

**Matter of Gourary**

2010 NY Slip Op 34133(U)

November 1, 2010

Surrogate's Court, New York County

Docket Number: File No. 0512-2007

Judge: Kristin Booth Glen

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

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In the Matter of Judicial Settlement of the Account of  
Marianne C. Gourary, as Executor of  
the Will of

PAUL GOURARY,

Deceased.

-----X  
G L E N, S.

New York County Surrogate's Court  
DATA ENTRY DEPT.  
Date: NOV 01 2010

File No.: 0512-2007

This intermediate accounting by Marianne Gourary as executor of the estate of her husband Paul Gourary is contested by the couple's son, John Gourary. The account, reporting that decedent left approximately \$17 million in assets, covers the 15-month period following decedent's death on January 29, 2007. The parties have cross-moved for partial summary judgment on John's objections.

Under his will, decedent specifically bequeathed his cooperative apartment and certain tangible personal property to Marianne, who also receives two-thirds of his residuary estate. The balance of the residuary estate is left to John. Disputes between mother and son with regard to the estate prompted the former to commence this proceeding, and the latter to file his objections, within months of her appointment as executor.

Both of the parties now seek summary disposition of four of John's eight objections.<sup>1</sup> Those objections challenge (1) Marianne's claim that a rare book collection worth more than \$5 million at the time of decedent's death was included in the specific bequest of tangibles; (2) her

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<sup>1</sup>John's pleading contained what purported to be 32 separate "objections," 11 of which have been withdrawn. In substance, only eight discrete issues remain, and of those John has moved for summary disposition of four. It is noted that Marianne's own motion papers appear to be based upon the incorrect premise that John withdrew all but four issues and that a summary disposition of those four in her favor would therefore allow her to be wholly discharged for the accounting period.

omission from the schedule of estate assets of a total of \$483,175 in individual income tax refunds; (3) her use of estate funds to pay a total of \$66,257 in maintenance and other expenses related to the apartment; and (4) her failure to reimburse the estate for penalties and interest on late payment of estate taxes. John also seeks summary disposition of his objections to (5) Marianne's use of estate funds (in the sum of approximately \$13,000) to pay for secretarial assistance in the administration of the estate.<sup>2</sup>

As is well-established, the court may grant summary judgment only where it is clear that no material question of fact exists (*Daliendo v Johnson*, 147 AD2d 312, 317 [2d Dept 1989]; *Moskowitz v Garlock*, 23 AD2d 943 [3d Dept 1965]). Movant has the initial burden of demonstrating entitlement to summary judgment as a matter of law, and, if that is established, the burden shifts to the party opposing summary judgment to lay bare its proofs to demonstrate that there is a material factual question requiring resolution by trial (*Matter of Zuckerman v City of New York*, 49 NY2d 557 [1990]; *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065 [1979]; *Wider v Heritage Maintenance, Inc.*, 14 Misc 3d 963 [Sup Ct NY County]). Mere speculation, conclusory assertions or expressions of hope, however, are insufficient to create a bona fide issue of fact (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223 [1978]).

Such are the basic standards against which each of the issues raised by the present motions must be analyzed. Those issues are as follows.

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<sup>2</sup>John's motion papers also ask for summary disposition on his challenges to (a) Marianne's failure to account for \$200,000 that he alleges she wrongfully transferred to herself prior to decedent's death under a power of attorney, (b) her overpayments of estate taxes, and (c) her entitlement to commissions. These aspects of his motion are not considered, however, in view of the fact that such objections were not raised by his pleading.

### RARE BOOKS, ETC.

It is undisputed that, by the time of his death, decedent had amassed a significant collection of tangibles, identified in Marianne's accounting as "rare books," centering on the subjects of festivals and funerals. What is in dispute, however, is whether the items comprising that collection (the "Collection") fall within the pre-residuary bequest to Marianne under Article SECOND of the will. In its entirety, the Article provides that,

"All household furniture and furnishings, books, pictures, jewelry and other articles of personal or household use including automobiles, and all st[o]ck pertaining to my apartment in a cooperative corporation owning premise 45 East 85th Street, New York City, which I may own at the time of my death, I bequeath to my wife, MARIANNE C. GOURARY, if she survives me."

John asserts that the Collection "includes prints, manuscripts, scrolls, engravings and broadsides" and that some items within it were held in a safe deposit box, with the others maintained at the Gourarys's residence. Marianne does not dispute that assertion.

