Matter of Rockefeller Univ.
2016 NY Slip Op 31556(U)
August 15, 2016
Supreme Court, New York County
Docket Number: 153142/2016
Judge: Nancy M. Bannon

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42
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IN THE MATTER OF
ROCKEFELLER UNIVERSITY Index No. 153142/2016

Petitioner. DECISION AND ORDER

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NANCY M. BANNON, J.:

I. INTRODUCTION

Rockefeller University (the university) petitions the court pursuant to N-PCL 555(b) to release restrictions set forth in a will that bequeathed substantial institutional funds to the university, on the ground that the restrictions have become impracticable, wasteful, and an impediment to the prudent management and investment of the proceeds of the bequest. The Attorney General appears in the proceeding, and expressly concurs with the university's contention that the release of the restrictions would further the testamentary intent of the donor. The donor estate has not opposed the petition. The court grants the petition.

II. BACKGROUND

In a will dated October 10, 1962, James P. Martin made a bequest to the university, which provided that, upon the death of the last income beneficiaries of a testamentary trust identified

in the will, the trust would terminate and the university would receive the principal then remaining, to be held in perpetual trust for the purpose of combating arteriosclerosis. The bequest included the securities of numerous corporations. The university alleges that, from its receipt of the bequest in 2007 until the commencement of this proceeding, it has continued to allocate income therefrom to research combating arteriosclerosis. The will, however, restricts the university from selling securities in 17 enumerated industrial corporations bequeathed by the estate, and bars the university from allocating any segregable income generated by the bequest to the purchase of mortgages, corporate bonds, preferred stock, or government bonds while the value of the United States dollar remains unindexed to the price of gold, or to the purchase of securities in companies engaged in steel, copper, and railroad equipment production, and management of investment trusts and securities under any circumstances.

The Martin bequest was valued at more than $12.9 million as of December 31, 2015, according to account statements issued to the university by BNY Mellon, the custodian of the bequest assets. According to the petition, as of April 2016, 6 of the 17 corporations subject to the sale restriction had ceased to exist as independent entities or as divisions or subsidiaries of larger entities, and shares in one of the existing corporations, Eastman Kodak, lost more than 50% of its value between 2007, when the

university received them, and December 31, 2015, shortly before this proceeding was commenced. The petition also asserts that the securities subject to the sale restriction generated a 2.2% annualized return and an 18.6% cumulative return from 2007 through June 30, 2015, far underperforming the 4.6% annualized return and 43.6% cumulative return for the entirety of the university's endowment. The petition further asserts that, although the types of securities subject to the investment restriction would have generated a 2.9% annualized return and a 25.5% cumulative return during the same period had they been purchased in a segregated, nonunitized manner, i.e., outside of a portfolio, the higher-performing endowment, in accordance with modern portfolio theory, includes some of those very types of securities, and was not adversely affected thereby. The university thus alleges that the restrictions have become impracticable, wasteful, and an impediment to the prudent management and investment of the proceeds of the bequest, since they require the university to maintain underperforming securities and prohibit it from purchasing other securities that could gainfully be included in its portfolio. The Attorney General agrees. He asserts that the release of the sale and investment restrictions would further the purposes of the university's endowment fund by increasing the amount of income available to be expended for the purposes specified by Martin in

his will, enabling the university to invest its endowment fund fully in accordance with modern portfolio theory, in which management and investment decisions about an individual asset "must be made not in isolation but rather in the context of the institutional fund's portfolio of investments as a whole and as part of an overall investment strategy having risk and return objectives reasonably suited to the fund and to the institution." N-PCL 552(e)(2).

III. DISCUSSION

N-PCL 555(b), enacted in 2010, provides 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. The institution shall notify the donor, if available, and the attorney general of the application, and the attorney general and such donor must be given an opportunity to be heard. To the extent practicable, any modification must be made in accordance with the donor's probable intention." An "institutional fund" is a fund, such as the

university's endowment here, that is held by an entity that is organized and operated exclusively for charitable or eleemosynary purposes. N-PCL 551(d), (e).

