

Matter of Meyers

2015 NY Slip Op 31302(U)

March 23, 2015

Sur Ct, Nassau County

Docket Number: 2014-379072

Judge: Edward W. McCarty III

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

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Probate Proceeding, Will of

MARGUERITE MEYERS,
a/k/a MARGUERITE N. MEYERS,

File No. 2014-379072

Dec. No. 30446

Deceased.

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In the context of a proceeding brought by Joseph C. Hickey on March 27, 2014 for the probate of the will of Marguerite Meyers, the guardian ad litem appointed to represent the interests of decedent's infant distributees has submitted his final report. The guardian ad litem recommends the admission of the will to probate, based upon a stipulation of settlement entered into by Joseph C. Hickey, Lisa Browne, Esq., LaToya Cowan, and the guardian ad litem.

BACKGROUND

Marguerite Meyers (the decedent) died on November 24, 2012, a resident of Rockville Centre. She was 93 years old. Decedent was predeceased on March 14, 2010 by her only son, Ronald, who was survived by four infant children: three of whom continue to reside in decedent's home with their mother, LaToya Cowan (Cowan); and the fourth resides with his mother in North Carolina.

Joseph C. Hickey (Hickey), who is identified in the propounded will as decedent's godson, and who was a former neighbor, offered for probate in this court a three-paragraph document dated May 14, 2010, which was two months after the death of decedent's son and one month after decedent's grandson moved out to live with his mother in North Carolina. The first paragraph of the propounded instrument states, in its entirety

FIRST: I give, devise, and bequeath all my estate, real personal, and mixed, of whatever kind and nature and wherever situated, of which I may die seized or

possessed, or in which I may have any interest or over which I may have any power of appointment or testamentary disposition, to JOSEPH C. HICKEY, as trustee for Latoya Cowan Should Latoya Cowan, not survive me, I give devise and bequeath the said property to my HEIRS,”¹

The residuary estate includes decedent’s home in Rockville Centre. In the instrument’s second paragraph, Hickey is nominated as executor, with Cowan named as substitute executor. The third paragraph gives the nominated fiduciaries all of the powers granted to executors by New York State.

The will does not establish a trust.

REPORTS FILED BY THE GUARDIAN AD LITEM

The guardian ad litem filed a preliminary report on July 23, 2014 and a final report on November 18, 2014, in which he advises the court that he will not file objections to the will because the parties reached an agreement to hold the proceeds from the sale of decedent’s residence in Rockville Centre in trust for the benefit of the decedent’s four infant distributees. The guardian ad litem states that Hickey’s counsel, Greta Gainer Anderson (Anderson), had informed him that the only estate asset of value was decedent’s house, which was not well maintained and subject to a reverse mortgage that was already past due and possibly in foreclosure. Anderson said that Hickey had suggested that a trust be created for the benefit of the grandchildren and the house transferred into the trust. The guardian ad litem offered to prepare an agreement to provide for the creation of the trust, and Anderson offered to draft the trust.

In his reports, the guardian ad litem also advises the court about his telephone conversation with the attorney/draftsperson of the propounded instrument, as follows (emphasis

¹Errors have not been corrected in quoted materials

added):

