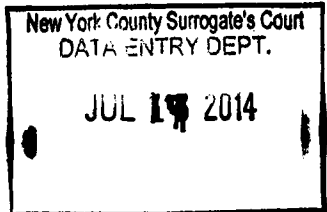


Matter of Romanello
2014 NY Slip Op 31849(U)
July 17, 2014
Sur Ct, NY County
Docket Number: 2013-2712/B
Judge: Nora S. Anderson
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SURROGATE'S COURT : NEW YORK COUNTY

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In the Matter of the Petition of Kim Romanello Paradiso for a Decree Reforming the Testamentary Trust under the Last Will and Testament of

File No. 2013-2712/B

WILLIAM ROMANELLO,

Deceased,

into a Third Party Special Needs Trust for the Benefit of Jo Mary Romanello pursuant to EPTL § 7-1.12.

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A N D E R S O N , S .

This is a proceeding to construe and reform a will in the estate of William Romanello. Decedent died on February 7, 2013, survived by six adult children, one of whom is substantially developmentally disabled. Decedent's will, dated May 15, 2009, has been admitted to probate. Decedent leaves his entire estate in trust for the benefit of his disabled daughter, and, upon her death, leaves any remaining assets to his surviving children in equal shares. The disabled daughter, aged 54, who does not speak or hear, lived at home with her parents until their respective deaths.

Another of decedent's daughters is the executor of the will and the trustee of the trust for the disabled daughter. The executor asserts that decedent intended to create a Supplemental Needs Trust ("SNT") which would not jeopardize his disabled daughter's access to government benefits (which currently include

Medicaid and Social Security Disability benefits) and further asserts that he instructed his attorney to create such a trust in his will to accomplish this. The drafter, however, failed to do so. Although Article FIFTH of the will, in which the trust appears, refers to the trust as a "special need trust fund," it does not meet the preconditions of EPTL § 7-1.12 for creating a valid SNT. Specifically, the statute requires that an SNT must clearly evidence the creator's intent to "supplement, not supplant, impair or diminish, government benefits for which the beneficiary may otherwise be eligible or which the beneficiary may be receiving..." (EPTL § 7-1.12 [a][5][I]). Article FIFTH of the will, however, contains a direction that trust income, and if necessary, principal, be used to provide for the beneficiary's maintenance, medical care and necessities, the very things which government benefit programs are designed to provide. The trust provision in the will, as drafted, thus contravenes the requirement of EPTL § 7-1.12 that an SNT provide funds only for goods and services not provided by government safety-net programs. If not reformed, it would disqualify the beneficiary from eligibility for such programs.

The executor seeks a construction as to decedent's intent, and, if it is shown that he intended to create a valid SNT, she seeks reformation of the trust provisions to conform to the statutory mandates.

The Department of Social Services ("DSS"), which provides benefits to decedent's disabled daughter, opposes the petition. DSS argues that the reference to a "special need trust fund" in Article FIFTH is a mere passing reference which can be disregarded. DSS argues that the court should look only to the operative provisions of the trust, including those directing expenditures for the beneficiary's medical needs and necessities, as a basis for concluding that the will is unambiguous and the decedent did not intend to create an SNT.

It is well established that the primary objective in a construction proceeding is to ascertain a testator's intent in order that it may be effectuated (*Matter of Carmer*, 71 NY2d 781 [1988]), and that such intent is determined "not from a single word or phrase but from a sympathetic reading of the will as an entirety..." (*Matter of Fabbri*, 2 NY2d 236, 240 [1957]). The cases hold that "[w]here a general testamentary scheme can be established from such a reading, it is the court's duty to afford such purpose force and effect," even if it is inconsistent with a literal reading of the will (*Matter of Bellows*, 103 AD2d 594, 597 [2d Dept 1984]).

In seeking to understand a testator's intent, the court is guided by well-established rules of construction. One such rule is that words are never to be disregarded or rejected as meaningless if they can be made significant by any reasonable

construction (*Matter of Buechner*, 226 NY 440 [1919]). Thus, the court cannot disregard the testator's use of the descriptive words "special needs trust fund" or pass them off as superfluous when they may have bearing on decedent's testamentary intent (*Matter of Van Cleaf*, 81 Misc 2d 854 [Sur Ct, NY County 1973], *aff'd*, 44 AD2d 542 [1st Dept 1974], *aff'd*, 36 NY2d 975 [1975]). This case is thus distinguishable from *Matter of Rubin*, 4 Misc 3d 634 [Sur Ct, NY County 2004], upon which DSS relies. The instruments in *Rubin*, and in *Matter of Mortimer*, decided together, were drafted before case or statutory law clearly authorized supplemental needs trusts, and there was no language in either instrument suggesting an intention to shelter the funds in such a manner or otherwise creating an ambiguity as to the maintenance of the trust or the disposition of the funds.

In this case, however, giving meaning to all the words used by the testator does not leave the court with a clear understanding of his intent. As described above, giving meaning to all the words used results in a contradiction between the use of the words "special needs trust fund," which tends to indicate an intention to create a valid SNT, and the direction that the trustee expend the funds in a manner violative of SNT requirements. This creates an obvious ambiguity which cannot be resolved from the instrument itself. In such circumstances, the court may properly consider extrinsic evidence in order to

clarify the ambiguity and glean the testator's actual intent (*Matter of Phillips*, 17 AD3d 1706, 1709 [4th Dept 2012], leave denied, 21 NY 3d 909 [2013]; *Matter of McCabe*, 269 AD2d 727, 729 [3d Dept 2000]; *Matter of Goldstein*, 46 AD2d 449, 451 [4th Dept 1975, *aff'd*, 38 NY2d 876 [1976]).

A hearing will thus be required to determine the testator's intent. As no discovery has yet been conducted, a conference will be held to set a discovery and trial schedule.

This decision constitutes the order of the court.

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S U R R O G A T E

Dated: July 17 , 2014