

<b>Matter of Ingberman</b>
2020 NY Slip Op 30030(U)
January 8, 2020
Surrogate's Court, New York County
Docket Number: 2007-0879/B
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 DEPT  
Date: JANUARY 8, 2020

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Proceeding to Settle the Account of Israel Ingberman as  
Executor of the Will of

HELEN INGBERMAN,

DECISION

File No.: 2007-0879/B

Deceased.

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M E L L A, S.:

In determining the instant motion for partial summary relief, the court considered the following submissions:

	<u>Date Filed</u>
1. Objectant's Notice of Motion	February 14, 2018
2. Affirmation of Mary D. Dorman, Esq., in Support	February 14, 2018
3. Memorandum of Law in Support	February 14, 2018
4. Affirmation of Thomas Brown, Esq., in Opposition	March 19, 2018
5. Petitioner's Memorandum of Law in Opposition	March 19, 2018
6. Objectant's Reply Memorandum of Law	March 26, 2018
7. Affirmation of Mary D. Dorman, Esq., in Further Support	March 26, 2018
8. Transcript of March 27, 2018 Oral Argument	May 31, 2019

In this proceeding commenced by Israel Ingberman, executor of the will of his mother Helen Ingberman, for settlement of his account for the period from September 3, 2006 to June 30, 2012, objectant Francisco Colon, administrator of the estate of Jeanette Ingberman, decedent's daughter, has filed the present motion for partial summary determination (CPLR 3212).<sup>1</sup> This is objectant's second such motion. Objectant's first motion was denied for reasons that will be explained below. Objectant now seeks a determination that the "purported transfer of Jeanette Ingberman's individual interests in

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<sup>1</sup> Objectant does not seek summary disposition of all of his objections. Among the objections to the account not addressed in the instant motion, for example, is the objection to the inclusion in Schedule A of five bank accounts, valued at \$23,954.29, which objectant alleges had been owned jointly by decedent and Jeannette and passed to Jeanette by operation of law.

certain Business Entities to Israel Ingberman fails as a gift *inter vivos*.” At issue is whether, as petitioner claims in his account, Jeanette gave to him her interests under decedent’s will in certain limited liability companies: Washington Jefferson Hotel, LLC, Iroquois Hotel, LLC, J & J Hotel Company, LLC, and New Syndicate, LLC.

After the court’s denial of objectant’s first motion for summary determination, the parties engaged in discovery. Through that discovery it has come to light that the records of the specified LLCs have been amended once, and only once, and reflect decedent’s interests as being held by “Estate of Helen Ingberman.” That is: the owner of decedent’s interests in the specified LLCs remains the fiduciary of decedent’s estate.

Objectant now contends that there was no gift because the property that was the subject of the gift was not delivered to Israel. In particular, movant contends that “the transfer [of Jeanette’s interest in the specified LLCs to Israel] was not recorded on the books and records of the Business Entities” and that, as a result of this failure to record the transfer, Jeanette could have rescinded the gift before her death. Objectant adds that, in fact, the evidence shows that Jeanette “never relinquished dominion and control over the assets,” an essential element of an *inter vivos* gift.

Determination of the instant motion warrants a recitation, not only of the facts, but also of objectant’s initial motion for partial summary determination.

Helen Ingberman died testate on September 3, 2006, leaving a \$3 million estate. She was survived by her two children, Israel and Jeanette, equal and sole beneficiaries of her residuary estate.<sup>2</sup>

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<sup>2</sup> Article FIFTH of the will is a disposition of the residuary. Article FIFTH (A) is a disposition of one half of the residuary to Israel; Article FIFTH (B) is a disposition of the other half to Jeanette.

Letters testamentary issued to them in March 2007.

Jeanette, individually, signed an undated writing which reads:

“The undersigned, JEANETTE INGBERMAN, hereby assigns to ISRAEL INGBERMAN my entire interest in WASHINGTON JEFFERSON HOTEL, L.L.C., IROQUIS [sic] HOTEL, L.L.C., J & J HOTEL COMPANY, L.L.C., and NEW SYNDICATE, L.L.C., all New York limited companies, whether my interest is owned directly by me or through my interest in the Estate of Helen Ingberman, as a beneficiary thereof as of August 31, 2009.

