Matter of Berman (Lipman)
2016 NY Slip Op 32040(U)
July 26, 2016
Surrogate's Court, Nassau County
Docket Number: 2012-370533B
Judge: Margaret C. Reilly
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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU
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In the Matter of the Application of Peter Lipman as a Beneficiary of the Estate of

GERALDINE BERMAN,

Deceased,

to Require Louis R. Manara, as Executor, to Deliver a Specific Bequest Pursuant to SCPA 2102 (4).
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DECISION & ORDER

File No. 2012-370533B
Dec. Nos. 31395
31495
31496

PRESENT: HON. MARGARET C. REILLY

The following papers were considered in the preparation of these decisions:

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The verified petition, filed by Peter Lipman, seeks the delivery of specific property pursuant to SCPA §2102(4), plus the payment of interest, legal fees and expenses. The executor, Louis R. Manara, filed a motion for summary judgment seeking construction and dismissal of the petition on the grounds that the will is ambiguous and a construction is unnecessary. The petitioner, Peter Lipman, filed a cross-motion, for summary judgment, seeking construction and on the petition directing payment of the bequest, legal fees and expenses.

The decedent, Geraldine Berman, died on June 4, 2012 . Her last will and testament, dated November 2, 2010, was admitted to probate by a decree of this court dated July 6, 2012 and letters testamentary issued on the same date to her son, Louis Manara (respondent). Peter Lipman (petitioner) is the beneficiary of a $75,000.00 bequest. The value of testamentary and non-testamentary assets approximated $1,500,000.00. The executor, Louis Manara, represents that the sole assets of the estate were a condominium located in Island Park, New York, an automobile and a securities account, all of which were sold to pay funeral expenses, administration expenses and debts. It is undisputed that the proceeds of the sale of the condominium are the sole remaining asset of the estate. In connection with this proceeding, two prior instruments, dated June 24, 2004 and September 13, 2006, were submitted for consideration.

Prior to serving an answer in this proceeding, the executor, Louis Manara, moved to dismiss the petition for payment of the $75,000 bequest (CPLR 3211[7]), on the grounds that it abated under EPTL §13-1.3 [c]. Peter Lipman, the petitioner, claims that the testator expressed, in the 2010 will, an intention to alter the statutory order of abatement and create a preference over all other dispositions. If that is correct, the order of abatement selected by the testator prevails (EPTL §3-1.3 [e]; *Matter of Schwartz*, 30 Misc 2d 814 [Sur Ct, Kings County 1961]).

In a previous decision, the court determined that a construction of the last will and testament was necessary to determine the order of abatement. Jurisdiction as to the construction was accomplished by the issuance of supplemental citation. That construction is now before the court.

Article III of the November 2, 2010 instrument provides in relevant part as follows:

"Specific Bequests I direct that the following specific bequests be made from my estate.

(1) I give and bequeath to my friend, PETER LIPMAN, the sum of $75,000.00 together with the furniture at the real property located at 100-120 Baker Court, Island Park, New York, as well as any motor vehicle I may own at the time of my decease. If this beneficiary does not survive me, the sum of $37,500.00 shall be left to Peter Lipman's niece, LISA GRAY, and nephew, STEVEN GRAY, to be split equally. The remaining $37,500.00 shall be distributed with my residuary estate.

(2) I give and bequeath to my niece, LESLIE K. SAPIENZA, the sum of $20,000.00. If this beneficiary does not survive me, then this bequest shall be distributed with my residuary estate.

(3) I give and bequeath to GRACE KAUFMAN and LEON KAUFMAN, the sum of $20,000.00. If this beneficiary does not survive me, then this bequest shall be distributed to the issue, per stirpes.

(4) I give and bequeath to my sister, PENNY NOTARNICOLA, the sum of $25,000.00. If this beneficiary does not survive me, then this bequest shall be distributed to the issue, per stirpes.

(5) I give and bequeath to my grandson, MARC MANARA, the sum of $50,000.00. If this beneficiary does not survive me, then this

bequest shall be distributed to the issue, per stirpes.

(6) I give and bequeath to my granddaughter, NICOLE MANARA the sum of $50,000.00, as well as all of my jewelry that I shall own at the time of my decease for her use and benefit forever. If this beneficiary does not survive me, then this bequest shall be distributed to the issue, per stirpes.

