

Matter of Hudson

2018 NY Slip Op 30184(U)

January 23, 2018

Surrogate's Court, Nassau County

Docket Number: 2017-1828/B

Judge: Margaret C. Reilly

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**SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

In the Matter of the Estate of

DECISION & ORDER

**SHERRY HUDSON, a/k/a
SHERRY BETTIS HUDSON,**

**File No. 2017-1828/B
Dec. No. 33838**

Deceased,

**for a Determination of Testamentary Substitutes
pursuant to EPTL § 5-1.1-A**

PRESENT: HON. MARGARET C. REILLY

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

Order to Show Cause, Affidavit and exhibits, Emergency Affirmation, 22 NYCRR § 202.7 Affirmation, and Petition for Determination of Elective Share.....	1
Affirmation to amend Petition and Affirmation in support.....	2
Affidavit by Counsel to the New York City Employees’ Retirement System.....	3
Affirmation by Counsel to the New York City Employees’ Retirement System and exhibits.....	4

Before the court is an unopposed petition brought by order to show cause by Carlton Hudson (“petitioner”), the surviving spouse of Sherry Hudson (“decedent”), for the court to issue an order determining: (1) that the Bank of America Account ending in 5559 and the NYCERS pension funds are testamentary substitutes pursuant to EPTL §§ 5-1.1-A(b)(1)(A) and 5-1.1-A(b)(1)(G); (2) that Crystal M. Simmons (“respondent”) shall pay the value of the testamentary substitute in the sum of \$12,000.00 to the petitioner; (3) that the New York City Employees’ Retirement System (“NYCERS”) shall pay the value of the testamentary substitute in the sum of \$111,666.66 to the petitioner; and granting any such further relief the court deems just and proper.

NYCERS has indicated by affidavit and affirmation that it has withheld payment of the decedent's death benefit pending the instant order to show cause. NYCERS has requested that the court determine whether the petitioner is entitled to assert a right of election as surviving spouse against the decedent's death benefit, or in the alternative, that the court order NYCERS to pay the decedent's death benefit into the court with discharge of all liability of NYCERS and to grant NYCERS such other further relief as the court may deem just and proper. The petition is unopposed.

BACKGROUND

The petitioner and the decedent were married on May 24, 1996 and were married at the time of the decedent's death, on March 26, 2017. The decedent was survived by her husband, the petitioner, and their three daughters. The petitioner was granted letters of administration by this court by decree dated on July 5, 2017. The instant petition was brought by order to show cause dated August 9, 2017, wherein the court restrained and enjoined NYCERS from paying out the death benefit pending determination of the testamentary substitutes.

The decedent left an account ending in 5559 at Bank of America and an account (the decedent's retirement account) with the NYCERS. In 2004 the decedent designated the petitioner as her beneficiary of the NYCERS death benefit. On March 13, 2017 the decedent revised her beneficiary and named her daughter Crystal M. Simons ("daughter"). At the time of her death the Bank of America account had a balance of \$36,286.19 and as of October 19, 2017 the NYCERS death benefit was valued at \$335,000.00.

The petitioner alleges that on or about March 27, 2017, the day after the death of the decedent, the daughter presented a check written against the decedent's Bank of America account for \$36,000.00, leaving a balance of \$286.19, that the petitioner collected. The check is dated March 13, 2017. The petitioner contends that the check constituted a gift causa mortis.

PETITIONER'S RIGHT OF ELECTION

Pursuant to SCPA §1421, the petitioner filed a notice of election on July 19, 2017. EPTL § 5-1.1-A (b) (1) (G) grants a decedent's surviving spouse a personal right of election against a pensioner's death benefit, provided the beneficiary designation was made after September 1, 1992. "It is well settled that the pension death benefit is a testamentary substitute under EPTL §5-1.1-A(b)(1)(G)" (*Matter of Richardson*, 20 Misc 3d 1105 [A] [Sup Ct, Bronx County 2008] [citation omitted]). The statute permits all of the death benefit to be treated as a testamentary substitute, which must be included in the estate for purposes of calculating the elective share of the surviving spouse.