The parties acknowledge that the intent underlying the Article SECOND bequest is to be gleaned from a sympathetic reading of the will and that extrinsic evidence cannot be used to inform such reading in the absence of any ambiguity (*see Matter of Jones*, 38 NY2d 89 [1975]; *Matter of Larkin*, 9 NY2d 88 [1961]; *see Johnston v MGM Emerald Enterprises, Inc.*, 69 AD3d 674 [2d Dept 2010]). The *Jones* case well illustrates the point. Indeed, *Jones* too involved the claim that a special collection (in that case consisting of rare books alone) fell within a specific bequest rather than within the will's residuary clause. The contested provision in *Jones*, however, contained no mention of "books" at all, "consisting of" only other specific pieces or specified types of personalty (furniture, bric-a-brac, and the like); nor did the bequest include a "catch-all" provision that might arguably have extended to the rare books at issue. The Court of

Appeals concluded that such a provision expressed the testator's intent clearly and the absence of any reference to books spoke for itself. Accordingly, the Court noted, resort to extrinsic evidence not only was unnecessary, but also, would be hazardous, leading as it might to a disposition not of testator's own making (*id.* at 193).

As indicated above, the bequest now at issue enumerates the type of properties bequeathed, but, unlike that in *Jones*, it expressly includes "books" among those properties. Moreover, both of the parties here propose that the provision at issue is, as they put it, "unambiguous" (although each of course insists that the provision unambiguously points to a loss for the other). Nevertheless, each of the parties invites the court to consider evidence beyond the will's four corners. That invitation appears to acknowledge tacitly what the court itself would have independently divined, *i.e.*, that Article SECOND does not in fact speak for itself as to whether decedent intended the phrase, "furnishings, books, pictures ... and other articles of personal or household use" to include the items in the collection. Indeed, the one extrinsic fact that cannot be ignored – the existence of the Collection itself – discloses a latent ambiguity in the phrase at issue and therefore the appropriateness of resort to other extrinsic evidence on the subject (*see Matter of Schermerhorn*, 31 NY2d 739 [1972]).

For her part, Marianne asserts that she and decedent "lovingly assembled" the collection over the course of their 50-year marriage and that "many" of the books and prints were kept in their home for viewing and display. In other words, she maintains that part or all of the Collection was used and enjoyed by the couple as an incident of their domestic life.<sup>3</sup> On the

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<sup>3</sup>It is noted nevertheless that, in June 2009, Marianne as fiduciary auctioned off most of the items in the Collection.

basis of his personal observations, however, John disputes Marianne's version of the Collection's history and the use to which his parents put it.

Moreover, John argues that, in any event, decedent intended Article SECOND to cover only items within the apartment. As to the latter contention, it is contradicted by the terms of Article SECOND itself, which bequeath "automobiles" (property that clearly was not housed in the apartment) and "jewelry" (property that might normally be stored, as some of the books were apparently at least at times, in a safe deposit box).

But the record to date does not shed light on questions having material bearing on whether decedent intended all or some or none of his rare books and other rare collectibles to pass under Article SECOND as items of personal or household use as opposed to items held for investment purposes. Thus, the record does not disclose the proportion of items (by type, numbers, and values) that were kept in the home as opposed to the off-premises box. Nor does the record indicate whether, in the case of particular items or types of items, such safekeeping was permanent or intermittent, and, if the latter, the reason items were removed from the box. In other words, the issue raised by this objection cannot be resolved summarily, and the cross motions seeking such disposition are therefore denied.

### **INCOME TAX REFUNDS**

After decedent's death, Marianne filed joint federal and State income tax returns for the couple's 2006 tax year. It is undisputed that as executor she paid the taxes entirely from the estate's funds and that those payments exceeded the tax liabilities, as finally determined, by a total of \$483,157. When the overpayments were refunded, Marianne retained the refunds as her

individual property. John claims that the refunds are instead estate assets and that Marianne should therefore be required to repay them to the estate in full.

As is reflected in federal and New York State tax regulations, the taxing authorities are neutral about the parties' ultimate allocation inter se of tax refunds on joint returns since that issue has no bearing on the amount or collectibility of tax revenues; the allocation issue is instead governed by State property law (U.S. Treasury Regulation 20.2053-6[f], 26 CFR § 20.2053-6[f]); 20 NYCRR § 112.3[g][1]).<sup>4</sup> But none of the New York decisions cited by the parties is apposite, since those cases involved refunds for income tax payments made from one or both spouse's accounts while they were both alive (*Matter of Sieminski*, 60 Misc 2d 292, 294 [Sur Ct Erie County 1969]; *Matter of Leeds*, NYLJ, Nov. 1, 1996, at 27, col 4 [Sur Ct NY County]); *Matter of Boyd*, NYLJ, April 30, 1996, at 35, col 1 [Sur Ct Nassau County]), rather than, as here, from the estate of one of them. That is, a decision such as *Leeds* could reasonably allow to a wife part of a refund paid entirely from the husband's individual account where the two as a practical matter had dealt with that account as marital property. In such a case, funds previously drawn from the marital pot and then refunded could be regarded as fairly divisible between the two partners equally.

