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

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WILLIAM T. WILLEMS,

Plaintiff,

File No. 155261

-against-

BARBARA C. WILLEMS, individually and
BARBARA C. WILLEMS, as Executrix of the Estate of

WILLIAM WILLEMS,

Dec. No. 223

Defendants.

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Before the court are a motion by respondent to dismiss the petition for reformation of a deed and a cross-motion by petitioner for summary judgment

William Willems died on July 29, 1971 survived by his wife, Barbara Willems, and three issue, Linda Christina Willems, William Thomas Willems and Ursula Brigitte Willems. Letters testamentary issued to Barbara Willems on June 12, 1972. At the time of his death, decedent was the sole owner of real property located at 214 Parkside Drive, Roslyn Heights, New York.

Article "Eighth" of decedent's last will and testament dated January 23, 1969 provided as follows:

> EIGHTH: I give, devise and bequeath all the rest, residue and remainder of my property, both real and personal, wheresoever situate, and whether acquired before or after the execution of this Will to my Trustee, IN TRUST nevertleless [sic], to receive, hold, manage and invest the same, and to collect and receive the income therefrom, and to pay the entire net income therefrom to my wife, BARBARA C. WILLEMS, throughout her life time or until she remarries; and upon here [sic] death or remarriage, the then entire principal of this trust fund to go to my three children, URSULA B. WILLEMS, LINDA C. WILLEMS, and WILLIAM T. WILLEMS to be divided in three equal shares, one share going to each child so that they share and share alike.

On June 30, 1972, respondent Barbara Willems married Gerald Keeler. Barbara

subsequently was divorced on June 8, 1981. By deed dated October 18, 1995, Barbara, as executor, deeded the Roslyn Heights property to Linda, William and Ursula, each receiving a one-third (1/3) interest in the property. The conveyance was subject to a life estate in favor of Barbara. Each grantee signed a Real Property Transfer Gains Tax affidavit (TP 584-I) dated September 12, 1995 acknowledging that the return, including the reference of a life estate to Barbara, was to the best of their knowledge "true and complete and made in good faith." On April 2, 1997, Barbara executed a New York State Durable General Power of Attorney appointing Ursula as agent. In 2007, Ursula, individually, and as agent for Barbara, commenced a partition action against Linda and William. By stipulation dated May 28, 2008, the partition action was settled, principally providing for the method for sale of the Roslyn Heights property. The stipulation also provided for an accounting of Ursula's actions as attorney-in-fact for Barbara for the period January 1, 2000 to the date of the stipulation of settlement. As to the payment of the costs of the accounting, the stipulation provided, among other things:

> Subject to approval by the Nassau County Department of Social Services, the full cost of the accounting, $6,000.00, shall be paid from Barbara C. Willem's (sic) share, as life tenant, of the proceeds of the sale of the aforesaid real property.

Barbara commenced a summary proceeding against William seeking his eviction from the property. In William's Verified Answer to the petition dated November 25, 2008, William stated that:

> 3) The Respondent inherited a one third interest in fee simple of the premises known as 214 Parkside Lane (sic), Roslyn Heights, New York from his late father, **WILLIAM WILLEMS'** Last Will and Testament filed in Nassau County.
>
> 4) The Respondent and his two sisters agreed to transfer life tenancy in the premises to their mother, **BARBARA C. WILLEMS,** with the children retaining

> the remainder interest, **even though the Petitioner, BARBARA C. WILLEMS was not devised any interest in the real estate.** The Last Will and Testament of **WILLIAM WILLEMS** devised the real estate directly to the three children (emphasis in original).

William commenced the instant proceeding to reform the October 18, 1995 deed as to delete any reference to Barbara having a life estate in the property asserting that the transfer of the property subject to a life estate in favor of Barbara is an error and not representative of Article "Eighth" of the decedent's will.

Barbara moves to dismiss the petition in its entirety pursuant to CPLR 3211(a)(1) on the ground that there is documentary evidence providing a defense to the petition. Barbara also seeks the imposition of monetary sanctions against William and his attorney.

William opposes the motion to dismiss and cross-moves for summary judgment asserting that an error was made on the deed when Barbara added herself as a life tenant without having William, Ursula and Linda sign with her on the deed. William asserts that the transfer is violative of the statute of frauds.

