

Matter of Morris
2019 NY Slip Op 30514(U)
February 28, 2019
Surrogate's Court, New York County
Docket Number: 2016-2746/A
Judge: Nora S. Anderson
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SURROGATE'S COURT : NEW YORK COUNTY

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In the Matter of the Application of
Emlie Anderson, Individually and as
Executor of The Estate of Joan
Anderson, for a Determination as to the
Validity, Construction and Effect of the
Last Will and Testament of

New York County Surrogate's Court

Date: February 28, 2019

File No. 2016-2746/A

JILL MORRIS,

Deceased.

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A N D E R S O N, S.

At issue in this contested construction proceeding is the application of a 30-day survivorship provision to the bequests/devises to Joan Anderson in paragraph (c) of Article EIGHTH of decedent's will.

Petitioner is Emlie Anderson, Joan's daughter and the executor of her estate.¹ Opposing the application are the executor of decedent's estate (Sue Renee Bernstein), the residuary beneficiaries (three charities), and the Attorney General of the State of New York. At the court's request, the parties made additional submissions. Thereafter, the court denied petitioner's motion for leave to file a supplemental affirmation (see *Matter of Morris*, NYLJ, Mar. 7, 2018, at 26, col 1 [Sur Ct, NY County 2018])).

Jill Morris died on June 7, 2016, at the age of 84, leaving

¹ Petitioner also seeks relief in her individual capacity. However, although she is the primary beneficiary of her mother's estate, she is not a beneficiary of decedent's estate and therefore has no direct interest as an individual in the outcome of this proceeding.

a substantial estate. Under her will, she made multiple pre-residuary bequests of cash, real property and tangible personal property to various individuals and a charity. She also established a \$1 million trust for the benefit of another individual with remainder to three charities that she also designated her residuary beneficiaries. Letters testamentary issued to respondent Bernstein, as the nominated successor to Joan, who died just 12 days after decedent.

There is no dispute that decedent and Joan had a long-term relationship and that Joan was a named beneficiary of many of decedent's most valuable assets. However, the parties differ as to whether decedent intended that the multiple legacies to Joan in the above-referenced Article be conditioned upon Joan's surviving her by 30 days.

The introduction to Article EIGHTH, the first dispositive provision in the will, states:

EIGHTH: "I make the following gifts of tangible personal property to the following entities and to the following persons (provided that he or she survives me by thirty (30) days):

Despite the introduction's reference to "tangible personal property," its colon is followed by a list of eleven separate paragraphs, in three of which decedent leaves to individuals more than merely tangibles. In two paragraphs, the named beneficiary receives specified tangibles and a pecuniary gift. In a third, Joan receives not only multiple items of valuable tangible

personal property, but also, a bequest of \$100,000 and a devise of decedent's townhouse in Manhattan and her home in Watermill, New York.

Another dispositive provision (Article ELEVENTH) contains a survivorship clause similar to the one in Article EIGHTH, which is followed by a list of 11 separate pecuniary bequests to various individuals. The only bequests that are not subject to a 30-day survivorship condition are contained in Articles NINTH, TENTH and TWELFTH. Article NINTH contains a bequest to Joan of decedent's pets, while Article TENTH contains a bequest to Joan of any tangibles not bequeathed elsewhere in the will. Finally, in Article TWELFTH, decedent establishes the trust.

Petitioner contends that the "so-called survivorship clause" in the introduction to Article EIGHTH "is not intended to apply to the bequest[s] [to Joan] in Article EIGHTH(c) and, alternatively, the Will is at least ambiguous in this regard."² The executor, the three charities named as residuary beneficiaries, and the Attorney General argue that a reading of the entire will makes clear that decedent intended that the survivorship clause apply to all of the bequests/devises in Article EIGHTH, notwithstanding the clause's reference to the "following gifts of tangible personal property." Alternatively, they offer extrinsic evidence, including prior

² The survivorship provision in Article EIGHTH does not apply to the two other beneficiaries who receive more than tangibles because they survived decedent by more than 30 days.

wills and an affidavit from the attorney who supervised the execution of the subject will, in support of a determination that decedent intended all of the bequests in Article EIGHTH, including the ones to Joan, to vest only if the beneficiary survived decedent by 30 days.

