

Matter of American Cancer Socy.

2024 NY Slip Op 30661(U)

March 1, 2024

Supreme Court, New York County

Docket Number: Index No. 160324/2023

Judge: John J. Kelly

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY **PART** **56M**

Justice

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In the Matter of

AMERICAN CANCER SOCIETY, INC.,

Petitioner.

INDEX NO. 160324/2023

MOTION DATE 11/08/2023

MOTION SEQ. NO. 001

**DECISION, ORDER, AND
JUDGMENT**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6, 7 were read on this motion to/for MISC. SPECIAL PROCEEDINGS.

In this proceeding pursuant to N-PCL 555, the petitioner, American Cancer Society, Inc. (ACS), seeks to modify an endowment fund that had been established under a charitable bequest to permit it to broaden the geographic areas and uses for which the restricted endowment fund can be spent. The petitioner served the Attorney General with the notice of petition and petition, and the Attorney General has expressly stated that her office has no objection to the proposed modification. The petition is granted.

Marguerite M. Minck died on December 6, 2006, leaving a last will and testament dated September 17, 2001 that was admitted to probate by Danbury Probate Court in the State of Connecticut on January 18, 2007. Article Eighth, Section (i) of the last will and testament provided that 15% of the residue of Minck’s estate was to be given to ACS in Weston, Connecticut to fund

“the MARGUERITE MARITA MINCK MEMORIAL AWARD, to be given to a Danbury volunteer, or volunteers, who demonstrate the most empathy and compassion to those they serve. The amount of said annual Award shall consist of the income derived from the funds granted herein.”

At the time that this fund was established, ACS was bequeathed the sum \$380,437.03. According to ACS, annual rates of return on that fund have varied with market fluctuations, typically generating between a 4% and 10% rate of return. Moreover, ACS asserted that,

pursuant to its policy, applicable to all of its endowment funds, and in accordance with NPC-L 553, ACS either appropriates for expenditure or accumulates approximately 4% of the subject fund's fair market value for the restricted purpose of the administering the award created by Minck's last will and testament, while any unused excess is generally added to the fund to preserve its earning power over time. As of December 31, 2022, the fund had a value of \$623,240.03, of which \$411,384.03 was principal and \$211,856.00 was undistributed income.

As ACS explained it, its Danbury, Connecticut, office was closed on or about March 31, 1999, and it does not intend to reopen the Danbury office at any point in the foreseeable future. Hence, ACS cannot satisfy the current restrictions set forth in the endowment fund because it no longer employs any volunteers in Danbury. It noted, however, that it maintains other offices in the State of Connecticut, including offices in East Hartford and Norwalk. It also had 6,216 volunteers working for it within the State of Connecticut, including 1,856 in Fairfield County, in which Danbury is located.

NPC-L 555(b) provides, in relevant part, that,

“[a] court, upon application of an institution, may modify a restriction contained in a gift instrument regarding the management or investment of an institutional fund if the restriction has become impracticable or wasteful, if it impairs the management or investment of the fund, or if, because of circumstances not anticipated by the donor, a modification of a restriction will further the purposes of the fund. . . . To the extent practicable, any modification must be made in accordance with the donor's probable intention.”

NPC-L section 555(c) provides, in relevant part, that,

“[i]f a particular purpose or restriction contained in a gift instrument on the use of an institutional fund becomes unlawful, impracticable, impossible to achieve, or wasteful, the court, upon application of an institution, may modify the purpose of the fund or the restriction on the use of the fund in a manner consistent with the purposes expressed in the gift instrument.”

ACS proposes to allow its volunteers in the entire state of Connecticut to be eligible for an award from the subject fund, in light of the size of the State of Connecticut, and the fact that office locations may change over time within the state. ACS alleged that this expansion of the geographic restriction would permit it to give approximately 2-3% of Connecticut volunteers an

award on an annual basis, which it claimed would ensure that the award is an honor and special form of recognition, in line with Minck's intent, as opposed to a quid pro quo or expectation of volunteering. Moreover, ACS asserted that, while its volunteers often appreciate receiving monetary awards, they generally volunteer for the purpose of raising funds for, and advancing the causes of, ACS. It thus further proposes to offer each award recipient the opportunity, in lieu of a cash payment, to direct a larger sum of money from the fund to be paid toward a particular program or cause within ACS from a select menu of programs.

As the Court of Appeals has explained,

“[w]hen a court determines that changed circumstances have rendered the administration of a charitable trust according to its literal terms either ‘impracticable or impossible,’ the court may exercise its cy pres power to reform the trust in a manner that ‘will most effectively accomplish its general purposes’”

(*Matter of Wilson*, 59 NY2d 461, 472 [1983], quoting EPTL 8-1.1[c][1]; *Matter of Hummel*, 30 AD3d 802, 804 [3d Dept 2006]; see *Matter of Post*, 2 AD3d 1091, 1093 [3d Dept 2003]). The cy pres doctrine only applies where the testator's specific charitable purpose is no longer capable of being performed by the trust and the testator had a general charitable intent (see *Matter of Wilson*, 59 NY2d at 472; *Matter of Hummel* at 30 AD3d at 804). Here, ACS demonstrated that changed circumstances have rendered it impracticable or impossible to administer the endowed fund to the extent of making awards to volunteers in its Danbury office, as that office no longer exists (see *Matter of McCarthy*, 49 AD2d 204, 209 [4th Dept 1975]), and it may be inferred that Minck's general intent was to make awards to ACS volunteers within Connecticut. In addition, in accordance with Minck's intent to benefit ACS and encourage people to volunteer for ACS, ACS has demonstrated that it would be appropriate to modify the restrictions set forth in Minck's last will and testament to permit ACS to offer an award recipient the opportunity to decline a cash payment and direct that a larger sum of money be appropriated from the fund toward a particular program or cause within ACS from a selected menu of programs.

In light of the foregoing, it is,

ADJUDGED that the petition is granted, without opposition; and it is further,

ORDERED that the restrictions set forth in Article Eighth, Section (i), of the last will and testament of Marguerite M. Minck, dated September 17, 2001, and admitted to probate by Danbury Probate Court in the State of Connecticut on January 18, 2007, are modified to:


- (a) permit American Cancer Society, Inc., to make an award from the fund created by the last will and testament of Marguerite M. Minck to any of its volunteers who perform volunteer work for it in the State of Connecticut or at any of its offices in the State of Connecticut; and
- (b) permit American Cancer Society, Inc., to provide a proposed recipient of that award with the right either to elect to accept the award as a cash payment, or to decline a cash payment and instead direct that American Cancer Society, Inc., appropriate a larger sum of money from the fund to a particular program or cause administered by American Cancer Society, Inc., from a selected menu of programs;

and it is further,

ORDERED that American Cancer Society, Inc., shall annually publish that menu of programs either on its website, or in any manner reasonably calculated to inform its volunteers in the State of Connecticut thereof.

This constitutes the Decision, Order, and Judgment of the court.

3/1/2024
DATE


JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE