

**Matter of Coudert**

2009 NY Slip Op 33161(U)

December 14, 2009

Surrogate's Court, Nassau County

Docket Number: 356365

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 Construction of the Revocable Trust  
 Created under Agreement dated May 3, 1990, made by

File No. 356365

FREDERIC R. COUDERT, III,

Dec. No. 666

Deceased.

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This request for construction was commenced by the petitioner Kenneth R. Page as executor of the estate of the decedent, Frederic R. Coudert, III. Petitioner asserts that there is an ambiguity within the decedent's will admitted to probate and a revocable trust agreement, as amended and restated, specifically relating to the issue of the payment of estate taxes and any other taxes and penalties accruing as a result of decedent's death.

The decedent died a resident of Nassau County on December 5, 2008. Decedent was survived by his spouse, Margaret Coudert, and his daughters from a prior marriage, Sandra Coudert and Cynthia Coudert. The decedent left a will dated May 1, 2008 which was admitted to probate by decree of this court dated May 22, 2009 and letters testamentary issued to petitioner. Decedent also established a revocable inter vivos trust created under trust agreement dated May 3, 1990. The trust agreement was amended and restated by the decedent three times prior to his death. The third amendment and restatement, which is at issue in this case, was executed May 1, 2008, along with the will, while decedent was undergoing kidney dialysis treatment.

Petitioner seeks a construction of the terms of the trust agreement, more specifically, the tax apportionment clause contained in the first sentence of paragraph two of Article III in the third amendment. Article III (Third Amendment) provides, "[i]f the Grantor's wife survives Grantor, any such taxes and interest and penalties thereon . . . shall be apportioned to and payable from any trust under Section A of Article II of this trust agreement or, if and to the

extent the same shall be insufficient, from that property disposed of under Section C of Article II of this trust agreement.” Thus, the estate and other taxes are to be paid from “any trust” under Section A of Article II. If any trust under Section A is insufficient to pay the taxes, then the taxes are to be paid from the property disposed of under Section C of Article II. This provision differs from the terms of the tax apportionment clause in the second amendment which directed payment of the taxes without apportionment from the trust fund. The language of Article III of the second amendment provides, “[a]ny such taxes and interest and penalties thereon so paid shall be paid without apportionment out of the Trust Fund.” In addition, Article SIXTH of the decedent’s will provides that the estate taxes “shall be paid out of the principal of my revocable inter vivos trust as provided by my Trust Agreement.” The will further provides that “[i]f and to the extent the same shall be insufficient for such purposes, I direct that such taxes, . . . , shall be paid without apportionment from my residuary estate.”

Petitioner seeks a construction of the first sentence of paragraph two under Article III of the trust agreement. The language in Article III of the third amendment provides for payment from “any trust” under Section A of Article II; however, there is no trust created under Section A of Article II of the trust agreement. Instead, Section A of Article II provides for an outright disposition of the credit shelter amount to the decedent’s daughters. The remaining provisions of Article II include a marital trust for the decedent’s spouse under Section B and under Section C the residuary estate is bequeathed, in trust, to the Frederic R. Coudert Foundation. Petitioner seeks a determination as to (i) whether the phrase “any trust under Section A” in Article II of the trust agreement means “disposition under Section A”; (ii) whether such phrase means “trust under Section B”; or (iii) whether the first sentence of the second paragraph of Article III was an inadvertent addition to the document.

The decedent's daughter Sandra has appeared in the proceeding. She contends that the trust agreement is clear and unambiguous. According to Sandra, the will directs that the estate taxes be paid as provided in the trust agreement. The trust agreement provides that the taxes be paid by "any trust under Section A" and if those funds are insufficient then the taxes are to be paid from the property disposed of under Section C without apportionment. She further contends that since there is no trust under Section A of Article II, the language in Article III of the trust agreement dictates payment of taxes from the property disposed of under Section C.

The Attorney General of the State of New York, appearing on behalf of the charitable beneficiaries, contends that the language of Article III of the trust agreement should be construed such that the estate and other taxes will be paid from the disposition made to the decedent's daughters under Section A of Article II of the trust agreement. In support of his position, the Attorney General asserts that the use of the word "trust" rather than "disposition," in the second paragraph of Article III of the third amendment and restatement may be the result of a scrivener's error. Accordingly, the estate taxes should be paid from the credit shelter "disposition" of Article II under Section A.

Petitioner's request for a construction of the tax apportionment clause of Article III of the trust agreement requires a search for the decedent's intent (*Matter of Gustafson*, 74 NY2d 448, 453 [1989]). Specifically, at issue in this case is the decedent's intent regarding the payment of taxes as set forth in the tax clause of Article III of the third amendment and restatement of the trust agreement. Unless provided otherwise in a will or any other instrument, EPTL 2-1.8 requires that the estate tax be "equitably apportioned among the persons interested in the gross tax estate. . . ." Although EPTL 2-1.8 provides for apportionment of estate taxes, EPTL 2-1.8

also allows the testator to direct payment of taxes in a manner contrary to the apportionment provided for by statute (*Matter of Cord*, 58 NY2d 539, 545 [1983]).

The paramount objective in a construction proceeding is to determine the intent of the testator (*Matter of Fabbri*, 2 NY2d 236, 239-40 [1957]), and not the intent of the draftsman (*Matter of Aldrich*, 259 App Div 162 [2d Dept 1940]). Where the language and meaning of a will or trust agreement is clear and unambiguous, the courts will not seek the assistance of the principles of construction or extrinsic evidence to determine the testator's intent (*Matter of Cord*, Misc 58 NY2d 539 [1983]). The testator's intent should be ascertained by giving the document a "sympathetic reading" in its entirety and in view of all of the facts and circumstances under which the provisions were framed (*Matter of Fabbri*, 2 NY2d 236, 240 [1957]).

In the instant case, Article III of the third amendment and restatement directs payment of the estate and other taxes from "any" trust under Section A of Article II. The instrument further provides, that if the trust under Section A is insufficient to pay the estate taxes, then the remaining taxes shall be paid from the "property disposed of under Section C of Article II of this trust agreement." This language on its face is clear and unambiguous because "any trust" can be read to mean that there may or may not be a trust established under Section A. If there is a trust established under Section A, then whatever funds exist in that trust shall be used first towards the payment of estate taxes. The trust agreement, as amended and restated, does not establish a trust under Section A, but rather provides for an outright disposition of the credit shelter amount to the decedent's daughters. Thus, there is no trust created under Section A and, therefore, the taxes are payable out of the property passing under Section C.

Moreover, the court notes that the construction urged by the Attorney General, specifically that "any trust" means "any disposition," would frustrate the decedent's intent to

provide for his daughters. In fact, such a construction would effectively eliminate the credit shelter disposition of \$2,000,000.00 to the decedent's daughters, which bequest the decedent specifically included in both the second and third amendments to the trust agreement.

In addition, to construe the trust agreement in this manner would render meaningless Article SIXTH of the will, as well as the provision in the trust agreement providing for payment of taxes without apportionment from the property disposed of under Section C of Article II. "Words are never to be rejected as meaningless or repugnant if by any reasonable construction they may be made consistent and significant." (*Matter of Buechner*, 226 NY 440, 443 [1919]).

Accordingly, estate, inheritance, and other death taxes shall be paid from the disposition of residuary property under Section C of Article II of the trust agreement.

This constitutes the decision of the court.

Settle decree.

Dated: December 14, 2009

JOHN B. RIORDAN  
Judge of the  
Surrogate's Court