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.

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File No.: 0512-2007

G L E N, S.

Before the court in this contested accounting in the estate of Paul Gourary are cross motions for reargument and renewal of various issues addressed in the court's summary judgment decision entered November 1, 2010 (*Matter of Gourary*, NYLJ, Nov. 16, 2010, at 43, col 3 [Sur Ct NY County]). The parties are decedent's surviving spouse, petitioner Marianne Gourary, who serves as executor and is the beneficiary of two-thirds of decedent's residuary estate, and their son, John Gourary, who has objected to her intermediate account and is beneficiary of one-third of the residuary estate.

Petitioner sought renewal and reargument of her request in the summary judgment motion that the "rare books" (the "Collection") passed to her under the bequest in Article SECOND of the will of certain personal property. On this particular issue, the parties were informed by the court that the decision would be not be altered on renewal and reargument. The court held a fact-finding hearing and, based on the evidence, issued a separate decision, determining that the Collection passed via the residuary clause of decedent's will. The instant decision memorializes those holdings as to reargument and renewal on the issue of the Collection,[1] and resolves the

[1]Assuming for these purposes that the court's prior conclusion that Article SECOND was ambiguous provides sufficient justification for failure to present the renewal evidence on the earlier motion (CPLR 2221[e][3]), the additional evidence supplied in support of renewal provided an insufficient basis for changing the prior holding and granting summary resolution of the issue (CPLR 2221[e][2]). Although petitioner offered her own statements, an affidavit of an attorney colleague of the now deceased attorney drafter of the will (which provided only hearsay

remaining portions of the parties' motions.

As to petitioner's motion for reargument, the court grants reargument but adheres to its original decision with the exception of two holdings as set forth below. The court on reargument, as noted, adhered to its original ruling that the bequest under Article SECOND is ambiguous as the court neither overlooked, nor misapprehended the facts or the law in reaching that conclusion (CPLR 2221[d][2]). For the same reason, the court also adheres on reargument to its ruling that all penalties and interest for late filing of the estate tax return are a surcharge against Marianne.

As to the status of a joint income tax refund, which the court originally determined to be an estate asset, the court misapprehended the facts as to the overpayment by petitioner of a certain income tax liability. Estate funds were not used, but rather petitioner acting pursuant to a power of attorney from decedent, some weeks before his death, transferred funds necessary to pay the income tax liability to a separate account of the decedent but one that was routinely used to pay the couple's household expenses, including their income taxes.[2] The law regarding this issue, as set forth in the summary judgment decision, correctly provided that a spouse is entitled to part of a refund paid entirely from the other spouse'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"(*Matter of Gourary*, NYLJ, Nov. 16, 2010, at 43, col 3 [Sur Ct New York County], *citing Matter of Leeds*, NYLJ, Nov. 1, 1996, at 27, col 4

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within hearsay regarding decedent's intent, and includes statements for which objectant provided an alternate explanation), and insurance policies covering the rare book collection, the admissibility and the weight to be given this evidence were better addressed at the hearing on the issue. Renewal was properly denied.

[2]As objectant himself noted, "My father handled the household finances – all income taxes were paid by him out of his individual account."

[Sur Ct New York County]).

Here, there is no claim that the power of attorney under which petitioner acted was defective or invalid, and there is nothing indicating that the overpayment when refunded would not have returned to this "marital pot" account. In such an instance, the refund was not exclusively decedent's as previously determined. Instead, the income tax refund is properly considered one-half decedent's and one-half petitioner's. The court thus holds on reargument that fifty percent (50%) of the income tax refund is properly included as an asset of decedent's estate.

Petitioner also seeks reargument of the imposition of statutory (9%) interest on the surcharges against her. Those surcharges on which such interest was imposed were: for one-hundred percent (100%) of the joint income tax refund (now fifty percent (50%)); for fees paid to a secretary to assist in executorial duties, for amounts paid on upkeep of the cooperative apartment that she received under the will; and for penalties and interest imposed by the Internal Revenue Service for late filing and payment of estate taxes.

Even though markets may not currently yield so high a return, statutory interest remains at nine percent (9%) (CPLR § 5004). However, in equitable proceedings such as these "[w]hether interest is awarded, and at what rate, is a matter within the discretion of the trial court" (*Matter of Janes*, 90 NY2d 41, 55 [1997]; *see* CPLR § 5001[a]). While statutory interest can be imposed (*see Janes*, 90 NY2d at 55 [affirming nine percent (9%) interest award]), the court is mindful that generally interest is awarded to compensate beneficiaries for any losses they may have suffered, and it should not be imposed to punish an accounting fiduciary for past misconduct or negligence (*Matter of Acker*, 128 AD2d 867, 867-868 [2d Dept 1987]). On reargument and in the exercise of discretion, interest is awarded at the rate of six percent (6%) on the surcharges against petitioner from: the dates of improper payments from the estate for the

secretary hired to perform executorial duties and for the upkeep of the cooperative apartment, the date of payment of penalties and interest imposed regarding estate taxes, and the date of the deposit of the joint income tax refund, respectively (*cf.* EPTL § 11-1.5[d]).

As to objectant's cross-motion, he seeks reargument only with respect to the ruling that three "objections" on which John sought summary disposition had not been adequately pled.

As to the first, the failure to plead that petitioning executor should forfeit all commissions, reargument is denied (CPLR 2221[d]).

As to the second, although the objections referred to possible pre-death transfers of decedent's assets that should properly be part of the estate, the specific $200,000 transfer by petitioner under a power of attorney shortly before decedent's death was not explicit; however, the parties and the court have permitted its inclusion in the objections, and a supplemental objection on this alleged transfer has been filed. The need for reargument or additional motion practice as to this issue has thus been made moot.

As to objectant's final unpled claim that any "overpayments of estate taxes" not refunded by the Internal Revenue Service should be surcharged to petitioner, this has likewise been mooted by petitioner's written confirmation that all requests for a refund have been timely made, thus eliminating any possible claim of damages due to overpayments not refundable because the statute of limitations has run.

Accordingly, petitioner's motion for renewal is denied; petitioner's motion for reargument is granted as set forth in this decision; and objectant's cross-motion for reargument is denied or denied as moot as set forth in this decision.

This decision constitutes the order of the court.

Dated: November, 18, 2011

SURROGATE