

**Matter of Boccasini**

2011 NY Slip Op 30373(U)

January 20, 2011

Surr Ct, Nassau County

Docket Number: 352418/A

Judge: Edward W. McCarty

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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 Last Will and  
 Testament of

File No. 352418/A

NICHOLAS J. BOCCASINI,

Dec. No. 26938

Deceased.

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In this proceeding for construction of a last will and testament, jurisdiction is incomplete.

The decedent's last will and testament (November 9, 2001) and codicil (July 2, 2003) was admitted to probate by a decree of this court dated April 28, 2009.

The decedent's last will and testament provides as follows:

- A. I give one eighth (1/8) of my residuary estate as follows:
- (a) If ROCHELLE BONELLI shall survive me, to ROCHELLE BONELLI.
  - (b) If ROCHELLE BONELLI shall not survive me, I give the aforesaid one eighth (1/8) of my residuary estate to the other beneficiaries of my residuary estate, in proportion to interest under this Article SECOND and subject to the provisions hereof.
- B. I give one eighth (1/8) of my residuary estate as follows:
- (a) If ANNETTE GIACONE shall survive me, to ANNETTE GIACONE.
  - (b) If ANNETTE GIACONE shall not survive me, I give the aforesaid one eighth (1/8) of my residuary estate to the other beneficiaries of my residuary estate, in proportion to interest under this Article SECOND and subject to the provisions hereof.
- C. I give one eighth (1/8) of my residuary estate as follows:
- (a) If MICHAEL BOCCASINI shall survive me, to MICHAEL BOCCASINI.

(b) If MICHAEL BOCCASINI shall not survive me, I give the aforesaid one eighth (1/8) of my residuary estate to the other beneficiaries of my residuary estate, in proportion to interest under this Article SECOND and subject to the provisions hereof.

D. I give one eighth (1/8) of my residuary estate as follows:

(a) If JOSEPH IEVOLI shall survive me, to JOSEPH IEVOLI.

(b) If JOSEPH IEVOLI shall not survive me, I give the aforesaid one eighth (1/8) of my residuary estate to the other beneficiaries of my residuary estate, in proportion to interest under this Article SECOND and subject to the provisions hereof.

E. I give one eighth (1/8) of my residuary estate as follows:

(a) If CHARLES IEVOLI shall survive me, to CHARLES IEVOLI.

(b) If CHARLES IEVOLI shall not survive me, I give the aforesaid one eighth (1/8) of my residuary estate to the other beneficiaries of my residuary estate, in proportion to interest under this Article SECOND and subject to the provisions hereof.

F. I give one eighth (1/8) of my residuary estate as follows:

(a) If ROBERT BOCCASINI shall survive me, to ROBERT BOCCASINI.

(b) If ROBERT BOCCASINI shall not survive me, I give the aforesaid one eighth (1/8) of my residuary estate to the other beneficiaries of my residuary estate, in proportion to interest under this Article SECOND and subject to the provisions hereof.

G. I give one eighth (1/8) of my residuary estate as follows:

(a) If MICHAEL BOCCASINI shall survive me, to MICHAEL BOCCASINI.

(b) If MICHAEL BOCCASINI shall not survive me, I give the aforesaid one eighth (1/8) of my residuary estate to the other beneficiaries of my residuary estate, in proportion to interest under this Article SECOND and subject to the provisions hereof.

H. I give one eighth (1/8) of my residuary estate as follows:

- (a) If ANTHONY IEVOLI shall survive me, to ANTHONY IEVOLI.
- (b) If ANTHONY IEVOLI shall not survive me, I give the aforesaid one eighth (1/8) of my residuary estate to the other beneficiaries of my residuary estate, in proportion to interest under this Article SECOND and subject to the provisions hereof.

The codicil to the decedent's will provides the following with regard to the residuary:

I give one eighth (1/8) of my residuary estate as follows:

- (a) If Maryanne Ievoli shall survive me, to Maryanne Ievoli.
- (b) If Maryanne Ievoli shall not survive me, I give the aforesaid one eighth (1/8) of my residuary estate to the other beneficiaries of my residuary estate, in proportion to interest under this Article SECOND and subject to the provisions hereof.

The issues presented in this proceeding are: 1) the identity of "Michael Boccasini" in subdivisions [C] and [G] of the residuary clause of the last will and testament, and 2) the effect of the codicil on the division of the residuary estate.

On the issue of the identity of "Michael Boccasini" in the two provisions of the residuary clause, respectively, the executor states that there are five persons who may be the intended beneficiaries: 1) Michael Boccasini, nephew (Valley Stream, New York [executor]); 2) Michael Boccasini, nephew (Springfield, Missouri); 3) Michael Boccasini, nephew (Mesa, Arizona); 4) Michael Boccasini, grand-nephew (Port Jefferson, New York); and 5) Michael Boccasini, nephew (Deer Park, New York [predeceased]).

The executor originally filed a petition for construction of the last will and testament and

citation issued. Thereafter, an amended petition was filed. Citation was not served upon those persons whom the executor had determined had “conceded” that they were not beneficiaries (Michael Boccasini [Arizona], Michael Boccasino [Missouri]).

Upon the filing of the amended petition, which proposed a construction different than that of the original petition, citation should have issued to all interested persons.

A beneficiary is not required to answer a petition for construction. The court must make a determination with respect to the intention of the decedent (*Matter of Larkin*, 9 NY2d 88 [1961]; *Matter of Fabbri*, 2 NY2d 236 [1957]) regardless of whether any interested person appears in response to the petition. The failure to file a response is not an admission that the proposed construction is correct.

Further, on a construction, where the executor is the petitioner, he may not propose a construction which benefits any beneficiary at the expense of another beneficiary (*Isham v New York Association for Improving the Condition of the Poor*, 177 NY 215 [1905]) particularly where, as here, the executor proposes a construction which advances his personal interests.

A construction of both the original instrument and the codicil affects all of the residuary beneficiaries. Therefore, all possible residuary beneficiaries must be cited.

This matter will be re-submitted for decision when jurisdiction is complete.

Proceed accordingly.

Dated: January 20, 2011

EDWARD W. McCARTY III  
Judge of the  
Surrogate's Court

