

**Matter of Armstrong**

2023 NY Slip Op 32282(U)

July 6, 2023

Surrogate's Court, Bronx County

Docket Number: File No. 2017-1504/C

Judge: Nelida Malave-Gonzalez

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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, BRONX COUNTY

July 6, 2023

ESTATE OF ALTIMON ARMSTRONG,  
Deceased  
File No.: 2017-1504/C and 2017-1504/D

Currently pending in this estate is a proceeding commenced by decedent's son pursuant to SCPA 2102(4) asking that the court direct the co-executors, two daughters of the decedent, to transfer to him title of real property located at 32 West 130<sup>th</sup> Street, New York, NY (the "Realty") that was specifically devised to him pursuant to decedent's will (File No. 2017-1504/C). The co-executors opposed that petition and filed an accounting proceeding (2017-1504/D) wherein they request, inter alia, an order allowing them to sell the Realty to pay debts of the estate and to satisfy the spouse's elective share. The son filed a reply and the parties requested that the court issue a decision on the papers as filed in the son's proceeding. In addition to this pending request for a decision in the son's application, the parties are conducting SCPA 2211 disclosure in the accounting proceeding and have entered into an amended disclosure schedule which will be addressed herein.

The decedent died on January 19, 2017 survived by a spouse and four children from a prior marriage. His will dated May 29, 2015 was admitted to probate on August 11, 2017, and his daughters Nola and Lorna

were appointed co-executors. The spouse petitioned to extend her time to file her right of election which was unopposed and granted pursuant to a decision dated March 16, 2019. The probate and accounting petitions list estate assets consisting of, inter alia, numerous parcels of real property specifically devised pursuant to the will.

The son moved by order to show cause seeking relief against the co-executors with respect to the Realty, including, inter alia, an order: 1) restraining them from transferring, assigning, mortgaging, encumbering, pledging or otherwise disposing of any interest in said property and from collecting rents or use and occupancy from the tenants of that property without a further order from this court; and 2) directing them to deed the property to him, to account for rents and other payments collected on the property and to deliver to the son all rents and other sums collected relating to this property. An order was signed on October 15, 2020 restraining the co-executors from transferring, assigning, mortgaging, encumbering or otherwise disposing of any interest in the Realty or collecting any rent or use and occupancy related to that property pending the further of order of this court.

As relevant herein, Article FOURTH of the will provides for the following dispositions: 1) the spouse is devised four parcels of real property including 963 East 228<sup>th</sup> Street, Bronx, NY, 30 West 130<sup>th</sup> Street, New York, NY, 111 Williamsburge Avenue, Lake City, South Carolina and 115 Williamsburge Avenue, Lake City, South Carolina; 2) decedent's daughter

Dorothy is devised real property located at 117 West 119<sup>th</sup> Street, New York, NY; 3) decedent's daughter Lorna is devised two parcels of real property including 188 Lenox Avenue, New York, NY and 190 Lenox Avenue, New York, NY; 4) decedent's daughter Nola is devised real property located at 368 West 188<sup>th</sup> Street, New York, NY; and, 5) the Realty is devised to the son. In addition to Article FOURTH which disposes of these properties, Article FIFTH of the will provides, inter alia, "I direct that none of my children shall sell or otherwise dispose of the property, I give, devise and bequeath to them pursuant to Article FOURTH [above] without first offering it for sale to my other children surviving me." That article provides a mechanism for an offer of the specifically devised property to the other children and under what conditions the property may ultimately be sold if the other children do not exercise this option. In addition to the dispositions referenced above, the spouse also receives all tangible personal property pursuant to Article THIRD, decedent's entire interest in a hardware store known as Virgo Hardware and Housewares pursuant to Article SIXTH and the residuary estate pursuant to Article SEVENTH.

Article ELEVENTH provides that in addition to the powers granted to the co-executors under the EPTL with respect to all property that is a part of the estate, as relevant herein, they also have the authority with respect to the real property to, inter alia, retain, manage, improve, enter into contracts, collect rents, make mortgage payments, keep up the insurance, make payment, partition or distribution in kind or in cash to satisfy a legacy.

Article ELEVENTH ends noting that the co-executors have the full and absolute discretion in exercising these powers and all matters left to their judgement or decision shall be final and conclusive upon all persons interested in the estate.

