

**Matter of Reich**

2018 NY Slip Op 31654(U)

July 18, 2018

Surrogate's Court, New York County

Docket Number: 2016-2996/A

Judge: Rita M. Mella

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

New York County Surrogate's Court  
Date: July 18, 2018

-----X  
SCPA 2102 (5) Petition of Charles Reich, Preliminary  
Executor of the Estate of Lilian Reich, for an Advance  
Payment of a Portion of Lilian Reich's Elective Share of  
the Estate of

SEYMOUR REICH,

AMENDED  
DECISION and ORDER  
File No.: 2016-2996/A

Deceased.

-----X  
M E L L A, S.:

The decision dated July 17, 2018, issued by this court in this proceeding is vacated and the following decision is issued in its place.

Charles Reich as preliminary executor of the estate of his mother, Lilian Reich, has petitioned for an order directing his sister, Elizabeth Brimberg, as preliminary executor of the estate of their father, decedent Seymour Reich, to make an advance payment of \$2.5 million, on account of Lilian's elective share of decedent's estate (*see* SCPA 2102 [5]). The requested funds are needed, according to petitioner, in order to pay a federal estate tax of \$8 million, due on July 20, 2018, on Lilian's largely illiquid estate. Petitioner has agreed to post a full refunding bond to secure the \$2.5 million. Respondent opposes the petition. Both parties have asked the court to determine the petition based on the present record.

Facts

Decedent died on July 22, 2016, survived by his spouse, Lilian, and their two children, Charles and Elizabeth, leaving a \$35 million probate estate. Decedent's purported will contains a single dispositive provision: decedent's entire probate estate is to be distributed to the trustee of a revocable trust, known as the "Seymour Reich 2016 Revocable Trust," created by decedent on the same date as the purported will. Under the terms of the

trust instrument, Lilian is to receive all tangible personal property, outright, and Lilian is the primary beneficiary of two continuing trusts.

On September 26, 2016, Lilian filed a notice of the exercise of her spousal right of election. Consistent with such notice, Elizabeth, as preliminary executor of decedent's will, claimed a \$2.9 million federal estate tax deduction for Lilian's elective share but, nevertheless, reported that such amount was uncertain, as the validity of Lilian's exercise of her spousal right of election was in dispute.<sup>1</sup>

On October 20, 2016, Lilian died. Her \$33.3 million taxable estate is composed of: (1) a co-operative apartment, which decedent and Lilian had owned jointly, valued by petitioner to be "at least" \$18.5 million, (2) \$8 million in mutual funds held in a revocable trust created by Lilian, (3) \$365,000 of real property, (2) checking accounts totaling \$125,000, (4) miscellaneous assets, including tangible personal property, of \$220,000, and (5) assets that passed by operation of law to Charles, individually, valued at \$6 million.<sup>2</sup> The main asset of Lilian's estate — the co-operative apartment — is illiquid.<sup>3</sup>

#### Respondent's Contentions

---

<sup>1</sup> On May 31, 2018, Charles as preliminary executor of Lilian's estate filed a petition to determine the validity of Lilian's exercise of her spousal right of election (*see* SCPA 1421). Citation has not yet issued.

<sup>2</sup> Charles as preliminary executor of Lilian's estate alleges that he paid \$4.7 million in New York State estate tax, that he made a \$1.7 million payment on account of the \$9.6 million federal estate tax due, and that he has only \$1.6 million in liquid assets on hand.

<sup>3</sup> In a memorandum of law filed after the return day of the citation on the instant petition, petitioner indicated that he recently had accepted an offer for the sale of the co-operative apartment but that the prospective buyer had yet to submit his financial documents to the co-operative board, the board had yet to schedule a meeting, and a closing date had yet to be set. Petitioner did not reveal the agreed-upon sales price.

Elizabeth as preliminary executor of decedent's estate concedes that petitioner's request satisfies the requirements of SCPA 2102 (5), but she contests petitioner's need for the requested advance.

