Matter of Colon
2017 NY Slip Op 31993(U)
September 6, 2017
Surrogate's Court, Nassau County
Docket Number: 2011-363500/A
Judge: Margaret C. Reilly

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU
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In the Matter of the Petition of Julia Marenghi, as Executor, for Turnover of Property of the Estate of

WILLIAM COLON,

Deceased.

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DECISION & ORDER
File No. 2011-363500/A
Dec. No. 32655
Seq. # 2

PRESENT: HON. MARGARET C. REILLY

The following papers have been considered in the preparation of this decision:

In this turnover proceeding commenced by the executor of the estate pursuant to SCPA §2103, the contest is over the proceeds of an annuity policy with the funds, amounting to approximately $249,731.85, being held in escrow pending a determination by this court as to title. The Attorney General of the State of New York has appeared on behalf of the charitable beneficiaries and raises no objection to the relief sought in the petition.

In a decision, dated December 29, 2016, this court discussed the parties contentions and scheduled a court conference to move the case forward to trial or dispositive motion. By so-ordered stipulation, the parties agreed to submit the matter for decision on a statement of agreed facts.

The last will and testament of decedent William Colon, dated December 1, 2000, was admitted to probate by a decree of this court dated February 5, 2015. Under the provisions of the will, the entire estate is bequeathed to charitable institutions. Anthony Marenghi (now deceased) is the nominated executor of the estate and Julia Marenghi the nominated alternate executor. Anthony Marenghi was the decedent's brother-in-law. Letters testamentary issued to Julia Marenghi, Anthony Marenghi's sister, and the petitioner in this proceeding.

The subject annuity policy was issued in the State of Illinois by the Employees Life Company. The policy was not signed by the decedent but was executed by Catherine Fletcher. Anthony Marenghi, acting as attorney-in-fact pursuant to a Durable General Power of Attorney signed by the decedent and dated May 28, 2001 (the "POA"), in turn executed a Durable General Power of Attorney, dated May 12, 2005, appointing Catherine Fletcher pursuant to Article P of the POA, as an adjunct attorney-in-fact for the purpose of executing the annuity contract on behalf of the decedent. The application for the annuity is also dated May12, 2005. Anthony Marenghi is the designated beneficiary and his wife, respondent Mary Marenghi, is the designated contingent beneficiary.

This proceeding was commenced for a determination that the estate is the owner of the proceeds of the annuity policy. Specifically, the executor alleges that Anthony Marenghi acted for his own benefit and not at the direction of or for the benefit of the decedent. In addition, the executor contends that the contract is unenforceable as a matter of law, as it

required the signature of the decedent (EPTL §13-3.2). It is not disputed that the decedent was a domiciliary of the State of New York a the time that the annuity was purchased.

In her answer and counterclaim, Mary Marenghi asserts title to the proceeds as the named contingent beneficiary, Anthony Marenghi having pre-deceased William Colon. In addition, she alleges that the contract requirements are governed by ERISA, which preempts state law and does not require the signature of the decedent.

In purchasing the annuity policy and naming himself beneficiary and his wife as contingent beneficiary, Anthony Marenghi purported to exercise his authority under the POA. The decedent initialed subdivision "Q" of the POA and granted authority for all matters referenced in subdivisions "A" through "P."[1] Subdivision "M" was added to General Obligations Law § 5-1501 in 1996 (L.1996 ch. 499 [the additional requirement of a gift rider to the power of attorney was added to the statute after the date of this transaction]). Pursuant to the provisions of subdivision "M" that were in effect when the annuity was procured, the class of persons to whom an attorney-in-fact could make a gift from the principal was limited to the principal's parents, spouse, children and more remote descendants (*Matter of Ferrara*, 7 NY3d 244 [2006]). The two designated beneficiaries in the annuity contract named in the application executed by Ms. Fletcher are not members of this class.

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[1] The instrument also contains an Article R, expressly granting the attorney in fact the power "To make such charitable donations as I have been in the habit of making and to make such other charitable gifts as in the circumstances my attorney-in-fact shall think I would if I were able."

Respondent argues that subdivision "M" is irrelevant because the transaction was fundamentally not a gift but rather a part of financial planning and that the power of attorney authorized the purchase of insurance and retirement planning. Petitioner contends that even if the attorney-in-fact was authorized to purchase an annuity, the designation of these particular beneficiaries resulted in a gift not authorized by the statute. Petitioner further argues that under general principals governing an attorney-in fact's obligations, he could not authorize a gift to himself and/or his wife.

It is plain from the submissions that the main issue is whether or not the designation of beneficiaries by the "adjunct attorney-in-fact" is legally effective. This breaks down into the secondary issues specifically addressed by the parties.

