

Matter of Pozsonyi
2018 NY Slip Op 32601(U)
October 12, 2018
Surrogate's Court, New York County
Docket Number: 2011-4323/G
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

Date: October 12, 2018

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In the Matter of the Application of the New York County
Public Administrator, as Temporary Administrator of
the Estate of

ERIKA POZSONYI,

DECISION

File No.: 2011-4323/G

Deceased,

for Advice and Direction pursuant to SCPA 2107.
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M E L L A, S.:

In this contested proceeding, the Public Administrator of New York County ("Public Administrator"), as temporary administrator of the estate of Erika Pozsonyi, petitions for advice and direction (SCPA 2107) regarding the meaning of "net estate" as used in the separation agreement between decedent and her former-spouse Anthony Pozsonyi ("Pozsonyi") and referenced in a decision by New York County Supreme Court, dated December 1, 2014, that determined Pozsonyi's interest in the estate.¹ Pozsonyi and decedent's surviving spouse Mark Denison ("Denison") support the Public Administrator's request for advice and direction, but Denison argues that discovery is needed in order to ascertain the meaning of "net estate."

Pozsonyi's interest in decedent's estate derives from their separation agreement that was incorporated into the Judgment of Divorce and filed in the New York County Clerk's Office on March 30, 1992. Under the separation agreement, decedent and Pozsonyi agreed to convey certain real property located in New Jersey ("New Jersey property"), which they held as tenants by the entirety, to decedent's sole name. In return, decedent agreed to execute and keep in effect

¹ In essence, the Public Administrator seeks construction of the separation agreement as to the term "net estate."

a will during Pozsonyi's lifetime providing Pozsonyi with 60% of her "net estate" if the New Jersey property was sold during her lifetime,² or 85% of the net sale proceeds if the property passed to her estate. If decedent failed to make the agreed-upon testamentary dispositions, Pozsonyi was given a claim against decedent's estate for the New Jersey property if owned by decedent's estate, or, if not, 70% of decedent's "net estate."³

Decedent sold the New Jersey property during her lifetime and used the sale proceeds to purchase certain real property located in Colorado ("Colorado property"). On April 25, 2011, decedent executed a will that leaves the Colorado property and the residuary estate to Denison. In that instrument, Decedent did not make the testamentary dispositions in favor of Pozsonyi in accordance with the separation agreement.

Decedent died on May 28, 2011, survived by Denison as her sole distributee. The Colorado property is the primary estate asset. Decedent's will was admitted to probate by this court on January 26, 2012, with letters testamentary issuing to Denison. In October 2013, Denison's letters were suspended in a decision and order of this court which also directed Denison to file an account and appointed the Public Administrator as temporary administrator (*Matter of Pozsonyi*, NYLJ, Oct. 22, 2013, at 22, col 6 [Sur Ct, NY County]).

At the same time that these proceedings were taking place in this court, Denison and Pozsonyi were involved in litigation in the New York County Supreme Court. By decision dated

² In addition, if the New Jersey property was sold, Pozsonyi was to be entitled to receive at the time of sale 20% of the net sale proceeds, and he agreed to deposit that share into an interest-bearing account to pay interest to decedent during her lifetime.

³ The separation agreement further directs that decedent's estate shall bear the attorneys fees and other costs associated with Pozsonyi's claim against decedent's estate.

December 1, 2014, the Supreme Court determined that Pozsonyi was entitled to 70% of decedent's net estate based on decedent's breach of the separation agreement. The Appellate Division, First Department, affirmed the Supreme Court's determination (*Denison v Pozsonyi*, 139 AD3d 618 [1st Dept 2016]).⁴ Now the Public Administrator seeks direction from the court as to the meaning of "net estate," a term that was not defined in the separation agreement or in the Supreme Court or First Department decisions.

The Public Administration alleges that decedent's "net estate" should be determined by using the definition of such term found in New York State decisional law. While agreeing that advice and direction by the court "would expedite a resolution of this case," Denison argues that "the term 'net estate' is not a term of art, so its meaning as well as the intentions of the parties cannot be resolved as a matter of law," and that, therefore, discovery needs to be conducted to determine such meaning. Denison asks the court to conclude that, in any event, "there is no net estate" because the primary asset of the estate, the Colorado property, was specifically devised to him and it is not subject to Pozsonyi's claim.

