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

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Accounting of the Public Administrator of the County of New York, as Administrator c.t.a. of the Estate of

TESSY LANE,

Deceased.

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DECISION

File No. : 2010-1582/C

M E L L A, S. :

This is a proceeding by the Public Administrator of New York County to settle her account as administrator c.t.a. of the Estate of Tessy Lane. Incident to her accounting, petitioner asks the court to construe a direction in decedent's will that cannot be carried out as written.

Article IV of the will makes fourteen cash bequests totaling $365,000 to various individuals and entities, ranging in value from $5,000 to $100,000. The only other effective dispositive provision is the residuary clause, which bequeaths the balance of the estate to two named charities.[1] The problematic direction is found in Article V, which reads as follows:

> "If the sum of all monetary bequests made in ARTICLE IV which do not lapse is greater than fifty (50%) percent of my net estate, determined by deducting from the value of my gross estate, as finally fixed for federal estate tax purposes, all my debts and cremation expenses, Executor's commissions, legal fees and all other expenses of administration (excluding estate or other transfer taxes), then such bequests shall be proportionately reduced so the total of such bequests shall not exceed fifty (50%) percent of my net estate. However, the bequests to RENEE SICHER, PAULINE SCETBUN and ANNE SICHER-HEARLE shall not be reduced below $45,000 each."

The total of the monetary bequests under Article IV of the will that do not lapse exceeds fifty percent of the net estate, thereby triggering application of the Article V direction for

[1] A specific bequest of tangible personal property under Article III has lapsed, and another has adeemed.

proportionate reduction of bequests.

Pauline Scetbun and Anne Sicher-Hearle survived the decedent, but Renee Sicher predeceased her, leaving issue. The Article IV bequest to Renee Sicher provides:

> "I give and bequeath the following sums to the following named individuals and/or institutions: . . .C. The sum of FORTY FIVE THOUSAND ($45,000.00) DOLLARS to RENEE SICHER, presently residing at [address] or, in the event she shall predecease me, to her then surviving issue in equal shares per stirpes." [2]

Petitioner asks the court, first, to determine whether the Article V direction for proportionate reduction of bequests applies to the bequest passing to the surviving issue of Renee Sicher.

The court's task in construing a will is to determine the testator's intent as expressed in the will, read as a whole (*e.g. Matter of Thall*, 18 NY2d 186 [1966]; *Matter of Fabbri*, 2 NY2d 236 [1957]). Relevant to the analysis here is the principle that, when ascertaining intent, the court must give the words used in the will "their usual and accepted meaning" (*Matter of Stanley*, 209 AD2d 70, 74 [1st Dept 1995]).

In this case, the testator made a bequest "to" Renee Sicher, on the condition that Renee survive her, and otherwise "to" Renee's surviving issue. The Article V language exempting certain bequests from proportional reduction protects the bequest "to" Renee. The ordinary meaning of the words used indicates that decedent did not intend to extend the exemption to cover the bequest "to" Renee's surviving issue. The complexity of the instructions in Article V also suggests that the decedent would not have abbreviated a reference intended to apply more broadly than as she actually stated. The court therefore determines that the bequest to the issue

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[2] The bequests to Pauline Scetbun and Anne Sicher-Hearle use identical language except for the beneficiaries' names and addresses.

of Renee Sicher is subject to pro rata reduction.

Petitioner asks the court to resolve another ambiguity concerning the cash bequests. As noted above, Article IV gives cash legacies to fourteen named beneficiaries. The net estate amounts to approximately $156,000. Since the two remaining "protected" $45,000 legacies alone exceed half the net estate, it is not possible to achieve decedent's goal of preserving the other half for the charities, regardless of any reduction in the other cash bequests.

One possible interpretation of decedent's intent in these circumstances is that she wanted to preserve the $45,000 bequests in all events, while favoring the residuary charitable beneficiaries over the other legatees. Under this view, and recognizing that the decedent put no limit on the amount of the proportionate reduction of the pre-residuary bequests, all of the net estate after the two protected bequests would pass under the residuary clause to the charities, leaving nothing for the other beneficiaries. The court finds that decedent did not intend such a result and rejects this interpretation. Although the Article V direction shows that she anticipated the possibility that her estate would decline in value, she clearly did not expect her net estate to fall to such an extent that her instructions would be impossible to follow. The sheer number of the legacies and the inclusion of specific directions in case of a decline are inconsistent with an intent that the legacies be vitiated entirely.

The court finds that the proper interpretation is to read the terms "such bequests" and "net estate" in Article V to exclude the "protected" $45,000 bequests from the reckoning in the formula. The words in a will are ordinarily to be given their usual meaning, as discussed above, but the court is not required to adhere to a literal reading in every instance. As the Court of Appeals explained in *Matter of Fabbri*, 2 NY2d at 240:

> "If the court upon reading the will in this setting discerns a dominant purpose or plan of distribution, the individual parts of the will must be read in relation to that purpose and given effect accordingly. This is true despite the fact that a literal reading of the portion under construction might yield an inconsistent or contradictory meaning because of the use of awkward language inadvertently or carelessly chosen. As this court pointed out in an early opinion: 'If we can see that the inapt, or careless, use of language by the testator has created the difficulty in ascertaining his intention, but, nevertheless, feel certain as to what he meant, from reading the whole instrument in connection with the clause in question, we may subordinate the language to that meaning.' " [Internal citations omitted.]

It is also well established that "the transposition, substitution, elimination or addition of words in a will is always permissible . . . if that be necessary to attain the goal which the will had established to be the purpose of the testator" (*Matter of Lathers*, 35 Misc 2d 298, 300 [Sur Ct NY County 1962]).

In this case the court finds that decedent's dominant purpose was to maintain a proportional balance among all her estate distributions, after payment in full of certain bequests, rather than to allow the statute (EPTL 13-1.3) to control in case of any necessary abatement. Her intent is evident from her reference to a fraction of her estate, rather than a fixed amount, in invoking the Article V formula that adjusts between the residuary and pre-residuary gifts; and from the express direction for proportional reduction within those pre-residuary gifts, when necessary to achieve the desired balance. Removing the $45,000 bequests from the operation of the formula is also consistent with decedent's instruction that they not be "reduced" below $45,000, effectively stating that they should not be "reduced" at all and are therefore not subject to the formula.

Accordingly, the court determines that the $45,000 bequests to Pauline Scetbun and Anne

Sicher-Hearle shall be paid in full; one-half of the balance of the net estate shall be distributed to the other cash legatees in the proportion that their bequests as written bear to the total sum of $275,000; and the remaining half of the net estate shall be distributed to the residuary charities in the proportions established in Article VI of the will.

There being no objection to the account, the account is settled. Petitioner may deposit the shares of legatees whose whereabouts are unknown with the Commissioner of Finance of the City of New York, and may pay the share of any post-deceased legatee to the duly appointed fiduciary of his or her estate or deposit such share with the Commissioner of Finance, as requested in the petition.

Settle decree providing for distribution of the estate in accordance with the foregoing, and for compensation to the guardian ad litem.

Dated: July 12, 2016

SURROGATE