

Matter of Ikenson

2017 NY Slip Op 31647(U)

June 30, 2017

Surrogate's Court, Nassau County

Docket Number: 2014-380584/F

Judge: Margaret C. Reilly

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**SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

**In the Matter of the Construction of the Last Will
and Testament of**

DECISION & ORDER

MARTIN IKENSON,

**File No. 2014-380584/F
Dec. No. 32962**

Deceased.

PRESENT: HON. MARGARET C. REILLY

The following papers have been considered in the preparation of this decision:

Petition.	1
Last Will and Testament	2

This is a petition for the construction of a last will and testament, brought by Maxine Vogel, the trust beneficiary.

The last will and testament of Martin Ikenson was admitted to probate by a decree of this court dated August 26, 2015. Letters of trusteeship issued to Robert Brady, Esq.

Article “SEVENTH” of the will provides in pertinent part:

“I give, devise and bequeath all the rest, residue and remainder of my property and estate, both real and personal, of whatever kind and wherever located, that I own or to which I shall be in any manner entitled at the time of my death (collectively referred to as my “residuary estate”), as follows:

(a) To my Trustee hereinafter named, **IN TRUST**, to hold the same in a separate trust, for the benefit of my friend, **MAXINE VOGEL**, to manage, invest and reinvest the same, and to dispose of the net income therefrom and principal thereof, as follows:

(b) Upon the death of my friend, **MAXINE VOGEL**, the principal of this trust at that time remaining, shall be paid over and distributed

in equal shares to the following five charities, to be used for their general operating purposes:

1. Ohr Torah Stone Institute
49 West 45th Street, Suite 701,
New York, NY;
2. American Committee for Shaare Zedek Hospital
55 West 39th Street - 4th Floor
New York, NY 10018;
3. Chai Lifeline
151 West 30th Street - 3rd Floor
New York, NY 10001;
4. American Friends of Landiado Hospital
261 West 35th Street - Suite 803
New York, NY 10001; and
5. American Friends of Yeshivat Kerem B'Yavneh
1481 Avenue N - Suite 1
Brooklyn, NY 11230.”

Petitioner Maxine Vogel seeks a determination as to the construction and effect of Article “SEVENTH” and as to the standard for distribution of the Article “SEVENTH” trust. Her position is that the testator intended that she receive all of the “net income” from the trust and that invasion of principal for her benefit is in the discretion of the trustee.

The general rule of construction is that the intention of the testator is to be discerned within the four corners of the will (*Matter of Fabbri*, 2 NY2d 236 [1957]) from a reading of the document as a whole (*Matter of Thall*, 18 NY2d 186 [1966]). Extrinsic evidence is inadmissible to vary or contradict an unambiguous provision in a will (*Matter of Walker*, 64

NY2d 354 [1985]; *Matter of Cord*, 58 NY2d 539 [1983]) but extrinsic evidence may be admissible to clarify an ambiguity (*Matter of Phillips*, 101 AD3d 1706 [4th Dept 2012]).

Here, the court finds no ambiguity but rather the omission of a provision. The instrument: 1) clearly expresses an intention to create a trust for the benefit of Maxine Vogel; 2) defines the duration of her interest; and 3) identifies the charitable remaindermen. The instrument omits a direction as to the payment of income and invasion/distribution of principal during her lifetime.

It appears that the testator gave instructions as to administration of the trust during the lifetime of Maxine Vogel and the instructions were deleted from the text. The reference to the “net income” Article “SEVENTH” subdivision (a), can only apply to the payment of income during the lifetime of Maxine Vogel. Therefore, it is logical to conclude that there is a typographical error in the instrument, resulting in the omission of a sentence directing the payment of income and with it the standard for the invasion of principal.

On a construction, where there is a typographical error, the court can make a correction consistent with a testamentary plan ascertained from the will (*Matter of Herceg*, 193 Misc 2d 201 [Sur Ct, Broome County 2002]; *Matter of Dorson*, 22 Misc 2d 945 [Sur Ct, New York County 1959]).

Here, the court cannot speculate as to the directions given by the testator as to the distribution of trust assets during the lifetime of Maxine Vogel. In limited circumstances, the court may receive extrinsic evidence to ascertain the intent of the testator at a hearing (*Matter of Schaffner*, 162 AD2d 972 [4th Dept 1990]) or in the form of an affidavit of the

attorney draftsman (*Matter of Bordewick*, 64 AD2d 183 [3rd Dept 1978]), *Matter of Herceg*, 93 Misc 2d 201 [Sur Ct, Broome County 2002]).

Robert A. Brady, Esq., the attorney-draftsman, is directed to file an affidavit as to any information he has regarding the intention of the testator, within 30 days of receipt of this decision/order.

This is the decision and order of the court admission of extrinsic evidence.

Dated: June 30, 2017
Mineola, New York

E N T E R:

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Judge of the Surrogate's Court

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