Matter of Bernstein
2018 NY Slip Op 30847(U)
May 7, 2018
Surrogate's Court, New York County
Docket Number: 2013-2297/D
Judge: Nora S. Anderson

SURROGATE'S COURT : NEW YORK COUNTY
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Proceeding for Reformation of Indenture of Trust Dated April 3, 2012, Created by

DEBORAH L. BERNSTEIN,

Grantor.
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File No. 2013-2297/D

A N D E R S O N, S.

This is a contested proceeding to reform an inter vivos insurance trust created by Deborah Bernstein ("Grantor"). The mother of Grantor, who is now deceased, seeks to reform the Deborah Bernstein Irrevocable Family Trust (the "Trust") to provide for the outright disposition to her of all the insurance proceeds collected by the trustee upon Grantor's death. Meena Ravella, Grantor's friend and the successor trustee of the Trust, and David Miller, Grantor's husband and a Trust beneficiary, have each moved to dismiss the petition for failure to state a claim (CPLR § 3211[a][7]). The guardian ad litem for Grantor's infant child, who is also a beneficiary of the Trust, supports the motion.

Background

Deborah Bernstein died on May 10, 2013, at the age of 41. Her husband and infant child are her sole distributees. Her probated will, dated March 22, 2012, divides her estate, valued in excess of $5 million, into two trusts, a unified credit shelter trust for the benefit of David and her issue, and a marital trust for the benefit of David.

Shortly after executing the will, Grantor established the Trust and funded it with several insurance policies on her life with a total value of more than $3 million. The Trust instrument provides in Paragraph 3(a) that, upon Grantor's death, if David and petitioner are still living, the trustee shall continue to hold the Trust's assets for the benefit of David, petitioner and any of Grantor's issue. The Trust instrument's directive as to making distributions is set forth in Paragraph 3(b), which provides that the trustee

> "shall pay over and distribute to such one of more of [petitioner], David and [Grantor's] issue living from time to time, in equal or unequal portions, and to the exclusion of one or more of them, so much (or none) of the income and principal thereof, even to the extent of the whole thereof, as the Trustee shall, in her sole and unrestricted discretion, determine, accumulating any balance of said income and adding the same to principal."

Upon the death of the survivor of David and petitioner, Paragraph 3(c) further provides that the remaining assets of the Trust are to be distributed to Grantor's issue per stirpes either outright or in further trust, depending on the beneficiary's age.

Contentions of the Parties

In support of her request for reformation, petitioner alleges that the Trust was the product of a mistake because it does not reflect Grantor's actual intent that, upon her death, petitioner would be the Trust's sole beneficiary. According to petitioner, Grantor was under the erroneous belief that, in order

to avoid a 50% estate tax on the insurance proceeds, the Trust instrument had to include a provision directing that, upon her death, the proceeds of the insurance policies be held in a continuing trust of which David and her issue were also beneficiaries. Petitioner thus asks the court to reform the Trust to allow for the "outright distribution" to her of the proceeds of the insurance policies with which the Trust was funded. Alternatively, petitioner asks that the Trust instrument be reformed to provide a much more lenient standard for discretionary distributions to her, one permitting invasion for her "comfort" and "happiness" and expressly excluding consideration of petitioner's "other financial resources."

Movants' argument in support of dismissal is simple. According to them, petitioner fails to state a ground for reformation because the clear language of the Trust instrument demonstrates Grantor's intent to give her trustee absolute discretion to make distributions of income and principal not only to petitioner, but also, to David and her child. Since the Trust instrument contains no ambiguity regarding Grantor's intent, movants contend that, as a matter of law, the terms of the Trust instrument must be enforced as written without resort to extrinsic evidence. Petitioner counters that, by alleging that the execution of the Trust was the product of a mistake, she has stated a ground for reformation that allows resort to extrinsic

evidence to prove that Grantor's intent was not as expressed in the instrument.

Discussion

Courts have the power to reform a will or trust, *i.e.*, to add, excise, change or transpose language, if doing so would correct the instrument's failure to state or reflect its creator's intent accurately (*see e.g. Matter of Snide*, 52 NY2d 193 [1981]). However, courts are generally reluctant to fix mistakes through reformation (*id.*). But for very limited exceptions, reformation is available only when the mistake in question is apparent from the face of the instrument (*see e.g. Matter of Dickenson*, 273 AD2d 89 [1st Dept 2000]; *see also Matter of Zucker*, NYLJ, May 2, 2007, at 25, col 5 [Sur Ct, NY County 2007][reformation denied where mistake did not appear on the face of will]).

