SURROGATE'S COURT : NEW YORK COUNTY

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Petition of Maria Crowley-Hald for Construction of the Last Will and Testament of

File No. 2008-493

DAVID S. HAYES,

Deceased.

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A N D E R S O N , S .

This is a contested proceeding to construe a will that exercises (or purports to exercise) a New York testator's limited power to appoint property held in trust in Ohio. The will in question was executed by David Hayes, who died on December 25, 2008, and it was admitted to probate in this court on December 19, 2009.

Petitioner, executor of the Hayes estate, asks the court to construe the provision of the will to find that Mr. Hayes appointed the trust property to four individuals who also happen to be the beneficiaries of his residuary estate, an exercise which does not exceed the power conferred upon him, rather than to his residuary estate, an exercise which would violate the limitations on the power and thus render it ineffective. In the alternative, petitioner asks the court to reform the will to find that he intended to name the four individuals on the premise that any failure to do so was caused by scrivener's error.

Respondent Summa Health System Hospitals ("Summa") is an

Ohio charity that takes the trust remainder in default if Mr. Hayes did not effectively exercise his appointive power. Summa maintains that this court lacks jurisdiction to determine the issue raised by the petition.

Both parties have moved for summary resolution of the jurisdictional question. Should the court conclude that it has jurisdiction to rule on the merits, petitioner alone seeks summary judgment on the merits.

Background

The trust whose property is at stake originated in a 1919 agreement between the grantor, L.E. Sisler, an Ohio domiciliary, and the trustee, an Ohio bank. Under the terms of the agreement, the assets held in the trust at the time of L.E. Sisler's death were subject to a limited power of appointment which he delegated to his son, William T. Sisler ("William").[1] William in turn exercised his limited power by provisions in his own will in which he appointed the trust assets to the Ohio trustee as the principal of a further trust. This trust continued for the benefit of William's wife, Mary Sisler, and, upon her death, for

[1]L.E. Sisler originally gave William a general power of appointment over the L. E. Sisler trust remainder. In order to minimize estate taxes, however, William executed a partial release of his power, surrendering his right to exercise the power in favor of his estate, his creditors, or himself, thus leaving himself only a limited or special power. Because he had only a limited power, William was acting as L. E.'s agent, rather than on his own account, when he exercised the power.

the lifetime benefit of her two sons (William's step-sons), David Hayes and Paul Hayes. As part of his exercise of his limited power, William gave his step-sons their own limited powers to appoint trust property, as follows:

> "Upon the death of each son of Mary Sisler ... the property which then comprises the separate trust estate held hereunder for the benefit of such deceased son ... shall be distributed by the Trustee to or be applied by it for the benefit of such one or more persons not hereinafter excepted, and in such amounts, proportions, interests and estates, either absolutely or in trust, as he by his last will and testament, expressly referring to this instrument, shall have designated and appointed. The exception aforementioned is that such power of appointment shall not be exercisable in favor of such son, his estate, his creditors or the creditors of his estate." (Emphasis added).

William's will further provided that, if either of his stepsons died without exercising his limited power, the remainder would pass to the survivor.[2] William's will named City Hospital of Akron (now Summa) as the taker in default if the power were not exercised or its exercise were to be determined invalid.

David Hayes invoked his limited power of appointment In Article Third of his own will, as follows:

> "Reference is made to the power of appointment given to me by William T. Sisler in his will dated October 1, 1953 as modified by Codicil III thereto dated November 7, 1958. I hereby exercise said power of appointment, and direct that all property which is subject of said power of appointment shall be given and disposed of as hereinafter

[2]Paul predeceased David Hayes without exercising his power, thus his share passed to David's trust.

provided with regard to my residuary estate."

In Article Fourth of his will, David Hayes disposed of his residuary estate by giving four-fifths of it in equal shares to four individuals and the remaining fifth in equal shares to two individuals.

Since the death of David Hayes, the Ohio trustee[3] has continued to hold the trust remainder pending an adjudication as to whether the trust assets are distributable to the named individuals in Article Fourth or instead to the Ohio charity as taker in default.

