

Matter of Stutey (Viggiano)

2018 NY Slip Op 32632(U)

September 11, 2018

Surrogate's Court, Nassau County

Docket Number: 2016-391236/B

Judge: Margaret C. Reilly

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**SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

**In the Matter of the Application of Michael Viggiano,
as Administrator c.t.a., for a Construction of Articles
“TENTH” and “ELEVENTH” of the Last Will and
Testament of**

DECISION

**File No. 2016-391236/B
Dec. No. 34264**

**ELAINE STUTEY,
a/k/a ELAINE STUTEY,**

Deceased.

PRESENT: HON. MARGARET C. REILLY

The following papers were considered in the preparation of this decision:

Petition and Exhibits.	1
Memorandum of Law.	2
Citations	3

In this miscellaneous proceeding, petitioner Michael Viggiano (“petitioner), the administrator c.t.a. of the estate, seeks a construction that the dispositions under Articles “TENTH” and “ELEVENTH” of the Last Will and Testament of Elaine Stutey (“decedent”), dated July 6, 1999, be distributed to Patricia Adrion a/k/a Tricia Bataze Adrian, Ronald Barone and Angela Ruberto.

The decedent and Dorothy McMahon, were companions for decades and married in 2012. Dorothy McMahon predeceased the decedent.

The last will and testament of the decedent, dated July 6, 1999, was admitted to probate by a decree of this court dated May 2, 2017. The nominated executor renounced and petitioner was appointed administrator c.t.a.

The decedent had two siblings, Muriel Stutey and George Stutey. Muriel Stutey predeceased the execution of the will and George Stutey died subsequent to its execution. The

decedent, who died on August 22, 2016, was survived by seven nieces and nephews. The other interested persons in this proceeding are the surviving grand-nieces and nephews of Dorothy McMahon, who are named as beneficiaries under the will. A fourth nephew, Thomas Barone, predeceased the decedent.

The petition seeks a determination that the surviving grand-nieces and surviving nephew of Dorothy McMahon are beneficiaries of Articles “TENTH” and “ELEVENTH” of the last will and testament. Those persons who would take under EPTL § 4-1.1, i.e., the decedent’s distributees, were served with citation but have not appeared in this proceeding.

The last will and testament provides in part:

“FIFTH: I give, devise and bequeath all of my right, title and interest in and to the real property located at 38 North Avenue Beacon, New York, which is presently owned by my friend, DOROTHY A. McMAHON, and myself, to my friend, DOROTHY A. McMAHON, provided, however, if my friend, DOROTHY A. McMAHON, shall predecease me, I direct that all of my right, title and interest in the aforesaid real property be sold and that the proceeds thereof be equally distributed among TRICIA BATAZE ADRIAN, RONALD BARONE, THOMAS BARONE and ANGELA RUBERTO, said persons being the grand nieces and nephews of my friend, DOROTHY A. McMAHON.”

“SIXTH: I give, devise and bequeath all of my right, title and interest in and to the real property located at 692 Park Lane South, Franklin Square, New York, which is presently owned by my friend Dorothy [sic] A. McMAHON and myself, to my friend, DOROTHY A. McMAHON, provided, however, if my friend DOROTHY A. McMAHON, shall predecease me, I direct that all of my right, title and interest in the aforesaid real property be sold and that the proceeds thereof be equally distributed among TRICIA BATAZE ADRIAN, RONALD BARONE, THOMAS BARONE and ANGELA RUBERTO, said persons being the grand nieces and nephews of my friend, DOROTHY A. McMAHON.”

“SEVENTH: In the event that any of the grand nieces and nephews of my friend, DOROTHY A. McMAHON, hereinabove mentioned in paragraphs

“FOURTH, “FIFTH” and “SIXTH” of this, my Last Will and Testament, shall predecease me, the share of that grand niece or nephew of my friend, DOROTHY A. McMAHON, who shall have predeceased me shall be equally divided among the grand nieces and nephews of my friend, DOROTHY A. McMAHON, who shall have survived me.”

Article “TENTH” of the last will and testament provides:

“TENTH: I give, devise and bequeath to my friend, DOROTHY A. McMAHON, all of my bank accounts, cash, securities, automobiles and personal property of which I may die seized or possessed, or to which I may in any wise be entitled, at the time of my death.”

Article “ELEVENTH” of the last will and testament provides:

“ELEVENTH: I give, devise and bequeath all of the rest, residue and remainder of my estate, real, personal and mixed, of whatever kind and nature and wherever situated, of which I shall die seized or possessed or to which I may in any wise be entitled, to my friend, DOROTHY A. McMAHON.”

An instrument purporting to be the last will and testament of Dorothy McMahon has been filed with the court for safekeeping. The instrument contains provisions which are fundamentally reciprocal to the subject instrument. However, the court cannot consider the effect of the McMahon instrument on the construction of the subject will as the validity of the McMahon instrument has not been established.

