Matter of Gluckman
2017 NY Slip Op 31440(U)
July 11, 2017
Surrogate's Court, New York County
Docket Number: 1990-5410/A
Judge: Rita M. Mella
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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

New York County Surrogate's Court
Date: JULY 11, 2017

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Reformation Proceeding, Estate of

GLADYCE GLUCKMAN,

Deceased.
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DECISION
File No.: 1990-5410/A

M E L L A, S.:

In determining the CPLR 2221 motion, the court considered the following submissions:

	Date Filed
1. Notice of Motion	February 16, 2017
2. Affidavit of Thomas Gluckman in support	February 16, 2017
3. Memorandum of Law in Support	February 16, 2017

Thomas S. Gluckman, trustee of a trust under the will of his mother, Gladyce Gluckman, for the primary benefit of his sister, Wende Gluckman, has filed a motion, pursuant to CPLR 2221, in the proceeding to reform the disposition of the trust remainder. The court had denied the petition on January 11, 2017.

The motion is styled as one for leave to reargue (*see* CPLR 2221 [d]). Petitioner, however — at least in his written submissions — bases his motion, not "upon matters of fact or law allegedly overlooked or misapprehended by the court" (CPRL 2221 [d] [2]), but upon the premise that prior counsel failed to present to the court all relevant facts. Essentially, therefore, petitioner seeks leave to renew, "based upon new facts not offered" in the petition "that would change the prior determination" (CPLR 2221 [e] [2]). The court will treat petitioner's motion as one for leave to renew (*see* Siegel, NY Prac § 254 at 451 [5th ed 2011]).

Under the terms of the will of decedent, who died in 1990, Wende was granted a limited testamentary power to appoint up to $50,000 of the trust principal. The balance of the principal (including any property not so appointed by Wende) is to be distributed to or for the benefit of

[* 2]

petitioner's two children. The value of the trust, as of April 30, 2016, was $2 million.

Petitioner alleges that the termination of the trust results in the imposition of a generation-skipping transfer tax of $524,870. Petitioner asks the court to reform the will: (1) to give to Wende — who died intestate in 2015, leaving no assets, in a year in which the value of the trust remainder was less than each of the federal estate tax "basic exclusion amount" (IRC § 2010 [c] [3]) and the New York State estate tax "basic exclusion amount" (Tax Law § 952 [c] [2] [A]) — a general testamentary power to appoint the trust remainder, and, presumably (2) to include a disposition of the trust remainder to petitioner's children, in default of the exercise of such power. The trust remainder would then pass to petitioner's children, tax-free and with a stepped-up basis.

The "new facts" not offered in the underlying petition concern the magnitude of Wende's mental illness. In addition, petitioner purports to present "new facts" regarding the importance to decedent of minimizing taxes and the failure of decedent's estate planning counsel to advise her appropriately. Those allegations, however, were included in the petition.

Petitioner explains that, on December 9, 1994, four years after decedent's death, he petitioned for the appointment of guardians for Wende, pursuant to MHL Article 81. On January 11, 1996, the New York County Supreme Court appointed Robert Cancro, M.D, and Robert N. Swetnick, Esq., as co-guardians of Wende's person and appointed Mr. Swetnick as guardian of her property. Petitioner argues, by means of an affirmation from Mr. Swetnick, that, had decedent given to Wende a general testamentary power to appoint the trust remainder, Wende would "never have exercised" such power, because, "she lacked the legal capacity to do so, as evidenced by her Guardianship, and it appears that she lacked that capacity for some time prior to

her mother's passing," and, further, that, given her "complete lack of personal relationships," any exercise of such power "would have undoubtedly been voided as the product of undue influence."

The court need not address the propriety of its being asked to re-write an instrument to give a testamentary power of appointment to a person who lacks testamentary capacity, because the record does not establish that the now-deceased Wende did lack testamentary capacity.

MHL § 81.29 (a) and (b) provide:

> "(a) An incapacitated person for whom a guardian has been appointed retains all powers and rights except those powers and rights which the guardian is granted.
>
> "(b) Subject to subdivision (a) of this section, the appointment of a guardian shall not be conclusive evidence that the person lacks capacity for any other purpose, including the capacity to dispose of property by will."

The Appellate Division has explained: "[A] finding of incapacity under Mental Hygiene Law article 81 is based upon different factors from those involved in a finding of testamentary capacity" (*Matter of Colby*, 240 AD2d 338, 338 [1st Dept 1997]). Thus, the extent of Wende's disability as described by petitioner in his motion, is not a fact that would change the prior determination (CPLR 2221 [e] [2]).

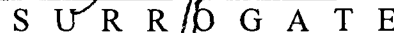
Additionally, during the March 10, 2017 oral argument of this motion, petitioner cited *Matter of Brecher* (NYLJ, Jan. 13, 2017, at 24, col 1 [Sur Ct, New York County]). In *Matter of Brecher*, the testator bequeathed to his spouse a pecuniary amount described in terms of a formula — "the minimum amount necessary to provide a federal estate tax marital deduction sufficient to reduce [decedent's] federal estate tax to zero" — and left the residuary to the trustee of a "Credit Shelter Trust," the two dispositions operating in tandem to minimize estate tax. At

the time the will was executed — July 24, 1989 — the law of New York State was such that any New York estate which was free of federal estate tax liability also would be free of New York State estate tax liability. But, by the time the testator died — April 17, 2016 — the New York State estate tax regime had changed. In the absence of modification — specifically, the inclusion of a reference to state law, so that the formula would read, "the minimum amount necessary to provide a federal estate tax marital deduction sufficient to reduce [decedent's] federal estate tax and state estate tax to zero" — the residuary trust would be funded with an amount in excess of the New York State "basic exclusion amount" (Tax Law § 952 [c] [2] [A]), which, in turn, would have resulted in a significant estate tax liability. The court determined that reformation was warranted "to protect the testator's intent from being thwarted by a change in the tax law."

Here, by contrast, petitioner seeks reformation of a will based, not so much on changes in the tax law (e.g., an increase in the amount that can pass free of federal and New York State estate tax), as on the particular circumstances which obtained a quarter of a century after decedent's death. For example, had the trust assets been invested in such a way that, at the time of Wende's death, the value of the trust would far exceed each of the federal estate tax "basic exclusion amount" (IRC § 2010 [c] [3]) and the New York State estate tax "basic exclusion amount" (Tax Law § 952 [c] [2] [A]), the requested reformation would not generate the same tax advantage.

Leave to renew is granted; upon renewal, the court adheres to its January 11, 2017 decision. This decision constitutes the order of the court.

Dated: July 11 , 2017



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