Matter of Hirsch
2018 NY Slip Op 34580(U)
November 30, 2018
Surrogate's Court, Queens County
Docket Number: File No. 2015-4149/A
Judge: Peter J. Kelly
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PRESENT: HON. PETER J. KELLY
SURROGATE

SURROGATE'S COURT: QUEENS COUNTY
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In the Matter of the Application of David Hirsch, as Co-Executor of the Estate of

IDA HIRSH, File No. 2015-4149/A

Deceased,

for the turnover of assets of the Estate.
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Petitioner has filed a motion pursuant to SCPA § 506 [6][a][1] seeking an order rejecting the Referee's report dated August 24, 2018 which found that respondent established the validity of six (6) inter vivos gifts made to him by decedent from her Charles Schwab (hereinafter "Schwab") account totaling $522,695.89.

SCPA § 506 [6] [a] provides that the court "may confirm, modify or reject the report in whole or in part, may make new findings with or without taking additional testimony or may order a new hearing."

With respect to the substantive objections to the Referee's Report raised by the petitioner, upon review of the papers submitted and the court's file, the court finds that the Referee did not misapprehend the pertinent facts or misapply

[1] Petitioner also moves, erroneously, pursuant to CPLR 4403 for the relief requested. SCPA 506 governs in the Surrogate's Court to the exclusion of the CPLR (CPLR 101; SCPA 102; see Deborah S. Kearns, Practice Commentaries, McKinney's Cons Laws of NY, SCPA § 506, Book 58A, 2017).

the relevant law, and that the referee's determination is amply supported by, and consistent with, the evidence adduced at trial.

Petitioner argument that the deposition testimony of Schwab representatives, Collier and Taylor, as well as the testimony of decedent's former attorney Bermas and home-aide Martinez should have been barred on the ground that they are "interested" witnesses within the meaning of the Dead Man's Statute (CPLR § 4519), is patently without merit.[2] The statute provides as follows:

> Upon the trial of an action or the hearing upon the merits of a special proceeding, a party or a person *interested in the event* . . . shall not be examined as a witness in his own behalf or interest . . . against the executor, administrator or survivor of a deceased person . . . concerning a personal transaction or communication between the witness and the deceased person . . . except where the executor . . . is examined in his own behalf . . . concerning the same transaction of communication. (*emphasis added*)

To be "interested in the event," the witness must "either gain or lose by direct legal operation and effect of the judgment," or, "the record will be legal evidence for or against [him/her] in some other action" (*Laka v Krystek*, 261 NY 126, 130 [1933]). These non-party witnesses have no direct, vested interest in the operation of any decree herein, nor are they affected thereby in another action. They are also not otherwise "interested in the event" as persons who passed their own title in any property to respondent (*see Abbott v Doughan,* 204 NY 223 [1912]; *see e.g. Stay v Horvath,* 177 AD2d 897 [3d Dept 1991]).

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[2] It is also noted that petitioner stipulated to admitting the deposition transcripts of Collier and Taylor into evidence at trial without limitation.

Furthermore, the court finds no palpable error in the Referee's determination as to the credibility of these respective witnesses (*see Matter of Winsweiler*, 146 Misc 436 [Sur Ct, NY Cty 1933]).

Petitioner argues that the Referee erred in admitting into evidence two unnotarized copies of letters addressed to Schwab purportedly signed by decedent, dated August 20, 2010 and May 17, 2011, authorizing certain transfers of money to respondent. Petitioner contends that the copies of the letters are barred by the best evidence rule. The best evidence rule provides that proof of the contents of a writing must be made by producing the original writing where its contents are in dispute and sought to be proven or satisfactorily account for its absence (*see Schozer v William Penn Life Ins. Co. of NY*, 84 NY2d 639, 643-644 [1994]; *see* Prince, Richardson on Evidence, § 10-101 [2008]).

Copies of an original writing are admissible, however, if a proper foundation for the secondary evidence is laid (*see 76-82 St. Marks LLC v Gluck,* 147 AD3d 1011, 1012 [2d Dept 2017]; *Allstate Ins. Co. v Spadaccini,* 52 AD2d 813 [1st Dept 1976]). CPLR § 4539 (a) provides that:

> If a business . . . in the regular course of [its] business of activity has made, kept or recorded any writing, entry, print or representation and in the regular course of business has recorded, copied, or reproduced it by any process which accurately reproduces the original, such reproduction, when satisfactorily identified , is as admissible as the original, whether the original is in existence or not.

A foundation may be laid upon a threshold showing that the proponent of the

secondary evidence has sufficiently explained the unavailability of the primary evidence and has not procured its loss or destruction in bad faith and that it is an accurate portrayal of the original (*see Schozer v William Penn Life Ins. Co. of NY*, 84 NY2d 639, 643-644 [1994]; *Amica Mut. Ins. Co. v Kingston Oil Supply Corp.*, 134 AD3d 750, 753 [2d Dept 2015]). The affidavit of the custodian of records from Schwab together with the deposition testimony of Taylor, a senior financial consultant for Schwab, sufficiently explained the absence of the primary evidence from their document management system, the adequacy of Schwab's document retention policy, the reproduction process utilized for the letters dated August 20, 2010 and May 17, 2011, and that they were accurate portrayals of the original kept in the ordinary course of business. Thus, the Referee did not err in admitting them into evidence.

Petitioner argues that the Referee erred in permitting witnesses Collier and Taylor testify from so-called "MARS" notes concerning their conversations with the decedent, and admitting such notes into evidence. The portions of the MARS notes admitted into evidence were made in the ordinary course of business by Collier and Taylor, both Schwab employees, to memorialize their contemporaneous conversations with the decedent concerning the subject transfers from her account to respondent's account. The evidence considered by the Referee, including the testimony by Taylor and Collier, as well as the certificate of authenticity of Schwab's records manager, established the

necessary foundation of these records under the business records exception to the hearsay rule (CPLR § 4518 [1]; CPLR § 3122-a). The evidence also established the foundation necessary to admit the MARS notes into evidence for use in conjunction with the testimony of Taylor and Collier as past recollections recorded (*see People v Taylor*, 80 NY2d 1, 8 [1992]; *see e.g. Citmortgage Inc. v Diamant*, 131 AD3d 1193 [2d Dept 2015]). Thus, the Referee did not err in admitting them into evidence.

Petitioner argues that the Referee should have concluded that decedent did not have the requisite "donative intent" for making the cash gifts to the respondent due to the fact that no gift tax returns were filed thereon. Contrary to petitioner's argument, the failure to file gift tax returns is not a determinative factor on the question whether donative intent exists for making a gift (*see Matter of Gruen v Gruen*, 104 AD2d 171 [2d Dept 1984], *aff'd* 68 NY2d 48 [1986]).

The court finds that the petitioner's remaining contentions are without merit.

Accordingly, the petitioner's motion to set aside the Referee's report dated August 24, 2018 is denied, and the report is confirmed in all respects.

This is the Decision and Order of this Court.

Dated: November 30, 2018

SURROGATE