Matter of Ledoux
2017 NY Slip Op 30465(U)
March 10, 2017
Surrogate's Court, New York County
Docket Number: 1979-3324/A
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: MARCH 10, 2013

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Proceeding for the Construction of the Will of

JEAN L. LEDOUX,

Deceased.

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DECISION and ORDER

File No.: 1979-3324/A

M E L L A, S. :

This is a proceeding by the trustee of the trust created under Article TENTH of the will of Jean L. Ledoux for construction of the terms of the will to determine the beneficiary of the trust remainder.

Decedent died in 1979. Her will, executed in 1976, and admitted to probate in August 1979, left her residuary estate for the benefit of her two children: Renee Ledoux Sands and Louis Pierre Ledoux ("Louis"), with the share for each held in trust pursuant to respective articles in her will. Here at issue are the terms of the Article TENTH Trust, created for the lifetime benefit of Louis and his wife Joan F. Ledoux ("Joan").

According to the provisions of the Article TENTH Trust, during his life, Louis was to receive net income, as well as so much of the principal as determined by the Trustee, in its absolute discretion. Upon Louis's death, Joan was to receive net income, and certain principal distributions, if requested in writing, and subject to limitations as to the maximum that she could receive, as detailed in Article TENTH.

The provisions for distribution of the trust remainder, read in relevant part as follows:

> "If my son shall survive me, upon the death of the survivor of my said son and his wife, I direct my Trustees to transfer and pay over the principal of the trust to or for the benefit of a class composed of my son's issue in such shares and estates, either outright or in trust, as my said son shall appoint by specific reference in his will to this power."

In default of Louis's exercise of the power of appointment, upon the death of the survivor of Louis and Joan, decedent bequeathed the trust remainder "to the issue of [Louis's] then living or if there shall be no such issue to my issue then living . . . but if my son's daughter, JEANNE NICOLE LEDOUX, is then living, I direct that her share shall be held in trust as hereinafter provided."

Louis and Joan, who both survived decedent, had two children: Jeanne Nicole Ledoux ("Jeanne Nicole") and Louis Andre Ledoux. The latter died in 1994, with no issue. Louis died in 2001, domiciled in Vermont, where his will and first codicil were duly admitted to probate. Article FOURTEENTH of Louis's will, as supplemented by Article THIRD of Louis's first codicil provides in pertinent part as follows:

> "I hereby exercise the power of appointment given to me under Article TENTH of the Last Will and Testament of my late mother, JEAN L. LEDOUX . . . by directing the then Trustees of the trust under said Article TENTH to pay over the then principal of said trust to my daughter, JEANNE NICOLE LEDOUX, outright and free of trust."

Jeanne Nicole died intestate and without issue in 2013, leaving her mother, Joan, as her sole distributee. The Article TENTH Trust terminated when Joan died in 2015, at age 102.

The trustee asks the court to construe the scope of the special testamentary power to appoint that decedent granted Louis. Although taking no position itself, the trustee indicates that the interested parties have adopted opposite views on the question of whether a condition of survival should be imposed as a limitation on the class of appointees in whose favor the donee may appoint. Personal representatives for the estates of Jeanne Nicole and Joan take the position that Jeanne Nicole had an indefeasibly vested remainder interest in the trust property upon Louis's valid exercise by will of his power to appoint in favor of her, which he did "outright and

free of trust." On the other side of this dispute is decedent's sole surviving issue, Renee Sands Tobin ("Renee"), who is the grandchild of decedent's daughter. Renee maintains that Jeanne Nicole's interest in the trust remainder could not have been other than a vested interest subject to defeasance, because Louis's exercise of the power to appoint was limited by an implicit condition of survival, as evidenced by its presence as a condition of many if not all of the other dispositions made throughout decedent's will. Renee asserts that the intent of decedent–as donor of the power to appoint–controls this disposition.

The parties do not appear to dispute that the language of Louis's appointment of the remainder interest to Jeanne Nicole, "outright and free of trust," read in isolation, would create a remainder interest in favor of an ascertained person in being, and such interest vested at a time when Jeanne Nicole was alive – following Louis's death (*see Matter of Walker*, 53 NYS2d 102, 105 [Sur Ct, NY County 1944]; *see also Matter of Kraetzer*, 119 Misc 2d 436, 438 [Sur Ct, Kings County 1983]; *Matter of Hobert*, 7 Misc 3d 447 [Sur Ct, Westchester County 2004]; *Matter of Fink*, NYLJ, Oct. 17, 2016 at 18, col 4 [Sur Ct, NY County]; *Matter of Cruikshank*, 192 Misc 2d 450, 455 [Sur Ct, Kings County 2002] [unless a will uses express words of survivorship of the income beneficiary, as opposed to the decedent, a gift of a remainder interest is not divested by the death of the remainder beneficiary before the income beneficiary dies]; *Matter of Campbell*, 307 NY 29, 34 [1954] [life estate merely suspends remainder beneficiary's enjoyment and does not prevent vesting]; *Matter of Stewart*, 131 NY 274 [1892]). Instead, Renee argues that Louis's appointment must be read in conjunction with decedent's will, including but not limited to the provision granting Louis this limited power to appoint, and that doing so makes clear that decedent's general intent was to provide for relatives surviving the termination of the