The court must first determine if the \$36,000.00 check was in fact a gift causa mortis pursuant to EPTL § 5-1.1A(b)(1)(A), a testamentary substitute, and therefore included in the net estate subject to the surviving spouse's right of election. The burden of proving that a gift was made is upon the one asserting it (*Matter of Kelly* 285 NY 139 [1941]. To be a gift causa mortis the decedent must have had an apprehension of death (*Matter of Spaulding*, 49 AD 541 [1900]). A gift made by check is not complete if the check did not clear the depositor's bank account before the donor's death (*Matter of McCallister*, NYLJ, Nov. 27,

2000, at 37, col 2 [Sur Ct, Kings County]). A check that has not been paid has been described as the voluntary and unenforceable promise of an executory gift (*Matter of Bloch*, 186 Misc 705 [Sur Ct, New York County 1945]). The petitioner does not put forth any argument to support his contention that this check was in fact a gift causa mortis. The court has determined from the filed documents that: the check was dated March 13, 2017; the decedent's death certificate indicates that the decedent died March 26, 2017 and; the check was not presented for collection until March 27, 2017, the day after the decedent's death. Therefore, the check does not meet the standard for a gift causa mortis. The funds however, are assets of the estate and must be returned to the estate (*Matter of Ross*, NYLJ, April 1, 2005, at 8, col 4 [Sur Ct, Nassau County]).

In applying EPTL §5-1.1-A, both the computation of the decedent's estate and the computation of the surviving spouse's elective share must account for all estate assets and testamentary substitutes, which include the decedent's retirement account, as well as the Bank of America account balance. Therefore, for purposes of calculating the petitioner's elective share, EPTL § 5-1.1-A(2) states that share is: "the pecuniary amount equal to the greater of (i) fifty thousand dollars or, if the capital value of the net estate is less than fifty thousand dollars, such capital value, or (ii) one third of the net estate."

The estate consists of the balance in the Bank of America checking account which was \$36,286.19 at the time of the decedent's death and the NYCERS death benefit in the sum of \$335,000.00 which equals \$371,286.19, one third, of which is \$123,762.06. However, the net estate against which the elective share is calculated is the gross estate less debts, funeral

expenses, and administrative expenses (EPTL § 5-1.1A[a][2]). The petition does not include a statement regarding any debts and/or expenses. The court further notes, there is a related administration proceeding in which the petitioner indicated that there may be a cause of action related to the decedent's death. Any proceeds from a cause of action related to the decedent's death would also be a factor to consider in determining the petitioner's elective share.

The petition is **GRANTED** to the extent that the court finds that the funds in the Bank of America checking account and the NYCERS death benefit are both testamentary substitutes. The court finds that the petitioner has validly exercised his right of election. However, until the administrator files an account showing all administrable assets of the estate as well as the testamentary substitutes (EPTL §5-1.1-A [b][1][A]-[I]), the court is unable to calculate the surviving spouse's elective share.

This constitutes the decision and order of the court.

Dated: January 23, 2018
Mineola, New York

E N T E R:

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

cc: Joanne Hawthorne, Esq.
552 Broadway
Massapequa, New York 11758

Zachary W. Carter
Corporation Counsel of the City of New York
Att: Adam M. Moss, Assist. Corp. Counsel
Attorney for NYCERS
100 Church Street, Room 5-178
New York, New York 10007

Carlton Hudson
97 Oliver Avenue
Valley Stream, New York 11580

Carlique Hudson
97 Oliver Avenue
Valley Stream, New York 11580

Ciara Hudson
97 Oliver Avenue
Valley Stream, New York 11580

Crystal M. Simmons
9851 Hanberry Boulevard
Charlotte, North Carolina 28213