N-PCL 555(f) provides that "[t]his chapter shall not limit the application of the doctrines of cy pres and deviation." As the university correctly contends, the statute essentially codifies the equitable doctrine of deviation, which permits a court to modify, or to direct or permit a trustee to deviate from, an administrative or distributive provision if, because of circumstances not anticipated by the donor, the modification or deviation will further the purposes of the trust. See Restatement (Third) of Trusts § 66. The doctrine is to be liberally applied to permit deviations from the terms of a governing instrument when they are not in conflict with the law. See Matter of Talman, 128 Misc 2d 860 (Surr Ct, N.Y. County 1984).

"Where the provisions of a will limiting the trustee to a particular type of investment is held to be inapplicable under current economic conditions, the trustee will be relieved from the restrictive provision of the will." Matter of Morgan, 13 Misc 2d 214, 220 (Sup Ct, N.Y. County 1958); see Matter of Chamberlin, 135 AD3d 1052 1054 (3rd Dept 2016); Matter of Aberlin, 264 AD2d 775, 775 (2nd Dept 1999); Matter of Siegel, 174 Misc 2d 698, 700 (Surr Ct, N.Y. County 1997). Moreover, application of the doctrine of deviation is warranted where, as

here, a trustee seeks to sell assets that the settlor had specified should be retained because economic circumstances have changed since the time the restriction was imposed (see Mertz v Guaranty Trust Co. of N.Y., 247 NY 137, 144 [1928] [Cardozo, J.]; Matter of Pulitzer, 139 Misc 575, 579 [Surr Ct, N.Y. County 1931], affd 237 App Div 808 [1st Dept 1932]), particularly in light of subsequent developments in investment theory and changes in the law governing fiduciary investment standards. See Matter of Siegel, supra. Thus, deviation is appropriate here to empower the university with greater investment discretion than that originally granted by the settlor (see id.; Matter of Flanagan, 199 Misc 862 [Surr Ct, N.Y. County 1951]), inasmuch as current legal standards for prudent investing reflect modern portfolio theory, in which investments should be not assessed in isolation, but instead evaluated in the context of the portfolio as a whole and as a part of an overall investment strategy. N-PCL 552(e)(2).

Accordingly, the university should be permitted to invest in and sell any kind of property or form of investment without presumption of imprudence (see NPCL 552[e][3]), since diversification of investments is favored unless, "because of special circumstances, the purposes of the fund are better served without diversification." NPCL 552(e)(4). Such special circumstances are not present here.

The university has established its entitlement to relief pursuant to N-PCL 552(e) by demonstrating that the restrictions in Martin's will have become impracticable, wasteful, and, in light of current investment theory and practice, an impediment to the prudent management and investment of the proceeds of the bequest, and that the release of the restrictions will serve the donor's intent. In light of the foregoing, the court need not address the university's alternative contention that application of the doctrine of cy pres provides a basis for releasing it from the sale and investment restrictions in the Martin will. See generally Committee to Save Cooper Union, Inc. v Board of Trustees of Cooper Union for Advancement of Science and Art, Sup Ct, N.Y. County, Dec 15, 2015, Bannon, J., Index No. 155185/14; Matter of Edward John Noble Hosp. of Gouverneur, N.Y., 39 Misc 2d 279 (Sup Ct, St. Lawrence County 2013); EPTL 8-1.1(c).

IV. CONCLUSION

Accordingly, it is

ORDERED that the petition is granted, and the petitioner is released from the obligation to comply with the sale and investment restrictions set forth in the will of James P. Martin, dated October 10, 1962, at paragraph SEVENTH, subparagraph 1,

thereof.

This constitutes the Decision and Order of the court.

Dated: August 15, 2016

ENTER:

J.S.C.

HON. NANCY M. BANNON