IN CONSIDERATION of ten dollars (\$10.00) and other good and valuable consideration.”

Below and to the left of Jeanette’s signature — which was not notarized or witnessed or acknowledged — appears the word, “Accepted,” followed by a colon, and, beneath that, Israel’s signature.

The reference to consideration is formulaic; there is no allegation or evidence on the record that the purported assignment was other than gratuitous.

On August 24, 2011, Jeanette died. On October 21, 2011, Francisco Colon, her husband and sole distributee, was appointed administrator of her estate.

On October 10, 2012, Israel, as sole surviving executor, commenced the instant accounting proceeding. His account reflects, at Schedule E (“Statement of Distributions of Principal”), a September 1, 2009 distribution to Israel — “Pursuant to ARTICLE FIFTH (A) under the Will and assignment by Jeanette Ingberman of her interest under ARTICLE FIFTH (B) of the will” — of decedent’s interests in Washington Jefferson Hotel, LLC, Iroquois Hotel, LLC, J & J Hotel Company, LLC, and New Syndicate, LLC — along with Yale Syndicate, Inc. — valued in the aggregate at \$3,177,000. Schedule J of the account (“Statement of Other Pertinent Facts and of Cash Reconciliation”) reads, in part:

“On August 31, 2009 Jeanette Ingberman assigned to Israel Ingberman her entire interest as a beneficiary of the Estate of Helen Ingberman in Washington Jefferson Hotel, LLC, Iroquois Hotel, LLC, J&J Hotel Company LLC [sic] and New Syndicate LLC. . . . On September 1, 2009, the Estate of Helen Ingberman distributed to Israel Ingberman its 7.5% non managing membership interest in Washington Jefferson Hotel, LLC, its 15% non managing membership interest in Iroquois Hotel, LLC, its 5% non managing membership interest in J&J Hotel Company, LLC, and its 18% non managing membership interest in New Syndicate, LLC.”

Francisco filed objections to the account on May 29, 2014.<sup>3</sup> He challenged the validity of the purported assignment on a number of bases but not the allegation that one or both of the executors had distributed Jeanette’s interests in the specified LLCs to Israel. An account is a pleading (*see* SCPA 302 [1] [a]) and, “unless denied by answer, objection or other proof, is due proof of the facts therein stated” (SCPA 509; *see* CPLR 3018 [a]).

By decision dated July 15, 2015, this court denied objectant’s initial motion for partial dispositive relief. The court agreed with objectant that the purported assignment had not been executed in accordance with EPTL 13-2.2 (a) — which provides that an assignment of an interest in a decedent’s estate shall be “in writing and acknowledged or proved in the manner prescribed by the laws of this state for the recording of a conveyance of real property” — and, accordingly, did not constitute an assignment within the meaning of the statute. Nonetheless, the court observed that, although Jeanette had not assigned her interests in certain LLCs in decedent’s estate, she nevertheless appeared to have transferred those interests to Israel as a gift.

As noted by this court in its July 2015 decision, “The elements of a gift are: ‘intent on the part of

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<sup>3</sup> Objectant filed amended objections on March 31, 2017, and second amended objections on April 10, 2018.

the donor to make a present transfer; delivery of the gift, either actual or constructive[,] to the donee; and acceptance by the donee” (*Matter of Ingberman*, NYLJ, July 21, 2015, at 18, col 3, quoting *Mirvish v Mott*, 18 NY3d 510, 518 [2012], quoting *Gruen v Gruen*, 68 NY2d 48, 53 [1986]). This court concluded that the writing at issue appeared — on its face — to establish Jeanette’s donative intent. The then undisputed allegations in the account established the elements of delivery — one or both of the executors, rather than distributing half of decedent’s interests in the specified LLCs to Israel and the other half to Jeanette, appeared to have distributed all of decedent’s interests in the LLCs to Israel — and acceptance. Objectant, however, had challenged the authenticity of Jeanette’s signature on the instrument, her capacity to form a donative intent, and her freedom from restraint, issues of fact which had yet to be determined.<sup>4</sup>

This brings us to the instant motion.<sup>5</sup> As to delivery of the property that was the subject of the purported gift, it is undisputed that the records of the LLCs reflect decedent’s interests as being held by “Estate of Helen Ingberman.” In other words, those records do not show a distribution of decedent’s

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<sup>4</sup> In his Second Amended Objections, objectant appears to have withdrawn his challenge to the authenticity of Jeanette’s signature on the writing at issue.