In support of his petition to have title to the Realty transferred to him the son argues that unless the will provides otherwise, an executor does not take title to the real property specifically devised in a will as title vests in the devisee subject to the expenses of administration. He notes further that although he was informed that the Realty would need to be sold in order to pay administration expenses, including the spouse's elective share, without detailed information as to assets and expenses of the estate there would be no way for him to determine whether this specifically devised property would be required to be sold to satisfy any such claims. Accordingly, he asks for an order directing the co-fiduciaries to, inter alia, distribute and deliver to the son the entire fee title interest in the Realty.

In opposition to the petition, the co-executors argue that although title to specifically devised real property passes automatically to the devisee upon death, the estate maintains qualified legal title to enable the fiduciaries to use that property, if necessary, to protect the estate as a whole or to satisfy a duty imposed on the fiduciaries. They cite several cases in support of their position that specifically devised property can be used to pay administration expenses and taxes, including, *Matter of Ballesteros*, 20 AD3d 414 [2d Dept 2005]; *In re Katz*, 55 AD3d 836 [2d Dept. 2008] and *Matter of*

Edwards, NYLJ Feb. 18, 2000, at 30, col. 2, 2000 NYLJ LEXIS 845 [Sur Ct, Kings County 2000].

The opposition goes on to note that although the estate is valued at an estimated more than \$8 million dollars, the vast majority of the estate is comprised of SROs with tenants who pay very little rent. The co-executors allege that the buildings have always struggled to meet their financial obligations which has resulted in the estate accumulating a large amount of debt that remains unpaid. In addition, as the spouse has filed her right of election, the Realty will need to be sold in order to pay the estate's accumulating debt and to satisfy the right of election, with all distributees contributing ratably to satisfy the elective share. In addition to the authority granted under the statute and case law, the co-executors refer to Article ELEVENTH of the will which they argue expands their authority over property that is a part of the estate. Specifically they quote the following language:

“[i]n addition to the powers granted by law, I give to my co-executrixes the following powers, authority and discretion in the management and administration of my estate and in respect to any and all property, real, personal or mixed, including cash, of which I may die seized or possessed, or which constitute at any time a part of my estate . . . **(H) To adjust, compromise, and settle or refer to arbitration any claim in favor of or against my estate. It is my intention that my co-executrixes shall have absolute and full discretion in the exercise of the powers hereinbefore granted and their determination concerning all matters left to their judgment or decision shall be final and conclusive upon all persons interested in my estate.**” (emphasis supplied).

They assert that even though the real properties are specifically devised these provisions authorize them to sell the property and is left in their discretion to decide which property is used to satisfy the claims of the estate. As the vast majority of the estate consists of real property, the co-executors maintain they have no choice but to liquidate those properties to pay off all claims.

In his reply the son acknowledges that all beneficiaries must contribute toward the spouse's elective share. He argues, however, that the contribution is ratable, based on each beneficiaries' share of the estate, and it is within the beneficiaries' discretion how to satisfy that share. He points specifically to EPTL 5-1.1-A (c)(2) which reads, in part, "[e]xcept as otherwise expressly provided in the will or other instrument making a testamentary provision, ratable contribution to the [elective share] . . . shall be made by the beneficiaries . . . which contribution may be made in cash or in the specific property received from the decedent by the person required to make such contribution or partly in cash and partly in such property as such person shall in his or her discretion shall determine." He notes he is unaware of what his ratable share would be particularly given that there are other beneficiaries, and that the spouse receives other dispositions under the will. Depending on what the set-off of those contributions and dispositions would be, he asserts it may be possible to pay off his ratable portion of the elective share in cash without the necessity of selling the Realty. Accordingly, he concludes that the co-executors do not have a right to sell the Realty that was specifically

devised to him under the will.

EPTL 11-1.1 delineates the powers granted to fiduciaries with respect to property of an estate, including real property, and allows a fiduciary to sell, and otherwise manage real property, including collecting rents, unless that property is specifically devised (see EPTL 11-1.1 [b] [5][E]). Unless the will provides otherwise, “[w]ith regard to specifically devised realty, an executor has no power to . . . dispose of the realty without the approval of the surrogate, which shall be granted only where such power is necessary for the purposes set forth in SCPA 1902.” (See *Matter of Marino*, 36 Misc3d 1215[A] [Surr Ct, Bronx County 2012]). SCPA 1902 enumerates the reasons a court may authorize the sale of real property, including for the payment of administration expenses and distribution of shares of an estate to the persons entitled thereto and encompasses the spouse’s elective share (*Matter of Katz*, 55 AD3d 836 [internal citations omitted]). Accordingly, the co-executors correctly assert that although title to the Realty vested in the son upon decedent’s death, the vesting of that title is “subject to the executor’s duty to ensure that all debts and obligations of the estate were met” (*id.* at 836) which may require that it be sold.

