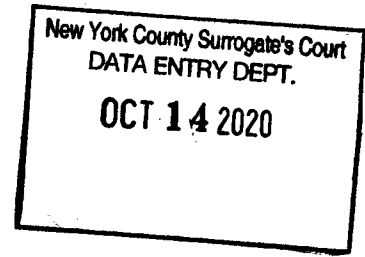


<b>Matter of Montalbano (Silverstein)</b>
2020 NY Slip Op 33396(U)
October 14, 2020
Surrogate's Court, New York County
Docket Number: 2011-1257/D
Judge: Rita M. Mella
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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



-----x  
In the Matter of the Settlement of the Final Accounting by  
Judith Silverstein, as Executor of the Will of

ERIKA M. MONTALBANO,

DECISION  
File No.: 2011-1257/D

Deceased.

-----x  
M E L L A, S.:

This is a contested accounting by the Executor of the estate of Erika Montalbano, who died on March 26, 2011. Decedent's Last Will and Testament was admitted to probate by Decree of this court dated September 7, 2011. Under its terms, Judith Silverstein, decedent's only child and Petitioner in this proceeding, is the Executor and sole beneficiary. Decedent made no provision for her spouse of 30 years, Dominick Montalbano ("Dominick"), her will expressing the view that he had "adequate assets of his own."

The Executor commenced this proceeding pursuant to a decision and order of this court dated July 18, 2012, issued in response to a petition by Dominick to compel an accounting. The Executor's account, which covered the period from April 11, 2011 to August 24, 2012 (as amended), showed a probate estate of \$933 (the date-of-death balance in a checking account), with administration expenses totaling \$48,316.

Dominick filed verified objections. After the parties had engaged in extensive discovery, Dominick died, and the fiduciaries of his own estate ("Objectants") were in due course substituted for him in this proceeding pursuant to CPLR 1015. Ultimately, the parties agreed to waive trial testimony, submitting the substantive issues in this accounting for determination

based solely on the paper record.<sup>1</sup> The following are the court's findings of fact and conclusions of law.

The objections relate mainly to four assets held solely in decedent's name at her death: a brokerage account, two annuity contracts, and an account maintained pursuant to a deferred compensation plan. For each of these interests, decedent had executed a beneficiary designation operating independently of her will. Accordingly, all four of these interests are, by definition, non-probate assets (the "Non-Probate Assets").<sup>2</sup>

To the extent that the objections fault the Executor for omitting the Non-Probate Assets from Schedule A of the account, they lack merit. First, Schedule A is by definition a report as to only probate assets. Second, Dominick had no standing to object to such an omission, since any asset reported in Schedule A would be distributable pursuant to decedent's will -- an instrument under which Dominick received no interest. Third, the Non-Probate Assets are in any event reported in the Account, but properly, in Schedule J, as "testamentary substitutes" in the context of the discussion about Dominick's right of election as surviving spouse (*see* EPTL 5-1.1-A[b][1][B]).

Objectants do not challenge the Executor's calculation of Dominick's elective share, as reflected in Schedule J. Nor do they dispute the assertion in Schedule J that Dominick's elective share -- roughly speaking, a pecuniary amount equaling 1/3 of the values of decedent's probate and non-probate assets, net of administration expenses -- was paid to him in full. Instead, their objections are based on the premise that Dominick is entitled to nothing less than the Non-

---

<sup>1</sup> This record includes memoranda of law, including a reply memorandum by Petitioner, and exhibits submitted by each side.

<sup>2</sup> The objections also took issue with the account's report as to certain tangible personal property that Dominick claimed as his own. The competing claims of Dominick and the estate to ownership of the tangibles were the subject of a separate proceeding in this court, in which the Executor sought turnover from Dominick. The issues in that proceeding were ultimately resolved, after mediation, by a settlement that has mooted those objections.

Probate Assets themselves, in full. In other words, Objectants ask the court to ignore each of the beneficiary designations executed by decedent in connection with the Non-Probate Assets.

It is not clear whether Dominick's claim to ownership of the Non-Probate Assets is proposed as a factual matter or, instead, as a matter of fairness.<sup>3</sup> Regardless of its nature, the court will proceed to address each of the claimed bases for such ownership.

Objectants allege that Dominick was the major contributor to all of the Non-Probate Assets. If intended to establish Dominick's ownership on the basis of facts, allegations as to Dominick's contributions are (1) self-refuting in relation to decedent's deferred compensation account (a fund that by its nature consists exclusively of withholdings on earnings, in this case, decedent's), (2) without evidentiary support in the record, and (3) of dubious relevance, in view of decedent's legal ownership of the assets as reflected in their being titled in decedent's name at the time of her death.

