SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU
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In the Matter of the Application of Howard Katelansky, Executor of the Last Will and Testament of

IRVING KATELANSKY,

Deceased,

For a determination as to the Tax provisions Under Said Will Pursuant to SCPA §1420.
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DECISION & ORDER

File No. 2016-391406/A
Dec. No. 33370

PRESENT: HON. MARGARET C. REILLY

The following papers were considered in the preparation of this decision:

Verified Petition with Exhibits. 1
Citation and Proofs of Service. 2
Waivers and Consents [3]. 3
Affirmation of Urgency. 4

In this miscellaneous proceeding, petitioner seeks a court order reforming decedent's probated will in order to avoid a New York State estate tax that will otherwise be imposed under a New York tax law that was not in effect when the will was executed. The petition is unopposed.

Decedent died on August 12, 2016, leaving an estate valued at approximately $7.6 million. He was survived by his wife and three adult children.

The petition asserts that the testator's intent was to provide for his spouse and descendants while minimizing estate taxes. Despite this objective, the will, as currently

drafted, will cause the estate to incur a one-time New York State estate tax of approximately $420,000.00.

Petitioner thus requests a reformation of the will to modify the fractional formula for disposition of the residue to the Remainder Trust by referencing the New York State estate tax. This will increase the amount passing to the marital trust and reduce the amount passing to the remainder trust to be the lesser of the New York State estate tax exemption and the Federal estate tax exemption. Such a modification would, it is claimed, effectuate the testator's intention and result in the elimination of the projected New York estate tax liability.

The will, which was executed on December 13, 1987, divides the estate into two parts. The first, set forth in Article Second, is based on a formula which designates a minimum amount that qualifies for the marital deduction and does not cause a Federal estate tax. Article Third directs that the first part is designated for distribution to a Marital Trust created as a revocable stand-by trust which provides for net income and discretionary distributions of principal to the spouse and separate continuing trusts for his children upon the spouse's death. Under Article Third, the remainder of the estate assets is designated for distribution to a Remainder Trust created as a revocable stand-by trust for the benefit of testator's children.

The petition asserts that at the time the will was drafted, this formulation produced no Federal or New York State estate tax as the two tax regimes were unified at that time. Thus the estate plan created was consistent with testator's intention to minimize or eliminate

estate taxes. "[I]n 2014, New York revamped its estate tax laws, providing for the gradual increase of its estate tax exemption amount to match the federal amount in 2019. Although many estates have benefitted by avoiding the payment of New York estate taxes as a result of the increase in the exemption amount, the legislation has also created a potential pitfall, the so called "cliff tax." If a New York resident's taxable estate is valued over the permitted exemption by only 5 percent, the estate must pay New York estate tax on the entire taxable estate, not just on that part of the estate over the exemption amount" (*In re Stern*, NYLJ, Jan 11, 2017, at 22, col. 4 [Sur Ct, New York County]).

If the will is reformed in the manner requested, to limit the amount passing into the Remainder Trust to the amount of the New York State estate tax exemption, the amount being transferred to the Remainder Trust would be exempt from New York State estate tax, while the remainder would pass to the Marital Trust and qualify for the unlimited marital deduction.

A similar question was recently determined in *Matter of Brecher*, 2017 NY Misc LEXIS 38, 2017 NY Slip Op 30022(U) (Sur Ct, New York County 2017), where the Surrogate permitted reformation, concluding that:

> "At the time the will was executed, New York limited its estate tax to what was commonly referred to as a "sponge tax," because it was tied to the amount of the state death tax credit available to an estate as an offset against federal estate tax. As an incident of the relationship between the two tax systems, any New York estate that had no federal estate tax liability would also be free of liability for New York estate tax. Would therefore have been a redundancy if the marital Formula had

> expressed an aim, not only to reduce the federal estate tax to zero, but also, to reduce the state estate tax to zero. However, by the time of decedent's death, the New York estate tax law had changed, The sponge tax was replaced by a tax system that, inter alia, provided for an exclusion amount, but the latter was smaller than the exclusion amount under the federal system. Accordingly, absent modification, the Marital Formula will require a funding of the Credit Shelter Trust in excess of the state estate tax exclusion and, in turn, will result in a significant state estate tax liability. Indeed, the New York "cliff tax" applicable to decedent's estate, will render the estate's New York estate tax liability particularly substantial, absent the remedy the petitioner now seeks."

Reformation is only sparingly allowed under the precedents (Ordover and Gibbs, *Correcting Mistakes in Wills and Trusts*, NYLJ, Aug. 6, 1998, at 25, col. 3). However, the courts have been liberal in their regard for petitions seeking reformation when the relief is needed to avert tax problems caused by a defective attempt to draft a will provision in accordance with the then tax law or caused by a change in law subsequent to the execution of the will that renders a tax driven will provision counterproductive. The central question in such a case is whether the subject instrument subverts rather than serves the testator's intent and therefor should be judicially altered (*Matter of Lepore*, 128 Misc 2d 250 [Sur Ct, Kings County 1985]). In resolving that issue, the courts have presumed that testators intend to take full advantage of tax minimizing possibilities (*In re Estate of Offerman*, 145 Misc 2d 477 [Sur Ct, Kings County 1989]; *Matter of Kaskel*, 146 Misc 2d 278 [Sur Ct, New York County 1989]; *Matter of Choate*, 141 Misc 2d 489 [Sur Ct, New York County 1988]). This presumption does not always override other considerations *(Matter of Stern*, NYLJ, Jan 11,

2017, at 22, col. 4 [Sur Ct, New York County]; *Matter of Stonehill*, 136 Misc 2d 272 [Sur Ct, Monroe County 1987]).

This court agrees with petitioner that the instant case is one in which reformation is warranted in order to protect the testator's intent from being thwarted by a change in the tax law. It is evident in the will's dispositive provisions that testator's intent was to both protect his assets from tax erosion and benefit his wife and their descendants as much as possible. The descendants' consent is critical to the relief requested because such may prove to be at their own expense, endorsing the reduction in the Credit Shelter Trust in favor of the outright bequest to the wife. The consents indicate that they do not perceive the proposed remedy as a threatened injury to them. In consideration of the foregoing, the petition is **GRANTED**.

Settle decree.

Dated: September 19, 2017
Mineola, New York

E N T E R:

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HON. MARGARET C. REILLY
Judge of the Surrogate's Court

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