“On June 9, 2014, I interviewed the attorney draftsman Irving Singer via telephone at length. Regarding the circumstances surrounding the preparation and execution of the Will, Mr. Singer told me ‘everything seemed wrong’, but he couldn’t put a finger on it. He stated that he was expecting a call from someone regarding this Will because ‘everything seemed wrong with it’. He told me that the Decedent could not get out of bed and he was disturbed when it looked like ‘the old lady was locked in a bed’. Mr. Singer stated to me that he was not approached or directly hired by the Decedent but rather by Joseph Hickey who came to his office and indicated to Mr. Singer that he was a young man from the Decedent’s block, he was of no relation to her and he wanted to help her. Mr. Singer advised me that he received two payments of \$250 each to come to the decedent’s house and to prepare a Will and he believes that LaToya Cowan, the decedent’s daughter-in-law and mother to three of the four minors, probably paid him. Mr. Singer said that he has no recollection that the Decedent did or even could have paid him. Mr. Singer also told me that the Testator appeared cognizant but dependent on all the others around her and that she could not and did not speak freely with him. Mr. Singer told me that he did not at any time speak with the Testator alone and everyone was listening. Mr. Singer said there were too many people there and at no time did he speak to her alone. He also said he felt as if he ‘walked into a group of co-conspirators’. Mr. Singer stated to me that he believed the Will should be ‘tossed in the garbage’. Nevertheless he did prepare the Will and oversaw the execution of the Will which was performed at the Testator’s residence. The three witnesses to the Will were Anthony Cowan, a relation living with the decedent, the attorney draftsman Irving Singer and Paul Capellupo, an employee of Mr. Singer. Mr. Singer told me he did not recall speaking with the attorney for the executor prior to the filing of the petition. Mr. Singer indicated to me that Anthony Cowan, one of the witnesses to the Will, lived at the testator’s house rent free. Mr. Singer indicated that he does not keep a file regarding the Wills he prepares nor does he keep any notes when he drafts a Will. He again told me that he appreciated my letter contacting him because he wanted to tell someone about the problems with the Will.”

PRELIMINARY LETTERS

Hickey applied for and was granted preliminary letters testamentary on March 2, 2015.

The petition values the decedent’s real property at approximately \$399,000.00.

STIPULATION OF SETTLEMENT

The stipulation entered into by Hickey, Browne, Cowan and the guardian ad litem

provides the following substantive provisions:

1. Cowan waives and renounces her interest in the estate.
2. All estate assets will be transferred into an irrevocable testamentary trust. The infants will be equal co-beneficiaries of the trust. The trustees will be Hickey and Lisa Browne, Esq. (Browne).
3. Hickey's attorney will prepare the trust, which will be approved by the guardian ad litem and the Court, and executed simultaneously with the stipulation.
4. Upon execution of the stipulation and the trust, letters testamentary will issue to Hickey.
5. Hickey will sell decedent's home as soon as possible. All mortgages and estate obligations will be satisfied from the proceeds of sale. Petitioner shall immediately list the house with an independent licensed broker, who shall determine the price. The guardian ad litem shall receive a copy of the broker's agreement, the listing, and all offers received. Hickey shall take steps to ensure the safety and security of the house before the closing.
6. All estate administration fees are subject to court approval and payable from estate assets or the proceeds of the real estate sale.
7. The net proceeds from the sale of decedent's home will be deposited in the trust and held in accordance with the trust terms for the benefit of the infants.

TRUST AGREEMENT

The trust agreement referenced in the agreement is titled "The Irrevocable Testamentary Trust of Marguerite Meyers." The agreement provides that Hickey is the creator and trustee of

the trust, and that Browne is a co-trustee.² Article I lists decedent's issue. There is no Article II. Article III names Hickey and Browne as co-trustees, giving each the authority to appoint a successor upon a co-trustee's death, incapacity, resignation, or failure or refusal to serve, subject to the approval of the guardian ad litem and confirmation of the court. Article IV defines trust property as the proceeds of the sale of decedent's home. Paragraphs (A) and (B) of Article V provide the following:

“A. DISTRIBUTION FOR EDUCATION:

Each beneficiary shall receive a twenty-five (25%) per cent interest of trust assets to be used for educational purposes. Separate trust accounts shall be maintained on behalf of each Infant Child. In the event the Infant Child does not matriculate then his or her benefit shall be held by the Trustees until said Infant Child reaches the age of Twenty-Five years. All principal and accrued interest shall be released to said beneficiary upon the age of twenty-five years and his or her trust shall terminate.

