Matter of Fink

2016 NY Slip Op 31893(U)

October 12, 2016

Surrogate's Court, New York County

Docket Number: 1982-3487/D

Judge: Rita M. Mella

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

New York County Surrogate's Court
Date: October 12, 2016

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Proceeding for the Construction of the Will of

BLANCHE S. FINK,

Deceased.

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DECISION AND ORDER

File No. : 1982-3487/D

M E L L A, S. :

This is a proceeding by the trustee of the trust under Article VI of the will of Blanche S. Fink for construction to determine the beneficiary of the trust remainder.

The decedent died in 1982. Her will, executed in 1969, created a trust of her residuary estate for the benefit of her only child, Kathleen Colwell (Kathleen). The trust provided for distribution of income and principal to Kathleen for her support and maintenance, in the discretion of the trustee. Significantly, the will granted the trustee an express power to terminate the trust or to use the trust assets to purchase an annuity for Kathleen, in an amount sufficient to provide for her support for life.

The provisions for distribution of the trust remainder are contained in Article XI, which reads in its entirety as follows:

> "XI. If the trust herein created for my daughter is still in force and effect upon her death, then and in that event I give, devise and bequeath the balance remaining in such trust fund which has not been used or expended in behalf of my daughter, both real and personal and wheresoever situate, to my sister EDYTHE H. STEGMAN, to have AND to hold the same forever."

Kathleen died in 2012, survived by a daughter, Sally Annmelissa Colwell-Machado (Sally), the respondent. Edythe H. Stegman (Edythe), decedent's sister and the named remainder beneficiary, died in 1985, predeceasing Kathleen. Petitioner maintains that the trust remainder is

payable to Edythe's estate, despite her death prior to that of the life beneficiary, and seeks a construction of the will to that effect.[1] Sally opposes this interpretation, and argues that the remainder passes in intestacy to her as the sole heir of Kathleen, who was decedent's sole heir. The amount remaining in the trust is approximately $328,000.

In construing a will the court must 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]). When the intention is not readily ascertainable, the court may be guided by constructional preferences (*Matter of Young*, 62 Misc 2d 86 [Sur Ct, Kings County 1969]). Where an ambiguity arises from the failure of a testator to specify whether the interest of a remainder beneficiary is conditioned on surviving the life beneficiary, the courts have frequently applied the constructional preference for early vesting of future estates, recognized as a "presumption[ ] based on what the ordinary testator would probably have intended in the circumstances" (*id.* at 89).

Reliance on the preference for early vesting is particularly appropriate in this case. Numerous decisions have held that the constructional preference is strong where, as here, the remainder is payable to a named individual; moreover, it applies "with particular force" where, as here, the gift in question is a disposition of the residuary estate (*Matter of Swanton*, 53 Misc 2d 1092, 1094 [Sur Ct, Kings County 1967]). Surrogate Sobel articulated the principle in *Matter of Bogart* (62 Misc 2d 114, 119 [Sur Ct, Kings County 1970]):

> "When the remaindermen are *named* individuals as distinguished from a class, there exists a strong presumption against a condition of survival -- so strong as to be *almost* irrebuttable in the absence

[1] The fiduciary of Edythe's estate has consented to the relief requested.

> of an express requirement of survival. This is so because of the uniformly recognized preference for early vesting and indefeasibility . . . and the preference against intestacy (or more accurately for complete disposition)."

Explaining the rationale for this preference, the opinion continues:

> "It is reasoned that when a testator leaves a remainder interest to a named individual, unless he has specified survival or made a substitutionary direction, he has anticipated that the named individual would survive to take possession. Since the named individual did not survive, the constructional preferences are applied to determine what testator would have done if he had thought about that possibility. From such preferences, it is concluded that testator had no objection to allowing the named remainderman to himself decide by will or intestacy who should take the disposition if he did not survive to take possession. For this is precisely what would happen if in fact he had survived to receive actual possession" (*id.*).

