

Matter of Katz
2019 NY Slip Op 30976(U)
April 16, 2019
Surrogate's Court, New York County
Docket Number: 2016-188
Judge: Nora S. Anderson
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SURROGATE'S COURT : NEW YORK COUNTY

New York County Surrogate's Court

Date: APRIL 16, 2019

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Probate Proceeding, Will of

File No. 2016-188

ELLA KATZ,

Deceased.

-----X
A N D E R S O N, S.

In this probate proceeding in the estate of Ella Katz, proponent, decedent's accountant and nominated executor, moves to compel examination of witnesses pursuant to SCPA § 1404. The Public Administrator of the County of New York ("PA"), on behalf of unknown distributees, cross-moves to dismiss the probate petition and to vacate the preliminary letters issued to proponent.

Decedent died on December 12, 2015, survived by at least one cousin and leaving an estate in excess of \$10 million. The propounded instrument, dated July 12, 2012, was prepared by a legal document preparation service and executed at the proponent's office. The sole dispositive provision of the instrument (Article 2.01) bequeaths decedent's entire estate to proponent "to distribute to people and charities on a list to be provided to him by testator." It is undisputed that such a list does not now exist, and there is no indication that it ever did. Preliminary letters issued to proponent on June 2, 2016.

The Attorney General and the PA requested SCPA § 1404 examinations. At the call of the calendar, the court held the motion to compel SCPA § 1404 examinations in abeyance pending the outcome of the motion to dismiss the probate petition.

In her cross-motion, the PA cites *Reynolds v Reynolds* (224 NY

429 [1918]) for the proposition that probate must be denied where a testator fails to designate a beneficiary in the sole dispositive provision of the propounded instrument. However, in *Reynolds*, the will had already been admitted to probate when testator's sisters commenced a construction proceeding to determine the validity and effect of the following provision of the will: "I do hereby give and bequeath to my said executor all of [my] personal property ... in trust, however, and for the purpose of paying out and disposing of same as I have advised and directed him to do." The Court of Appeals held that the total failure to designate beneficiaries made the provision ineffective for any purpose and dismissed the proceeding which had asked the court to construe the provision and impress a trust for the sisters' benefit. The validity of the instrument as a whole was not at issue in *Reynolds*. *Reynolds* stands only for the proposition that "[t]he total failure to designate the beneficiaries ... invalidate[s] that portion of a will" (11 Warren's Heaton, Surrogate's Court Practice § 190.04[1] at 190-44 [7th ed 2008]).

At the core of the PA's arguments is her contention that the propounded instrument is not a testamentary instrument because it lacks a dispositive provision. This ignores the clear language of EPTL § 1.2-19, which in relevant part defines a will as a:

"... written instrument, made as prescribed by [EPTL] § 3-2.1 or 3-2.2 to take effect upon death, whereby a person disposes of property or directs how it shall not be disposed of, ... appoints a fiduciary or makes any other provision for the administration

of his estate, and which is revocable during his lifetime." Here, even assuming for the sake of argument that the propounded will's lone dispositive provision is invalid, the instrument still provides for the revocation of all prior wills, the payment of debts and expenses with estate assets, and the designation of the person to serve as executor. Each of these other provisions could be the lone basis for a will under EPTL § 1.2-19, as long as there has been compliance with the statutory requirements set forth in EPTL §§ 3-2.1 or 3-2.2.

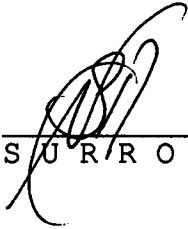
This court has refused to deny probate to an instrument based upon the lack of a dispositive provision (see e.g. *Matter of Lew*, NYLJ, Dec. 2, 2002, at 17, col 1 [Sur Ct, NY County 2002] [admitting to probate will without dispositive provisions]; *Matter of Webb*, 122 Misc 129 [Sur Ct, NY County 1923], *affd* 208 AD 793 [1st Dept 1924] [holding that a properly executed will must be admitted to probate even if its sole dispositive provision is invalid]; see also *Matter of Freidlander*, 34 Misc 3d 1216[A], 2011 NY Slip Op 52484[U] [Sur Ct, NY County 2011] [stating that "[i]t is axiomatic that a case for probate is presented ... whenever a testamentary instrument reflects at least some intent on the testator's part that can be honored"]).

Moreover, notwithstanding the PA's insistence that her cross-motion does not seek a construction of Article 2.01, she is, nonetheless, asking the court to determine the "validity, construction or effect" of the provision as contemplated by SCPA §

1420. This is procedurally improper. Such a request requires first that the instrument be admitted to probate (see SCPA § 1420 [a petition seeking construction of a will may be "presented to the court in which the will was probated...."]; see e.g. *Matter of Martin*, 17 AD3d 598 [2d Dept 2005][holding that it was improper for Surrogate to construe will prior to its admission to probate]). The court has considered movant's other arguments and deems them to be without merit.

Based upon the foregoing, the cross-motion to dismiss the probate petition is denied. Proponent's motion to compel SCPA § 1404 examinations is granted to the extent that such examinations, if any, shall be concluded within 90 days of the date of this decision, which constitutes the order of the court.

Dated: April 16, 2019



 S U R R O G A T E