B. UPON THE DEATH OF A BENEFICIARY:

Upon the death of any beneficiary prior to full distribution of all principal, accrued income and interest all remaining funds in the trust account shall be equally distributed to the surviving beneficiaries.”

Paragraphs (C) and (D) provide a spendthrift provision and address the rule against perpetuities. Article VI grants powers to the trustees, and Article VII provides for “distributions for incompetents” to be made to the beneficiary, the beneficiary's legally appointed guardian or conservator or other legal representative, or by expenditure by the trustee for the person's health, support, maintenance and education, and also provides that if the beneficiary “should become incapacitated during his or her lifetime, and in that event this Trust shall be deemed a supplemental needs trust for the benefit of the beneficiary, and the payment or expenditure shall be deemed full release of the Trustee in such instance.” Article VIII allows for distributions in

²Hickey lives in Virginia. At Anderson's suggestion, Browne was added as a trustee because she lives in East Islip, New York.

cash or in kind. Article IX addresses the trustee's resignation, removal, substitution and accountability, providing that the trustee is not required to file an annual accounting with any public official, and providing also for the trustee's delegation of powers for a period of up to six months, and for compensation of trustees and reimbursement of expenses. Article X addresses the application of flower bonds for the payment of estate taxes due by reason of the Creator's death.³ Article XI designates New York law as initially governing the trust but permits the trustee to "change 'situs' whenever it seems best to the trustee", and Article XII grants the trustee power to amend administrative provisions of the trust. Articles XIII and XIV address construction and copies. There is no Article XV. Article XVI provides the purpose of the trust. Article XVII states incorrectly that both Hickey and Browne are the creators of the trust, as well as the original co-trustees. It also provides:

"If any of the beneficiaries of the Trust die prior to the distribution, then in that event their interest shall be equally divided and deposited in the Trust of the survivor(s) of them. In the event full distribution was made to a survivor of their own 25% interest and their Trust is terminated, then an outright distribution shall be made directly to the survivor."

The final article states that if any trust provisions are unenforceable, the remaining provisions shall remain enforceable. The trust is signed by Hickey and by two witnesses to his signature, and by Browne and by two other witnesses to her signature, followed by a self-proving affidavit typically found affixed to a last will and testament, which affidavit is signed by each of the four witnesses and notarized.

³The inclusion of this paragraph must be an error, as the draftsman presumably did not intend for the trust to pay taxes on Hickey's estate. In any event, the proposed trust corpus does not appear to include flower bonds.

ANALYSIS

The court cannot approve the stipulation or the trust agreement filed with the court. The most significant reason is that by limiting the trust for education only, and directing that the funds be held until age 25, without providing for inheritance by a beneficiary's issue should a beneficiary die before reaching age 25, the proposed trust actually provides less for the infants than they would receive under decedent's will in the event Cowan renounced (the will provides for a distribution of the entire estate to decedent's heirs), and less than they would receive by intestacy in the event that the will is not admitted to probate (which would also direct a distribution to decedent's heirs). Further, many of the trust provisions are unclear. For example, the trust includes no directions or guidelines for the actual making of distributions to the infants, and it fails to define the educational purposes for which distributions can be made, other than to provide that if a child does not "matriculate" then the child's interest will be held until age 25. In another example, the trust requires approval of the guardian ad litem for the appointment of a successor trustee, but the guardian ad litem's appointment will terminate once the will is granted or denied probate.

FEES

The guardian ad litem has filed an affirmation of services dated November 18, 2014 in which he indicates that he provided 16.05 hours of legal services in the representation of his wards, and requests a fee of \$4,815.00 plus non-specified disbursements of \$1.61. The court will not address the fee request while this matter is still pending, but will address it in a subsequent decision.

CONCLUSION

The court directs Cowan, Hickey and/or his counsel Anderson, Browne and the guardian ad litem to appear for a conference to discuss resolution of this matter on April 13, 2015 at 2:15 p.m.

This constitutes the decision and order of the court.

Dated: March 23, 2015

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