SURROGATE'S COURT : NEW YORK COUNTY

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In the Matter of the Application for the Construction and Reformation of The Carcanagues Living Trust under Agreement Dated June 6, 1997, Created by

JACQUES CARCANAGUES,

Grantor.

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File No. 2014-3399

A N D E R S O N, S.

Petitioners, trustees of The Carcanagues Living Trust ("the Trust"), seek construction and reformation of certain provisions to ensure that the Trust is eligible for the marital deduction under Section 2056 of the Internal Revenue Code ("IRC"). Notwithstanding the lack of opposition, the requested relief is denied for the reasons stated below.

Grantor Jacques Carcanagues established the Trust in June 1997, naming himself as sole beneficiary and trustee during his lifetime with the power to amend, modify or revoke the Trust in whole or in part. Upon grantor's death on January 13, 2014, the Trust became irrevocable and Sergio Francescon became its sole primary beneficiary and a co-trustee along with attorney David Glassman. Francescon is entitled to the Trust's "net income" and may receive discretionary principal distributions for his "health, support and maintenance." Upon Francescon's death, the surviving trustee is directed to distribute the Trust's principal "and any accumulated income" to grantor's two sisters, per stirpes.

According to the petition, nine months prior to his death, grantor was diagnosed in France with a terminal illness. While there, he executed a holographic will on May 13, 2013, in which he named Francescon, whom he described as his partner in a civil union, as the sole beneficiary of "[his] estate." Grantor and Francescon returned to New York in late September 2013 so that they could be legally married and decedent could "organize his estate planning in New York."

On October 2, 2013, decedent transferred his interests in a Manhattan cooperative apartment and a commercial condominium to the Trust on the advice of counsel. The next day, grantor, age 76, married Francescon, 11 years his junior, in New York City. The two had previously lived together in Manhattan for more than 28 years. However, grantor never amended the Trust instrument to include language that would ensure that the Trust would be treated as a Qualified Terminable Interest Property ("Q-TIP") trust eligible for the estate tax marital deduction under IRC section 2056(b).

Petitioners are concerned that the Trust, in its present form, does not meet IRC requirements for a Q-TIP trust. Accordingly, they ask the court to construe and reform the Trust so that it qualifies as a Q-TIP trust. Without the marital deduction, grantor's estate would be liable for substantial estate taxes that would otherwise be deferred until the death of

Francescon. Petitioners state that neither the estate nor Francescon has the liquid assets to pay such taxes and that any payment required would have a "catastrophic" effect on Francescon's financial affairs.

To qualify as a Q-Tip trust, the surviving spouse must have the absolute right to all trust income (paid annually or at more frequent intervals) during his or her lifetime (*see* IRC § 2056[b][7][B]). Any provision of the Trust that has the potential to limit the right to all income will defeat the marital deduction. Petitioners identify three provisions as "ambiguous or inconsistent" with grantor's specific direction that Francescon receive the "net income" of the Trust, thus putting Q-TIP treatment in jeopardy.

The first of these provisions, the Trust's so-called "disability provisions," are in Article IV (E) and (F) and apply to "any beneficiary" who "becomes entitled to any property from any Trust created by this instrument or upon termination thereof ...." The disability provisions allow the trustees, in their discretion, to hold funds otherwise distributable to a beneficiary in further trust if he or she is under one of the specific disabilities described in the instrument. If such beneficiary dies while still under such a disability, the funds previously held would pass to that beneficiary's descendants. Thus, if these provisions apply to Francescon, his income

interest would arguably not meet IRC requirements for a Q-TIP trust because his right to income could be curtailed.

The second provision is in Article IV(C)(2), which governs the disposition of the "Residuary Estate," and directs that, upon Francescon's death, the trustees shall pay the principal of the Trust "and any accumulated income" to the grantor's sisters. Although grantor's direction that the trustees pay Francescon the "net income" from the Trust is not expressly made subject to a specific power to accumulate income, the reference to "accumulated income" here is entirely inconsistent with Q-TIP status, since it arguably indicates the grantor intended that the trustees in their discretion could withhold income from Francescon and then pay it to grantor's sisters upon grantor's death.