A separation agreement that is not merged into a judgment of divorce, is subject to the principles of contract construction and interpretation (*Meccico v Meccico*, 76 NY2d 822 [1990]; *Keller-Goldman v Goldman* 149 AD3d 422 [1st Dept 2017]). Agreements are construed in accordance with the parties' intent, and the best evidence of intent is the written instrument (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). Where an agreement is complete,

⁴ In the same decision, the First Department affirmed (1) the determination that Pozsonyi could assert a claim against the estate for his legal fees in the Supreme Court proceedings, (2) the imposition of a constructive trust over the Colorado property and the income derived from it, and (3) the court's imposition of restrictions against the transfer, mortgage, and other encumbering of the Colorado property.

clear and unambiguous on its face, the intent of the parties to the agreement must be gleaned from “within the four corners of the instrument” (*Meccico v Meccico*, 76 NY2d at 824) and the agreement must be enforced “according to the plain meaning of its terms” without resort to extrinsic evidence (*Greenfield v Philles Records*, 98 NY2d at 569). Therefore, if the agreement “on its face is reasonably susceptible of only one meaning, a court is not free to alter the [agreement] to reflect its personal notions of fairness and equity” (*id.* at 570).

The separation agreement between decedent and Pozsonyi sets forth in clear terms decedent’s obligation to make testamentary dispositions in favor of Pozsonyi—60% of the net estate if the NJ property was sold during decedent’s lifetime— or, if decedent breached the obligation, Pozsonyi’s right to claim 70% of decedent’s net estate. The agreement is unambiguous in that “net estate” is used only to refer to dispositions under decedent’s will, or Pozsonyi’s remedies in case of decedent’s breach. There is no indication in the agreement, drafted by lawyers, that decedent and Pozsonyi intended a meaning different from the usual meaning of “net estate” as expressed in the context of testamentary dispositions. Accordingly, the court determines that “net estate,” as used in reference to decedent’s testamentary estate under the separation agreement, was used in its ordinary technical sense to mean “gross estate less debts, funeral and administration expenses[,] or the amount available for distribution prior to payment of estate taxes” (*Matter of Thaw*, 60 Misc 2d 184, 185 [Sur Ct, NY County 1969]; *see Matter of Demmerle*, 130 Misc 684, 687 [Sur Ct, Bronx County 1927]; *Matter of Missett*, 136 NYS2d 923, 925 [Sur Ct, Westchester County 1954]; *Matter of McCandless*, NYLJ, Aug. 5, 1998, at 24, col 3 [Sur Ct, Westchester County]; *cf. Matter of Lieberman*, 2 Misc 2d 833, 839-840 [Sur Ct, Westchester County 1955] [testator intended to include both testamentary and non-

testamentary assets in calculating the “net estate,” which was expressly defined in the will as “adjusted estate after payment of all obligations”]), and that it does not include non-testamentary assets or assets that pass by operation of law (*Matter of Mills*, 34 Misc 2d 164, 166 [Sur Ct, Nassau County 1962] [the definition of “net estate,” under testator’s will, excluded non-testamentary assets that testator had otherwise disposed of]).

The court deems unpersuasive Denison’s argument that the definition of “net estate” is unclear and that discovery is needed to ascertain its meaning. As previously stated, the term “net estate” has been consistently construed by New York courts as having its “ordinary meaning” in the context of testamentary dispositions and Denison has proffered no reasonable basis for giving it a different meaning, nor has he cited any authority suggesting an alternate definition.

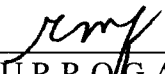
Additionally, no ambiguity in the separation agreement has been established by Denison, and, therefore, no extrinsic evidence is allowed to ascertain the parties’ intent.

In addition to addressing the narrow and specific issue before the court on this petition, Denison has raised arguments that he made or should have made in the Supreme Court proceedings. For instance, he disputes the validity of the separation agreement and Pozsonyi’s claim against the estate. The Supreme Court has already made determinations of Pozsonyi’s rights predicated on the separation agreement, and those determinations have been affirmed by the Appellate Division (*Denison v Pozsonyi*, 124 AD3d 521 [1st Dept 2015], *lv denied* 25 NY3d 906 [2015] [affirming the determination that ownership of the cooperative apartment, which was held jointly by decedent and Pozsonyi with right of survivorship, passed to Pozsonyi by operation of law upon decedent’s death]; *Denison v Pozsonyi*, 139 AD3d 618 [1st Dept 2016] [affirming the determination that Pozsonyi is entitled to 70% of decedent’s net estate]).

Denison also argues that, if the court were to determine the meaning of “net estate” as proposed by the Public Administrator, the relevant “provision [of the separation agreement] is unenforceable, as it would infringe on his elective share.”⁵ While acknowledging that Denison failed to address the conflict between his right of election and Pozsonyi’s claim before the trial court, the Appellate Division noted that “former spouses may enforce a separation agreement even at the expense of the [surviving spouse]’s right of election” (*Denison v Pozsonyi*, 139 AD3d at 619). The determination of other affirmative relief sought by Denison with respect to the valuation of the Colorado property, decedent’s gross estate, and the validity or effect of Denison’s election to take a share shall be deferred to the accounting proceeding.

This decision constitutes the order of the court.

Dated: October 12, 2018



S U R R O G A T E

⁵ The court notes that Denison filed his notice of election on June 17, 2015, after the expiration of the time period allowed under EPTL 5-1.1-A (d)(1).