As cases cited by petitioner illustrate, these exceptions are generally confined to cases involving drafting errors that would defeat medicaid and public-benefits planning or cause unintended tax consequences. In these limited circumstances, courts often permit extrinsic evidence to demonstrate that, due to a drafting error, the words appearing in the instrument do not effectuate the intent of the creator at the time of execution (*see e.g. Matter of Scheib*, 14 Misc 3d 1222[A] [Sur Ct, Nassau County 2007] [extrinsic evidence permitted to show drafting error

which would have defeated grantor's medicaid planning objective); *Matter of Gottfried,* NYLJ, Apr. 11, 1997, at 46, col 4 [Sur Ct, NY County 1997] [extrinsic evidence permitted to correct drafting error that would have resulted in unintended tax consequences).

The type of "mistake" for which petitioner seeks reformation is unrelated to any of these exceptional circumstances. Moreover, petitioner does not seek reformation because a drafting error resulted in language contrary to what Grantor intended at the time of execution. Here, petitioner alleges that Grantor actually intended that her husband and any issue surviving her be included as Trust beneficiaries. The mistake, according to petitioner, was that Grantor would have employed other language, *i.e.,* provided for petitioner to receive the proceeds of the insurance policies upon Grantor's death, had she not been given allegedly faulty legal advice. However, if any disgruntled survivor could simply allege as a ground for reformation of an unambiguous instrument that a testator or Grantor would have disposed of his or her property in his favor but for a misapprehension, whether factual or legal, the reformation doctrine would necessarily become a vehicle for re-writing testamentary instruments based on unavoidable (and improper) guesswork by courts. As the Third Department has noted, "courts will not create a new [instrument] to carry out some supposed but unexpressed purpose [of the creator] (*Matter of Lezotte*, 108 AD2d 1052, 1053 [1985]).

On a motion to dismiss for failure to state a ground for relief (CPLR 3211[a][7]), the standards are clear. The court must "'accept the facts as alleged in the [pleading] as true, accord [the petitioner] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory'" (*Braddock v Braddock*, 60 AD3d 84, 86 [1st Dept 2009], *quoting Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). The issue of "[w]hether a [petitioner] can ultimately establish [his or her] allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). However, liberally construing the petition does not eliminate the requirement of CPLR 3016(b) that, where mistake is alleged, the "circumstances constituting the wrong must be stated in detail" (*New York Fruit Auction Corp. v New* York, 81 AD2d 159, 161 [1st Dept 1981]; *see Matter of Dickinson*, NYLJ, Aug. 4, 1999, at 26, at col 5 [Sur Ct, NY County 1999], *aff'd* 273 Ad2d 89 [1st Dept 2000]).

Here, petitioner simply fails to allege the type of "mistake" that courts are willing to fix outside of the exceptional circumstances described above. This leaves a large body of case law, including from the Appellate Division, First Department, that does not support petitioner's efforts to make herself the sole beneficiary of a trust, which petitioner concedes, unambiguously reposes in the trustee absolute

discretion to make distributions to her, as well as Grantor's husband and child (*see e.g. Matter of Dickinson*, 273 AD2d 89, *supra* [affirming dismissal of trust reformation proceeding for failure to state a claim]; *Matter of Wickwire*, 270 AD2d 659, 661 [3d Dept 2000] [affirming refusal to consider extrinsic evidence of "what decedent would have done or intended to do" where terms of will were unambiguous]; *Matter of Vogel*, NYLJ, Aug 11, 2008, at 31, col 6 [Sur Ct, NY County 2008] [in denying uncontested reformation petition, court refused to consider extrinsic evidence that would contradict the plain language of trust]).

Even viewed in their most favorable light, petitioner's allegations fail to state a ground for reformation. Petitioner's opposition papers rely primarily on uncontested tax or government-benefits-driven reformation cases, which, as noted above, have no application here (*see e.g. Matter of Gottfried*, NYLJ, Apr. 11, 1997, at 46, col 4, *supra*). Nor does petitioner's effort to distinguish unfavorable reformation cases on the ground that they were commenced by fiduciaries or grantors, *i.e.*, parties to the agreement then at issue, have any merit. She offers no basis for the proposed distinction, which implies that a reformation proceeding commenced by a non-party to the trust instrument should be viewed more favorably. Indeed, the purpose of a reformation proceeding is to effectuate the intent of the grantor or testator and, as the trustee here suggests, a party to

the instrument would necessarily be in "a better position to claim 'mistake' than a non-party." Certainly, in *Matter of Dickinson* (273 AD2d 89, *supra*), the petitioner's status as a non-party to the creation of the instrument did not aid his endeavor to reform a trust. The *Dickinson* petitioner was the adopted child of the grantor's son. He sought to include himself within the definition of "issue" on the ground of "mistake" where the trust expressly excluded adopted children from the class. The Appellate Division, First Department, affirmed this court's dismissal of his petition for failure to state a ground for reformation.