The final provision at issue is in Article XIV ("Various Provisions Regarding Fiduciaries"). In Paragraph G, the trustees are given the power to retain and acquire non-income-producing property. Such a power is antithetical to Q-TIP requirements because it undermines Francescon's absolute right to all income.

Petitioners argue that the requested reformation of the above provisions is necessary so that the Trust provides for Francescon in the manner grantor intended and effectuates grantor's "intent to take advantage of the marital deduction." They propose that the court omit and/or add language to these

provisions (and other related ones) so that no provision of the Trust can be interpreted to impede Francescon's absolute right to any and all Trust income. Thus, for example, petitioners seek reformation of Article IV(E) to make clear that the disability provisions do not apply to Francescon. Similarly, the reference to the trustees' distributing "accumulated income" in Article IV(C)(2) would be omitted and the trustees' power to purchase or retain non-income producing property in Article XIV(G) would be subject to Francescon's approval.

Courts have the power not only to ascertain the "validity, construction or effect" of language in a testamentary instrument (SCPA § 1420), but also, to reform such instrument, *i.e.*, add, excise, change or transpose language to effectuate a decedent's intent (*see e.g. Matter of Snide*, 52 NY2d 193 [1981]). Whether construction and/or reformation is sought, the paramount duty of the court is to determine the intent of the testator from a reading of the will in its entirety (*see e.g. Matter of Bieley*, 91 NY2d 520 [1998]; *Matter of Snide*, 52 NY2d 193, *supra*). As pertinent here, courts have reformed instruments so that estates could take full advantage of available tax deductions and exemptions, but only if literal application of an instrument's provisions would frustrate testator's actual intent as reflected in the entire document (*see e.g. Matter of Martin*, 146 Misc 2d 144 [Sur Ct, New York County 1989]; *Matter of Choate*, 141 Misc

2d 489 [Sur Ct, New York County 1988]; *Matter of Lepore*, 128 Misc 2d 250 [Sur Ct, Kings County 1985).

Thus, in *Matter of Lepore* (128 Misc 2d 250, *supra*), the court permitted the reformation of a will so that certain "inadvertently excluded words" could be added to the document's definition of the marital deduction (*id.* at 253). There, the will defined the marital deduction under prior law, which had limited the amount of the marital deduction to the greater of $250,000 or one-half the adjusted gross estate, instead of the unlimited marital deduction under current law. Because a sympathetic reading of the will made it clear that the testator had intended to give his wife the largest possible bequest by use of the maximum available marital deduction, the court allowed reformation of the instrument to ensure that the entire residuary estate could qualify for the unlimited marital deduction.

In contrast, in *Matter of Dunlop* (162 Misc 2d 329 [Sur Ct, Hamilton County 1994]), the court refused to reform a will to create five trusts (instead of two) in order to preserve decedent's $1,000,000 Generation Skipping Transfer tax ("GST") exemption and the later application of the spouse's GST exemption. The Dunlop court noted that nothing in the language of the will indicated that testator had even been aware of the GST implications of his dispositive scheme. As the court

observed, neither the clause regarding maximization of the marital deduction nor the clause directing the fiduciary to obtain maximum tax benefits in the event his spouse predeceased him (which she did not) demonstrated that decedent intended to utilize the GST exemption in his estate in order to minimize any taxes imposed on his widow's estate. In denying reformation, the court noted that the result "may seem harsh," but it explained that it would be "inappropriate ... for [the] court to be the mechanism to create a new estate plan for the testator and his widow" (*id.* at 335).

As in *Matter of Dunlop*, grantor here did not express an intent to secure the specific tax advantages sought through reformation. Indeed, grantor could not have intended that the Trust qualify for the marital deduction, since, at the time of the Trust's creation in 1997, same-sex marriages were prohibited in every state. Some states, including New York in 2011, passed legislation allowing same-sex marriage. However, it was not until the Supreme Court found the Defense of Marriage Act ("DOMA") unconstitutional on June 26, 2013, three months before grantor married Francescon, that the marital deduction for purposes of the federal estate tax became available to same-sex married couples (*see Windsor v United States*, 133 S Ct 2675, 570 US [2013]).