Respondent's arguments about petitioner's "need" seem to be made in the alternative (although respondent does not frame them that way). She seems to argue that: either Charles, individually, must demonstrate a personal need for funds, and he has not done so; or else Charles as fiduciary must demonstrate a need, and the need for funds to meet an estate tax obligation does not constitute one of the "needs" referenced in SCPA 2102 (5).<sup>4</sup>

Further, respondent asserts that Lilian's exercise of her spousal right of election was invalid because Lilian lacked the requisite capacity at the time she executed her notice of election and because the notice was the product of duress and undue influence exerted by Charles. Nevertheless, respondent contends: "If Decedent's estate had not claimed a marital deduction [on the IRS Form 706], it would have paid more estate taxes than might legitimately be payable and would run the risk of not getting a refund of the overpayment."

When asked in open court during the May 18, 2018 proceeding in this case why the imposition of a refunding bond would not alleviate Elizabeth's concerns, her counsel replied merely that the granting of the petition "would affect the status quo." Here, however, the remedy sought — an order directing respondent to take affirmative action — is pursuant to a

---

<sup>4</sup> Respondent argues, for example: "Here, because Petitioner does not contend that he has any need for *his own* support or education or that of his family or any other person, his Petition for advance payment should be denied." (Emphasis added.) And: "Even if estate taxes could be considered to be living expenses included in 'support,' which they cannot . . . , Petitioner does not claim that he has any financial need whatsoever. Indeed, Petitioner . . . states that he 'is considering making a personal loan of monies to Lilian's estate' to pay the remaining estate taxes."

statute, SCPA 2102 (5), that authorizes a change in the status quo.

### Analysis

The Appellate Division has made clear that a Surrogate has discretion to authorize an advance payment against a claimed beneficial interest in an estate — even when the validity of that claim is disputed — provided the claimant is willing to post a full refunding bond (*Matter of Goldman*, 150 AD2d 267, 268 [1st Dept 1989]).<sup>5</sup> In addition, the Appellate Division has recognized an “inability to meet such obligations as taxes owed” as one of the “needs” referenced in SCPA 2102 (5) (*id.*).

Charles has petitioned in his capacity as fiduciary of Lilian’s estate for funds necessary to satisfy that estate’s tax obligations. Accordingly, Charles, individually, need not demonstrate a personal inability to satisfy the total tax imposed on Lilian’s estate.<sup>6</sup>

The question of the entitlement of the fiduciary of Lilian’s estate to a \$2.5 million

---

<sup>5</sup> In *Matter of Goldman*, petitioner asserted as one of the bases for her entitlement to an advance payment against her claimed beneficial interest in the decedent’s estate her exercise of a spousal right of election. Her children, however, contended that she had abandoned decedent and, therefore, did not qualify as a surviving spouse (*see* EPTL 5-1.2 [a] [5]). Nevertheless, the court, citing *Matter of Milbank* (49 AD2d 848 [1st Dept 1975]), ruled: “SCPA 2102 (5) empowers the Surrogate with the discretion to authorize an advance payment against a claimed beneficial interest in an estate, even when the question of spousal status is at issue, provided that the claimant is willing to post a full refunding bond,” *Matter of Goldman* (150 AD2d 267, 268 [1st Dept 1989]).

<sup>6</sup> The court observes that, unless and until Lilian’s purported will is admitted to probate, the tax apportionment provision included therein remains without effect. Accordingly, Charles, individually, would appear to be responsible for the portion of estate tax allocated to the non-testamentary assets he has received (EPTL 2-1.8 [c] [1]). There is nothing in the record, however, to indicate that any portion of the requested \$2.5 million — which is a small fraction of the overall tax due — is intended to cover any tax for which Charles, individually, bears any responsibility.

payment from the fiduciary of decedent's estate has yet to be resolved. The imposition of a full refunding bond, however, will protect decedent's estate from any prejudice to the extent of any ultimate determination that Lilian's estate is not so entitled.

Conclusion

The petition is granted. Elizabeth Brimberg as preliminary executor of the estate of Seymour Reich is directed to make an advance payment to Charles Reich as preliminary executor of the estate of Lilian Reich — upon his posting a full refunding bond — in the amount of \$2.5 million.

This decision, together with a transcript of the May 18, 2018 proceedings, constitutes the order of the court.

Dated: July 18, 2018

*rmf*  
S U R R O G A T E