

Matter of Corbin (Jacobs)

2017 NY Slip Op 32287(U)

October 27, 2017

Surrogate's Court, New York County

Docket Number: 2015-4795/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

October 27, 2017

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In the Matter of the Application of Irwin Jacobs to Compel
Payment of a Bequest Pursuant to SCPA 2102 in the Estate of

SOL NEIL CORBIN,

Deceased.

DECISION and ORDER

File No. : 2015-4795/A

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M E L L A, S. :

This is a contested application pursuant to SCPA 2102 (4) to compel the executor of the will of Sol Neil Corbin (decedent) to pay a \$100,000 bequest to a 92-year-old legatee. Petitioner also requests interest from the date the court determines the bequest should have been paid, and attorneys' fees that he incurred to bring this proceeding. After being given opportunity to submit briefs and affidavits, the parties have consented to have the court determine the petition based on the papers.

Decedent died in January 2015 with a probate estate valued in excess of \$6 million. His will was admitted to probate and letters testamentary issued to his son, respondent David Corbin, on March 21, 2016. David receives the entire estate except the \$100,000 bequest that petitioner, who is decedent's brother-in-law, seeks to collect here.¹

It is within the court's discretion to compel payment of a legacy before a fiduciary has accounted (*Matter of Liebowitz*, NYLJ, July 19, 1991, at 28, col 2 [Sur Ct, Kings County]; *Matter of Cain*, NYLJ, Jan. 16, 2014, at 25, col 2 [Sur Ct, NY County]). In exercising its discretion, the court has considered and rejects each of the numerous defenses respondent has raised to justify his failure and refusal to pay the legacy.

¹ David is also the beneficiary of all of decedent's non-probate assets, having a gross value of approximately \$1.7 million.

According to figures used on the estate tax returns, decedent's residuary estate has more than sufficient assets to satisfy estate obligations without contribution from petitioner's specific legacy. Respondent had argued that, if taxes were increased on audit, the bequest would be vulnerable to abatement. Now that the returns have been accepted as filed and the tax issue is moot, respondent continues to argue that additional administration expenses incurred after the tax filings will exhaust the residuary estate. He does not support these conclusory allegations, however, with sworn statements, itemization, or details of any kind. These bald assertions do not justify his failure to make even a partial payment of the bequest (*cf. Matter of Ehmer*, 272 AD2d 542, 543 [2d Dept 2000] [accounting fiduciary's speculation that "certain unspecified, potential tax liabilities may consume the assets of the estate" held insufficient to defeat application to compel payment of a legacy]).

Nor does the court find merit in respondent's assertion that the will authorizes him to use his own discretion for the timing of the payment of bequests. He cites Article NINE (A) (21), which grants the executor the power:

"To pay all bequests herein, and to make distribution in whole or in part as soon as may be practicable; provided that no bequest shall be discounted if paid within the time required by law[.]"

The court interprets this provision as permitting the executor to pay bequests *before* expiration of the seven-month periods after which interest accrues (EPTL 11-1.5 [a] and 11-A-2.1 [3]), without liability to persons who would otherwise be entitled to income on the property during these periods.² The provision is not a license for the executor to delay the payment indefinitely.

² For a discussion of this issue illustrating the purpose of such a clause, see Colleen F. Carew et al., *New York Estates: Probate Administration and Litigation* § 14:7 at 1038 (Harris 6th ed 2016) ("If circumstances warrant early payment, the executor should consider obtaining the

Respondent also argues that petitioner was responsible for the delay in probating decedent's will and therefore should be equitably estopped from receiving his bequest. This allegation arises from petitioner's refusal to sign a second renunciation of his right to serve as executor when respondent's former attorney could not locate the first instrument. Petitioner was under no obligation, however, to execute a written renunciation of his right to serve, let alone do it twice. Nor is the court aware of any authority that requires a legatee to forfeit a bequest for such behavior.

Each party has requested that the other pay a portion of his attorneys' fees. Both of these requests are denied. Petitioner's counsel has not brought additional assets into the estate, nor is there any other basis to depart from the general rule that a beneficiary must pay his or her own attorneys' fees (*see Matter of Wallace*, 68 AD3d 679 [1st Dept 2009]). Respondent's counsel asserts that petitioner's bequest should be offset by the "substantial" legal fees the estate incurred in connection with the dispute over the renunciation document. It was not necessary, however, for the executor to incur "substantial" fees, if any, over this dispute. He could simply have cited petitioner in the probate proceeding and alleged petitioner's unwillingness to serve.

Lastly, the court is mindful of decisions that have held requests for payment of a legacy in abeyance until administration and other expenses are fixed in an accounting proceeding, including *Matter of Cain, supra* (NYLJ, Jan. 16, 2014, at 25, col 2 [Sur Ct, NY County]) and *Matter of Polacco* (NYLJ, Apr. 25, 1995, at 32, col 5 [Sur Ct, Nassau County]). The present case is distinguishable from *Cain* and *Polacco* in at least one critical respect. In both matters, an

consent of income beneficiaries who will be adversely affected, and/or on having the legatee who is paid early take a discounted amount").

accounting proceeding was either underway or had been compelled. A formal accounting proceeding here, however, would not likely be in the estate's best interests because of the attendant cost and further delay. This is so despite the fact that petitioner has raised questions about the validity of certain administration expenses claimed on the estate tax returns, since he would have no standing to object to these expenses if he receives his full bequest. In that case, respondent would be accounting only to himself, a useless exercise. Worse, the very act of accounting formally could generate expenses that would exceed the amount available to pay the bequest.

The parties have already demonstrated a penchant for unnecessary litigation by arguing extensively over matters that have no relevance to this application, including whether petitioner received a proper (or any) notice of probate; whether petitioner tried to mislead the court by submitting an inaccurate copy of the notice of probate; whether petitioner decided not to serve as executor as an accommodation to respondent or instead for his own personal reasons; and whether respondent tried to prevent petitioner from learning the identity of his attorney. In all the circumstances, it does not appear that a formal accounting would be practical at this juncture. Should any shortfall occur in the amount ultimately distributable to petitioner in respect of his legacy, the court finds that respondent will be adequately protected by a refunding agreement.³

Accordingly, in the exercise of its discretion, the court orders respondent to pay petitioner his \$100,000 bequest within 30 days of the date of this decision, subject to a refunding

³ The court notes that the executor has been given ample opportunity to show that some part of petitioner's legacy must be reduced to cover specific administration expenses, but he has failed to do so. The court further notes that petitioner's bequest would be charged with only one-half of any shortfall, because respondent receives an equal bequest that would be responsible for the other half.

[* 5]
agreement. The bequest shall be paid with interest calculated with reference to the target federal funds rate as provided in EPTL 11-A-2.1 (3), from May 26, 2017, the date of filing of respondent's formal appearance, to the date of payment.

This decision constitutes the order of the court.

Clerk to notify.

Dated: October 27, 2017



SURROGATE