition for probate of the September 5, 2007 will; and, (3) granting a decree admitting to probate the September 5, 2007 instrument.

Jerome moves for an order under CPLR 3212 (a) dismissing Ivan's petition seeking probate of the September 5, 2007 instrument; (b) dismissing the Kline's objections to Jerome's appointment as executor of the decedent's estate; and, (c) under SCPA 2103, granting the relief sought in the turnover proceeding commenced by Jerome.

The motions are disposed of as hereinafter set forth.

THE PARTIES' CONTENTIONS

The facts herein are largely undisputed. Neither Jerome nor the Klines contend that any of the relevant documents are ambiguous. Further, the parties do not contend that there was a prohibition or restriction by the will against either decedent, or Jerome, during their lifetime, from making inter vivos transfers or gifts.

The Klines contend that decedent disposed of her ownership interest in the Roslyn

property during her lifetime in the 2006 Trust and that decedent maintained no incident of ownership thereof. The Klines contend that no violation of the joint will or the marital settlement agreement occurred.

Jerome contends that pursuant to Article "SECOND" of the will, the property that decedent placed into the Trust should pass to him. Jerome asserts that under Article "SECOND", two categories of property passed to the survivor of Jerome and the decedent: (1) "the entire estate of the one dying first" and, (2) "all property of which she (decedent) or he (Jerome) has power of disposal, whether owned jointly or severally." Jerome asserts that even if the Roslyn property was transferred to the Trust and not part of decedent's probate estate, decedent retained at the time of her death the "power of disposal" as contemplated by Article "SECOND" of the joint will.

The issue presented is whether the transfer of certain property, including the Roslyn property, into the 2006 trust created by the decedent, which then passes to the decedent's and Jerome's four children by decedent's exercise of the power of appointment retained by her in the September 2007 will, is violative of the terms of the joint will.

ANALYSIS

It is a fundamental proposition that a will is ambulatory in nature and is ordinarily revocable during the life of the testator (EPTL 1-2.18[a]; *Blackmon v Battcock*, 78 NY2d 735 [1991]; *Tutunjian v Vetzigian*, 299 NY 315, 319 [1949]). Even after due execution of a will, testators retain unfettered authority to dispose of all property during their lifetimes (*Matter of Fabbri*, 2 NY2d 236, 239 [1957]). Testators may surrender the power of revocation by agreement (*Blackmon v Battcock*, 78 NY2d 735 [1991]; *Oursler v Armstrong*, 10 NY2d 385

[1961]).

It is established law in New York that two persons may contractually agree to dispose of their estates in a particular manner and that such an agreement may find expression in a joint or mutual will (*Glass v Battista*, 43 NY2d 620, 623 [1978]; *Schwartz v Horn*, 31 NY2d 275, 279 [1972]). Such surrender of the right to revoke a prior will is scrutinized carefully and there must be a clear and unambiguous exhibition of that intent in the joint will under review (*Rubenstein v Mueller*, 19 NY2d 228, 232 [1967]; *Oursler v Armstrong*, 10 NY2d 385 [1961]). An agreement not to revoke a joint will "can be established only by an express statement in the will that the instrument is a joint will and that the provisions thereof are intended to constitute a contract between the parties" (EPTL 13-2.1[b]). A perusal of the December 20, 1993 joint will establishes that Jerome and the decedent jointly and individually agreed to abide by the testamentary plan contained in the will. The will expressly states that Jerome and decedent executed the document "as an agreement binding upon both of us, and upon the survivor of us." As to what Jerome and decedent agreed to do, a specific testamentary plan for the disposition of property upon the death of both of them was set forth in the will. Article "FOURTH (A)" provides that all estate property of the survivor is to be given to Jerome and decedent's surviving grandchildren in trust divided into as many separate shares as surviving grandchildren and one additional share to Karen B. Kline. Pursuant to Article "SECOND," upon the death of one of them, the entire estate of the one dying first and all property of which she or he has the "power of disposal" is given to the survivor upon condition that whatever remains of the estate after the death of the survivor should be given as set forth in Article "FOURTH." The use of the provision "we" throughout the will is additional evidence that the decedent and Jerome intended

the will to be a binding contract. These factors, taken together, establish an agreement between the testators to dispose of their respective estates in the manner specified in the joint will (*see Glass v Battista*, 43 NY2d 620 [1978]; *Rich v Mottek*, 11 NY2d 90 [1962]; *Tutunjian v Vetzigian*, 299 NY 315 [1949]; EPTL 13-2.1[b]).

