

**Matter of Scavullo**

2014 NY Slip Op 31848(U)

July 14, 2014

Sur Ct, NY County

Docket Number: 2004-1028/B

Judge: Rita M. Mella

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New York County Surrogate's Court  
DATA ENTRY DEPT.  
JUL 14 2014

SURROGATE'S COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

-----X  
In the Matter of a Petition for Construction of the Will of

FRANCESCO SCAVULLO,  
  
Deceased.

DECISION  
File No.: 2004-1028/B

-----X  
M E L L A, S.

The following papers were considered for purposes of rendering a decision in this construction proceeding under SCPA 1420:

<u>Papers</u>	<u>Numbered</u>
Verified Petition, dated May 18, 2013, and May 20, 2013, with Exhibits A and B.....	1
Verified Answer, Objection, and Cross-Petition, dated August 6, 2013, with Exhibits 1 through 4.....	2
Petitioners' Memorandum ("Reply to Verified Answer"), dated September 3, 2013.....	3
Respondent's Memorandum ("Surreply to Reply"), dated September 13, 2013.....	4

In this contested construction proceeding in the estate of Francesco Scavullo, two cross-petitions ask the court to determine the proper disposition of certain photographic property under Mr. Scavullo's will. The parties have agreed to submit the matter for decision on the pleadings and supplemental papers.

Testator was a renowned fashion photographer who died on January 6, 2004, at the age of 82, leaving an estate valued at approximately \$3.7 million. It appears that the estate assets now at issue – one half of the extant photographs, negatives, and transparencies produced by testator during his lengthy career (along with associated rights, herein referred to as "the Property at Issue") – had a market value of less than \$45,000 at the time of testator's death. The central question in this proceeding is whether testator's will gives the Property at Issue to his long-time domestic partner, Sean Byrnes, outright, or, instead, to a trust for Mr. Byrnes' life benefit, the remainder of which passes to several individuals and a charitable foundation.

Testator's will, executed on September 23, 2002, was admitted to probate on June 18, 2004, with letters testamentary issuing thereunder to testator's friend, Michael Horwitz, and testator's niece, Angela Scott, the petitioners herein. In addition to modest pecuniary bequests to persons in testator's employ at the time of his death, testator made the following pre-residuary bequests:

"SECOND: I give the items of tangible personal property listed below . . . as follows:

A. I give and bequeath to the SCAVULLO FOUNDATION, a charitable not-for-profit foundation to be formed under the laws of the State of New York by my Executors . . . one-half (50%) of all photographs, negatives and transparencies created by me and any copyrights or other rights therein.

B. I give and bequeath to each of my brothers and sisters MARIE SCAVULLO SAEGERT, CHARLES SCAVULLO, VICTOR SCAVULLO and MARGARET SCAVULLO SCOTT, who survive[s] me, one silkscreen painting on museum board created by me.

....

D. I give and bequeath all of the balance of my tangible personal property to my friend, SEAN M. BYRNES, if he survives [me]."

Mr. Byrnes did survive the testator. Therefore, to the extent relevant here, the residue of testator's estate passes in trust for Mr. Byrnes' lifetime benefit under the following terms:

"FOURTH: 1.) In the event my friend, SEAN M. BYRNES, survives me, I give, devise and bequeath all the rest[,] residue[,] and remainder of my Estate, real and personal . . . of whatever nature and wherever situated, including, without limitation, photographs, negatives and transparencies and other works of art created or owned by me and not otherwise bequeathed pursuant to any other provision of this Will, together with any copyrights relating thereto any other rights of any kind . . . as follows:

A.) To my Trustees, in trust, to hold, manage, invest and reinvest; the same, to collect the income therefrom and to pay over the net income to SEAN M. BYRNES . . . for the balance of his

natural life. It is also my express desire and wish that SEAN M. BYRNES be allowed by my Trustees to live out the balance of his natural life at 119 Burnett Street, Southampton, New York 11968, if he so desires and needs, and I ask that my Trustees honor this wish and desire, as said wish and desire is one of the reasons for the trust created herein.

B.) When SEAN M. BYRNES dies, my Trustees are directed to pay and distribute all of the . . . [trust remainder . . . as per Subsection 2 below].

2.) In the event that my friend, SEAN M. BYRNES, does not survive me, then I give, devise and bequeath my residuary estate as follows:

. . . fifty percent (50%) . . . to ANGELA SCOTT DE SIMONE[;]  
 . . . thirty percent (30 %) . . . to ROBIN BUSH[;] . . . fifteen percent (15%) . . . to AUDREY DELLA RUSSO[;] . . . [and] five percent (5%) . . . to the SCAVULLO FOUNDATION.

The parties' competing claims to the Property at Issue can be simply stated. On the one hand, Mr. Byrnes, through the guardian of his person and property, claims that Article SECOND (D) gives to him outright the photographs, *etc.*, not bequeathed to the Scavullo Foundation under Article SECOND (A). For their part, the executors claim that such property passes instead in trust, under the above-quoted provisions of Article FOURTH (1).<sup>1</sup>

It is well established that the court's ultimate mission in a construction proceeding under SCPA 1420 is to determine the testator's intent where his meaning has been obscured by some infirmity in the drafting of his will (*see Matter of Carmer*, 71 NY2d 781 [1988]). To accomplish that objective, the court must be mindful of some basic principles. For one, careful construction entails a sympathetic reading of the will in its entirety, as opposed to a reading based upon

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<sup>1</sup>The court is aware that the construction urged by the executors as petitioners herein serves the individual interests of one of them under Article FOURTH (2). Since the record is silent as to Mr. Byrnes' own testamentary arrangements, or perhaps lack thereof, it is not known whether the competing construction urged by his property guardian (*infra*), who is his sister, likewise serves her own individual interests.

isolated words or phrases (*see Matter of Fabbri*, 2 NY2d 236 [1957]). For another, since the intent of a particular testator is as individual as he was himself, precedents concerning other testamentary instruments can be of only limited utility (*see Matter of Goodrum*, 171 Misc 2d 105, 108 [Sur Ct, Erie County 1996]).

