

Matter of Rice

2010 NY Slip Op 32795(U)

September 30, 2010

Surrogate's Court, Nassau County

Docket Number: 318983/B

Judge: John B. Riordan

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

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Motion of Linda Rice for Judicial Leave to Sell Real Property
and to Purchase a Personal Interest in Trust Property
in connection with the Accounting by Linda Rice,
as the Successor Trustee of the

File No. 318983/B

Dec. No. 26613

AGATHA E. RICE REVOCABLE LIVING TRUST

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Motion of Linda Rice for Judicial Leave to Sell Real Property
and to Purchase a Personal Interest in Trust Property
in connection with the Accounting by Linda Rice,
as the Successor Trustee of the

File No. 304668/C

Dec. No. 26614

CLARENCE E. RICE REVOCABLE LIVING TRUST

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Before the court are two motions¹ filed by Linda Rice as successor trustee of (1) The Agatha E. Rice Revocable Living Trust (the AER Trust) and (2) The Clarence E. Rice Revocable Living Trust (the CER Trust), for judicial leave to sell real property held by these two trusts as tenants in common. For the reasons set forth below, the motions are denied.

By agreement dated February 7, 1994, Agatha E. Rice, as grantor, created the AER Trust, naming her husband, Clarence E. Rice, and herself as the initial trustees. At the same time, Clarence E. Rice, as grantor, created the CER Trust, naming his wife, Agatha E. Rice, and himself as the initial trustees. The trusts are virtually mirror images of each other, and the distributions of the two trusts after the deaths of the grantors are identical.

Clarence E. Rice predeceased his wife on April 19, 1998. Agatha E. Rice, the surviving trustee, died on March 11, 2001. Linda Rice, the grantors' daughter, accepted her appointment as successor trustee in each trust by instruments dated April 4, 2001.

¹These were originally filed as petitions but were converted to motions pursuant to an order contained in decisions 26544 and 26545, issued by this court on June 15, 2010.

Both trusts provide that upon the death of the grantor, if the grantor is survived by a spouse, as was the case at the death of Clarence E. Rice, the federal unified trust amount shall be used to create a credit shelter trust for the benefit of the grantor's surviving spouse, upon whose death the remaining principal shall be distributed to the then living issue of the grantor. The balance of trust assets were to be distributed outright to the surviving spouse. If the grantor is not survived by a spouse, as was the case at the death of Agatha E. Rice, the entire principal is to be distributed to the then-living issue of the grantor. Upon the death of Agatha E. Rice, when principal became distributable from the AER trust as well as from the credit shelter trust created under the CER Trust, the then-living issue of the grantors were a son, Clarence Rice, and three daughters, Agatha M. Rice, Janet M. Fox and Linda Rice, movant herein.

Linda filed verified final judicial accounts in connection with each of these trusts, updated through September 30, 2004. At that time, the whereabouts of Clarence were unknown, and the court appointed a guardian ad litem to represent his interests. During the pendency of the accounting proceedings, Clarence was located, but the guardian ad litem continued in office due to Clarence's apparent disability. Upon the recommendation of the guardian ad litem, a petition was filed in Nassau County Supreme Court for the appointment of a guardian who could create a supplemental needs trust (a SNT) for Clarence's benefit. In November of 2008, the Nassau County Supreme Court determined that Clarence was an incapacitated person and appointed his sister, Agatha, as the Article 81 guardian of his property (McKinney's Cons Laws of NY, Book 34A, Mental Hygiene Law § 81). Subsequently, Agatha created and funded a SNT for the benefit of Clarence, to receive and hold his final distributions from the two trusts.

One of the assets contained in each trust is a fifty percent (50%) undivided ownership

interest in the form of a tenancy in common in a single family residential property (for a total of 100% owned by the two trusts). The real property is located at 1411 Galleon Avenue, Marco Island, Florida. The appraisal referenced in the motions reflects a property value of \$240,000.00 held by each trust, for a total value of \$480,000,² subject to an existing mortgage, which according to movant presently has an approximate balance of \$156,000.00 (paragraphs 16 and 17 of the motions). Linda originally planned to distribute each trust's fifty percent (50%) ownership interest in the real property in kind to all four beneficiaries, subject to the mortgage.

However, in view of Clarence's incapacity, Linda now proposes that the three sisters purchase the real property from the trusts at fair market value, after which Linda, as trustee, will make a cash distribution to Agatha as trustee of Clarence's SNT equal to his proportionate share of the property's fair market value. Waivers of process and consents to the relief requested by Linda were filed by Janet and were also filed by Agatha individually and as Clarence's Article 81 guardian.

Attached to each motion as Exhibit D is an agreement to sell the real property, including attached and appurtenant fixtures, by the seller, Linda, as trustee, to the buyers, Agatha, Janet and Linda, individually. The agreement reflects a purchase price of no less than \$540,000.00, which the agreement states is the appraised value as of October 9, 2009, with the final price to be determined by the appropriate judicial authority. The agreement is signed by Agatha, Janet and Linda and by Linda's attorney as escrow agent. An appraisal of the property is attached to each

²This appraisal reflects the property's value as of the date of death of Agatha E. Rice, which occurred on March 11, 2001. Movant indicates that the property was reappraised on October 9, 2009, as discussed in a subsequent paragraph. In any event, a current appraisal must be obtained before any distribution of the property can be granted court approval.

motion as Exhibit E, and it appears to reference a July 9, 2009 valuation of \$613,000.00.

Linda asserts that the proposed sale requires approval of this court because she will be acting in her capacity as trustee of each trust as the seller of the property, and simultaneously in her individual capacity as one of the three purchasers of the property. She also asserts that the proposed transaction will require the approval of the Nassau County Supreme Court because Agatha, who was appointed by that court to serve as guardian of the property of Clarence, will also be participating in the transaction in her individual capacity as a purchaser. Further, Linda states that she has been advised by counsel that the proposed transaction will require the review and approval of the Florida courts in a proceeding where the property may be subject to public auction.