Blackmon v Battcock, 78 NY2d 735 [1991] bears analysis. There, the decedent had executed a will in 1969 which left a bequest to a church and to a friend with the residuary bequeathed to decedent's two children, a son and a daughter, or their children, if decedent's children predeceased her. The decedent entered into a written settlement agreement with her late husband's estate in which, among other things, decedent "promised to leave intact and without change" her 1969 will. The settlement agreement was silent as to Totten trusts, trust accounts, inter vivos transfers, or gifts of any kind. After entering into the settlement agreement, the decedent opened various Totten trust bank accounts in her name for various charities and people. Decedent also executed two subsequent wills in 1982 and 1984, in which she left nothing to her surviving daughter or her daughter's children.

Decedent's daughter commenced a plenary action in which she sought a declaratory judgment that the creation of the Totten trusts by decedent violated the terms of the 1971 settlement agreement by changing the terms of decedent's 1969 will. In determining that the decedent did not violate the settlement agreement, the court noted that "[t]he agreement itself is silent as to the Totten trusts or any other testamentary like forms of disposition of property" (*Blackmon v Battcock*, 78 NY2d 735, 739 [1991]). The court stated that while the decedent agreed to leave in place the 1969 will, decedent did not agree to leave any particular property or any amount of money to her children and the settlement agreement did not preclude decedent

from disposing of any or all of her assets by gift or Totten trust (*Accord*, *Matter of Weisman*, 251 AD2d 112 [1st Dept 1998] [nothing in the subject testamentary agreement between decedent and her husband (who predeceased her), or in their wills, from which it can be fairly inferred that the decedent relinquished her right to dispose of assets not specifically referenced in either the agreement in the wills during her lifetime]).

The Klines contend that decedent never agreed to preserve for the benefit of Jerome any or all of her property and that neither the will nor the Marital Settlement Agreement prevented decedent from disposing of her property, in any manner, during her lifetime. The Klines assert that the decedent transferred her interest in the Roslyn property to the Trust in the 2006 Trust and retained no incidents of ownership.

Jerome acknowledges, as noted hereinabove, that neither he nor the decedent were precluded under the Last Will and Testament from making transfers of their property during their lifetime. Jerome concedes that had decedent deeded or gifted the Roslyn property outright to her and Jerome's four children, the holding in *Blackmon* would be applicable. Jerome asserts, however, that since decedent retained at her death the "power of disposal" over the property she put in the Trust through the exercise of the power of appointment in the 2007 will, that property should pass to him pursuant to Article "SECOND" of the Will. Indeed, the *Blackmon* court pointedly stated that in the line of cases governing joint wills, "the court has held that where two people sign joint or mutual wills and one of them dies, the survivor is bound to the terms of the will and may not make a different testamentary disposition or inter vivos gift that would defeat the purpose of the joint will agreement" (*Blackmon v Battcock*, 78 NY2d 735, 741 [1991]).

Here, regardless of any ownership interest, decedent retained the power of appointment

and the "power of disposal" of property by exercise thereof in the 2007 will. Under the circumstances, decedent could not convey title to the Roslyn property as decedent is bound by the terms of the joint will that no property which comprised her estate or over which she had the "power of disposal" could pass other than as provided under Article "SECOND" of the will. Here, in effect, decedent made a different testamentary disposition violative of the terms of the joint will. Accordingly, Jerome is entitled to summary judgment in the turnover proceeding to the extent of a direction that Ivan as co-trustee reconvey the property to the estate. Jerome is further entitled to summary judgment admitting the 1993 will to probate and dismissing Ivan's petition seeking probate of the 2007 instrument. The objections to Jerome's appointment as executor are dismissed.

The Klines' motion for summary judgment is denied in accordance with the foregoing.

The matter is scheduled for a conference with a member of the court's law department on April 8, 2009.

Settle order on the motions.

Settle decree on the probate petition.

Dated: March 17, 2009

JOHN B. RIORDAN
Judge of the
Surrogate's Court