

Matter of Walder
2017 NY Slip Op 31161(U)
June 1, 2017
Surrogate's Court, New York County
Docket Number: 2013-467/G
Judge: Nora S. Anderson
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

Date: June 1, 2017

SURROGATE'S COURT : NEW YORK COUNTY

-----X

Petition to Enforce a Partial Stipulation
of Settlement in the Estate of

File No. 2013-467/G

HELENE WALDER,

Deceased.

-----X

Probate Proceeding, Will of

File No. 2013-467/A,B

HELENE WALDER,

Deceased.

-----X

Petition to Remove a Fiduciary and Grant
Temporary Administration in the Estate of

File No. 2013-467/D,E

HELENE WALDER,

Deceased.

-----X

A N D E R S O N , S .

Helene Walder died on November 17, 2012, survived by two adult daughters, Barbara and Nancy Walder. An instrument dated October 26, 2006, has been offered for probate. Other than a small cash bequest to a friend, decedent left her estate, valued at about \$800,000, in two equal shares; one-half to Barbara outright and one-half in a Supplemental Needs Trust for Nancy's lifetime benefit, remainder to Barbara, or, if Barbara predeceased, to a charity. The propounded instrument sets out a scheme for the distribution of tangible personal property in the event that the daughters cannot agree on its division.

Although both daughters agree that the will should be

admitted to probate, they have had a prolonged and bitter dispute over who should serve as fiduciaries. Decedent did not name either daughter as executor in her will. Instead, she nominated a friend to serve in the first instance and a niece as alternate or successor executor. Both have declined to serve. With respect to the trust for Nancy's benefit, decedent named Barbara and decedent's niece to serve as co-trustees, alternatively allowing the niece, but not Barbara, to serve alone. If the niece did not serve (and she has declined to do so in this role as well), the will permits Barbara to select an independent co-trustee. A further provision allows sitting fiduciaries to name successor fiduciaries (other than Nancy). In the event that there is a vacancy in the office of trustee, the beneficiary of a trust (i.e., Nancy), if she is not under a disability, or an accounting firm, if she is under a disability, may designate an independent trustee.

Barbara filed a petition for probate and Nancy filed a cross-petition, each seeking to probate the will and be appointed administrator c.t.a. Barbara also seeks to be appointed sole trustee of the trust for Nancy's benefit. Barbara has also petitioned for revocation of temporary letters of administration issued to Nancy on the latter's emergency ex parte application. She opposes Nancy's petition to enforce a written settlement agreement regarding the appointment of an administrator c.t.a.

which Barbara subsequently disavowed.

Nancy's petition to enforce settlement agreement. The petition to enforce a settlement agreement disposes of much of the pending litigation.

The court held several lengthy conferences with the parties and their counsel in an effort to facilitate an agreement concerning the appointment of fiduciaries for the estate and for the trust benefiting Nancy. After Barbara engaged her third attorney, Steven Kay, Esq., the parties discussed his serving as administrator c.t.a. The discussion of selection of a trustee for the trust for Nancy's benefit was much more contentious. On several occasions, the parties appeared to be close to agreement on the naming of fiduciaries. On at least two occasions, it appeared that an agreement had been reached but Barbara was unwilling to sign a written agreement in court. Ultimately, she declined to sign, apparently realizing that her signature on a written settlement agreement would be binding. At a final conference held on July 1, 2015, the parties agreed, on the suggestion of the court attorney, to address only the issue of whether they could agree to designate an administrator c.t.a., which would allow the estate to be administered, and leave for another day the appointment of a trustee or trustees. After lengthy discussions between Barbara and her attorney, both alone and with the court attorney, and Nancy with her attorney, and the

parties together with their attorneys and the court attorney, Barbara and Nancy agreed to designate Mr. Kay as administrator c.t.a. with certain stipulations regarding his conduct as such. A handwritten agreement entitled "Partial Stipulation of Settlement" ("Stipulation") was drafted, and signed by the parties and their attorneys, at the court.

In the Stipulation, Barbara and Nancy designated Steven Kay to be appointed as administrator c.t.a. to serve without commission (§5A), and agreed to sign any documentation required by the court to achieve his appointment (§ 5C). Mr. Kay agreed to inform Nancy's attorney of his actions as estate fiduciary (§ 5B), and to cap his firm's legal fees at \$10,000 for non-litigation work (§ 5E). The Stipulation further provides that tangible personal property be distributed in the manner set forth in the will (§ 5D), and that, as administrator c.t.a., Mr. Kay will satisfy appropriate debts and administration expenses of the estate (§ 5F) and hold the remainder of the estate funds in escrow until further determination by the court (§ 5G).

