

Matter of Warnecke
2018 NY Slip Op 30005(U)
January 5, 2018
Surrogate's Court, New York County
Docket Number: 1980-4972/C
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

JANUARY 5, 2018

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In the Matter of the Trust under Article SEVENTH (B) of
the Will of

GEORGE W. WARNECKE,

DECISION

File No. : 1980-4972/C

Deceased.
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M E L L A, S. :

This is an application pursuant to EPTL 7-1.13 by Bank of America, N.A., and Robert W. Brundige, Jr., as co-trustees of the trust under Article SEVENTH (B) of the will of George W. Warnecke (decedent), for permission to split the trust along family lines into two separate shares. Petitioners allege that division is appropriate because of the disparity in the needs of the two family branches, and to maintain family harmony.

The single trust as now constituted has a value of approximately \$22 million. Fixed amounts of income are payable annually, per capita, to those descendants of decedent's niece, Georgianna, who are over the age of twenty-one, with principal distributions in fixed amounts at ages twenty-five, thirty, and thirty-five. The trustees are authorized to make additional distributions in their discretion to Georgianna's descendants of any age for their support, maintenance, education, emergencies, or general welfare. The trust terminates on the death of the survivor of Georgianna's descendants who were living at decedent's death, and then becomes payable to her living descendants, per stirpes.

Georgianna died in 2003 survived by two children, both of whom are living. One of her children, Karen, has two adult children and four grandchildren, all of whom are minors.

Georgianna's other child, Shirley, has two adult children and no grandchildren. Because of the

10-year age difference between Karen's older child and Shirley's younger child, Karen's branch of the family has been eligible for, and has received, more mandatory distributions than has Shirley's family. Karen's children have also received more discretionary distributions from the trust, largely because they are raising children of their own and have a greater need for capital. Shirley's children have no current need for such distributions and prefer to have their potential discretionary payments remain in the trust.

Given these differing circumstances, all adult beneficiaries have requested that the trust be divided to separate the interests of Karen's family from the interests of Shirley's family. The proposal is to split the trust, first, into two equal shares, and then to make a contribution from Karen's family's share to the share for Shirley's family to adjust for past distributions. Upon termination, the trust remainder would be payable to Georgianna's then living descendants, per stirpes, the same as under the current trust terms. The date of termination would not be affected.

Unless expressly prohibited by its governing terms, a trust may be divided into two or more separate shares "for any reason not directly contrary to the primary purpose of the trust" (EPTL 7-1.13 [a] [3]). Here, it appears that the primary purpose of the trust can be fulfilled whether or not it is divided as requested.

Decedent set forth a number of specific guidelines for the exercise of the trustees' discretion. He was explicit in his desire that the beneficiaries "learn the value of money and the virtues of hard work and diligence" and that they "not have excessive funds available for frivolous purposes." He wanted Georgianna's descendants to be "reasonably supported and maintained and receive as full and complete an education as their abilities will permit." He placed relatively modest limits on the amounts he deemed appropriate for discretionary trust

distributions. Although his will makes clear that these expressions are not binding on the trustees, they provide insight into the trust's purpose. Taken together, they indicate that decedent wanted to insure the beneficiaries' education and support in reasonable comfort, at least through their young adulthood.

The guardian ad litem for Karen's minor grandchildren suggests that the instrument's detailed provisions for specific distributions indicate decedent's desire to treat the individual beneficiaries equally, regardless of his or her family line, and that the trust language exhibits no intent that each family line, as a whole, be treated the same as the other. She is concerned that the proposed division will leave her wards to share in a smaller fund without a corresponding, proportionate decrease in the number of beneficiaries.

The court appreciates the guardian ad litem's concerns but concludes that the potential for unequal distributions among the individual beneficiaries would not violate the primary purpose of the trust. When he chose to fix the term of the trust without regard to the generation of the measuring lives, decedent must have anticipated the likelihood that even Georgianna's descendants in the same degree would not receive equal amounts from the trust. In fact, the infants would not receive equal shares if the trust were terminated now because two are presumptive remainder beneficiaries of a portion of the trust,¹ while their cousins in the same generation are merely contingent beneficiaries and would receive nothing. Moreover, whether or not the trust is divided, the number of beneficiaries who would ultimately share in each portion is too speculative to support denial of the petition on this ground.

¹ Two of Karen's four infant grandchildren have a parent who was a descendant of Georgianna living at decedent's death, thereby making the parent a measuring life.

This case is distinguishable from *Matter of Michaelian* (NYLJ, Nov. 7, 2011, at 18, col 3 [Sur Ct, NY County]), cited by the guardian ad litem, where the court denied a request to divide a trust along family lines. There the fund had a value of less than \$1 million and the instrument disclosed an intent that the entire fund be available to any single beneficiary who might need it. Such intent is not evident in the present case. More significant, the size of the trust here makes it highly unlikely that its assets would be insufficient to fulfill the trust's primary purpose, whether or not divided as requested. The risk of any such consequence is outweighed by the advantages of preserving harmony while addressing the differences in the financial needs of each side of the family (*cf. Matter of Steiner*, Sur Ct, NY County, Sept. 11, 2015, Mella, S., index No. 2014-4281 [trust division authorized to encourage "family peace" by accommodating difference in beneficiaries' needs and priorities]; *Matter of Rutgers*, NYLJ, Nov. 18, 2014, at 22, col 3 [Sur Ct, NY County]).

Accordingly, the petition is granted.

Decree signed.

Dated: January 5, 2018


SURROGATE