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<sup>4</sup>This is not to overlook the fact that, where a debtor's ownership of a tax refund is at issue in a bankruptcy case, federal bankruptcy law may have some procedural affect on the resolution of that issue (*see Matter of Marciano*, 372 BR 211 [SDNY 2007]); nevertheless, the bankruptcy courts acknowledge that, "[w]hether the Debtor ... has 'legal or equitable interest' in the ... Refund ... must be determined by applicable [S]tate law"(*id.*). Nor is this to ignore the apparent confusion attending certain decisions involving competing claims to ownership of a refund on a joint tax return. That is, rather than looking to restore tax overpayments to the taxpayer who used his or her funds to make them, some courts have gone so far as to propose that ownership of the refund should go instead to the joint taxpayer whose income attracted the tax. Where a return of funds overpaid by the former are thus diverted to the latter, the result is in effect insult added to the former's injury – and windfall added to the latter's windfall.

Here, by contrast, Marianne cannot claim to have a marital partnership interest in the estate account from which the tax payment was made. Rather, she can get the benefit of some part of the refund of that payment only to the extent that it enlarges her share of the residue under the will.<sup>5</sup> In other words, the refunds here at issue, restoring tax payments that consisted entirely of estate funds, belong entirely to the estate<sup>6</sup>. Summary judgment is therefore granted to John on this objection, and Marianne is surcharged in the amount of the tax refunds and, in the exercise of discretion, statutory interest.

**EXECUTOR'S PAYMENTS TO THIRD PARTIES FOR ADMINISTRATIVE SERVICES AND FOR EXPENSES ATTRIBUTABLE TO THE COOPERATIVE APARTMENT**

John has challenged the propriety of Marianne's payments for secretarial services in the administration of the estate and for the upkeep of the apartment. As explained below, these challenges are meritorious.

In connection with payments for administrative services, both parties claim to find support from the same basic treatise (*see* 4 NY Jur2d, Decedent's Estates, § 1991). The section that they invoke concludes with the observation that "the criterion [for determining whether

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<sup>5</sup>Of course, if decedent's provisions for her had been less than her elective share, she would have been entitled to exercise her right of election and thus ultimately might have derived some benefit from the refund in that way.

<sup>6</sup>Marianne's arguments invoking section 6013[d] of the Internal Revenue Code and section 675(a) of the New York State Banking Law are without merit and are mentioned only to demonstrate that they have not been overlooked. As noted in *Calloway v CIR* (231 F3d 106, 117 [2d Cir 2000]), by permitting spouses to file a joint income tax return, Congress did not intend to effect a change of ownership of the taxpayers' respective property rights. Nothing in New York law suggests otherwise.

payment to a third party for administrative services rendered to the estate] is whether or not the services performed by the agent are extraordinary and beyond the usual capabilities of the fiduciary” (*id.* at 620, *citing Matter of Barrie*, 25 Misc 2d 890 [Sur Ct Suffolk County 1960] and *Matter of Ogden*, 41 Misc 158 [Sur Ct Rensselaer County 1903]). Although the estate here was large, its assets were limited in number and complexity. There is no dispute that the estate consisted of the cooperative apartment, its contents, the “rare books,” one brokerage account, and two bank accounts at the same bank. Although Marianne insists that she acted reasonably in hiring a secretary to assist her in the administration of the estate, she does not explain why the estate’s administrative needs were beyond her capacity to handle.<sup>7</sup> In other words, Marianne does not show that, in addition to her own commissions, payments to a third party were warranted. Accordingly, she has failed to justify her retention of such an assistant or at least explained why the estate should bear the expense of her having done so. It is therefore concluded that the total payment made from the estate in this regard is properly a charge against her commissions (*cf. Merritt v Merritt*, 32 App Div 442, 451-452 [2d Dept 1898], *affd* 161 NY 634 [1900]).<sup>8</sup>

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<sup>7</sup>The court is mindful that, at the age of 89, Marianne might well have preferred to delegate certain garden-variety administrative tasks to someone else. Although neither the law nor the terms of decedent’s will forbade such delegation, Marianne could reasonably hire an assistant to relieve her of some of the administrative burden only at her own expense, since the commissions to which she is entitled will compensate her for personally carrying out all aspects of her fiduciary duties including those for which she has paid someone else.

<sup>8</sup>Marianne further maintains that the secretarial expenses are reasonably to be borne by the estate given the fact that at the time “she was not taking a commission that would have been several times the cost of the assistant.” However, she has not bound herself to waive commissions (*see Matter of Peskin*, 1 Misc 2d 442 [Sur Ct Bronx County 1954], *affd w/o opn* 286 App Div 1009 [1<sup>st</sup> Dept 1955]; 42 NY Jur 2d, Decedent’s Estates § 2325), and, in fact, her account requests them.