The primary rule of testamentary construction is to determine the intention of the testator (*Matter of Larkin*, 9 NY2d 88 [1961]; *Matter of Fabbri*, 2 NY2d 236 [1957]) from a reading of the document as a whole (*Matter of Thall*, 18 NY2d 186 [1966]).

A subsidiary rule of construction is that a testator is presumed to intend to avoid intestacy (*Matter of Bieley*, 91 NY2d 520 [1998]; *Matter of Fabbri*, 2 NY2d 236 [1957]), particularly with respect to the residuary clause (*Matter of Bieley*, 91 NY2d 520 [1998];

Matter of Hayes, 263 NY 219 [1934]). A corollary rule is that the presumption against intestacy is neutralized where it results in disinheritance of the testator's distributees in favor of non-relatives (*Matter of Fitzgerald*, 29 AD2d 325 [3d Dept 1968]), *affd* 23 NY2d 973 [1969]). This rule, in turn, is weakened where, as here, the distributees who will be disinherited are not named in any provision of the will (*Matter of Hayes*, 263 NY 219 [1934]).

In exceptional cases, where a will does not specifically provide for a contingency, a gift by implication may be found (*Matter of Bieley*, 91 NY2d 520 [1998]). The court may “give effect to an intention or purpose, indicated by implication, where the express language of the entire will manifests such an intention or purpose” (*Matter of Thall*, 18 NY2d 186 [1966]). Application of the doctrine of gift by implication requires a finding that there is no other reasonable inference which can be drawn (*Matter of Kronen*, 67 NY2d 587 [1986]).

In a construction proceeding, there is always the limitation that the court cannot rewrite a will (*Matter of Rosenzweig*, 19 NY2d 92 [1966]), and specifically not for the purpose of avoiding intestacy (*Matter of Gautier*, 3 NY2d 502 [1957]).

In this case, the testator selected Tricia Bataze Adrian, Ronald Barone, Thomas Barone and Angela Ruberto, grand-nieces and nephews of Dorothy McMahan as contingent remaindermen in Articles “FOURTH,” “FIFTH,” “SIXTH,” “SEVENTH” and “EIGHTH.”

Article “TENTH” bequeaths bank accounts, cash, securities, automobiles and personal property to Dorothy McMahan but provides no alternate disposition in the event Dorothy predeceased. Article “ELEVENTH” bequeaths and devises the residuary estate to Dorothy McMahan, again, with no gift over.

A bequest to a person lapses if that person does not survive the testator unless the provisions of EPTL § 3-3.3 apply. In this case, EPTL § 3-3.3 does not apply because the beneficiary is neither a sibling nor issue of the testator. In the absence of a finding of a gift by implication, the bequest in Article “TENTH” devolves as follows. The bequest to Dorothy McMahon lapses and falls into the residuary estate and, because there is no other beneficiary of the residuary, the property passes by intestacy (*Matter of Masi*, NYLJ, Dec. 26, 2003 at 26, col 5 [Sur Ct, Suffolk County]). Likewise, the disposition to Dorothy McMahon in the residuary clause in Article “ELEVENTH” lapses and passes by intestacy.

In order to find a gift by implication in this case, it would be necessary to conclude that because the grand-nieces and nephews are the contingent beneficiaries in Articles “FOURTH,” “FIFTH,” “SIXTH,” and “SEVENTH,” they were the intended contingent beneficiaries of Articles “TENTH” and “ELEVENTH.”

In the construction of this instrument, the court has not considered the extrinsic evidence in the form of the affidavit of Ralph Barone.

The testator’s ability to anticipate and provide for the contingency that Dorothy McMahon would predecease her was displayed in part of the will (*see Matter of Hayes*, 263 NY 219 [1933]), but the same contingency is not provided for in subsequent parts of the will, leading to equally reasonable conclusions that: (a) she intended to designate the grand-nieces and nephews as alternate beneficiaries in Articles TENTH and ELEVENTH but neglected to do so, or (b) she knew how to make an alternate disposition when she wanted to and the fact that she didn’t, with regard to Articles TENTH and ELEVENTH, evinces her intention not to.

“To uphold a legacy by implication the inference from the will of the intention must be such as to leave no hesitation in the mind of the court and to permit of no other reasonable inference” (*Matter of Kronen*, 67 NY2d 587, 589 [1986][internal citation omitted]). On this record, the court finds that the petitioner has failed to meet this standard. The relief sought is therefore **DENIED** and the petition is dismissed.

This constitutes the decision and order of the court.

Dated: September 11, 2018
Mineola, New York

E N T E R:

HON. MARGARET C. REILLY
Judge of the Surrogate’s Court

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