First, there is the question of the applicability of New York's statutory requirement that the designation of beneficiary in an annuity contract must be signed by the contract owner, here the decedent (EPTL §13-3.2). This issue creates two sub-issues. First, is this provision preempted by ERISA as asserted by Respondent relying on *O'Shea v First Manhattan Co. Thrift Plan & Trust*, 55 F3d 109 [2d Cir 1995]. *O'Shea* holds that ERISA preemption applies to "any and all State laws insofar as they ... relate to any employee benefit plan" covered by ERISA (*id*. at 113). Respondent has not demonstrated to the court how or why the Illinois annuity contract constitutes an employee benefit plan covered by ERISA and as such, there is no preemption. There is thus no preemption.

The second sub-issue involves whether the law of New York or the law of Illinois

applies to the beneficiary designation. If the forum state's law applies, the beneficiary designation must fail (EPTL §13-3.2). If resolution of this issue were necessary, the court would require further submissions respecting the proper choice of law.

The second question is whether the designation of the two unrelated individuals as beneficiaries of the annuity constituted a gift, a gift being a voluntary transfer of property made to another gratuitously and without consideration (Black's Law Dictionary 619 [Westlaw, 5th Ed. 1979]).

If it constituted a gift, such gift was not authorized under Anthony Marenghi's POA. Articles M and R of the POA address that subject. Article M authorizes "making gifts to my spouse, children and more remote descendants and parents, not to exceed in the aggregate $10,000 to each of such persons in any year" and Article R relates to charitable donations. A gift to Mr. Marenghi and/or his wife does not comply with either authorization. Nor could Mr. Marenghi grant a power to his adjunct that he did not possess. Thus, if the designation is determined to constitute a gift to the named beneficiary, it would fail as unauthorized.

Respondent argues that the "transaction" was fundamentally not a gift but rather a part of financial planning and the POA authorized the purchase of insurance and retirement planning. The statement of agreed facts address financial planning in a very limited way. In paragraphs 7 and 8 it is stated that "Medicaid planning for the decedent . . . included the replacement of decedent's existing annuity contract with a 'Medicaid compliant' annuity." None of the agreed facts relate to the selection of beneficiaries for the annuity. While the

transfer from one annuity to another may constitute financial planning for the benefit of decedent and the heirs under his will, the designation of his attorney-in-fact and that designee's wife as beneficiaries does not constitute financial planning for anyone other than Mr. Marenghi and his wife. Moreover, a particular transaction may partake of multiple identities. For example, when an agent authorized to engage in banking transactions but not to make gifts, moved a bank account into joint ownership with the principal's spouse, thereby defeating the daughter's interest as beneficiary of the account, the court held there was both a banking transaction and a gift and the gift was unauthorized (*Matter of Hoerter*, 15 Misc 3d 1101(A) [Sur Ct, Nassau County 2007]). Thus the court concludes that even though the transfer of annuities may have involved financial planning it also involved an unauthorized gift and the designation of beneficiaries, *i.e.*, the gift portion, is accordingly void.

Moreover, an attorney-in-fact may not make a gift to himself or a third party of money which is the subject of the agency relationship. Where such a gift is made it creates a presumption of impropriety, which can only be rebutted by a clear showing that the principal directed the making of the gift (*Borders v Borders,* 128 AD3d 1542 [4th Dept 2015]) or that the principal was properly divested of assets in order to effectuate his intention with respect to financial and tax planning (*Matter of Ferrara*, 7 NY3d 244 [2006]). Respondent has made no such showing.

As stated in *Borders v Borders,* 128 AD3d at 1543:

> "It is well settled that "[a] power of attorney . . . is clearly given with the intent that the attorney-in-fact will utilize that power for the benefit of the principal" *Mantella v Mantella*, 268 AD2d 852, 852 [2000] [internal quotation marks omitted]). "The

> relationship of an attorney-in-fact to his principal is that of agent and principal . . . and, thus, the attorney-in-fact must act in the utmost good faith and undivided loyalty toward the principal, and must act in accordance with the highest principles of morality, fidelity, loyalty and fair dealing' . . . Consistent with this duty, an agent may not make a gift to himself or a third party of the money or property which is the subject of the agency relationship" (*Semmler v Naples*, 166 AD2d 751, 752 [1990], *appeal dismissed* 77 NY2d 936 [1991]; *see Matter of Ferrara*, 7 NY3d 244, 254 [2006]). "In the event such a gift is made, there is created a presumption of impropriety [that can] be rebutted [only] with a clear showing that the principal intended to make the gift" (*Mantella*, 268 AD2d at 852-853), or that the gift was in the principal's best interest (*see Ferrara*, 7 NY3d at 254)."

The agreed facts contain no showing whatsoever that Mr. Marenghi or his wife provided any consideration for being named as beneficiaries under the annuity contract rendering such designation a "gift" or that the decedent intended to make such designation/gift or that such designation/gift was in the decedent's best interest. The presumption of impropriety prevails and the beneficiary designation is invalidated.

For the reasons set forth above, the petition is granted and the beneficiary designation invalidated. The escrow funds are to be delivered to the executor.

This constitutes the decision and order of the court.

Dated: September 6, 2017
Mineola, New York

E N T E R:

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Judge of the Surrogate's Court

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