(7) I give and bequeath my real property located at 100-120 Baker Court, Island Park, New York, shall be distributed to my beloved son, LOUIS MANARA for his use and benefit forever. If this beneficiary does not survive me, then this bequest shall be distributed with my residuary estate.

Residuary Estate I direct that my residuary estate, including any real property and personal property, be distributed, bequeathed and given to my son, LOUIS MANARA. In the event my son, LOUIS MANARA, is unable or willing to accept the legacies given to him under this Will, all property, whether real or personal, I hereby devise and bequeath to my grandchildren, MARC MANARA and NICOLE MANARA, per stirpes."

The residuary clauses in the 2004 and 2006 instruments, which are identical, are preceded by a similar succession of bequests. The residuary clauses in he 2004 and 2006 instruments provided as follows:

> "EIGHTH: I hereby give, devise and bequeath all of the rest, residue and remainder of my estate wheresoever situated, to my son, LOUIS MANARA, including the sculpture of my grand-daughter for his own use and benefit forever with full power to convert any assets to fluid funds, if necessary to effectuate the provisions of this Last Will and Testament."

The purpose of a construction proceeding is to ascertain the intention of the testator (*see Matter of Cord*, 58 NY2d 539 [1983]; *Matter of Thall*,18 NY2d 186 [1966]; *Matter of Fabbri*, 2 NY2d 236 [1957]). If possible, intention is discerned within the four corners of the instrument in the context of the facts and circumstances under which the provisions were framed (*see Matter of Murray*, 84 AD3d 106 [2d Dept 2011]).

EPTL §1-2.8 entitled "General Disposition" reads in relevant part as follows:

> A general disposition is a testamentary disposition of property not amounting to a demonstrative, residuary or specific disposition.

EPTL §1-2.17 entitled "Specific Disposition" reads in relevant part as follows:

> A specific disposition is a disposition of a specified or identified item of the testator's property.

The classification of dispositions (l) through (6) in the 2010 instrument as "Specific Bequests" is an erroneous description. Provisions (1) through (6) are general dispositions (*see* EPTL §1-2.8) and disposition (7) is a specific devise (EPTL §1-2.17).

Under EPTL §13-1.3 [c], the order in which the dispositions abate is: 1) residuary dispositions; 2) general dispositions; and 3) specific dispositions. The general dispositions abate pro rata (*see Matter of Neil*, 238 NY 138 [1924]; *Matter of Barnett*, 95 Misc 2d 675 [Sur Ct, Nassau County 1978).

Petitioner argues that the labeling of the dispositions, although inaccurate, reflects an intention by the testator to change the statutory order of abatement. He contends that: l) all of the dispositions in Article III, including his bequest, are to be treated as specific; and 2) his bequest is entitled to a preference over all the dispositions, including the condominium. It is petitioner's contention that it was the testator's continuous plan that in the event of a deficiency of assets, the devise of the condominium would yield to the payment of the cash bequests. The premise of petitioner's theory is that the last sentence of the residuary clause in the 2004 and 2006 instruments directs the executor to sell any assets in order to satisfy the monetary bequests. Further, that the testator deleted the last sentence and substituted the heading "specific bequests," in order to elevate the priority of bequests (1) through (6).

The statutory order of abatement can be altered where there is: l) an express provision in the instrument; or 2) an implied intention to change the order of abatement. In the earlier instruments, there is no express reference to abatement or a charge upon real property, nor is there any basis for a finding of implied intent. The language in the residuary clause of the earlier instruments does not explicitly refer to the sale of the real property, distinguishing it from the provisions in *Taylor v Dodd* (58 NY 335 [1874]) upon which petitioner relies. The provision of the residuary clause in the 2004 and 2006 instruments is general and may merely be a recitation of the powers set forth in EPTL §11-1.1. A provision, ambiguous to this

extent, cannot change the order of abatement, particularly where the object is to cut down a devise granted in a preceding clause (*see Matter of Jacobs*, 140 NYS2d 60 [Sur Ct, Kings County 1955]). The 2004 and 2006 instruments do not establish a testamentary plan to change the statutory order of abatement. Therefore, the further question as to the testator's intent is limited to construction of the 2010 last will and testament that was admitted to probate.