Then there is the estoppel argument advanced by Objectants. They make much of a "declaration" in decedent's hand, dated three years before she died and addressed to an agency that processes claims by Holocaust survivors against Germany from which decedent was then seeking to qualify for compensation on the basis of need. In that document, decedent reported that she held all of her assets jointly with Dominick. Objectants argue that, as a result of this statement, Petitioner, as fiduciary of decedent's estate, should be estopped from claiming that Dominick did not own the Non-Probate Assets. There being no evidence that decedent made a promise concerning the ownership of these assets or that Dominick ever relied on any such promise, whether to his detriment or otherwise, a case cannot be made for an estoppel under these circumstances (*see MatlinPatterson ATA Holdings LLC v Fed. Express Corp.*, 87 AD3d

---

<sup>3</sup> Certainly, the allegations in paragraphs 26 and 33 of the Objections to the Amended Account that Dominick was sole beneficiary of one of the annuities and of the deferred compensation plan would appear to claim a basis in fact, but they are in any event without documentary support.

836, 841-842 [1st Dept 2011] [promissory estoppel requires a showing of (1) a clear and unambiguous promise, (2) reasonable reliance on that promise by a party, and (3) injury caused by such reliance]).

Objectants further argue that the Non-Probate Assets were property of the marriage<sup>4</sup> that passed to Dominick upon decedent's death and they point to decisional law as support for their claim that Dominick succeeded to decedent's full ownership of the assets.<sup>5</sup> Well established New York Law belies this argument. In this state, spouses do not have a vested ownership right in marital property during their marriage and, instead, ownership is determined by title (*Matter of Schwartz*, 133 Misc 2d 1064 [Sur Ct, Nassau County 1986], *rev'd on other grounds*, *Sperber v Schwartz*, 139 AD2d 640 [2d Dept 1988]). Relatedly, a surviving spouse may not assert a claim for equitable distribution of marital property after the death of the other spouse (*Sperber v Schwartz*, 139 AD2d at 642). A deceased spouse's property passes to the beneficiaries under her will subject to the surviving spouse's right to elect against the will (EPTL 5-1.1-A; *Matter of Schwartz*, 133 Misc 2d at 1066).

Thus, anchored as it is in the common-law principles of equitable distribution, Objectants' position is unavailing. After all, there is a sound basis in reason for New York's choice of making equitable distribution principles inapplicable after the death of one spouse. Where a marital partnership is being dissolved, a court is reasonably positioned to distribute the contents of the marital pot between the spouses on the basis of the equities; in such case, both

---

<sup>4</sup> For instance, in the Memorandum of Law filed in August 2017, Objectants argue that the assets held in these accounts were acquired by decedent during the marriage and are thus marital property, that even if the assets were separate property they were transmuted into marital property by decedent's actions, that Petitioner cannot show that the assets in the accounts can be traced to pre-marital property, and that because Dominick contributed to these accounts, any appreciation is considered marital property.

<sup>5</sup> Tellingly, every decision that Objectants cite in this connection arose in the context of an action for divorce and ancillary relief, in particular, equitable distribution (*Hartog v Hartog*, 85 NY2d 36 [1995]; *Price v Price*, 69 NY2d 8 [1986]; *Majauskas v Majauskas*, 61 NY2d 481 [1984]; *Jones v Jones*, 92 AD3d 845 [2d Dept 2012]; *Steinberg v Steinberg*, 59 AD3d 702 [2d Dept 2009]; *Judson v Judson*, 255 AD2d 656 [3d Dept 1998]; *Imhof v Imhof*, 259 AD2d 666 [2d Dept 1999]).

spouses are available to speak for themselves as to the details of the marital history that are relevant to those equities. Moreover, implicit in the modern marital contract is notice to the parties that a dissolution of their union might entail a judicially imposed division of their property based on fairness rather than strictly on legal title.

By contrast, where disposition of a deceased spouse's estate is at issue, our legislature has eschewed the highly-fact intensive and subjective inquiry involved in equitable distribution. The legislature has opted instead for a much simpler standard for distributing the deceased spouse's estate, a standard in which "transmutation" and "tracing" (terms that, as mentioned previously, loom large in the objections in this case) have no place. Such standard honors the deceased's legal title to properties and her rights to dispose of them freely, while making those titles and rights subject to the safety net that the elective share affords a surviving spouse.

Finally, Objectants challenge all of the estate liabilities (administration expenses, *etc.*) reported in the account. But Objectants lack standing to raise such a challenge. Dominick's interest in decedent's assets upon her death, as explained before, was limited by statute to his elective share and Objectants do not dispute that the total value of what Dominick received from decedent, by survivorship (her interest in their condominium) and pursuant to a beneficiary designation (an interest in an annuity from a life insurance company), well exceeded the amount by which the administration expenses would otherwise have reduced such share (see EPTL 5-1.1-A [a][2]). For a similar reason, Objectants have no standing to challenge the account's report as to the Executor's return of a small compensation payment that was issued after the date of decedent's death. As to the balance of the objections, concerning certain tangible personal property as to which the Executor and Objectants raised competing claims, they have been

mooted by a settlement reached by Objectants and the Executor as parties to a separate proceeding.<sup>6</sup>

Accordingly, all of the objections to Petitioner's account are dismissed.

Settle Decree.

Dated: October 14, 2020

  
\_\_\_\_\_  
SURROGATE

---

<sup>6</sup> See note 1, supra.