The articles of each trust which must be considered in view of the request for relief include the following:

Article Eight, which directs that upon the death of the grantor who is not survived by a spouse, all of the trust assets will be distributed to the then living issue of the grantor, namely, Clarence, Agatha, Janet and Linda;

Article Twelve, which grants power to the trustee “to do everything they deem advisable, even though it would not be authorized or appropriate for a fiduciary (but for this power) under any statutory or other rule of law, including . . . B. Divide or distribute principal in kind or in money, or partly in each, or by way of undivided interests, even if shares be composed differently . . .”; and

Article Eighteen, which directs that “[t]he validity, effect and interpretation of this instrument and of the property interests herein created shall be controlled by the laws of the State

of New York ...”

Linda’s attorney has submitted a memorandum of law which indicates that in addition to the present motion, he intends to file an application in the Nassau County Supreme Court seeking authorization for Agatha to participate in the proposed sale as a purchaser of Clarence’s interest. Counsel anticipates that once leave is obtained from both New York courts, he will present a petition to the Circuit Court in Florida seeking approval of the sale, following a hearing, or a public auction of the property with the purchase price of the proposed contract serving as the opening bid, in accordance with Florida law. The winning bid and the terms of the contract of sale would then be subject to court approval in Florida.

Counsel cites EPTL 11-1.1 (b)(5)(B) for the authority of a trustee to sell Clarence’s beneficial interests in the two trusts at public or private sale, and on whatever terms deemed by the fiduciary to be advantageous to the interested parties. However, he also cites McKinney's Consolidated Laws of NY, Real Property Actions and Proceeding Law §232 for the proposition that a trustee or guardian is prohibited from participating in the sale of her ward’s interests, but then notes that case law actually seems to limit this restriction to guardians ad litem. Counsel cites other cases which mandate full disclosure to protect the interests of an incompetent party where dual interests are served.

Counsel asserts that contracts involving the transfer of title to land are governed by the situs of the property, and he cites Florida’s statutes which guard against conflicts of interest when a guardian seeks to acquire an interest which is adverse to the interest of her ward. In conclusion, counsel asks that the court grant the requested relief to allow the trustee to participate in each sale as seller and purchaser provided that the trustee is in compliance with Florida law. He further

requests that the court determine that Florida law applies to the proposed transactions.

The guardian ad litem appointed to represent the interests of Clarence filed a supplemental report on July 8, 2010,³ in which he argues against the orders sought in these motions and against the proposed proceedings in Nassau County Supreme Court and in the Florida Circuit Courts as unnecessary, in view of the powers granted to the trustee in each of the trust instruments and by New York law. The guardian ad litem maintains that the two trusts are governed by New York law, and that EPTL 11-1.1(c) provides that the court may authorize the trustee to exercise any power which the court deems necessary for proper trust administration. He maintains that under New York law a sale and purchase is unnecessary, citing EPTL 11-1.1(b)(20), which authorizes the trustee “[t]o make distributions in cash, in kind valued at the fair market value of the property at the date of distribution, or partly in each, without being required to make pro rata distributions of specific property.” The guardian ad litem notes that title to the properties remained with the trustee upon the deaths of the grantors, and she has not executed and delivered a deed that would have vested title in the remaindermen. Consequently, none of the remaindermen, including Clarence, currently possesses an interest in the real property that can be sold. Instead, the trustee should exercise the power expressly granted to her in Article Twelve (B) of each trust, to “[d]ivide or distribute principal in kind or in money, or partly in each, or by way of undivided interests, even if shares be composed differently” and make distributions of the interest in real property to each of the sisters, while making a distribution in cash of equal value to Agatha as trustee of the SNT for the benefit of her brother, Clarence. Such distributions would be in accordance with EPTL sections 11-1.1(b)(20) and 11-1.1(c), both

³The guardian ad litem’s initial report was filed on November 16, 2006.

cited above, and 11-1.1(d), which provides that the powers set forth in EPTL 11-1.1 are in addition to the powers granted to the trustee by law or under the trust agreement.

In connection with the prior review by the guardian ad litem and the court of the judicial accounts previously filed by the trustee, the court noted, in decisions numbered 863, 864, 866 and 867, issued on March 27, 2007, that distribution of title to the Florida property to some of the trust remaindermen but not to Clarence would “require that Clarence’s one-quarter remainder interest in the Florida property be sold to his siblings. The guardian ad litem has no objection to the sale provided a finally accepted arms-length objective value is established for his ward’s one-quarter interest.” However, the court agrees with the position now taken by the guardian ad litem that the property can be distributed by the trustee directly to the beneficiaries, pursuant to New York law and the applicable articles of the trust agreements, rather than by means of a sale. Since Clarence is under a disability and his Article 81 guardian may have an interest adverse to his, any agreement among the parties governing the distribution of trust assets will require participation by the guardian ad litem appointed to represent Clarence and would be subject to the approval of the court. Moreover, court approval will be necessary for the trustee to make payment to Agatha as trustee of Clarence’s SNT, rather than to Clarence outright.

The trustee is directed to bring her account for each trust down to date. The supplemental accounts should reflect the proposed distribution of trust assets, with appropriate adjustments for the cash distributions to be made to Clarence’s SNT in lieu of a 1/4 share of the real estate, and for the principal and income distributions previously made to Agatha and Janet in 2003. A current appraisal of the Florida property should be annexed to the accounts. The guardian ad litem will then file a second supplemental report, after which the accounts and the report may be

submitted for the court's approval.

This constitutes the decision and order of the court.

Dated: September 30, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court