Moreover, Article ELEVENTH of the decedent’s will gives the co-executors additional authority with respect to the specifically devised real properties that were a part of the estate, including to manage the properties by collecting rents, paying expenses and making improvements, among other acts. The co-executors assert that subdivision (H) of Article

ELEVENTH gives them the authority to sell the Realty in order to satisfy the spouse's elective share and other debts of the estate. They further point to the final provision of Article ELEVENTH which appears to leave to the discretion of the co-executors how they choose to exercise the powers they are granted therein.

On this state of the record, and under these facts where it is alleged that the estate does not have liquid assets to pay the outstanding debts of the estate, the court finds that it is in the estate's interest that real property be sold in order to satisfy the debts of this estate, including the spouse's elective share. However, the court disagrees with the co-executors that Article ELEVENTH allows them the discretion to choose which property can be sold without an order of the court. After noting that the co-executors have all the powers granted to fiduciaries under the EPTL, Article ELEVENTH goes on to list specific actions that the co-executors can take with regard to property that is a part of the estate, including:

(A) To retain and hold such property either temporarily or permanently.

(B) To manage, contract, lease, improve or develop such property (real, personal or mixed) and to enter any covenants or agreements relating to the property so leased for any term that they may deem advisable, without application to any court and without regard to present or future statutory limitations.

(C) To make such loans and expenditures and to take such other actions as they may deem advisable to protect, preserve or develop such property.

(D) To collect rents and make all required mortgage payments.

(E) To effect and keep in force, fire, rent, title, liability, casualty or other insurance to protect the property of the estate and to protect the fiduciary.

(F) To make payment, partition, division or distribution in kind or in cash, or partly in kind and partly in cash, in paying any legacy . . . or in making a division or distribution of my estate and to determine the value of any such property for such purpose.

(G) To exercise any rights of election available under and with respect to any tax law, and in particular to take such actions as they shall deem appropriate with respect to claiming expenses or other items as deductions for estate tax purposes, filing income, gift or other tax returns . . . or paying any tax or collecting any refund relative to such return.

(H) To adjust, compromise and settle or refer to arbitration any claim in favor or against my estate.

Reviewing the additional authority granted to the co-executors under Article ELEVENTH, no provision authorizes the co-executors to sell the specifically devised property. These provisions allow the co-executors to manage real properties that are a part of the estate even though they are specifically devised. The clauses appear to track the language of EPTL 11-1.1(b)(5)(A) with respect to specifically devised property which would not otherwise allow fiduciaries to manage said real property, including “to take possession of, collect the rents from and manage the same” unless provided such authority under the will. EPTL 11-1.1(b)(5)(B) allows a fiduciary “to sell [specifically devised real property] at public or private sale” if necessary pursuant to SCPA 1902, but requires an order of the court. However, the authority to sell language is not contained in any of the provisions quoted

above granting additional authority to the co-executors therein. Further the court finds that subdivision (H) of Article ELEVENTH does not authorize a sale of the specifically devised real property under the will. Instead, a close review of the additional authority that is granted to the co-executors under Article ELEVENTH with respect to the specifically devised properties leads the court to conclude that it was the decedent's intent to allow the co-executors to manage the real properties that were a part of the estate so that they could be maintained and not lost prior to the estate being fully administered. Another provision supports this interpretation. Specifically, Article FIFTH which references the specifically devised real properties to the decedent's children under Article FOURTH contains a provision requiring any child who wishes to sell their specifically devised property to first offer said property to the other children. It reads, in relevant part, "I direct that none of my children shall sell or otherwise dispose of the property I give, devise and bequeath to them pursuant to Article FOURTH above, without first offering it for sale to my other children surviving me." The addition of this right of first refusal with respect to specifically devised real property to decedent's children, allowing another child to purchase estate property prior to it being offered outside of the family, appears to have been done so that the property would remain within the family, if at all possible. Although Article ELEVENTH expands the co-executors' power to manage the specifically devised real property, as previously noted it does not list the sale of the real property as one of those powers. A collective reading of these provisions leads the

