SURROGATE'S COURT : NEW YORK COUNTY

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In the Matter of an Application to Construe and/or Reform a Provision of the Will of

LOUISE ESTE BRUCE,

Purporting to Exercise Her Limited Powers of Appointment over the Remainders of Two Trusts Established by Ellen Keyser Bruce.

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File No. 2013-2579/A

A N D E R S O N , S .

The issue raised in this contested proceeding is whether the remainders of two trusts created by Ellen Keyser Bruce, one trust under an inter vivos agreement and the other trust under her will (the "trust instruments"), have been validly appointed by her daughter, Louise Este Bruce, pursuant to the testamentary powers that the trust instruments conferred on the daughter. Petitioner is executor of the daughter's estate, and he asks the court to determine, by either construction or reformation of Article SIXTH of the daughter's will, that the daughter validly exercised the powers of appointment conferred by the trust instruments. Petitioner further asks the court to direct the trustees of the respective trusts to distribute the trust remainders in accordance with the construction or reformation for which petitioner argues. Objections were filed by three individuals who, in default of an appointment, would receive both remainders pursuant to the provisions of the trust instruments. The parties have now cross-moved for summary judgment.

Background:

The mother died in 1980, the daughter in 2013. Both mother and daughter were domiciliaries of New York at their death, and their respective wills were probated in this court.

The daughter was the primary beneficiary of both trusts. In substantially identical terms, the trust instruments gave the daughter testamentary powers to appoint the trust remainders to any person other than her "creditors, her estate, or the creditors of her estate."[1] The instruments further provided that, in default of the daughter's exercise of her powers of appointment, the remainders were to go to the mother's then living issue (respondents herein).

Article SIXTH of the daughter's will provides in relevant part as follows:

> A. I hereby exercise the power of appointment given me ...[over the remainder of my mother's inter vivos trust], and I hereby direct the Trustees of such trust ... to pay the property subject to said power to my Executor, to be added to my residuary estate.
>
> B. I hereby exercise the power of appointment given me ... [over the

[1]The trust instruments also expressly prohibited the daughter from appointing the remainders to herself. However, since the daughter was given only testamentary powers, such a restriction could make no sense. The point is mentioned here only to demonstrate that the court has not inadvertently omitted reference to one of the aspects of the powers as set forth in the trust instruments.

> remainder of the trust established under my mother's will], and I hereby direct the Trustees of such Trust ... to pay the property subject to such power to my Executor, to be added to my residuary estate.

Article SEVENTH of the daughter's will leaves her residuary estate to a not-for-profit foundation to be formed by her executor and named after her. Article SEVENTH also contains a proviso, however, that, if the property passing under the Article proves too modest to warrant the creation of a foundation, the executor is to distribute the residuary instead to one or more charitable organizations of the executor's choosing.

Analysis

Petitioner's submissions are replete with reminders as to standard principles governing summary judgment practice and various rules governing the exercise of a power of attorney as set forth in EPTL 10-6.1 *et seq*. The disquisition, however, is unnecessary, since respondents do not contend that some issue of fact prevents a summary determination of the issue here, and respondents do not challenge the daughter's attempt to exercise her powers of appointment on the ground of some formal defect under the statutes setting forth "Rules Governing Exercise of a Power of Appointment."

Respondents for their part strenuously argue that the terms of Article SIXTH clearly purport to exercise a power that the

daughter did not have and that those terms therefore fail to appoint the remainders.

The parties' respective positions cannot be evaluated without reference to the fact that, as our Court of Appeals has noted,

> "The donee of a special power to appoint an estate... is invested with an authority merely, and unless the appointment conforms to the authority given, the appointment is invalid, in so far ... as it transcends the power."

(*Hillen v Iselin*, 144 NY 365, 373-74). Moreover, in a case such as this, the court must be mindful that,

> "When the purpose of the testator is reasonably clear by reading his words in their natural and and common sense, the courts have not the right to annul or pervert that purpose upon the ground that a consequence of it might not have been thought of or intended by him...."

Matter of Dickinson (273 AD2d 89, 90 [1st Dept. 2000]).

At first blush, the foregoing guidance would appear to undercut the petition herein, since the terms of Article SIXTH seem to be as plain -- and as beyond the limits of the daughter's powers -- as respondents propose. Nevertheless, Article SIXTH must be read in conjunction with the trust instruments (*see Matter of Terwilligar*, 135 Misc 170, 174 [Sur Ct, Kings County 1929). When so read, it is clear that the Article must not be taken literally unless the daughter's intention or purpose is to be sacrificed in a process by which the court "doff[s its] common

sense]" (*Matter of Ferguson*, 194 Misc 840, 841 [Sur Ct, Broome County 1949]); *see Matter of Milliette*, 123 Misc 745 [Sur Ct, Clinton County 1924])(there is a "latent ambiguity ... where the language employed is clear and intelligible and suggests but a single meaning but some extrinsic fact or evidence aliunde [such as the known terms of powers of appointment] creates a necessity for interpretation or a choice among two or more possible meanings").

Two basic considerations strongly militate against accepting respondents' contention that Article SIXTH appoints the remainders to the daughter's estate and thus exceeds the authority invested in the daughter. First, this is not a case in which the donee of a clearly limited power was unaware of its existence and therefore might understandably have failed to honor its limits. Second, respondents' position rests on the untenable proposition that a donee of a power would take the trouble to purport to exercise it in a manner that she knew would be a nullity (*cf. Matter of Scarvullo*, NYLJ, Aug. 1. 2014, 22, col 6 [Sur Ct, NY County). Although a testator's plain words may not be ignored for the sake of sparing her estate from an unanticipated consequence of some complex situation (*see Matter of Dickenson, supra*), there is here no such complexity. There is instead only a simple question: whether the daughter intended to say that she appointed the remainders to her estate despite her

knowledge that her saying so had to be useless.

The foregoing mandates a construction of Article SIXTH that differs from the reading for which respondents argue. Under such construction, the trustees are to distribute the remainders to the "executor" not as agent of the daughter's estate, but as agent of the foundation that her will commissioned him to establish (or as agent of the charities that he selected as substitute recipients if the available funding was not large enough to warrant the formation of a foundation). As for the direction to the executor to "add" the remainders "to the residuary estate," it can plausibly be recognized as a maladroit way of directing the executor to give the remainders directly to the entity or entities designated under Article SEVENTH, as supplements to the benefits it or they were to receive as beneficiaries of the residuary estate.

None of the decisions cited by respondents prohibits the foregoing construction, based as that construction is on the daughter's clear intent, however inartfully expressed. As a prior court has observed,

> "Where a straightforward, literal interpretation is at all possible, it is not to be lightly disregarded, certainly never to be ignored because of any small reason for doing so. But in this case we have very much more than a 'small reason for doing so'. This is an instance wherein a literal fulfillment of the language found would lead to a setting at naught of dispositions which, beyond any reasonable doubt, we

know were intended by the [donee of the power]."

Matter of Hyde, 118 NYS2d 243, 248 [Sur Ct, Broome County 1953].

In view of the above, there is no need to consider whether and to what extent the latent ambiguity beclouding Article SIXTH permits reference to the extrinsic evidence proffered by petitioner. The court having concluded that Article SIXTH is a valid exercise of the daughter's powers, petitioner's motion for summary judgment is granted, and respondents' cross-motion is denied.

Settle decree.

Dated: April 10, 2017

NSA

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