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

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Petition for Construction of the Will of

LLOYD McAULAY,

Deceased.

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DECISION and ORDER
File No.: 2018-4060/E

M E L L A, S. :

Petitioner Maureen McAulay asks the court to construe Article FIFTH (a) (4) of the will of her stepfather, decedent Lloyd McAulay. The issue is whether certain real estate passing to her outside of the will reduces the testamentary share she would otherwise receive. This contested proceeding requires the court to consider the questions raised when an alleged mistake has thwarted the presumed intentions of a testator.

Decedent's will directs that a portion of his residuary estate be divided into four equal shares of 19% each, to be distributed, respectively, to Petitioner, to another stepdaughter, to his daughter, and to his son (together, the 19% beneficiaries). The relevant language in Article FIFTH is as follows:

> "I give, devise, and bequeath . . . (a) …
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> "(4) one such equal share to my step daughter MAUREEN McAULAY, provided that such share shall be distributed and paid as follows: (i) first, to convey to her such interest, if any, that my estate shall have in the real property situated at 11770 Roseglen Street, El Monte, California 91732 to the extent of such share; (ii) secondly, to pay and discharge any liens resulting from mortgages and other monetary liens on such property to the extent of the remainder of such share after taking into account the value of the aforesaid conveyance and (iii) thirdly, in cash to the extent of any remainder of such share after taking into account any distribution or payment made under clauses (i) and (ii) of this subparagraph (4)."

The other 24% of the residuary estate is disposed of in subsection (b) of Article FIFTH, which directs division into "four further equal shares, each constituting 6% of said residue," for distribution outright to a step-granddaughter and to trusts for each of three grandchildren (together, the 6% beneficiaries).

The parties agree that when decedent died, the California real estate referred to in Article FIFTH (a) (4) was titled in the names of decedent and Maureen as joint tenants, and therefore passed to her outside of his will by survivorship. They also agree that decedent furnished all of the consideration for the property. Two of the 19% beneficiaries and three of the 6% beneficiaries (the objecting beneficiaries) contend, however, that decedent believed the California property would pass under his will. They argue that the will evidences his intention that the two children and two stepchildren receive equal shares of his estate. They ask the court to effect such equality by interpreting Article FIFTH (a) (4) to require a reduction of Maureen's share by the value of the real estate that passed to her as joint tenant.[1]

In support of their position, the objecting beneficiaries submit an affidavit of the drafter who alleges, based on his own recollection and certain assumptions, that decedent was not aware that the California property passed by right of survivorship. They also offer an email from decedent's son advising the drafter (incorrectly) that the property was in decedent's name, and the drafter's (incorrect) reply that the property would pass under the will.

Petitioner and two other beneficiaries argue, on the other hand, that the instructions in the will are unambiguous and that firmly established law requires that its terms be executed as written.

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[1] The property has been valued at $360,616, in a gross estate of approximately $8,400,000.

The court's task in a construction proceeding is to determine the intent of the testator as evident from the language of the will itself, without resort to extrinsic evidence except when required to resolve an ambiguity (*e.g. Matter of Watson*, 262 NY 284, 293-294 [1933] ["We have, however, only one rule to follow — it is fundamental. The intention of a will-maker is to be found in the words used *in the will*, and when these are clear and definite there is no power to change them"] [emphasis added]; *Matter of Fabbri*, 2 NY2d 236, 239 [1957] ["The prime consideration here as in all construction proceedings is the intention of the testator *as expressed in the will*"] [emphasis added]). The Court of Appeals emphasized the importance of this principle in *Matter of Gustafson*, 74 NY2d 448, 453 (1989), where it stated, "Courts construing donative instruments are governed by a threshold axiom: a testator's intent, as ascertained 'from the words used in the will . . . according to their everyday and ordinary meaning', reigns supreme" (citations omitted).

Here, there is no ambiguity in the words of the will. The language is clear. Moreover, even assuming that the will reveals an intent that the 19% beneficiaries be treated equally, the argument does not advance the position of the objecting beneficiaries because the residuary clause of the will *does* treat them equally. It merely directs that Maureen's 19% share be funded, first, with the California real property, should the testator's *estate* have an interest in it. It did not. The objecting beneficiaries offer no authority that would support construing the will to change unambiguous language in the circumstances here and the court is aware of none.

The relief the objecting beneficiaries are seeking is more in the nature of reformation than construction. Reformation is used to alter the terms of a will that do not conform to the testator's intent when the will was executed. The remedy is usually granted to correct a mistake that is

evident from the face of the document or where language needs to be amended to avoid negative tax consequences. (*See* Warren's Heaton, Surrogate's Court Practice § 188.03 [2022]).

This case presents neither a tax mistake nor an error apparent on the face of the will. The decedent's inclusion of the words "if any" in describing his estate's potential interest in the property shows that decedent—who was a lawyer—was not unaware of the possibility that his estate would have no such interest. Where, as here, there is no ambiguity and the directions can be implemented exactly as written, the courts have refused to correct an alleged mistake.

For example, in *Matter of Patrick* (188 Misc 2d 295 [Sur Ct, Onondaga County 2001]), the testator left his residence solely to his daughter Lisa. Simultaneous with the execution of his will he signed an affidavit explaining that Lisa was the only of his four children who did not own her own home. In fact, two of his other children also did not own their own homes. The court nevertheless refused to correct the apparent mistake. The court reasoned:

> "In the present situation, the words used in the will are clear, definite and unambiguous. The alleged mistake imputed from decedent's affidavit is not evident on the face of the document.
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> . . .
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> "Addressing extraneous matters put forth by objectants in this regard is fraught with difficulty and mischief. To sustain the objections would substantially alter decedent's express testamentary scheme and result in a deviation from his clearly stated wishes. In short, to reform a will that has no ambiguities results in a will that is not that of the decedent. When the words used in a will are clear and definite, there is no power to change them (*Matter of Watson*, 262 NY 284, 293-294 [1933])."

(*Patrick*, 88 Misc 2d at 296-297).

The court is mindful that the historical prohibition on reformation of wills has been criticized for allowing dispositions that do not necessarily reflect the testator's intent. The court is constrained, however, by the well-established law of reformation, to grant the petition only

to the extent of directing that Maureen's testamentary share be distributed without reduction for the value of the California real estate.

This decision constitutes the order of the court.

Dated: February 23, 2023

SURROGATE