Matter of Low (Lintz)
2017 NY Slip Op 32286(U)
October 26, 2017
Surrogate's Court, New York County
Docket Number: 2002-2156/C/D
Judge: Rita M. Mella

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
----------X

Proceeding Commenced by Alan Lintz, as Executor of the Estate of Babette Low, for Construction of the Will of

ARTHUR J. LOW,

Deceased,

in Relation to the Trust Established Thereunder and to Compel the Trustee to Deliver the Trust Remainder to Him.
----------X

DECISION
File No.: 2002-2156/C/D

M E L L A, S. :

At the call of the calendar on September 19, 2017, the court granted this contested petition to construe the will of Arthur Low and to compel distribution of the remainder of his now-terminated credit shelter trust (the "trust") in accordance with Petitioner's reading of the testamentary provisions in question.[1] Petitioner, the surviving husband of testator's daughter, Babette, proposes that those provisions require the trustee to distribute the remainder, including accumulated income, to him as executor of Babette's estate. Among the respondents are the two children of testator's son,[2] and they maintain that they instead are the intended remainder beneficiaries.

---

[1] In open court, counsel for the parties stipulated to the court's deciding the issues raised by the pleadings on the basis of the papers submitted.

[2] The trustee in office at the time the proceeding was commenced and the then- prospective successor trustee (who is currently in office) are also among the respondents. Neither, however, had standing to take a position as to the proper disposition of the remainder, the fiduciary of the trust being in essence a mere stakeholder (*see Isham v NY Assn. for Improving Condition of Poor*, 177 NY 218, 222 [1904]; *Matter of O'Connor*, 72 Misc 2d 490, 492 [Sur Ct, NY County 1973]).

Testator died in 2001, survived by his wife, Marjorie, the son,[3] and Babette. Babette died in 2014, and Marjorie died in 2016.

The trust was established under Article FOURTH of the will pursuant to testator's direction that a formula-based pecuniary amount be held in trust if Marjorie survived him and that the trust be maintained for the benefit of Marjorie and Babette until Marjorie's death. Under subdivision (C) of Article FOURTH, testator provided that, upon Marjorie's death, the then remainder was to be distributed "in accordance with the provisions hereinafter set forth in Article SIXTH, if I am survived by my daughter, BABETTE." By the same subdivision, testator further provided that the remainder was to be distributed in accordance with Article SEVENTH "if I am not survived by BABETTE."

Under Article SIXTH, testator provided that, "Upon the death of my wife, MARJORIE, if my daughter, BABETTE, survives me, I give ... [the trust remainder] or my residuary estate, as the case may be, to my daughter BABETTE."

The issue in this proceeding arises because Babette, although surviving testator, did not also survive Marjorie and thus did not live to enjoy the remainder. Testators' grandchildren contend that under such circumstance testator had to have intended that his grandchildren receive the remainder pursuant to Article SEVENTH of the will, the terms of which leave the remainder to them at the trust's termination "if my . . . wife shall survive me and she is not survived by my daughter, BABETTE. In other words, the grandchildren argue that Babette's remainder interest did not vest upon testator's death, but rather, was conditioned upon her survival of Marjorie.

---

[3] Article THIRD(F) of the will acknowledged that the son and grandchildren were receiving benefits under the instrument only to a "limited extent," testator explaining that he and Marjorie had already made ample provision for the son by other means and that the son had "substantial resources to provide for his children," *i.e.,* two of the respondents in this proceeding.

It is in view of Article SEVENTH that the grandchildren ask the court to conclude that Article SIXTH's seemingly clear phrase "if I am survived by my daughter, BABETTE" is actually ambiguous, an ambiguity that they contend arises from an inconsistency between Articles SIXTH and SEVENTH. The proposed ambiguity, the grandchildren argue, allows resort to extrinsic evidence and canons of construction, and such tools, they further argue, point to a construction of the will in their favor.

The grandchildren's position, however, rests upon a flawed logic. That is so in light of the provision of Article FOURTH quoted above, the meaning of which is inarguably plain. As previously noted, testator provided under subdivision (C) of Article FOURTH that the trust remainder at Marjorie's death was to be distributed "in accordance with the provisions hereinafter set forth in Article SIXTH, if I am survived by my daughter, BABETTE." Since Babette did survive testator, only Article SIXTH applies to the disposition of the remainder, and Article SEVENTH is in effect silent. In other words, the inconsistency to which the grandchildren point is nonexistent, the will now calling for disposition of the remainder only by reference to the provisions of Article SIXTH.

Given the foregoing, the court concludes that the provisions in question mean what they clearly state. Accordingly, the court cannot accept the grandchildren's invitation to consider extrinsic evidence (*see Matter of Cord*, 58 NY2d 539, 544 [1983]). To be sure, seemingly clear terms can prove to be ambiguous. That is so in the relatively rare circumstance in which extrinsic evidence itself reveals a latent ambiguity (*see, e.g., Baumann v Steingester*, 213 NY 328 [1915]). But this is not such as case, as the grandchildren appear to concede. Nor is this the even rarer type of case in which clear terms – or even a clear signature – may be viewable only as a product of mistake, calling for a reformation that expresses the testator's actual intent (*see Matter of Snide*, 52 NY2d 193 [1981]). There was nothing nonsensical in testator's choice to

vest the remainder in Babette at his death for the benefit of her successors-in-interest (whether the latter were objects of her bounty under her own will or her own next of kin), rather than in his son's children (for whom, as testator noted, he believed more than adequate resources would be available through the son). In sum, there is no reason to believe that testator's choice of words could not have expressed his considered purpose.

The plain meaning of the provisions at issue also obliges the court to ignore the canons of construction invoked by the grandchildren. Canons have no bearing where, as here, testamentary intent has been clearly stated. Where a particular testator has made his meaning plain, it is not for a court to attempt to normalize his provisions by rewriting them to express what people generally might intend.[4]

Finally, the court denied the son's application for distribution of the trust's accumulated income to him as fiduciary of Marjorie's estate. Under the express provisions of subdivisions (B) and (C) of Article FOURTH, distributions of income were discretionary, and accumulated income was to be added to principal and thus distributed as part of the remainder.

Decree signed.

Dated: October 26, 2017

SURROGATE

[4] As for the grandchildren's theory that Babette herself had conceded their right to the remainder, it need not detain us long. True enough, Babette's petition for probate of testator's will had listed the grandchildren as "contingent beneficiaries." As it happened, the petition form required that all surviving persons named in the will as beneficiaries be listed in the petition. It was therefore not for Babette to omit the grandchildren from such a list. Moreover, even if Babette had anticipated that the vesting of her interest in the remainder might ultimately be challenged by the grandchildren, it was also not for her to presume to be the arbiter of the outcome of such a contest.