

**Matter of Bouvier**

2012 NY Slip Op 30565(U)

March 7, 2012

Sur Ct, Oneida County

Docket Number: 2009-61

Judge: Louis P. Gigliotti

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SURROGATE'S COURT  
STATE OF NEW YORK  
COUNTY OF ONEIDA

STATE OF NEW YORK  
SURROGATE'S COURT                      COUNTY OF ONEIDA

In the Matter of the Probate of the Last Will and  
Testament of

MAURICE BERNARD BOUVIER

Deceased.

DECISION

File No. 2009-61/C

*Appearances:*

Petitioner - Hilda Hinman                      Taylor & Miller, LLP, by Gerald H. Taylor, Esq.

**SURROGATE GIGLIOTTI:**

Maurice B. Bouvier, hereinafter "decedent," died a resident of the County of Oneida on June 9, 2008. Decedent's sister, Hilda Hinman, hereinafter "petitioner," was granted preliminary Letters Testamentary on March 13, 2009, to open an estate account and sell the decedent's real property located in Blossvale, New York, pursuant to the terms of an outstanding purchase offer.

Petitioner commenced the instant proceeding seeking full Letters Testamentary and a determination that the estate's assets be distributed in accordance with the scheme of intestate distribution pursuant to Estates, Powers and Trusts Law "EPTL" §4-1.1. Annexed to the petition were the following documents, all of which were located after a search of decedent's residence:

1. A Declaration of Trust executed by decedent in California on July 8, 1992, known as the Maurice B. Bouvier Trust.
2. Last Will and Testament of Maurice Bernard Bouvier executed in California on September 11, 2000, naming the petitioner as Executor.
3. The First Amendment to the Maurice B. Bouvier Trust, executed September 11, 2000.
4. Revocation of Trust, executed on October 21, 2004 in New York State.

5. A handwritten document on a note pad entitled My Will 5/30/08 signed "Per My Wishes" presumably by the decedent.

6. The completed first page of a form Last Will and Testament by Maurice B. Bouvier of the City of McConnellsville, County of Oneida, which first page is filled out but the document is not signed, dated or witnessed.

As background, petitioner avers that the decedent was never married nor did he have any natural or adopted children. Decedent died survived by eight brothers and sisters and was predeceased by one brother Gerald Bouvier, who left two daughters surviving.

The initial issue for determination is which document, if any, controls the distribution of decedent's property. Petitioner provided a Last Will and Testament of decedent dated and duly witnessed on September 11, 2000. The document totals four pages inclusive of the affidavit of two attesting witnesses and contains original signatures of the decedent and the two witnesses. The document was executed in Sacramento County, California. The Will recites decedent is not now married and that he has no children having nor any deceased children.

The Will executed by decedent in 2000 directs that all of decedent's property is devised to the Trustees named in the Maurice B. Bouvier Trust - Declaration Trust executed by decedent on July 8, 1992. Such direction by a testator such as decedent to pour-over to an existing trust is authorized by EPTL §3-3.7.

Shortly before his death, decedent, on May 30, 2008, prepared in handwriting a document entitled My Will wherein he referenced his property consisting of his house, car, bank, cash and certain accounts apparently invested in funds which are recited and assigned monetary values. Each class of property therein is assigned to a person or persons in designated percentages. The document was drawn on a compact note pad and at the end concludes with "Per My Wishes. Maurice B. Bouvier. 5/30/08." The document is not acknowledged or witnessed.

Also located among decedent's possessions was the first page of a form entitled Last Will and Testament. Blank spaces on this form were filled in, presumably by the decedent. The document was not signed by the decedent, not dated and contained no reference to or signatures of witnesses. The filled in provisions of the document devised all decedent's real and personal property to petitioner and nominated her as Executor.

When executing a will, a testator must comply with strict formalities of execution. See EPTL §3-2.1. These include that every will must be in writing, signed at the end by the testator, that the signature be affixed to the will in the presence of at least two attesting witnesses and the testator must declare at sometime during the ceremony of execution that the instrument which he has signed is his will.

By statute, only two types of wills are not required to be executed with the formalities required of wills under EPTL §3-2.1. These exceptions are for a nuncupative or oral will and a holographic will written entirely in the handwriting of the testator and not necessarily attested to. Holographic wills are valid only in a very limited number of circumstances as set forth in EPTL §3-2.2; in particular, where a holographic will is made by a mariner while at sea, or when made by a member of the armed forces during a war or armed conflict in which the armed forces are engaged.