The Trust instrument's unambiguous language does not evince an intent to prefer petitioner over the other beneficiaries. Nor does the language in Grantor's will support the view that Grantor intended petitioner to be the primary beneficiary of the Trust. Indeed, decedent's will unambiguously provides for a trust for petitioner's sole benefit only in the event that Grantor had not established an insurance trust of which petitioner was a "permissible beneficiary" and David and her issue had predeceased her. In other words, the will and Trust make clear that Grantor did not intend to make petitioner the primary beneficiary of any trust unless Grantor was not survived by David and issue.

Petitioner's allegations that Grantor told petitioner and others that 1) she wished to provide for her mother financially and that 2) "petitioner was her primary concern in creating the

[Trust]" also do not support reformation. Those allegations are entirely consistent with the Trust's provisions giving the trustee absolute discretion to make distributions to petitioner in "unequal portion and to the exclusion of [David and Grantor's issue]."[1] Moreover, any extrinsic evidence that petitioner could offer concerning Grantor's intent (to the extent it would even be admissible) would only serve to contradict the Trust instrument's clear and unambiguous language, which, as noted above, the case law does not permit in the circumstances here.

Likewise, petitioner's conclusory (and inconsistent) allegation that Grantor, a successful finance executive with degrees from Dartmouth College and Stanford University, was simply "mistaken" as to the meaning of the clear and unambiguous terms of the Trust is an insufficient basis upon which to base a reformation claim (*cf. Winant v Winant*, 83 AD2d 849 [2d Dept 1981], *aff'd* 55 NY2d 870[1982] [court refused to alter dispositive provisions in separation agreement on the ground that party had a different understanding as to their meaning]). As the Court of Appeals stated in *Matter of Tamargo* (220 NY 225, 228 [1917]), "[w]hen the purpose of a testator is reasonably clear by reading his words in their natural and common sense, the courts

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[1] Petitioner also alleges that the trustee is improperly exercising such discretion because she has not freely distributed funds to her, instead insisting that petitioner demonstrate "specific need." However, those allegations have no bearing on the issues in this proceeding.

have not the right to annul or pervert that purpose upon the ground that a consequence of it might not have been thought of or intended by him."

Also insufficient are petitioner's allegations that, prior to establishing the Trust, Grantor had made petitioner the sole beneficiary of at least one of her insurance policies worth $1 million. Assuming that the allegation is true, it establishes only that at some unspecified time Grantor had made her mother the beneficiary of some of the insurance policies eventually owned by the Trust. This fact is also entirely consistent with Grantor's reposing in the trustee discretion to make distributions to persons other than petitioner. And, even if it were not the case, Grantor was free at any point to change her mind about how she was going to dispose of her property.

Finally, petitioner failed to allege facts supporting her claim with the required particularity (*see* CPLR 3016[b]; SCPA § 302[2]). The petition alleges no details regarding the circumstances under which Grantor became "mistaken" as to the "operation of applicable tax law." Indeed, in her opposition papers, petitioner asserts for the first time, without any specifics, that the purported mistake here was the result of Grantor's having been "erroneously informed by the scrivener" that, to avoid estate tax, petitioner could not receive insurance proceeds outright on Grantor's death and could not be the sole

beneficiary of the Trust. Thus, the lynchpin of petitioner's argument in support her reformation claim, namely that Grantor received faulty legal advice, is not even alleged in the petition.

Without offering a principled basis for this court to ignore well-settled case law that would preclude the admission of extrinsic evidence to contradict Grantor's intent as expressed in the unambiguous language of the Trust, this court declines petitioner's invitation to expand the reformation doctrine "beyond recognition" (*Matter of Rubin*, 4 Misc 3d 634, 638 [Sur Ct, NY County 2004]). The motions to dismiss are therefore granted and the petition dismissed.

This decision constitutes the order of the court.

Dated: May 7, 2018