

Matter of Gaites

2018 NY Slip Op 34557(U)

February 8, 2018

Surrogate's Court, Richmond County

Docket Number: Filed No. 2011-1108/D

Judge: Robert J. Gigante

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

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In the Matter of the Estate of

ROBERT J. GAITES,

File No. 2011-1108/D

Deceased.

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In this proceeding, the petitioner, Carolyn D. Gaites, is seeking the appointment of a co-trustee of the Trust under Article Third of the Will ("The Trust") of Robert J. Gaites ("The Decedent") for the benefit of Carolyn D. Gaites ("The Petitioner").

The petitioner is seeking the appointment of her son, Robert C. Gaites ("Robert") to serve as co-trustee with her. Petitioner is the surviving spouse of the decedent and beneficiary of the Trust. The Trust is a qualified terminable interest property trust under IRC § 2056. The trust is required to pay petitioner all of the net income at least annually. In addition, petitioner may annually withdraw the greater of \$5,000.00 or 5% of the trust at her discretion. Under the terms of the trust, only a disinterested co-trustee may withdraw principal for petitioner without tax consequences. Petitioner is currently serving as sole trustee.

The decedent's testamentary instruments consist of a Will dated June 9, 2006 and a first Codicil dated November 20, 2009

and a second Codicil dated September 3, 2010. Article FIFTEENTH of the Will addresses the appointment of trustees and provisions for the resignation of trustees and appointment of successor trustees. The Will appoints petitioner and a family friend as co-trustees. The first codicil deleted Article FIFTEENTH of the Will in its entirety and replaced it with a provision appointing petitioner as sole trustee and Robert as successor trustee. The second codicil did not affect the trustee appointments.

A Guardian ad Litem was appointed to represent the interests of minors whose interests are contingent based on the exercise of the petitioner's power of appointment under such Will. The Guardian ad Litem interviewed the drafter of the codicil and his recollection was that the decedent changed his trustee designation because he wanted "family control," thus removing the non-family co-trustee. The petitioner also stated that the decedent wanted family control and so only wanted family members to serve.

Petitioner was appointed as sole trustee on January 18, 2012. Pursuant to EPTL § 10-10.1, a beneficiary who is the sole trustee of a trust cannot exercise the power to make principal distributions to oneself. Without the appointment of a co-trustee, the petitioner cannot exercise her annual power of withdrawal of principal.

Under SCPA 1502(1) the court has discretion to appoint a co-trustee to execute a power created by a Will or lifetime trust instrument creating a trust. There is ample judicial precedent for the appointment of a co-trustee where a trustee cannot withdraw principal as a sole trustee. Matter of Seidman, 58 AD2d 72, 395 NYS 2d 674 (Second Department 1977), Estate of Herman, NYLJ May 11, 1983, page 13 column 2 (Surrogate's Court, Bronx County).

The Court will exercise its discretion to appoint a co-trustee in this proceeding. The appointment of Robert to serve as co-trustee will allow principal distributions which are provided for under Article Third of the Will. The Codicil did not alter the provision of the Will which allows withdrawal of principal. Thus, the intent of the decedent to withdraw principal remains intact. The Court also looks at the fact that the decedent had named Robert as the successor trustee and as such, the appointment does not contravene any express intent of the decedent to name a different trustee under SCPA 1502(2).

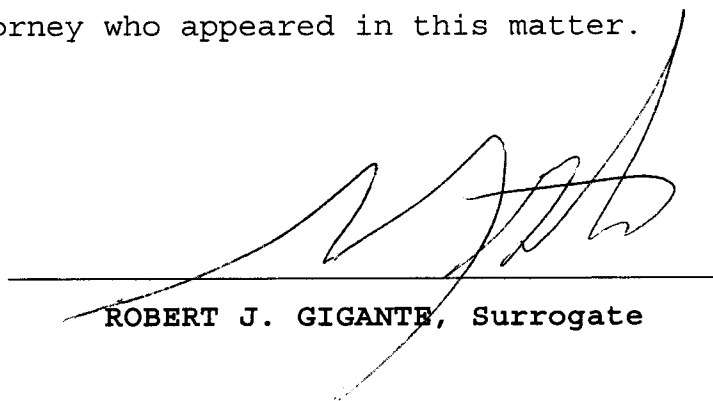
The fee of the Guardian ad Litem is hereby fixed at \$3,126.00 and shall be paid within thirty (30) days of the date of this decision.

Letters of Trusteeship shall issue to Carolyn D. Gaites and Robert J. Gaites, upon duly qualifying. The necessity of the posting of a bond is hereby waived.

Letters of Trusteeship issued to Carolyn D. Gaites on January 18, 2012 are hereby revoked.

Submit decree upon Notice of Settlement to the Guardian ad Litem, and any other attorney who appeared in this matter.

Dated: February 8, 2018



ROBERT J. GIGANTE, Surrogate