It is undisputed that, given the limits on Mr. Hayes's power imposed by William, the property may in no event devolve upon his estate.

The petition and motions

Petitioner asks this court to construe Article Third of David Hayes' will as an appointment of the trust remainder directly to the named individuals, which would constitute an effective exercise of the power, and to reject an alternate reading under which the provision would amount to only an abortive attempt to appoint the remainder to Mr. Hayes's residuary estate. As noted above, however, petitioner asks that the will be reformed if need be to reflect the intention that petitioner attributes to Mr. Hayes with respect to the

[3]Key Bank, N.A., currently serves as trustee.

appointment (*i.e.*, the intention to appoint the remainder directly to the named individuals).

Summa, for its part, seeks dismissal of the petition for lack of subject matter jurisdiction. It argues that, under the governing statutes and case law, this court lacks jurisdiction to determine an issue bearing upon the disposition of property held by an out-of-State trustee, serving under an out-of-State instrument, where an issue arises with respect to a limited power delegated to a New York donee by an out-of State donor.[4] Underlying Summa's position is the fact that the New York donee's estate would be entirely unaffected by the requested determination, whether the ruling favored one party or the other.

The Law

The jurisdiction of the Surrogate's Courts is defined in Article Two of the Surrogate's Court Procedure Act. The relevant statutes give the court broad jurisdiction over estates of New York domiciliaries (SCPA 205); of non-domiciliaries who leave assets in New York (SCPA 206); and of lifetime trusts in circumstances not present here.[5] Where there is no such

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[4]The Ohio trustee was not given notice of this proceeding. Such notice, if given, could have been the basis for in personam jurisdiction, but it could not have cured the absence of jurisdiction "in rem" or "quasi in rem" (see, e.g., Matter of Oregon, 230 AD2d 47, 50-51, aff'd sub nom Matter of Stern, 91 NY2d 591).

[5]The Surrogate's Courts have jurisdiction over a lifetime trust "which has assets in the state, or in which the grantor was

jurisdictional basis, however, the court necessarily lacks power to act -- even in relation to issues that generally comprise its docket.

Here, it is undisputed that the donor of the power[6] was not a New York domiciliary and that exercise or non-exercise of the power could affect only the remainder of an Ohio trust rather than an asset belonging to a New York decedent. This case thus presents the anomaly of a request by a New York fiduciary (a) for relief that can have no consequence for his decedent's own estate or non-probate assets, and (b) for guidance as to a matter that does not involve any testamentary direction to the fiduciary (e.g. to perform or refrain from performing an act). The anomaly stems from an axiom under the law of Ohio as well as of New York: the donee of a limited power of appointment acts merely as the agent of the donor when the donee exercises (or attempts to exercise) the power he has been given (*Cleveland Trust Co v McQuade*, 106 Ohio App 237, 142 NE2d 249; 41 Ohio Jur 3d,

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a domiciliary of the state at the time of the commencement of a proceeding concerning a trust, or of which a trustee resides in the state or... has its principal office in the state." (SCPA 207[1]).

[6]In this context, the term "donor" refers to L.E. Sisler, the original owner of the property and settlor under the trust agreement by whose terms the trust operates, rather than to his son William, his intermediate agent as donee of a limited power. This settles in the negative a question raised by Summa as to whether Florida, William's domicile, might have jurisdiction over this matter.

Estates, sec. 157; *Matter of Stewart*, 131 NY 274; *Matter of NY Life Ins. & Trust Co*, 139 NYS 695, 704, *aff'd*, 157 AD 916, *aff'd on the decision below*, 209 NY 585; *Matter of Rogers*, 250 AD 26; *Matter of Bradford*, 159 Misc 482). Thus, David Hayes and, before him, his step-father William, were themselves mere instrumentalities of settlor L.E. Sisler. As an aspect of that axiom, the grant of a limited power does not confer upon the donee an ownership interest in the property subject to the power. Accordingly, a donee's exercise of a limited power does not relate to or affect the donee's own assets (*Cleveland Trust Co v McQuade*, 106 Ohio App at 250; *Matter of Baer*, 46 AD3d 1368, 1370, *Matter of Bradford*, 159 Misc at 486.)

