

Matter of Swain

2019 NY Slip Op 33312(U)

October 4, 2019

Surrogate's Court, New York County

Docket Number: 1949-2706/C

Judge: Rita M. Mella

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

New York County Surrogate's Court
DATA ENTRY LEFT.
Date: October 4, 2019

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In the Matter of the Application for Construction of the Will of

FLORENCE THAYER SWAIN,

DECISION and ORDER
File No.: 1949-2706/C

Deceased.

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M E L L A, S. :

Despite its repeal more than fifty years ago, a former provision of the Domestic Relations Law, known as the “precautionary addendum,” continues to imperil the inheritance rights of many adopted children today. Before the court now is a petition for construction of a will that requires review and consideration of that statute.

Decedent Florence Thayer Swain died in 1949, leaving a will dated in 1947 and codicil dated in 1948 (together, the Will). The Will creates numerous trusts, including, in Article FIFTH, one for her granddaughter Joan. The trustee is directed to pay the income to Joan for her life, with remainder distributable on her death as follows:

“to [Joan’s] issue, if any, in equal shares; if none, then to her brother and sister, JOHN BRADLEY CUMINGS III and LEA CUMINGS REYNOLDS, in equal shares, or to the survivor of them.”

Joan died in 2017, survived by three children whom she had adopted in their infancy. She had no other children, natural or adopted. Joan’s brother, John, survived decedent but predeceased Joan in 1996. Her sister, Lea, has survived Joan. The trustee of Joan’s trust asks for instructions as to the proper disposition of the trust remainder, valued at approximately \$2.5 million, in light of the potential application of the precautionary addendum.

That statute still applies to wills of persons dying before March 1, 1964. The version in effect at the time of decedent's death provided:

“As respects the passing and limitation over of real or personal property dependent under the provisions of any instrument on the [adoptive] parent dying without heirs, the [person adopted] is not deemed the child of the [adoptive] parent so as to defeat the rights of remaindermen.” L. 1940, c. 442, § 1.

If the precautionary addendum applies to disqualify the adopted children, the trustee raises a second question: whether John's remainder interest was vested at his death, so that one-half of the remainder would pass through his estate; or, rather, whether the entire remainder would pass to Lea, as the survivor of Joan's two siblings.¹

The three adopted children of Joan argue that the precautionary addendum is not applicable and maintain that they are remainder beneficiaries of the trust. Three of their cousins, who are alleged to have an interest in the estate of their deceased father, John, maintain that the precautionary addendum operates to eliminate the adopted children as beneficiaries, leaving one-half of the trust remainder to the estate of their father, as a vested contingent beneficiary.

The Precautionary Addendum

The courts have narrowly applied the precautionary addendum, in recognition of public policy favoring adoption (*see e.g. Matter of Simons*, NYLJ, Oct. 13, 1992, at 28, col 1 [Sur Ct, NY County] [noting “the current public policy favoring adoption and the modern view that adopted children should be treated in the same manner as biological children”]). If the court finds that the testator showed an intent to include adopted children, whether in the instrument

¹ Lea has assigned any interest she has in the trust to Joan's three adopted children.

itself or from circumstances existing when the will was made, the precautionary addendum will not apply (*Matter of Rockefeller*, 12 NY2d 124, 133 [1962] [“[W]hen the issue is one of testamentary intent or settlor’s intent under a trust instrument, the right of a[n adopted] child to inherit is not tested by the words ‘heirs’, ‘issue’ or such like term, but by the intent of the testator or settlor to be derived from the text of the entire instrument and, if need be, by the facts and circumstances existing at its making”]; *Matter of Ward*, 9 AD2d 950, 950 [2d Dept 1959] [“[The precautionary addendum] will not operate against the intention of the testat[or]. The intention is not to be found only upon the words ‘lawful issue’, but upon the text of the entire instrument and the background of facts and circumstances existing when the will was made”]).

Intent to include adopted children has been found where the will makes bequests to persons outside of the testator’s bloodline, or grants a power to appoint property to persons not in the bloodline. Such was the case in *Matter of Snowden* (31 NY2d 322, 329 [1972], *revg* 38 AD2d 926 [1st Dept 1972]), where the Court of Appeals found intent to include an adopted child in the term “issue,” stating:

“Having permitted the child in the circumstances posited to appoint any one he selected, and having contemplated that, in default of appointment or of natural issue, persons not related to him by blood might share in the trust, the settlor must be deemed, by his lack of concern for bloodlines, to have had in mind that adopted children might likewise take.”

See also Matter of Lawrence, 86 Misc 2d 579, 595 (Sur Ct, Kings County 1974) (“[I]f the testator expressly provided that his property should or could be divided among those not among his bloodline, such a provision suffices to establish that he intended to include adopted children in his class disposition”).