The primary purpose of a construction proceeding is to ascertain, and to give effect to, the intent of the decedent (see e.g. *Matter of Bieley*, 91 NY2d 520, 525 [1998]). Intent is to be gleaned, not from one particular provision or phrase, but rather, from an examination of the entire instrument (see e.g. *Matter of Fabbri*, 2 NY2d 236, 240 [1957]). If a reading of the entire will makes clear a "dominant purpose or plan of distribution," the provisions at issue must be interpreted in light of that purpose, even if a literal reading might yield a different result (*id.*). Only where the decedent's intent cannot be determined from within the four corners of the instrument is resort to extrinsic evidence appropriate (see e.g. *Matter of Cord*, 58 NY2d 539, 544 [1983]).

The court agrees with petitioner that the introduction to Article EIGHTH is ambiguous. The ambiguity arises from the language immediately preceding the survivorship clause, which refers to a series of gifts as "tangible personal property," when, in fact, the gifts to Joan and the two other individuals include real estate and/or cash. Under these circumstances, the issue for the court is whether decedent intended to include in Article

EIGHTH all manner of gifts, including real estate and cash, notwithstanding her identification of the "following gifts" as "tangible personal property." If so, the survivorship clause, which is contained in a parenthetical at the end of the introduction to Article EIGHTH, would apply to all of the bequests/devisees to Joan in paragraph (c). And, since Joan died within 30 days of decedent, those bequests/devisees would lapse and the property would be distributable as part of the residuary estate.

It is important to note at the outset that ordinarily, courts read the language employed in a well-drafted will as technically correct and as an accurate reflection of the decedent's intent (see e.g. *Matter of Smith*, 14 Misc 2d 205, 206 [Sur Ct, Nassau County 1958] [stating "where, as here, the will is meticulously drawn by an obviously skilled draftsman, the words used must be given their usual and accepted meanings without enlargement and without restriction"])). Here, however, decedent's will is replete with ambiguous language and numerous errors. Accordingly, the court must consider that decedent's intent may have been obfuscated or compromised by the lack of precision on the part of the drafter.

Under these circumstances, decedent's declaration: "I make the following gifts of tangible personal property" cannot be taken literally as a limit on the type of property that decedent

intended to gift under Article EIGHTH. Such a construction would be counter to decedent's intent to make the gifts of realty and/or cash to Joan and two other individuals because it would render each of their respective gifts void ab initio, resulting in the distribution of that property as part of the residuary estate. Nor can such statement be taken literally as a limit on the type of gifts decedent intended to be subject to Article EIGHTH's 30-day survivorship requirement. This is particularly so given that decedent made gifts of real property and cash after specifically describing those "following gifts" as "tangible personal property." A fair reading of Article EIGHTH together with the will as a whole supports the conclusion that decedent intended for all assets specified in Article EIGHTH to pass subject to a survivorship condition, but that such intent was obscured by careless draftsmanship.

Petitioner ignores that the will as a whole discloses decedent's intent to impose a 30-day survival requirement on all her gifts, but for limited exceptions. Thus, in Article ELEVENTH, the only other provision in which decedent made gifts of substantial monetary value to multiple individuals, decedent also included a 30-day survivorship provision. Significantly, the bequests in Article ELEVENTH are all pecuniary, indicating that decedent intended to attach a survivorship condition to her cash legacies. Given the lack of precision of the drafter, the

inclusion of cash gifts to persons receiving tangibles in Article EIGHTH is more likely than not an oversight, rather than a reflection of decedent's intent to exempt them from the survivorship condition imposed on all of her other cash gifts. In the same way, decedent's gift of real estate to Joan in Article EIGHTH without a concomitant change to the description of her "following gifts" is more consistent with inept drafting than an expression of intent to exclude the devises of her homes from a 30-day survivorship requirement.