court to conclude that to the extent possible, it was decedent's intent to maintain the real properties specifically devised to his children within the family, and the additional authority granted to the co-executors to manage the specifically devised property was for that purpose as well, allowing them to maintain the properties while the estate is being administered. As the Court of Appeals has stated "in construing a will, the intention of the testator must be our absolute guide . . . [and] [t]hat intent is to be ascertained 'not from a single word or phrase but from a sympathetic reading of the will as an entirety' . . ." (In re Bieley, 91 NY2d 520, 525 [1998] [internal citations omitted]).

Accordingly, although the co-executors may be required to sell real property to pay administration expenses of the estate, the court finds that the co-executors have not established why this particular property, the Realty, should be sold. The son correctly notes, his portion of the elective share is ratable, and he can decide how to satisfy that share, including with cash. On this record, there are more questions than answers with regard to the valuation of the respective properties; the value of the elective share and what properties should be sold, including the properties specifically devised to the co-executors themselves, as a matter of equity. Inevitably, the court cannot determine whether the Realty will ultimately be required to be sold and conversely cannot pass upon the son's request for a turnover of the deed. (See Matter of Seviroli, 31 AD3d 452 [2d Dept 2006] [overturning Surrogate's decision to allow the sale of real property finding "the executrix

made no showing that the sale [was] necessary to the administration of the estate”]; see also Matter of Marquez, NYLJ Jun 22, 2000 at 31, col. 5, 2000 NYLJ LEXIS 4844 [Sur Ct, Westchester County 2000] [finding court had insufficient information to determine ratable shares of right of election]; Matter of Korn, NYLJ Jan. 23, 2007 at 33, col 2, 2007 NYLJ Lexis 1020 [Sur Ct, New York County 2007] [finding that sale of specifically devised property not shown to be necessary to pay estate debts and denying the request to sell]). Moreover, although the court is not passing upon this issue, it is possible that the co-executors are conflicted as fiduciaries insofar as they have not offered to sell the realty specifically devised to them, instead seeking to sell the Realty devised to the son (see Matter of Marino, 36 Misc3d 1215[A]).

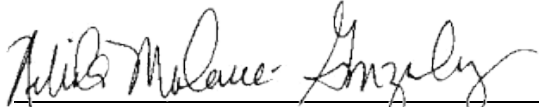
As the co-executors have requested permission to sell the Realty in the accounting proceeding, the court believes it is in the interest of equity and judicial economy to consolidate the son’s proceeding with the pending accounting proceeding and to have his request that the Realty be turned over to him determined therein (Matter of Sortis, NYLJ, Jun 25, 1992 at 28, col. 2, 1992 NYLJ LEXIS 315 [Sur Ct, Westchester County 1992] [consolidating right of election proceeding with accounting proceeding]; Matter of Kaufman, NYLJ, Aug 7, 1990 at 19 col. 1, 1990 NYLJ LEXIS 2770 [Sur Ct, Nassau County 1990] [consolidating proceedings]). Finally, as part of the son’s petition, the court entered an order on October 15, 2020 restraining the co-executors from transferring, assigning, mortgaging,

encumbering or otherwise disposing of any interest in the Realty or collecting any rent or use and occupancy related to that property pending the further of order of this court. Based on this record, the court sua sponte lifts the restraints on the co-executors only to the extent of permitting them to collect rents or use and occupancy, and permitting the payment of necessary expenses, including taxes, insurance and utilities and undertaking necessary repairs with respect to the Realty, but the restraints contained in that order otherwise remain. The son's request for an accounting and a turnover of rents and use and occupancy is also consolidated with the accounting proceeding.

As agreed to by all parties in the accounting proceeding: 1) all depositions are to be completed by August 15, 2023; 2) objections, if any, are to be served and filed no later than September 15, 2023; and (3) the parties are to appear for a compliance conference on September 19, 2023 at 9:30 a.m.

The Chief Clerk shall mail a copy of this decision, which constitutes the order of the court, to all counsel.

Proceed accordingly.

  
HON. NELIDA MALAVE-GONZALEZ  
SURROGATE