As noted above, it is clear that the resolution of the substantive issue at bar does not affect our decedent's probate estate or non-probate assets or petitioner's obligations as fiduciary of that estate. It therefore follows that this court lacks jurisdiction to determine the meaning of any of the provisions at issue for purposes of affecting the trust property outside its borders (*Matter of Baer*, 46 AD3d 1368).[7]

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[7]Where the situation is reversed, *i.e.*, where an out-of-State domiciliary attempts to exercise a special power of attorney given to him by a New York donor, New York courts exercise their jurisdiction over the estate of the New York donor, and freely decide whether the non-domiciliary donee's exercise of the power of appointment in his out-of-State will was effective (*Matter of Harriman*, 124 Misc 320, *aff'd* 217 AD 733; *Matter of Franciscus*, 12 Misc 2d 335).

Petitioner argues, however, that a decision of the New York Court of Appeals in *Matter of Acheson, 28 NY2d 155 (1971), cert denied sub nom Dowell v Acheson*, 404 US 826,[8] stands as precedent in support of this court's jurisdiction over a case such as the present one. In *Acheson*, a California court had issued a decision construing a California domiciliary's will that purported to exercise a general power of appointment conferred by a New York donor over a trust administered in New York. An accounting proceeding brought in New York by the trustee of the donor's underlying trust had been stayed pending the California construction proceeding. The California court issued a decree on the construction issue, and the New York Court of Appeals ruled in turn that there had been a jurisdictional basis for the California court's adjudication (given the "special and unique" facts of the case, which had involved California's Rule against Perpetuities, 28 NY2d at 165) and that the California decree was therefore entitled to full faith and credit.

Petitioner attempts to use *Acheson* as a template for obtaining relief in this court, asserting that she is asking only for a construction of David Hayes's intent and not a ruling on the validity of his exercise of the power of appointment, and that this court has jurisdiction to construe the donee's New York

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[8] *Acheson* is cited by the parties as *In re Morgan Guaranty Trust Co.*

will just as the California court had jurisdiction in *Acheson* to construe the California donee's will.

Acheson, however, is clearly distinguishable. The Court of Appeals found that the California decedent had held a "general" power of appointment (28 NY 2d at 159) which made the trust property at issue his own (*id.* at 162). The California decedent's ownership of the appointive assets is demonstrated by the fact that he exercised his power in his will by directing that the assets be paid to his own residuary estate and to be held in trust by his own fiduciary (*id.* at 159). Hence, the California Court had merely construed its domiciliary's disposition "of his personal property by will...." (*id.* at 162). The Court in *Acheson* thus gave full faith and credit to a decision of a California court where the California decedent had a cognizable power to dispose of the appointive property as his own. This is not such a case and *Acheson* is therefore inapposite.

For the reasons described above, this court does not have jurisdiction to determine the substantive issue raised by the petition.[9] Accordingly, the executor's motion for summary

[9] It is noted that the Ohio probate court stayed a case brought there by Summa on the ground that "the New York Court is the proper forum to construe and/or reform the decedent's Will, which is governed by New York law" (Judgment Entry, Summa Health System Hospitals v Key Bank, N.A., #2008 ADV 135457, January 15, 2009. The court of a sister State cannot, however, confer subject matter jurisdiction that is otherwise lacking. Moreover,

judgment is denied and Summa's cross-motion to dismiss the petition is granted.

This decision constitutes the order of the court.

S U R R O G A T E

June 28 , 2011

it is hardly an impediment to an Ohio court's exercise of its own subject matter jurisdiction that Ohio choice of law rules may oblige it to apply the substantive law of New York to the determination of whether Mr. Hayes exercised his power of appointment in favor of the individuals named in Article Fourth of his will or in favor of his estate.