

<b>Matter of Perelman</b>
2014 NY Slip Op 32443(U)
September 20, 2014
Sur Ct, New York County
Docket Number: 2007/2318/A
Judge: Nora S. Anderson
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SURROGATE'S COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

New York County Surrogate's Court  
DATA ENTRY DEPT.  
SEP 20 2014

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In the Matter of the Judicial Settlement  
of the Amended Interim Account of Ronald  
O. Perelman, as Executor of the Estate of

CLAUDIA COHEN,

Deceased.

File No. 2007/2318/A

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A N D E R S O N, S .

Incident to his interim accounting, the executor moves to strike the appearances of the contingent remainder beneficiaries ("respondents") of a trust under decedent's will (the "Trust") on the ground that their interest has been extinguished by the income beneficiary's exercise of a power of appointment. Respondents oppose on the ground of res judicata. In the alternative they argue lack of prejudice if the court exercised its discretion and allowed them to remain parties to the proceeding.

Background

Decedent died testate survived by her daughter. Her will provides for pre-residuary bequests to various charities and individuals, and the residuary to pass in trust for her daughter.

The daughter was given a special power of appointment over the remainder either by her will or by an instrument she may execute during her lifetime. If the daughter defaulted in exercising her power, the remainder would then pass to her issue; if she had no issue, \$17 million would pass to various charities and individuals, with any excess passing to decedent's brother or

his issue. Respondents are the issue of decedent's brother.

Four years after letters testamentary and trusteeship issued, respondents sought to compel the executor to account, alleging that he failed to timely fund the Trust, and that he wasted estate assets in pursuing a course of unsuccessful law suits against decedent's family. The executor opposed, arguing, *inter alia*, that respondents' interests were too remote to afford them standing to seek a compulsory accounting and that, even if they had standing, it was eradicated when decedent's daughter exercised her power of appointment in her will.

In its decision dated April 22, 2011 this court ruled that respondents were "persons interested" under SCPA 2205(2)(b), notwithstanding the remoteness of their contingent interests, and that they, thus, possessed the requisite standing to seek a judicial accounting (Benjamin v Morgan Guaranty Trust Co, 163 AD2d 135; Matter of Morse, 177 Misc 2d 43; Matter of Ziegler, 157 Misc 2d 423). In a later decision dated January 30, 2013, the court ruled that because the daughter's will was ambulatory, it did not terminate the respondents' interests and did not divest them of their standing to compel an accounting.

#### Motion To Amend

On June 13, 2013 the daughter executed her Power of Appointment, pursuant to EPTL 10-3.3, over the remainder of the Trust in favor of the Samantha Perelman 2013 Irrevocable Trust. The executor contends that respondents' contingent interests

have, thus, been extinguished and seeks an order striking their appearances and granting him leave to supplement his pleading by adding the name of the prospective trustee as a person interested.

In opposition, respondents argue that the executor is barred by res judicata, referring to this court's two prior decisions confirming their standing to seek an accounting. The executor asserts that res judicata does not apply, since the court's prior decisions were rendered before the daughter irrevocably exercised her power of appointment.

Respondents also question the irrevocability of the daughter's exercise of her power of appointment by raising a theoretical possibility that the Samantha Perelman 2013 Irrevocable Trust could be terminated under EPTL 7-1.9. The executor, however, accurately argues that the statute applies only to trusts, and does not affect the irrevocable nature of the daughter's contract to exercise her power of appointment.

Finally, respondents propose that the court decline to exercise its discretion to strike their notices of appearance because respondents' presence would assure a critical review of the estate's administration during the accounting period. The executor counters that respondents offer no law that would allow such "special standing". He further contends that there is no equitable need for respondents to remain in the proceeding, as the primary issue in the accounting is the executor's legal fees, and the court has previously directed his attorneys to file

affidavits of legal services to be reviewed by the court.

Discussion

Respondents' reliance on res judicata is misplaced. The rationale underlying the principle is that a party who has been given a full and fair opportunity to litigate a claim should not be allowed to do so again (see *O'Connell v Corcoran*, 1 N.Y.3d 179, 184-185; *Gramatan Home Invs. Corp. v Lopez*, 46 N.Y.2d 481). However, new facts, i.e., the exercise of the power of appointment, give rise to a question that has not and could not have been determined in the earlier decisions.

Respondents' reliance on EPTL 7-1.9 in an attempt to characterize the Irrevocable Exercise of Power of Appointment as being ambulatory is easily dismissed. The statute which allows for the amendment or termination of a trust, does not apply to an irrevocable contract. Moreover, the contract provides for alternative dispositions in the event that the Trust is terminated. The instrument specifically states that in that event, the remainder passes to a named foundation or alternate charities. There is no foreseeable situation that would render the daughter's inter vivos exercise of her power any less certain than if she waited to exercise it upon her death by her will.

The court also rejects the respondent's alternative argument that the court exercise its discretion and ignore their lack of legal standing because the daughter *may* have been unduly influenced by the executor, or the court *might* require their

assistance in evaluating the executor's legal fees. Respondents offer no law which recognizes such "special standing." The court also rejects, as mere speculation with no basis in fact, their suggestion that the daughter *might* have been unduly influenced to exercise her power, or that the court needs assistance in determining legal fees.

Based on the foregoing, the executor's petition is granted. This decision constitutes the order of the court.

Dated: *20 September*, 2014

  
S U R R O G A T E