(*See also Matter of Sprinchorn*, 151 AD2d 27, 29 [3d Dept 1989] [disposition of a remainder to a named individual creates a "strong presumption, 'almost irrebuttable', against the imputation of a condition of survival" (internal citations omitted)]; *Matter of Lockwood*, 127 AD2d 973, 974 [4th Dept 1987] [noting "constructional preference which favors the early vesting of a future interest where the gift is to a named individual"].)

Courts look for an expressly stated condition of survival or provision for an alternate gift to overcome the presumption of early vesting (*e.g. Matter of Lockwood*, *supra*, 127 AD2d at 974 [noting "the rule of construction disfavoring defeasance of vested interests except where the will contains an express defeasance or substitutionary clause"]; *Matter of Brahaney*, 117 Misc 2d 46, 53 [Sur Ct, Cattaraugus Co 1982], *aff'd* 103 AD2d 1002 [4th Dept 1984] ["[w]ith respect to [future interests], a condition of survival will not be imputed unless unequivocally expressed" (internal quotation marks omitted)]; *Matter of Bogart*, *supra*, 62 Misc 2d at 119).

The will here has no substitutional gift in case of the death of Edythe before Kathleen, nor does it contain an express direction or otherwise suggest that Edythe's interest is conditioned upon her survival. To the contrary, the words "to have and to hold the same forever" following the disposition to Edythe are indicative of unconditional vesting (*cf. Matter of Krooss*, 302 NY 424, 428 [1951] [where gift of remainder was made to children "absolutely and forever," the interest would not be defeated except by language equally as "clear and decisive"]).

Respondent argues that the words "*if* the trust herein created for my daughter is still in force and effect upon her death, *then* and in that event I give [the remaining balance to Edythe]" [emphasis added] denote a future, rather than immediate, gift, compelling a finding that the gift was contingent until the death of Kathleen. The cases on which respondent relies concern construction of language in substitutional gifts involving principles not apposite here.[2] The "if . . . then" language in this will did not create a contingency that affected the vesting of Edythe's interest. It merely indicated that Edythe's interest could be defeated had the trust been depleted, an event which did not occur. This interpretation is supported by the powers given the trustee in Article X to terminate the trust and to use its assets to purchase a lifetime annuity for Kathleen. The court finds that the reference to the possibility of the trust's termination before the death of Kathleen was meant to avoid any doubt as to the trustee's power to exhaust the trust assets in

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[2]*Matter of Dinkel* (133 Misc 868 [Sur Ct, Westchester County 1929]), on which respondent also relies, involved a trust where the life beneficiary had a right to "as much of the principal as she may desire." The case was distinguished on this basis from the will in *Matter of Werner* (167 Misc 92, 94 [Sur Ct, Lewis County 1938]), where the court observed that "[t]he law favors such construction of a will as will avoid the disinheritance of remaindermen who may happen to die before the termination of the precedent estate," and upheld a bequest to the remainder beneficiary who predeceased the life tenant. As in the present case, the life beneficiary in *Werner* did not have unlimited control over the property comprising her life estate.

certain circumstances.

Respondent also argues that decedent was aware of the likelihood that Edythe would predecease Kathleen, given their twenty-four-year difference in age. She maintains that, in these circumstances, the decedent would have made an express provision for succession by Edythe's estate had she intended such result. But such an awareness more strongly supports the opposite conclusion. Decedent's failure to make a substitutional gift, particularly when the gift to Edythe was coupled with the words "to have and to hold the same forever," is indicative of her desire that Edythe, and Edythe alone, either receive the property or, via her estate, control its ultimate disposition.

The remainder of the residuary trust under Article VI of decedent's will shall therefore be paid to those entitled as beneficiaries of the estate of Edythe H. Stegman.

Respondent's request for a trial by jury is moot because there are no relevant issues of fact to be tried, and, in any event, trial by jury is not available in a construction proceeding.

This constitutes the order of the court.

Dated: October 12, 2016

SURROGATE