The record in this proceeding reflects that on May 30, 2008, decedent was 74 years old and residing in Blossvale, New York. As he was not at that time a member of the armed forces engaged in armed conflict or a mariner at sea, the Court determines the handwritten document titled "My Will" is not a holographic will authorized by EPTL §3-2.2 to dispose of decedent's property. The Court further determines the unsigned and undated one page document entitled Last Will and Testament, partially completed by decedent is not a holographic will and does not comply with the formalities of execution entitling it to be admissible as a Last Will and Testament of the decedent.

The Court having observed decedent's Last Will and Testament dated September 11,

2000, to have been executed in compliance with the strict formalities required of wills pursuant to EPTL §3-2.1, and not having been specifically revoked by a subsequently executed instrument, is now called to construe its dispositive provisions. As previously stated, decedent's September 2000 will contained a pour-over provision whereby all decedent's property was to be added to, administered and distributed as part of the Maurice B. Bouvier Declaration of Trust according to its terms as amended prior to decedent's death. The Trust was executed on July 8, 1992 and amended contemporaneously with the execution of the 2000 Will. Thereafter, on October 21, 2004, decedent specifically revoked the Declaration of Trust in accordance with paragraph 5 of the Trust, so that at his death, decedent's Trust was no longer in existence.

The operative language contained in the second paragraph of FOURTH of the Will states:

“If for any reason the disposition of this Article Fourth is not operative or is invalid, or if the Trust referred to fails or has been revoked, then I hereby incorporate by reference the terms of said Trust as executed on the 8<sup>th</sup> day of July 1992 (emphasis provided)...without giving effect to any subsequent amendments thereto...and I give the residue of my estate to the Trustee named in said Trust, in trust, to be held, administered and distributed as therein provided.”

The Declaration of Trust provided that upon the Grantor's (decedent's) death, the trust estate was to be transferred absolutely to Dennis Francis Bradford, of Cool, California. In the event such beneficiary Bradford, is not living the principal was to be distributed per stirpes among the then living lineal or legally adopted descendants of that person, and if there be none, then per stirpes among the then living lineal descendants of the Grantor, the decedent herein.

As set forth in the affidavit of Lucille Eckgren sworn November 18, 2008, her brother Dennis F. Bradford died on February 14, 1996; attached thereto in confirmation is a death certificate from the State of California. Ms. Eckgren further attests she had a lifelong close

relationship with Dennis Bradford, that he never married and had no children, natural or adopted.

In determining the meaning to be given to the phrase “lineal descendants” the Court first notes lineal descendants is nowhere defined in the California Probate Code or relevant statutes in New York. In a will construction proceeding, the primary consideration is to implement the testamentary plan the testator intended, determining intent from the words used in the will and construing them according to their everyday and ordinary meaning. Matter of Walker, 64 NY 2d 354, at 357-358. Black’s Law Dictionary 8<sup>th</sup> Ed. defines lineal descendant as a blood relative in the direct line of descent, noting that children, grandchildren and great-grandchildren are lineal descendants. Based upon the Eckgren affidavit, the Court determines Dennis Bradford, who predeceased the decedent herein, had no living lineal or legally adopted descendants.

Inquiry must then be made regarding any living lineal descendant of the decedent herein. As stated hereinbefore, the Will, at paragraphs SECOND and THIRD, recite decedent was not married at the time of its execution and he had no children living nor any deceased children. The petition recites that decedent was never married nor did he have any natural or adopted children. Based upon the foregoing, the Court determines decedent did not have any living lineal descendants at the time of his death.

There is no other residuary clause in the Will. The dispositive provision contained in the 1992 Trust that directed the transfer of all interest in the trust estate to the then living lineal descendants of the decedent fails. The general rule with relation to a residuary bequest that has lapsed with no provision made for a substitutionary gift, is that the estate is distributable as though the decedent had died intestate. EPTL §4-1.1, See Matter of Estate of Sorensen, 28 AD 2d 534.

Decedent’s Will at paragraph SIXTH nominated Petitioner as Executor to serve without bond. The Court having previously issued a citation served upon the necessary

parties, hereby directs that the Clerk of the Court prepare a Decree:

- 1) admitting the Will to probate, valid to pass real and personal property;
- 2) revoking Preliminary Letters Testamentary;
- 3) granting Letters Testamentary to Petitioner upon properly qualifying for such office; and
- 4) directing Petitioner to distribute the assets of the estate in accordance with EPTL

§4-1.1.

Dated: March 7, 2012  
Utica, New York

ENTER:

  
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HON. LOUIS P. GIGLIOTTI, SURROGATE

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