In this case, decedent not only created substantial pre-residuary trusts for each of her grandchildren, but also made identical provisions for the children of the brother of her predeceased second husband. The court finds this to be evidence of decedent's lack of concern for limiting beneficiaries to those in her bloodline, revealing an intent not to exclude adopted children from the definition of Joan's "issue."

Vesting of the Interest of Joan's Predeceased Brother

Even if the court concluded that the precautionary addendum operated to exclude Joan's adopted children from the class of her "issue," the children would nevertheless inherit the remainder of Joan's trust. As discussed below, the court determines that John's interest was not vested at his death before Joan. In this circumstance, the entire trust remainder would pass to Lea, who has assigned any interest that she may have in the trust to Joan's children.

There are two lines of authority in cases similar to this where a trust remainder is left to named individuals, or to "the survivor of them," after an intervening life estate. One line (*e.g.* *Matter of Rogers*, 25 Misc 2d 469 [Sur Ct, NY County 1960], *aff'd* 14 AD2d 731 [1st Dept 1961]; *Matter of Nicholas*, 50 Misc 2d 76 [Sur Ct, Suffolk County 1966]) recognizes a constructional preference that the named individuals must survive the life beneficiary in order to take the remainder, reasoning that the testator would prefer her legacy to pass to the named parties only if they lived to enjoy it, rather than pass through their estates in a manner that she could not predict. The other line of cases (*e.g.* *Healy v Empire Trust Co.*, 276 App Div 305 [1st Dept 1950], *aff'd* 301 NY 620 [1950]; *Matter of Walker*, 277 App Div 811 [3d Dept 1950]) construes the phrase "or to the survivor of them" as indicating an intent that the remainder beneficiary need survive only the testator, and not the termination of the life estate that follows.

The rationale of such decisions is that inclusion of the phrase is used “for the purpose of preventing a lapse of the legacy if one of the legatees predeceased the testator” (*Walker, supra* at 811). This latter line of cases also tends to rely on the principle that the law favors early vesting of estates.²

It is well settled that the construction of a will requires the court to ascertain the intent of the testator and that the intent is to be gleaned, where possible, from the words of the will itself (e.g. *Matter of Thall*, 18 NY2d 186, 192 [1966]; *Matter of Fabbri*, 2 NY2d 236, 239-40 [1957]). Constructional preferences have no relevance where the testator’s intent is evident from the language in the will. As the Court of Appeals stated in *Matter of Bisconti* (306 NY 442, 445 [1954]),

“The application of the rules of construction of wills is for the purpose of determining the intent of the testator where that intent is not clearly expressed by the testamentary words, and the rules of construction are to be disregarded when the language is clear and definite. It is well established that rules of construction are merely subsidiary aids.”

Here, the court need not and should not rely on constructional preferences for vesting, because the language in Article EIGHTH (3) of decedent’s Will clearly reveals her intent. That provision creates three equal trust shares in one-half of her residuary estate, one share for each of her three grandchildren, whom she names: John, Lea, and Joan. Income is payable for the maintenance, education and support of the grandchild for whom the trust was created, with outright distribution to the grandchild at age 30. It then provides,

² The wisdom of employing this preference is questioned in Edward H. Rabin, *The Law Favors the Vesting of Estates. Why?*, 65 Colum L Rev 467 (1965).

“In case any of my said grandchildren shall predecease me, or shall survive me but depart this life before reaching the age of thirty years, the principal of his or her trust shall be paid and transferred, in equal shares, to his or her issue, if any; if none, in equal shares, *to the survivors or survivor of said grandchildren . . .* (emphasis added).”

Any distribution in respect of a grandchild under this provision presupposes that at least one of them has died before decedent or before age 30. Since decedent has provided in such case for distribution to others, that is, “to the survivors or survivor of said grandchildren,” the only possible interpretation is that “the survivor or survivors of said grandchildren” does not include the very grandchild who is deceased. Accordingly, the grandchild’s interest was contingent both on surviving decedent and reaching age 30, and it did not vest prior to the time for outright distribution.

There is no reason to find that the words “or to the survivor” has a meaning in the Article FIFTH trust for Joan that is different from the meaning in the Article EIGHTH trust. Were there any doubt as to decedent’s intent concerning the use of this language, reliance on a canon of construction would yield the same result. As stated in *Matter of Pflomm* (214 App Div 1, 7 [1st Dept 1925], *mod on other grounds* 241 NY 513 [1925]),

“[U]nder a familiar rule of construction the same words when used by the testator in his will are ordinarily to be given the same meaning in one part as they are in the other.”

For the foregoing reasons, the court concludes that the remainder of the Article FIFTH trust is distributable in equal shares to Joan’s three children, William Francis, John Francis, and Lea Lailey. This constitutes the decision and order of the court.

Dated: October 4, 2019


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