The same holds true for the expenses of maintaining the cooperative apartment. There is no question that Marianne continued to reside in the apartment after her spouse's death. Although, as a technical matter, the actual shares appurtenant to the decedent's interest in this asset were not transferred to Marianne individually until 15 months after decedent died, that fact did not per se make the apartment's expenses an estate liability. It has been long established that a specific bequest passes directly to the legatee upon the testator's death, subject to the probate of the will and any need to sell the bequeathed asset to pay a valid administration expense (*Matter of Van Houten*, 18 App Div 306 [2d Dept 1897], *aff'd on opn below sub nom. Matter of Pye*, 154 NY 773 [1898]); *Matter of Columbia Trust Co.*, 186 App Div 377, 380 [1st Dept 1919]; *Matter of Warren* [Utica Trust & Dep. Co.], 148 App Div 525 [3d Dept 1911]; *Matter of Wright*, 15 Misc 2d 225, 228 [Sur Ct NY County 1958].<sup>9</sup> As a specific legatee, Marianne was individually responsible for the expenses accruing in respect of the apartment after decedent's death (*see Matter of Morawetz*, 35 Misc 2d 762, 766 [Sur Ct Albany County 1958]). This was not a situation calling for the intervention of the estate fiduciary, such as where title is contested or a third party is in possession, *i.e.*, the type of problem that, pending resolution, might require the estate to carry an apartment at its expense. Not surprisingly, Marianne cites no authority for the proposition that, in the absence of such a circumstance, she was simply entitled to live in the apartment at the estate's expense until the date of formal transfer. It is concluded, rather, that all expenses attributable to the apartment's upkeep were Marianne's individual responsibility, and

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<sup>9</sup>These cases indicate that implementation of the transfer is subject to the fiduciary's assent, which clearly can be reasonably withheld only if the estate may need the asset in question as a source of payment of its expenses and debts. Here, there is no question that as fiduciary Marianne had no basis for withholding such assent.

she therefore must restore to the estate the total amount of estate funds used to defray such expenses, with statutory interest on each amount from the dates of its payment.

**INTEREST AND PENALTIES ON LATE FILING OF RETURNS AND LATE TAX PAYMENTS**

Schedule J of Marianne's account attests to the fact that she and the professionals assisting her missed a number of tax-related deadlines at the estate's expense. Marianne hired a CPA firm in April of 2007 to prepare the estate tax return, but those professionals failed to do so timely. Requests for extensions were made, but were denied, since they too were untimely. No payment on account of estate taxes was made to forestall the accrual of interest and penalties. Although petitioner at the time professed her shock at missing the October 29, 2007 filing deadline, it was not until March of the following year that she retained a new accountant to do the work.<sup>10</sup>

The duty of an estate fiduciary to file an estate return, if one is required, and to pay any estate tax due is fundamental and may not be delegated to another without oversight and follow-up to ensure compliance with the tax laws (*see Matter of Campbell*, 138 AD2d 827 [3d Dept 1988]; *Matter of McCranor*, 176 Ad2d 1026, 1027 [3d Dept 1991]; *Matter of Santoro*, 18 Misc 2d 980, 981 [Sur Ct Nassau County 1959]). Marianne's professed good faith does not absolve her of liability for her failure to meet these obligations (*see Matter of Newhoff*, 107 Misc 2d 589,

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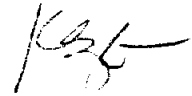
<sup>10</sup>Interest and penalties in respect of the estate tax were reduced as a result of an ultimate overpayment of the tax, but they remain significant. It is noted, however, that there may be a further reduction as the result of an amended estate tax return; in such event, on a subsequent accounting Marianne would be entitled to seek the amount refunded as an overpayment of her surcharge.

597 [Sur Ct Nassau County 1989], *aff'd* 107 AD2d 417 [2d Dept 1985]). John's objection seeking a surcharge against Marianne to the extent that interest and penalties have been paid by the estate is granted, with statutory interest (*Matter of Scott*, 234 AD2d 551 [3d Dept 1996]).<sup>11</sup>

On the basis of the foregoing, the motion and cross motion for partial summary judgment are granted as set forth in this opinion and are otherwise denied. The parties will be notified of the date and time of a conference to schedule discovery relating to the Collection.

This decision constitutes the order of the court.

Dated: November 1, 2010



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SURROGATE

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<sup>11</sup>Notwithstanding Marianne's contentions to the contrary, this holding does not in effect make her an insurer. The problem was not that she hired an accountant to attend to the estate's tax requirements, but that she failed in her duty to oversee the delegation responsibly (*Matter of Steinhart*, 91 Misc 2d 1034 (Sur Ct Bronx County 1977)). Although the question of oversight is a fact-intensive inquiry, the undisputed material facts here are consistent only with an abdication by Marianne of her duty to assure the timely filing and payment of estate taxes.