The defect in the drafting of this testator's will, and thus the need for its construction, is not at first apparent. On the one hand, testator devoted Article SECOND to disposing of such "items of tangible personal property" as he "listed below" and under Subdivisions (A) and (B) of that Article he specified photographs, *etc.*, along with select silkscreen paintings, on such list; testator then left "all of the balance" of his "tangible personal property" to Mr. Byrnes. Had testator said nothing further about his tangibles, it would have appeared perhaps arguable that the provisions of Article SECOND in combination were intended to dispose of every item of testator's tangible personal property, including the Property at Issue. But testator did say something further, specifying that some of the photographs, *etc.*, were to be held in trust under Article FOURTH (1). Hence the difficulty of discerning whether testator intended the Property at Issue to pass outright to Mr. Byrnes under Article SECOND (D) or only in the trust for him during his life, with remainder to other persons, under Article FOURTH (1).

Where, as here, a will does not speak for itself clearly, courts often resort to the analytic aid of accepted canons of construction. Particularly because each testamentary instrument is unique, a court should not gauge a testator's intent by merely rote application of such canons (*see Matter of Young*, 62 Misc 2d 86, 89 [Sur Ct, Kings County 1969]). Nevertheless, the canons are in substance expressions of common sense and, as such, they often prove helpful to the construction process. For purposes of the present case, there are two canons that are particularly

instructive.

The first relevant canon is that a testamentary instrument should if possible be construed to avoid the conclusion that the instrument contains empty or irreconcilable provisions. The proposition may be stated somewhat differently as follows: where the testator was either inartful or nonsensical, the former is to be presumed over the latter. Thus, as our Court of Appeals has observed, “Words are never to be rejected as meaningless or repugnant if by any reasonable construction they may be made consistent and significant, [since] [e]xcision is a desperate remedy” (*Matter of Griffith*, 226 NY 440, 443 [1919], quoting *Adams v Massey*, 184 NY 62, 69 [1906]). In the present case, this court would be in such desperate straits if the Article SECOND (D) bequest of “tangible personal property” outright to Mr. Byrnes had to be understood to include the Property at Issue, the very same property that was bequeathed to the trust as a part of the residuary estate.

If the two provisions in question were indeed irreconcilable, a second canon of construction would point to the prior provision’s giving way to the later one. Thus, as the Court of Appeals has noted, “when two clauses in a will . . . cannot possibly stand together, the one which is posterior in position shall be considered as indicating a subsequent intention, and prevail, unless the general scope of the will leads to a contrary conclusion” (*Van Nostrand v Moore*, 52 NY 12, 16 [1873]; see *Matter of Fuchs*, 212 AD2d 612 [2d Dept 1995]). In the present case, the “general scope of the will” does not militate against following such canon, since the most that can be said of testator’s general intention is that he wished to provide for Mr. Byrnes partly outright and partly in trust, rather than solely the former.

This case, however, does not in any event require the court to read the provisions in

question as necessarily contradictory. This is not to ignore that “tangible personal property” may in common parlance be understood to include items such as photographs and the like (*see Matter of Faggen*, NYLJ, Mar. 10, 2010, at 36, col 2 [Sur Ct, NY County] and cases cited therein). Nor is it to forget that testator himself used the phrase “tangible personal property” to include items such as photographs, *etc.*, under Article SECOND. However, the phrase is not so inflexible as to preclude a broader usage at one point or a narrower usage at another point (*id.*). It is thus far more plausible that testator lapsed into a drafting inconsistency (by using the phrase “tangible personal property” at one point broadly and at another point more narrowly) than that he surrendered to an irrational urge to dispose of the same property twice.

It should be noted that Mr. Byrnes’ guardian for her part sees no tension between Article SECOND (D) and Article FOURTH (1). According to the guardian, Article FOURTH (1) was intended to dispose of the Property at Issue only if the Article SECOND (D) bequest failed because Mr. Byrnes did not survive him. Simply put, however, the guardian’s contention ignores the plain terms of the will. Under those terms, the Article FOURTH (1) trust -- which testator specified was to be funded with assets including the Property at Issue -- was to come into effect only if Mr. Byrnes survived decedent. Indeed, if the guardian’s theory were correct -- *i.e.*, that the Property at Issue was intended to pass under Article FOURTH only if the bequest under Article SECOND (D) failed, a specific reference to the Property at Issue as within the residuary would have been entirely unnecessary, since under such circumstance that Property would automatically have defaulted into the residuary estate without any need for the specification. Thus, the specific reference in Article FOURTH (1) to the Property at Issue is best understood as the drafter’s way of making clearer that Article SECOND (D) had not been intended to dispose of that Property.

For the foregoing reasons, the court grants the petition to construe the will as disposing of the Property at Issue under Article FOURTH (1)(A), and the cross-petition is denied.

Settle decree accordingly.

Dated: July 14, 2014

*[Signature]*  
SURROGATE