Petitioner contends that Articles NINTH and TENTH support a construction that would exempt all of the gifts to Joan in paragraph (c) (including tangibles) from the survivorship requirement in Article EIGHTH. However, Articles NINTH and TENTH demonstrate that decedent knew how to make exceptions to the survivorship requirements set forth elsewhere in the will when she wished to do so. Thus, in Article NINTH, decedent bequeathed her pets to Joan without a survivorship condition, ensuring that Joan would care for the pets or, if Joan subsequently died, someone other than her charitable residuary beneficiaries would be responsible for finding them a home. That decedent stated in the will that she believed that her \$100,000 gift to Joan in Article EIGHTH would give "[Joan] more than sufficient means to provide for the care of my pets" demonstrates only that decedent intended for Joan, the person she believed would be caring for her pets, to

receive the money. Such language does not indicate, as petitioner contends, that decedent intended the undetermined beneficiaries of Joan's estate, who might decide not to care for the pets, to receive the bequest.

Also understandable is the lack of a survivorship condition in Article TENTH. There decedent bequeathed to Joan the remainder of all of her tangible property. Given the breadth of decedent's specific bequests of tangible personal property elsewhere in the will, this catch-all provision necessarily includes property that does not have substantial value or would not be of interest to the charitable remainder beneficiaries.

Nor does decedent's creation of the trust under Article TWELFTH support petitioner's proposed construction. Without merit is petitioner's contention that, if decedent had wanted to ensure that, if Joan died, the residuary beneficiaries receive the bulk of her estate, *i.e.*, the gifts of cash and real estate in paragraph (c), she would have created a trust for the life benefit of Joan. Decedent did not need to create another trust, since she had included the gifts of cash and real estate in Article EIGHTH, which contained a 30-day survivorship provision. More important, had decedent wanted Joan's estate to benefit in the circumstances here, she could have easily ensured that result simply by incorporating the bequests and devises to Joan in paragraph (c) into Article NINTH or Article TENTH, both of which do not include

a 30-day survivorship requirement.

Petitioner offers many other arguments in support of her petition. However, none supports a construction of Article EIGHTH that would eliminate a 30-day survivorship requirement for any of the gifts decedent made to Joan in paragraph (c). For example, petitioner cannot avail herself of the general rule that testamentary provisions should be construed in a spouse's favor. Joan and decedent were never married. Also without merit is petitioner's argument that the survivorship clause "was never meant to disinherit [petitioner]" and her related argument that application of the survivorship clause would leave the disposition of the bulk of decedent's estate to "utter random and ridiculous chance." There is nothing in the will to suggest that petitioner, as opposed to Joan, was an object of decedent's bounty. Had decedent wanted to ensure that petitioner inherit from her, she would have made her a beneficiary. She did not. Nor did decedent provide for petitioner to succeed to the gifts to Joan in paragraph (c) in the event that Joan did not survive decedent by 30 days. That decedent knew how to provide for a gift over on default of survivorship when she wanted to is evident in paragraph (f) of Article EIGHTH.

Moreover, in making these arguments, petitioner assumes, without basis, that decedent 1) knew that petitioner would be the primary beneficiary of Joan's estate, and 2) would have wanted

petitioner to receive the gifts in paragraph (c) instead of her designated charitable residuary beneficiaries. Although petitioner describes the residuary beneficiaries as "stranger beneficiaries," the will speaks to that issue. Decedent selected the specified charities, not petitioner or anyone else, to receive all assets that were not, for whatever reason, disposed of in the will.