The last will and testament does not contain an express reference to abatement. On a construction, it is presumed that a testator believed that her testamentary assets were sufficient to fund all dispositions (*see Matter of Title Guarantee & Trust Co.,* 195 NY 339 [1909]). Where a question of abatement arises, the rule of implied intent permits an inference that a preference was intended. The question presented is what the testator would have desired had she realized that all gifts could not be effectuated.

Conversely, petitioner's theory is based upon the assumption that the testator knew of the deficiency and deliberately directed an order of abatement. The inference sought to be drawn in this case is that the description of the dispositions as "Specific Bequests" emanates from a decision to change the statutory order of abatement. As to this question, the limitations on the application of implied intent should be considered.

Historically, under the doctrine of implied intent, a preference may be granted where the legacy is for the benefit of a near relative, dependent on the testator's bounty and not otherwise provided for (*Matter of Wenner*, 125 App Div 358 [3d Dept 1908], *affd* 193 NY 672 [1908]; (*Matter of Carr*, 24 Misc 143 [Sur Ct, Kings County 1898]; *see* Preferences Among General Legacies as Regards Abatement, 34 A.L.R. 1247). The bequest itself must

be necessary for the beneficiary's support and comfort (*see Matter of Smallman*, 138 Misc 889 [Sur Ct, Kings County 1931]). There is precedent for the extension of the rule to a non-relative of special importance to the testator (*see Matter of Hochster*, 166 Misc 621 [Sur Court, Westchester County [1938], *affd* 256 App Div 844 [2d Dept 1939]), provided the condition of support and maintenance is satisfied.

Peter Lipman was a long-time companion of the testator. Louis Manara alleges that Peter Lipman took financial advantage of the testator and did not contribute to any of their mutual household expenses. In response, Peter Lipman states, in an affidavit, that he was employed and financially independent during the entire period of their relationship, thus negating any implied intent argument (*see Matter of Levy*, 106 NYS2d 123 [Sur Ct, Kings County 1951]).

Alternatively, if the testator did not anticipate a deficiency of assets, the question presented is what her intent would have been if she had known the circumstances. Applying the same authority previously cited, the result would be the same. This court finds that there is an inadequate basis for concluding that the testator would have intended a preference for the $75,000.00 bequest.

The preferred approach to a will construction is to exclude the testimony of the attorney-draftsperson. Specifically, declarations of intent made to the attorney by the testator are not admissible (*see Matter of Chodikoff,* 50 Misc 2d 86 [Sur Ct, Rensselaer County 1966]). However, it may be appropriate to take into consideration the experience of the draftsperson and his familiarity with technical terms (*see Matter of Barnett*, 141 Misc 637 [Sur Ct, Jefferson County [1931]). It is therefore noted parenthetically that the preparation

of wills was a very small part of the attorney's practice and there is a question as to his understanding of the labels employed.

A fair review of the terms of the will and the relationship of the beneficiaries leads to the conclusion that the use of the term "Specific Bequest" was a technical error which does not reflect the intention of the testator.

Accordingly, it is hereby ordered that the dispositions in the last will and testament of Geraldine Berman abate in the following order: 1) residuary dispositions; 2) general dispositions; [1] through [6] [which abate pro rata]; and 3) the devise of the condominium.

The petition to compel payment of Peter Lipman's bequest is **DENIED AND DISMISSED** because it is undisputed that after the payment of debts and expenses there are no assets in the estate to fund payment of his bequest. The branch of the executor's motion for summary judgment as to that part of the petition which seeks to re-instate the 2006 instrument under the doctrine of dependent relative revocation is **DENIED, AS MOOT** because the entire petition is dismissed.

The executor's motion for summary judgment dismissing the petition is **GRANTED** (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *PFM Packaging Machinery Corp. v ZMY Food Packing, Inc.*, 131 AD3d 1029 [2d Dept 2015]).

Petitioner's cross-motion for summary judgment on the construction is **DENIED**.

Settle order.

Dated: July 26, 2016
Mineola, New York

E N T E R:

_____
HON. MARGARET C. REILLY
Judge of the Surrogate's Court

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