Barbara opposes the cross-motion contending that all three children were aware that Barbara had no legal right to a life estate and that William is precluded from asserting that Barbara does not have a valid life estate in the property.

Reformation is an equitable remedy warranted where parties come to an understanding but, in reducing it to writing, omit some agreed-upon provision or insert one to which the parties did not agree (*see* 16 NY Jur 2d, Cancellation of Instruments, §64). In *Ross v Food Specialties*, 6 NY2d 336, 341 [1949], the Court of Appeals stated:

> "We have consistently and repeatedly held that before a reformation can be granted the plaintiff '*must establish his right to such relief by clear, positive and*

> *convincing evidence*. Reformation may not be granted upon a probability nor even upon a mere preponderance of evidence, but only upon a certainty of error' nor may the plaintiff 'secure reformation merely upon a showing that he or his attorney made a mistake. In the absence of fraud, the mistake shown "must be one made by both parties to the agreement so that the intentions of neither are expressed in it'" (*Amend* v. *Hurley*, 293 N.Y. 587, 595; *Salomon* v. *North British & Mercantile Ins. Co.*, 215 N.Y. 214; *Strong* v. *Reeves*, 280 App. Div. 301, affd. 306 N.Y. 666). * * * Reformation is not designed for the purpose of remaking the contract agreed upon but, rather, solely for the purpose of stating correctly a mutual mistake shared by both parties to the contract; in other words, it provides an equitable remedy for use when it clearly and convincingly appears that the contract, as written, does not embody the true agreement as mutually intended" (emphasis in original).

A court may reform a deed to reflect the true intention and agreement of the parties. Such reformation may involve deleting property descriptions, or interests, so that the deed accurately specifies the interests being conveyed (*see Carla Realty Co. v County of Rockland*, 222 AD2d 480 [2d Dept 1995], app den 88 NY2d 808 [1996]; 16 NY Jur 2d, Cancellation of Instruments, §78). Here, William's contention that the deed should be reformed is belied by the documentary evidence in the nature of the Real Property Transfer form, dated September 12, 1995, the May 28, 2008 stipulation of settlement entered into between decedent's issue in the partition action and William's verified answer in the District Court eviction proceeding, all of which clearly demonstrate that decedent's issue intended Barbara (their mother) to enjoy a life estate in the property. Under all the circumstances, William should be estopped from asserting that the 1995 deed is in error or is violative of the statute of frauds as his conduct with knowledge of all the relevant facts herein in acknowledging the life estate in the 1995 transfer form, entering into the 2008 stipulation agreeing that monies were due Barbara as a life tenant upon the sale of the real property, and admitting such life estate interest of Barbara in his 2008 verified answer in the District Court proceeding operates as an estoppel (*see Nassau Trust Co. v Montrose Concrete*

Prods. Corp., 56 NY2d 175, 184 [1982]; *cf. Wikioseo Inc. v Proller*, 276 App Div 239 [1949]; *Schaps v Roberman*, 140 NYS2d 308 [Sup Ct, Nassau County 1955]). As noted, William, with knowledge of all the relevant facts, that is, that Barbara no longer retained a life estate by reason of her 1972 remarriage, cannot now assert an inconsistent position that he previously asserted to Barbara's prejudice (*cf. In re Town of Southampton*, 220 AD2d 752 [2d Dept 1995]; *Chautauqua County Fedn. of Sportsmens Club v Caplisch*, 15 AD2d 260 [4th Dept 1962]). This conclusion is buttressed by the affidavit of Jerri A. Cirino, Esq. dated December 4, 2008 submitted in connection with the District Court eviction proceeding wherein she states that the rationale for executing the 1995 deed was that Barbara have the right to reside in the marital residence and obtain a senior citizen tax deduction. Ms. Cirino states: "I had a telephone conference with the three children to explain my plans and the reasons therefore (sic), so that they would agree to granting their mother a life estate in the marital residence." The various documentation, referred to above, evidences the children's agreement thereto. Simply, petitioner has not demonstrated his entitlement to the equitable remedy of reformation.

Accordingly, respondent's motion to dismiss the petition is granted. Petitioner's cross-motion for summary judgment is denied. Respondent's request for the imposition of monetary sanctions is denied.

The above constitutes the decision and order of this court.

Dated: June 19, 2009

JOHN B. RIORDAN
Judge of the
Surrogate's Court