Shortly after signing the Stipulation, Barbara repudiated the agreement. She refused to sign a waiver and consent to a probate petition prepared by Mr. Kay in accord with §5C, and she informed him that she would contest his application. She expressed to him that she had changed her mind because of her concern that if a disagreement arose between her and him as her

counsel as to his conduct as administrator c.t.a., he would have a conflict of interest. She asked him not to pursue the fiduciary role. Mr. Kay did not file the probate petition, but he has advised the court that he is willing to abide by the terms of the Stipulation and to serve as administrator c.t.a. The court granted his motion to be relieved as Barbara's counsel. Nancy's petition to enforce the Stipulation followed.

Barbara responded to Nancy's petition through new counsel, who has also been allowed to withdraw. She asserted that she was unaware that she was agreeing to Mr. Kay's appointment as administrator c.t.a. and thought that the Stipulation only covered the question of distribution of her mother's tangible assets. There were several hours of discussion immediately before the Stipulation was signed, much of it in the presence of a court attorney, as to whether Barbara would agree to the appointment of Mr. Kay as administrator c.t.a. Barbara actively participated in the discussion and ultimately signed the Stipulation. Under these circumstances, her claim that she did not understand the effect of the Stipulation is plainly incredible.

It is well-settled that "[s]tipulations of settlement are favored by the courts and not lightly cast aside" (*Hallock v State*, 64 NY2 224, 230 [1984]). Settlements serve the interests of courts in furthering judicial efficiency and the interests of

parties in avoiding costly litigation with uncertain outcomes. These policy objectives are advanced "only if settlements are routinely enforced rather than becoming the gateways to litigation" (*Denberg v Parker Chapin Flattau & Klimpl*, 82 NY2d 375, 383 [1993]). Such agreements are essentially contracts, and enforcement proceedings accordingly adhere to principles of contract law. Absent a showing of fraud, collusion, mistake or accident, a stipulation of settlement must be upheld (*Matter of Slaughter*, 206 AD2d 537 [2d Dept 1994]). As the Stipulation is clear and unambiguous, the court must, absent extraordinary circumstances, enforce it according to its terms (*Rebell v Trask*, 220 AD2d 594, 596-97 [2d Dept. 1995]). No such extraordinary circumstances are presented here.

Accordingly, the petition to enforce the Stipulation is granted. Mr. Kay is directed to file his cross-petition for probate and appointment as administrator c.t.a.. The Stipulation, which has been filed with the court, is sufficient proof that the interested parties have designated him to serve.

Other petitions rendered moot by this decision. This determination that the Stipulation is valid renders moot cross-petitions by Barbara and Nancy, each seeking her own appointment as administrator c.t.a., as well as Barbara's petition to revoke Nancy's temporary letters of administration. Those letters will be revoked automatically upon Mr. Kay's appointment.

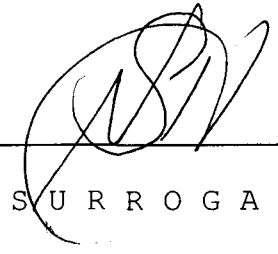
Remaining unresolved issue. This decision leaves unresolved the matter of appointment of a trustee for Nancy's trust. In petitioning for probate, Barbara failed to check a box on the first page of the petition indicating that she was requesting letters of trusteeship, but at a later point, in the wherefore clause, she asked to be appointed as sole trustee as well as executor. In response to Nancy's petition to enforce the settlement, Barbara asks the court to excuse her inadvertent pleading error and consider her application to be appointed as trustee. However, as noted above, decedent's will specifically prohibits Barbara from serving alone as trustee. Thus, even if the court were to consider Barbara's application for letters of trusteeship to be correct, the application itself must be denied as it is in direct contravention of the testator's wishes. No other application for appointment of trustees is before the court. Appointment of a trustee or trustees thus must await further application for an appointment which accords with the testator's wishes as expressed in the will.

Any questions of legal fees or sanctions raised in the above-captioned proceedings are deferred until a final accounting. In addition, a pending application by one of Barbara's former attorneys to fix his firm's legal fee and direct that it be paid from the estate is not addressed in this decision in view of other unsettled estate issues which might have an

impact on any award of legal fees.

This decision constitutes the order of the court.

Dated: June 14, 2017



A handwritten signature in black ink, consisting of several overlapping loops and strokes, positioned above a horizontal line.

SURROGATE