

Matter of Beacher

2010 NY Slip Op 33066(U)

September 30, 2010

Surrogate's Court, Nassau County

Docket Number: 335107/G

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

FRED M. BEACHER,

Deceased.

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File No.: 335107/G

Dec. No. 26600

Before the court in this miscellaneous proceeding are separate applications by Mindy Beacher and Jeffery Beacher for interim distributions from the estate of their deceased father, Fred Beacher. Mindy seeks an interim distribution of \$250,000.00. Jeffrey seeks an interim distribution in excess of \$900,000.00. The decedent, Fred Beacher, died on November 20, 2004. He was survived by his children, Jeffrey Beacher and Mindy Beacher. The decedent died leaving a will dated April 30, 2003, which was admitted to probate by decree dated January 12, 2005. Letters testamentary issued to the decedent’s attorney, Harry Helfeld.

The decedent’s will provides as follows. Pursuant to Article THIRD (a), the decedent’s Woodmere residence and Fifth Avenue apartment are bequeathed to his daughter, Mindy. Article THIRD (b) provides that the decedent’s Florida apartment is to be retained for use by the decedent’s mother, Mildred Beacher. If Mildred vacates the apartment, decedent requests that the apartment be sold and the net proceeds distributed to Jeffrey and Mindy. Subdivision (c) of Article THIRD provides that the decedent’s Central Park South apartment be placed in a trust for Jeffrey. Additionally, the will directs that the decedent’s office building in Kew Gardens be placed in trust for Jeffrey. Article FOURTH of the will divides the residuary estate equally between Jeffrey and Mindy.

By order to show cause, Mindy has moved for an interim distribution to be made from the estate in the amount of \$250,000.00. In support of her application, Mindy states that she has only

received \$22,500.00 from the estate despite the fact that her father died over six (6) years ago. She alleges that both she and her husband, Michael Nirenberg, have repeatedly asked the executor questions regarding the estate, yet those questions remain unanswered.

Mindy further claims that the accounting that has been filed leaves many questions regarding “expenses, balances and distributions.” In addition, Mindy asserts that a “document dump” was made on her attorney’s office, which consisted of hundreds of pages of documents. Mindy argues that the executor’s claim that additional monies are due the taxing authorities is incredulous because the estate tax returns were filed more than four years ago and she is “sure that all audits are completed and taxes have been paid.”

Mindy also submits the affidavit of her attorney in support of her application. Mindy’s attorney acknowledges that the attorney for the executor has advised that no interim distribution will be made due to further estate tax obligations and the uncertainty of federal litigation commenced by the decedent’s brother against the estate concerning ownership of a corporation that holds title to the decedent’s office building in Kew Gardens. Mindy’s attorney argues that the real property at the heart of that litigation passes to the trust for Jeffrey’s benefit under the will and that Mindy should not be prejudiced. Moreover, he argues that the legal fees in “defense of this frivolous litigation” are excessive, and Mindy should not be paying any part of such fees. He further argues that it is “difficult to believe that an audit is still open.”

Jeffrey has similarly moved, by order to show cause, for an interim distribution claiming the executor has “over \$900,000.00 in estate funds in the bank.” Jeffrey’s attorney argues that the executor is stone-walling requests for an interim distribution. Jeffrey’s counsel further argues that the account lacks supportive documentation and the expenses are grossly excessive. He

asserts that the amount of estate taxes paid appears excessive. Moreover, he argues that no approval has been sought for the legal fees shown in the account as having been paid.

Essentially, he contends that the executor is unjustifiably withholding Jeffrey's inheritance. He claims that Jeffrey "is in need of his inheritance now and wishes to move on with his life and claim what rightfully belongs to him."

The executor has filed an answer in which he asserts that the applications are procedurally defective because neither application is supported by a petition. Mr. Helfeld points out that both Mindy's and Jeffrey's applications are supported only by affidavits by each of them and an affirmation by their respective attorneys. Accordingly, the executor asks that the applications be dismissed in their entirety as procedurally defective.

As to the substance of the applications, Mr. Helfeld argues that most of the arguments made by Jeffrey and Mindy are the subject of resolution in the underlying accounting proceeding. For example, Jeffrey and Mindy have raised issues as to whether the administration expenses including, but not limited to, attorneys' fees, are excessive.