Trust. Renee maintains that the power granted to Louis should be construed to be limited to his exercise in favor of those living at the time the remainder becomes payable. As aforementioned, part of the rationale for this conclusion is that the condition of survival is found elsewhere throughout decedent's will, including the provisions relating to the takers in default of Louis's appointing the trust remainder. Additionally, Renee argues that decedent gave Louis the power to appoint to a class comprised of his issue and that it can be inferred from this limitation on the power to appoint that decedent intended that only living issue benefit. Renee then concludes that the trust remainder did not indefeasibly vest in Jeanne Nicole. In further support of this conclusion, Renee argues that decedent's clear intent in her will is to benefit her bloodline and that disposition of the Trust remainder to Jeanne Nicole's estate, which would lead to ultimate distribution in accordance with the terms of Joan's will, brazenly ignores decedent's clear intent.

Certainly, a donee's authority to appoint is limited by the terms of the power granted (*see* EPTL 10-5.1), but only as so expressed by the donor. The question Renee presents for the court is whether decedent intended to limit the persons to whom Louis could appoint the Trust remainder to "a class composed of [Louis's] issue in such shares and estates, either outright or in trust" *as are living at the termination of the Trust.*

"The purpose of a will construction proceeding is to ascertain and give effect to the testator's intent" (*Matter of Levitan*, 134 AD3d 716, 717 [2d Dept 2015] [citations omitted] [determining that the takers-in-default of decedent's surviving spouse's exercise of her testamentary power to appoint her trust remainder held a vested remainder subject to complete divestment if power to appoint exercised]), 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]).

Here, neither the appointive language in Louis's will nor the donative language in decedent's will expressly provides a condition of survival. It would be contrary to the plain donative language, which provides Louis with an exclusive testamentary power to appoint to a "class composed of [his] issue in such shares and estates, either outright or in trust," to impose an additional limitation that he can appoint only to those surviving at the termination of Joan's life estate.

The cases cited by Renee in support of her position are inapposite. The operative language sought to be construed in both *Matter of Larkin* (9 NY2d 88 [1961]) and *Matter of Gulbenkian* (9 NY2d 363 [1961]) is materially distinct from the donative language of decedent's will here at issue.[1] In *Matter of Larkin*, the decedent made various bequests to his sons, certain ones as absolute gifts and another, under article Third, as remainders of a trust for the lifetime benefit of the decedent's wife. Article Eleventh of the decedent's will then provided that "[i]n the event that any of my said sons should die leaving descendants, said descendants shall take the share of any such deceased son, per stirpes . . . " (9 NY2d at 91).

Similarly, in *Matter of Gulbenkian*, the Court of Appeals was asked to determine whether language following a bequest of a remainder interest was surplusage or a substitutionary gift conditioned upon the death of the remainder beneficiary (9 NY2d at 368). While finding that, absent language suggesting a contrary intent, words of survivorship do not refer to the time of

[1]A final case cited by Renee, *Matter of Leo* (20 AD2d 807 [2d Dept 1964]), relies on *Matter of Larkin* and *Matter of Gulbenkian* without making clear the basis for the analogy, or describing the relevant dispositional language in the will.

testator's death when the first devisee or legatee takes a life estate (*id.* at 369), the Court, upon a reading of decedent's will in its entirety, concluded that the testator's failure to use words commonly understood to create an indefeasible gift, and which he knew would do so, as demonstrated by his use of such words elsewhere in his will, made it "clear and decisive" that testator intended the trust remainder to be subject to the condition of survival to the time of trust termination (*id.* at 371). Such precedent supports this court's determination that inferring a condition of survival as a limitation on Louis's power to appoint is unwarranted.

The terms of the Article NINTH Trust, created for the benefit of decedent's daughter, as well as the default disposition of the remainder of the Article TENTH Trust, clearly demonstrate that decedent was able to condition a remainder interest on survival when she so intended. Such survival condition is conspicuously missing, however, from the special, exclusive testamentary power to appoint that decedent granted her son Louis under Article TENTH and there is no basis for inferring it here (*see Matter of Lukenbach*, 122 AD2d 54, 55 [2d Dept 1986]; *see also Matter of Monroe*, NYLJ, Mar. 12, 1990, at 25 [Sur Ct, NY County] ["[I]t is another rule of construction that: 'When a testator in one part of his will demonstrates his ability to make a certain variety of gift by apt terms, the use of a different mode of expression in another direction raises the inference that he had a diverse disposition in mind'" [citation omitted]]; *Matter of Lockwood*, 127 AD2d 973, 974 [4th Dept 1987] [defeasance of vested interests disfavored except where the will contains an express defeasance or substitutionary clause]).

Accordingly, the trustee of the Article TENTH Trust is directed to pay the remainder to the estate of Jeanne Nicole Ledoux.

This decision constitutes the order of the court. Clerk to notify.

Dated: March 10, 2017

SURROGATE