<sup>5</sup> As a threshold matter, petitioner argues that objectant’s motion was not “supported by . . . a copy of the pleadings” (CPLR 3212 [b]) and, accordingly, must be denied (*Weinstein v Gindi*, 92 AD3d 526, 527 [1st Dept 2012]). But objectant has cured this defect, at least partially, by appending to a responsive affirmation a copy of petitioner’s account and a copy of the original and first amended objections to the account (the second amended objections having been filed thereafter) although not the accounting petition. The court, however, has the authority to disregard a defect in form if “a substantial right of a party is not prejudiced” (CPLR 2101 [f]). Here the petition was attached to the objectant’s first motion for summary determination and is in the court records, including the court’s electronic database, available both to the court and to petitioner (*Studio A Showroom, LLC v Yoon*, 99 AD3d 632 [1st Dept 2012]). Moreover, petitioner has not asserted that he was prejudiced by objectant’s failure to attach a copy of the petition to the moving papers (*see Sensible Choice Contracting, LLC v Rodgers*, 164 AD3d 705, 707 [2d Dept 2018]). The court, therefore, will consider the motion on its merits.

interests in the LLCs to Jeanette or to Israel. Not owning an interest in the LLCs, Jeanette had no such interest to deliver to Israel.<sup>6</sup>

Petitioner contends that Jeanette effectively “delivered” her interest under decedent’s will in the specified LLCs to Israel upon her tendering the purported instrument to him. Alternatively, petitioner contends that Jeanette effectively transferred her interests under decedent’s will in the LLCs to Israel upon his signing the purported instrument. Those contentions are without merit. They are based on petitioner’s position — made clear at oral argument — that the property here, an as yet undistributed interest in a decedent’s estate, is akin to that involved in the cases on which he relies, *Mirvish v Mott* (18 NY3d 510), which concerned the gift of a 1,100 pound sculpture, and *Gruen v Gruen* (68 NY2d 48), in which the delivery of title to a remainder interest in a painting was at issue. According to petitioner, similar to those cases, here, the ownership of what was given is not capable of being recorded anywhere, and therefore, delivery of the written instrument of gift to Israel was the only possible form of delivery. An interest in a decedent’s estate, however, which is all Jeanette possessed, may be properly given only through a written instrument in conformity with EPTL 13-2.2 (a) and the instrument in question here does not comply with that statute. Delivery of that instrument could not have conveyed Jeanette’s interests to petitioner.

Petitioner also relies on *Speelman v Pascal* (10 NY2d 313 [1961]), which concerned the validity of an assignment, in the form of a letter delivered to the assignee, of a percentage of the profits of a play (and the film version of the play) that had yet to be produced. Validating the assignment, the court

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<sup>6</sup> Had the interests in the LLCs been transferred to Jeanette after decedent’s death, she, of course, could have given away those interests to Israel by causing the change in ownership to be reflected on the records of those entities. But Jeanette never held those interests.

concluded: “[T]here was nothing left for [the deceased assignor] to do in order to make an irrevocable transfer to plaintiff of part of [his] right to receive royalties from the productions” (*id.* at 320).

Here, by contrast, there was something left for Jeanette to have done in order to make an irrevocable transfer to Israel of her interests under decedent’s will in the specified LLCs. Jeanette could have executed an assignment in accordance with EPTL 13-2.2. As the court noted in its July 15, 2015 decision, Jeanette did not.

In view of the court’s determination that Jeanette neither owned any interest in the specified LLCs — and, therefore, could not have given away such interests — nor assigned her interests under decedent’s will in the specified LLCs, the court need not address objectant’s remaining arguments.

Accordingly, objectant’s motion for partial summary determination is granted.

This decision constitutes the order of the court.

Dated: January 8 , 2020

  
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