In any event, petitioner's claim that decedent would not have subjected the bulk of her assets to the "whim" of a survivorship clause reveals a misunderstanding of the purpose of such a provision. Petitioner ignores at least two very good reasons to include a survivorship clause, both of which are particularly applicable here. First, a decedent may not want the property, particularly if it is substantial, to go through probate (and possibly taxed) twice in a short period of time. Second, a decedent may want to have control over where his or her assets might end up rather than leaving them subject to the unknown testamentary choices of a beneficiary or the intestate disposition of a beneficiary's estate.

Based upon the foregoing, it is clear that decedent did not intend to exempt any of her gifts to Joan from the 30-day survivorship requirement in Article EIGHTH. Rather, she believed that a survivorship condition was appropriate for her most valuable assets. Because decedent's intent can be determined from the will itself, extrinsic evidence shall not be considered (see

e.g. *Matter of King*, 198 AD2d 115 [1st Dept 1993][determining that extrinsic evidence was not admissible where decedent's intent could be determined from four corners of the will]). Article EIGHTH is thus construed to provide that the "following gifts" include cash, real property as well as tangible personal property. As a result, all of the gifts in paragraph (c) lapsed as a result of Joan's death 12 days after decedent and shall be distributed as part of decedent's residuary estate.

Finally, the court must address the procedural posture of this proceeding given certain statements in petitioner's submissions. Petitioner mischaracterizes the court's initial request for an additional submission in support of the petition. Petitioner claims that the court's direction was limited in scope to whether petitioner had "set forth a case, *prima facie*, for construction of the Will," i.e., whether the will contains an ambiguity requiring construction. As the transcript confirms, however, the court's direction was not so limited. That much should have been clear to petitioner, since the very premise of a request for construction is that the instrument in question contains an ambiguity that prevents it from being understood without some interpretation or reference to matters outside its four corners (see e.g. *Matter of Kerr*, NYLJ, Sept. 24, 2012, at 18, col 3 [Sur Ct, NY County 2012], citing *Matter of Fabri*, 2 NY2d 236, 244, *supra* [construction denied as unnecessary where

provision of will at issue was unambiguous]).

What the court requested from petitioner was a submission setting forth her legal arguments in support of the petition, since it appeared from her pleading that she was claiming that decedent's intent could be discerned in the first instance by resort only to the words of the will. Normally, in circumstances such as this, a petitioner will submit additional papers in support of the pleading so that the matter can be fully briefed and decided without further motion practice. Respondents made clear that their responsive papers would be addressed "to the construction" and would include the submission of extrinsic evidence, namely decedent's prior wills. Thereafter, the court specifically noted that, upon the filing of the additional submissions from all the parties, the matter would be marked "submit," i.e., ready for decision.

Neither at this point nor thereafter did petitioner ask for clarification of the court's direction or object to the matter's being marked for decision. She then filed papers in which she claimed that the scope of her submission had been circumscribed by the court, but then proceeded to include all manner of legal and factual arguments, some supported by extrinsic evidence, that went beyond identifying the ambiguity in the will and directly to the merits of her petition. Because petitioner had actually submitted papers responsive to the court's request, the court concluded that

she had been given ample opportunity to support her petition. Accordingly, the court denied petitioner's motion to make yet another submission (see *Matter of Morris*, NYLJ, March 2, 2018, at 26, col 1, *supra*).

Moreover, since no extrinsic evidence is required to construe the will, petitioner's claim that discovery would aid her case is without merit. However, had the court considered extrinsic evidence, neither the evidence that petitioner offered nor claims that she would offer if allowed to do so, would support the construction she seeks. Evidence of petitioner's purported relationship with decedent does not establish that decedent intended to benefit petitioner in the circumstances here. In contrast, the prior wills submitted by respondents would support the court's conclusion that decedent intended all of her most valuable assets to be subject to a survivorship condition and that the ambiguity in Article EIGHTH was simply the result of careless drafting.

Based upon the foregoing, the petition is denied. This decision constitutes the order of the court.

Dated: February 28, 2019


S U R R O G A T E