The executor also claims that the current balance in the estate's accounts as of March 31, 2010 is \$571,081.57 and is subject to continuing attorneys' fees to defend the accounting and removal proceedings and the federal litigation. Moreover, he claims that the estate has additional estate tax obligations. According to the executor's counsel, the taxable value of the negligence matter pending at the time of the decedent's death has been increased by the Internal Revenue Service by \$262,139.00. In addition, the shares of BBE Realty Co., Inc. were increased by \$505,000.00. This has generated an additional federal estate tax of \$398,733.68, together with interest of \$40,584.34, which has not been paid. In addition, since the close of the accounting,

the executor states that he paid \$346,718.00 in New York estate taxes and an additional \$64,800.46 in New York estate tax is due. For these reasons, the executor claims that an interim distribution is not possible.

In reply to the executor's assertions, counsel for Jeffrey argues that it is unclear how an estate initially valued at \$2,213,344.67 can now have a balance of \$571,081.57. He argues that Mr. Helfeld's assertion that the estate still has tax obligations is incredible. He further argues that Mr. Helfeld is unfit and there, is "no true accounting." He asks for an interim distribution of \$911,342.18.

Pursuant to SCPA 2102(4), a proceeding may be commenced to require a fiduciary to pay a legacy or distributive share. A proceeding to compel payment should be brought by separate petition rather than by motion in the accounting proceeding (5-21 NY Civ Prac SCPA 2102.5). Moreover, the pendency of an accounting proceeding does not preclude a beneficiary from bringing a proceeding under SCPA 2102(4) (*Matter of Scifo*, NYLJ, Mar. 25, 1999, at 36, col 3 [Sur Ct, Nassau County]). "Although a proceeding for the voluntary accounting of an executor is pending and undetermined in the Surrogate's Court, the statute allows an independent proceeding brought by a legatee to compel a partial distribution of the estate, if it can be done without prejudice to the rights of the creditors or representatives, and the pendency of the former proceeding is no bar to the latter" (*Matter of Rutter*, 173 AD 563 [1st Dept 1916]). Accordingly, the fact that an accounting proceeding is pending here does not bar the application.

Before bringing an action under SCPA 2102 (4) to enforce payment, the beneficiary should first make a prior demand for payment. Here, both Mindy and Jeffrey allege that they have made such demands, and they have been refused.

EPTL 11-1.5(a) implies that once seven months have passed since letters have issued, the fiduciary is obligated to make payment of a testamentary distribution or intestate share if there are sufficient assets to cover administration expenses, funeral expenses and debts.

Together, SCPA 2102 (4) and EPTL 11-1.5 (c) provide a means for a beneficiary to enforce his right to receive the legacy or distributive share if the estate fiduciary refuses upon demand to pay the disposition. Moreover, a fiduciary's speculation that unspecified tax liabilities might completely diminish the estate is not sufficient to defeat an application for payment of a legacy (*Matter of Ehmer*, 272 AD2d 542 [2d Dept 2000]).

First, the court notes that, although the executor may be technically correct that the applications are procedurally defective because they are not supported by verified petitions, the court agrees with Jeffrey's counsel that the affidavits are sworn statements and the merits should be considered. Moreover, the applications are separate miscellaneous proceedings and not part of the accounting proceeding.

Here, the applications are replete with conclusory allegations. Both Mindy and Jeffrey argue that it is hard to believe the estate tax audit is still ongoing. The executor, who is the fiduciary charged with paying the taxes, has submitted a sworn affidavit asserting that the final estate tax liability has not been fixed. Further, the estate is the defendant in the federal litigation concerning the decedent's office building. The Court has been advised that the matter has proceeded to trial, but a decision has not been rendered. In addition, the court notes that the amount Jeffrey seeks as a distribution is in excess of the liquid assets the executor states are currently on hand. Nevertheless, the court is concerned that almost six years have passed since the issuance of letters and only minimal distributions have been made. It appears that a partial

distribution of the residuary estate is appropriate under the circumstances if adequate provision is made for refunding in the event the assets remaining on hand are insufficient to cover the federal litigation and estate tax liability. Accordingly, the executor is directed to distribute to each of Jeffrey and Mindy the sum of \$100,000.00 upon the filing of a refunding bond by each of them respectively. The court also notes that most of the allegations made by Mindy and Jeffrey involve issues that are the subject of the objections in the accounting proceedings. The SCPA 2211 examination of the executor and the depositions of Mindy and Jeffrey have been taken. The matter is scheduled for a conference on October 6, 2010 at 9:30 a.m., at which time a trial date will be set in the accounting proceeding.

This constitutes the decision and order of the court.

Dated: September 30, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court