

Matter of Weisner

2017 NY Slip Op 31496(U)

July 12, 2017

Surrogate's Court, New York County

Docket Number: 1991-3783/J

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

July 12, 2017

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Petition of Harrison J. Weisner to Construe Article
ELEVENTH of the Will of

SIDNEY WEISNER,

DECISION

File No.: 1991-3783/J

Deceased,

and for the Appointment of Petitioner as Successor
Co-Trustee of the Trust under Article NINTH (II) (A) (1)
of the Will for His Primary Benefit.
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M E L L A, S.:

In determining three motions for partial summary determination — regarding the construction of Article ELEVENTH of the will of Sidney Weisner — the court considered the following submissions:

Papers:

Date Filed:

- | | |
|---|-------------------|
| 1. Notice of Motion | February 15, 2017 |
| 2. Affirmation of John R. Morken, Esq., in Support | February 15, 2017 |
| 3. Memorandum of Law in Support | February 15, 2017 |
| 4. Notice of Cross-Motion filed by Jessica Fieber | March 6, 2017 |
| 5. Affirmation of Alfreida B. Kenny, Esq., in Support of
Jessica Fieber's Cross-Motion | March 6, 2017 |
| 6. Jessica Feiber's Memorandum of Law
in Opposition to Petitioner's Motion | March 6, 2017 |
| 7. Notice of Cross-Motion filed by Trustee
Melvin Ginsberg | March 7, 2017 |
| 8. Memorandum of Law in Support of
Trustee Melvin Ginsberg's Cross-Motion | |
| 9. Affirmation of John R. Morken, Esq., in Further Support
of Petitioner's Motion | March 17, 2017 |

Harrison J. Weisner, primary beneficiary of a trust under Article NINTH (II) (A) (1) of the will of his father, Sidney Weisner, has petitioned for two prongs of relief: (1) a construction of the first paragraph of Article ELEVENTH of the will which governs, inter alia, the nomination of successor co-trustees (*see* SCPA 1420) and (2) his appointment as successor co-trustee.

Petitioner has moved for summary determination as to only the first prong. He contends that his father nominated him to succeed Murray T. Koven as co-trustee. By contrast, his sister, Jessica Fieber, presumptive remainder beneficiary of the trust, and Melvin Ginsberg, sole acting trustee of the trust, have each cross-moved for summary determination that Koven had authority to nominate his successor.

The instant construction proceeding was prompted by the petition of co-trustees Koven and Ginsberg for leave for Koven to resign, as of December 31, 2016, and for the appointment of Koven's designee, Bank of America, N.A. (successor to United States Trust Company), as successor co-trustee.¹ The parties to that proceeding filed a stipulation on October 24, 2016, in which they consented to Koven's resignation and agreed that, pending a determination of the instant construction proceeding, Ginsberg would serve as sole trustee, but that, "the Order revoking Murray T. Koven's Letters of Trusteeship shall not result in the operation of the provision of Article Eleventh requiring the nomination and appointment of Harrison J. Weisner if Melvin Ginsberg is 'the only acting . . . trustee.'" On December 29, 2016, the court granted Koven leave to resign and revoked his letters of trusteeship as of December 31, 2016. Koven died on February 23, 2017.

The first paragraph of Article ELEVENTH of the will reads:

"I nominate, constitute and appoint my friend and my attorney ARTHUR LUBELL and my friend MELVIN GINSBERG as executors of this my Last Will and Testament and ARTHUR LUBELL and MELVIN GINSBERG as trustees of all of the trusts herein created. If Arthur Lubell shall fail to qualify as executor and/or trustee, or having qualified, shall for any reason fail to continue to act as

¹ In the original petition, Koven designated Bradley R. Harris to succeed him as co-trustee; however, in an amended petition, Koven designated Bank of America, N.A., as successor co-trustee.

such, then I nominate, constitute and appoint MURRAY T. KOVEN as substitute or successor executor and/or trustee in his place and stead. In the event either or both shall for anyreason [sic] fail to qualify or act then they or either of them may appoint a successor executor and/or trustee. If Melvin Ginsberg shall fail to qualify as executor and/or trustee, or having qualified, shall for any reason fail to continue to act as such, then I direct that either ARTHUR LUBELL or MURRAY T. KOVEN may appoint a substitute or successor executor and/or trustee in his place and stead. In the event that ARTHUR LUBELL or MURRAY T. KOVEN or MELVIN GINSBERG shall be the only acting executor or trustee at any time, then and in that event, I nominate, constitute and appoint my son HARRISON WEISNER as co-executor and/or co-trustee to act in conjunction with the remaining executor and/or trustee and in the event there is none then he shall act with the UNITED STATES TRUST COMPANY OF NEW YORK." (Emphasis in original.)

The dispute arises from the clumsy drafting of the third sentence. The antecedents of the pronoun "either," as the word is first used in the third sentence, are Lubell and Koven, the individuals referred to in the preceding sentence. Petitioner asks the court to construe the last portion of the third sentence — "shall for anyreason [sic] fail to qualify or act then they or either of them may appoint a successor executor and/or trustee" — as authorizing Koven to nominate a successor co-trustee only if Koven were to fail to qualify and thus were never to act as a co-trustee. To adopt such construction, however, would be: (1) to deprive Koven, after twelve years of service as a co-trustee, of the authority to nominate his successor but to leave him with the authority to nominate a co-trustee had he been ineligible to qualify as a co-trustee in the first instance; and (2) inconsistent with the clear grant of authority to Koven (in the fourth sentence) to nominate Ginsberg's successor. In the fifth sentence — the only sentence in which petitioner's name appears — petitioner is nominated to serve as successor co-trustee only in the event that Lubell, Koven, or Ginsberg were the sole acting trustee or if there were no trustee, conditions which, by virtue of the agreement reached by the parties, do not exist now and did not


exist at the time co-trustees Koven and Ginsberg filed their petition for leave for Koven to resign.

The principles of will construction are of long standing. The testator's intent is "our absolute guide" (*Williams v Jones*, 166 NY 522, 532 [1901]; see *Matter of Bieley*, 91 NY2d 520, 525 [1998]). That intent "must be gleaned not from a single word or phrase but from a sympathetic reading of the will as an entirety" (*Matter of Fabbri*, 2 NY2d 236, 240 [1957]). The Court of Appeals has further explained: "If we can see that the inapt, or careless, use of language by the testator has created the difficulty in ascertaining his intention, but, nevertheless, feel certain as to what he meant, . . . we may subordinate the language to that meaning" (*Matter of Miner*, 146 NY 121, 130 - 131 [1895]).

Here, a sympathetic reading of the text reveals a clear intent on the part of the testator to authorize co-trustee Koven to nominate his successor. Accordingly, petitioner's motion for partial summary determination is denied, each of the cross-motions for partial summary determination is granted, and the balance of the petition — a request for the appointment of petitioner as successor co-trustee — is also denied.

This decision constitutes the order of the court.

Dated: July 12, 2017


S U R R O G A T E