

Matter of Brecher

2017 NY Slip Op 30022(U)

January 11, 2017

Surrogate's Court, New York County

Docket Number: 2016-1971

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

JANUARY 10, 2017

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In the Matter of A Petition by the Executor of the Will of

OSKAR BRECHER,

File No. 2016-1971

Deceased,

for Reformation of Decedent's Will.
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ANDERSON, S.:

In this miscellaneous proceeding, petitioners seek a court order reforming decedent's probated will in order to avoid a New York estate tax that will otherwise be imposed under a New York tax law that was not in effect when the will was executed. The petition is unopposed.

Decedent died on April 17, 2016, leaving an estate valued at approximately eight million dollars. His will, which was executed on July 24, 1989, bequeathed a pecuniary amount to his wife pursuant to a formula (the "Marital Formula") designed to minimize estate taxes by use of the marital deduction when operating in tandem with a credit shelter arrangement. In relevant part, the Marital Formula established the pecuniary amount bequeathed to the wife, under pre-residuary provisions, as

"the minimum amount necessary to provide a federal estate tax marital deduction sufficient to reduce [decedent's] federal estate tax to zero, after taking into account (a) all other interests in property passing to or for the benefit of [decedent's] wife under [his] Will or otherwise than under [his] Will, but only to the extent such interests are included in [his] gross estate for federal estate tax purposes and allowed as a marital deduction and (b) all credits and deductions available in calculating the federal estate tax on [decedent's] estate...."

The residuary was left in trust (the "Credit Shelter Trust") for the benefit of decedent's wife and descendants, with the trustees given broad sprinkling and invasion powers and the remainder

going to or for the benefit of the descendants.

At the time the will was executed, New York limited its estate tax to what was commonly referred to as a “sponge tax,” because it was tied to the amount of the state death tax credit available to an estate as an offset against federal estate tax. As an incident of the relationship between the two tax systems, any New York estate that had no federal estate tax liability would also be free of liability for New York estate tax. It would therefore have been a redundancy if the Marital Formula had expressed an aim, not only to reduce the federal estate tax to zero, but also, to reduce the state estate tax to zero. However, by the time of decedent’s death, the New York estate tax law had changed. The sponge tax was replaced by a tax system that, inter alia, provided for an exclusion amount, but the latter was smaller than the exclusion amount allowed under the federal system. Accordingly, absent modification, the Marital Formula will require a funding of the Credit Shelter Trust in excess of the state estate tax exclusion and, in turn, will result in a significant state estate tax liability. Indeed, the New York “cliff tax” applicable to decedent’s estate¹ will render the estate’s New York estate tax liability particularly substantial, absent the remedy that petitioners now seek.

The reformation proposed by petitioners would alter the Marital Formula by inserting the words “and state estate tax” immediately after the phrase “federal estate tax” and immediately before the phrase “to zero.” The modification would achieve for the estate a savings of more than \$500,000 in state estate tax.

Reformation as a general rule is only sparingly allowed under the precedents (*see*, Ordover and Gibbs, *Correcting Mistakes in Wills and Trusts*, NYLJ, Aug. 6, 1998, at 25, col 3).

¹NY Tax Law 952(c)(2)(B).

Also as a rule, however, the courts have been more liberal in their regard for petitions seeking reformation when that relief is needed to avert tax problems caused by a defective attempt to draft a will provision in accordance with the then tax law or instead caused by a change in law, subsequent to execution of the will, that renders a tax-driven will provision counterproductive (*see id.*). The central question in such a case is whether the clear wording of the subject instrument subverts rather than serves the testator's intent and therefore should be judicially altered (*Matter of Lepore*, 128 Misc 2d 250 [Sur Ct, Kings County]). In resolving that issue, the courts have presumed that testators intend to take full advantage of tax-minimizing possibilities (*see, e.g., Matter of Offerman*, 146 Misc 2d 795 [Sur Ct, Kings County 1990]; *Matter of Kaskel*, 146 Misc 2d 278 [Sur Ct, NY County 1989]; *Matter of Choate*, 141 Misc 2d 489 (Sur Ct, NY County 1988);). To be sure, the presumption does not always override other considerations (*see Matter of Stonehill*, 136 Misc 2d 272 [Sur Ct, Monroe County])[reformation for purposes of tax savings unavailable where beneficiaries objected to request for reform that would alter will's dispositive scheme). But this court agrees with petitioners that the instant case is one in which reformation is warranted in order to protect the testator's intent from being thwarted by a change in the tax law. As is obvious from the will's dispositive provisions, testator's intent to protect his estate from tax erosion was but an aspect of his main intent, *i.e.*, to benefit his wife and their descendants as much as possible. The tax-driven nature of his allocation of benefits among them suggests that he viewed a gift to one as being, in effect, a gift to the others. Even if the descendants' consents to the relief now requested may prove to be, technically, at their own expense -- endorsing as they do the reduction of the Credit Shelter Trust, in favor of the outright bequest to the wife -- those consents indicate that the descendants do not perceive the proposed

remedy to be a threatened injury to them (*compare Matter of Stonehill, supra*). In sum, the dispositive change that a reformation would work here is not the kind that would mandate denial of the petition. Based upon the foregoing, the petition is granted.

Decree signed.

Dated: January 11, 2017

NSA
SURROGATE