As a result, petitioners incorrectly rely on reformation

cases where decedents were married at the time of their instruments' execution and the instruments themselves demonstrated their testators' intent that the marital deduction apply (*see e.g. Matter of Choate*, 141 Misc 2d 489, *supra; Matter of Martin*, 146 Misc 2d 144, *supra*). Similarly, because grantor was not married to Francescon at the time of the Trust's creation, the general rule that testamentary provisions should be construed in a spouse's favor has no application. Grantor's intent at the time of execution controls (*see e.g. Matter of Tamargo*, 220 NY 225 [1917]; *Matter of Fitzgerald*, 29 AD2d 325 [3d Dept 1968], *affd* 23 NY2d 973 [1969]; *Matter of Stonehill*, 136 Misc 2d 272 [Sur Ct, Monroe County 1987]).

Contrary to petitioners' contention, the requested reformation would require the court to ignore grantor's intent as reflected in unambiguous language in the Trust. Particularly problematic are the disability provisions in Article IV(E). By its terms, Article IV(E) applies to "any beneficiary," of whom Francescon is clearly one. Petitioners' argument that "any beneficiary" was intended to pertain only to remaindermen because of the manner in which the word "beneficiary" is or is not capitalized in the instrument is based upon no more than speculation. If grantor did not wish the disability provisions to apply to Francescon, he could have easily provided so.

In addition, petitioners ignore the qualifying phrase at

the beginning of Article IV(E): "[n]otwithstanding anything herein contained to the contrary...." This language is a clear indication that grantor intended the disability provisions to apply even if their application would be inconsistent with other language in the instrument and therefore undermines petitioners' argument that grantor did not wish to limit Francescon's income interest. Similarly without merit is petitioners' argument that grantor did not intend that Francescon be subject to the disability provisions because "all of [the disability events] are absurd for application to an older spouse or a person who was of the utmost importance to the Grantor." In fact, among the disability events envisioned by grantor are several that are plainly applicable to any person regardless of age, including 1) involvement in a "divorce proceeding" or a "bankruptcy or other insolvency proceeding[]", 2) the existence of "a large unsatisfied and enforceable judgment against [him]," or 3) "chemical or alcohol dependence."

The disability provisions at issue, when viewed in the context of the instrument as a whole, demonstrate that, although grantor clearly wanted Francescon to be the primary beneficiary of the Trust, he also envisioned circumstances in which Francescon's right to income could be curtailed. In view of the unambiguous language in the disability provisions, and the fact that grantor could not have been seeking a marital deduction for

the Trust at the time of its creation, petitioners' argument that grantor never intended to jeopardize Francescon's right to income and "imperil his primary intention for the trust to qualify as a Q-TIP trust" must fail. So too must petitioners' alternative argument that reformation is warranted in view of grantor's expression of a general intent to minimize estate taxes (*see e.g. Matter of Dunlop*, 162 Misc 2d 329, *supra; Matter of Burkett*, NYLJ, Nov. 7, 1997, at 2, col 6 [Sur Ct, New York County 1997]). If this were the case, courts would be bound to reform every testamentary instrument that failed to achieve maximum tax benefits. This would broaden the reformation doctrine, which is intended to be applied sparingly (*see Matter of Snide*, 52 NY2d 193, *supra*), beyond recognition.

The court has considered the unfortunate tax consequences of this result. However, grantor had the power to amend the Trust so that it would qualify for the marital deduction, but he did not do so. The court, now presented with an instrument in which grantor did not express an intent for Francescon to receive Trust income in all circumstances, cannot reform the Trust as requested. As the Appellate Division, First Department, stated in *Matter of Dickinson* (273 AD2d 89, 90 [1st Dept 2000]), a case in which the court affirmed dismissal of a reformation proceeding:

> "'When the purpose of the testator is reasonably clear by reading his words in their natural 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 Tamargo*, 220 NY 225, 228 [1917].'"

Based upon the foregoing, the petition is denied.

This decision constitutes the order of the court.

Dated: August 17, 2016

SURROGATE