Matter of Durcan
2018 NY Slip Op 30629(U)
April 11, 2018
Surrogate's Court, New York County
Docket Number: 2014-4296/C
Judge: Rita M. Mella

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of the Petition of James Durcan, as Administrator of the Estate of

JOAN DURCAN,

Deceased,

DECISION

File No.: 2014-4296/C

For the Turnover of Property.

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M E L L A, S. :

The following papers were considered in determining this motion and this cross-motion for summary judgment:

Papers Considered	Numbered
Administrator's Petition for Turnover of Property	1
Verified Answer of Mary Anne Cunney	2
Verified Answer of Morgan Stanley Smith Barney LLC	3
Affirmation of Abigail Elrod, on behalf of Morgan Stanley Smith Barney, LLC, in "Response to Order to Show Cause" and Petition, filed on May 4, 2016, with Exhibits	4
Notice of Motion for Summary Judgment and Affirmation in Support with Exhibits	5,6
Memorandum of Law in Support of Motion for Summary Judgment	7
Notice of Cross-Motion for Summary Judgment by Mary Anne Cunney and Affirmation in Support and in Opposition to Motion, with Exhibits	8,9
Memorandum of Law in Opposition to Motion for Summary Judgment and in Support of Cross-Motion	10
Petitioner's Reply Memorandum of Law	11

James Durcan, the administrator of the estate of decedent Joan Durcan, petitions for turnover from Mary Anne Cunney ("Cunney") and Morgan Stanley Smith Barney LLC ("Morgan Stanley") of the proceeds of four accounts owned by decedent which Morgan Stanley paid to Cunney after decedent's death.

Decedent died in November 11, 2014, survived by her two siblings, Cunney and petitioner, and five nieces and nephews, children of a pre-deceased brother. Petitioner obtained

letters of administration of decedent's estate on October 23, 2015, and shortly thereafter filed the instant petition, pursuant to SCPA 2103, claiming that the proceeds of these accounts belong to decedent's estate.

The accounts in question, Individual Retirement Accounts ("IRAs"), were created by decedent in 2002, at Merrill Lynch & Co., Inc. ("Merrill Lynch"). At that time, decedent executed instruments designating Cunney as the sole beneficiary upon decedent's death. Raymond George III, decedent's long-time financial advisor, testified at his deposition that he spoke with decedent frequently, and that each quarter they would review her IRA designations. George indicated that decedent never wavered in her desire to have her sister as the sole beneficiary of these accounts.

On or about October 23, 2014, George, together with several other members of his team, transferred employment from Merrill Lynch to Morgan Stanley. When informed of George's transfer, decedent consented to have her assets transferred also to Morgan Stanley. According to George, the transfer of the assets occurred in two steps or "waves." In the first wave, in late October 2014, Morgan Stanley sent decedent a Client Data Form, a Single Advisory Contract and account transfer forms. Decedent completed these documents and returned them to George and his team. The Client Data Form, completed in decedent's handwriting but not signed by her, listed Cunney as 100% beneficiary. Based on these documents, Morgan Stanley established new accounts on decedent's name.

In early November of 2014, as part of the second wave, additional forms were sent to decedent, including a Traditional IRA Adoption Agreement ("Adoption Agreement") and signature pages. The Adoption Agreement included a provision for designating a beneficiary for

the new accounts.

George testified at his deposition that he had spoken with decedent on the phone, providing her assistance with filling out the beneficiary designation included in the Adoption Agreement, and that decedent had reiterated, during those calls, that she wanted Cunney to be the sole beneficiary. According to George, decedent told him that she completed the forms and that they were in an envelope ready to be mailed back to Morgan Stanley.

Also deposed was Amy Curley, a member of George's financial planning team. She also helped decedent, by telephone, fill out the forms sent by Morgan Stanley, and, during this conversation, decedent confirmed that Cunney was the sole beneficiary of her accounts and asked Curley to identify the place in the forms where she needed to write down Cunney's name. Curley thought that decedent was completing the forms during this telephone conversation and recalled that decedent told Curley that she was going to find a UPS box to mail the forms back to Morgan Stanley. Curley further testified that she was friendly with decedent for several years and decedent had never mentioned having a brother.

Decedent died unexpectedly a few days later. The documents sent by Morgan Stanley in the second wave, including the beneficiary designations contained in the Adoption Agreement, were neither received by Morgan Stanley nor found among decedent's papers. At the time of decedent's death, the four IRAs were valued at approximately $2 million.

Upon Cunney's application after decedent's death, Morgan Stanley transferred the proceeds of the IRAs to "inherited" IRA accounts in Cunney's name. According to a September 24, 2015 letter from a Morgan Stanley Complex Risk Officer to petitioner's counsel, the proceeds of decedent's IRAs were transferred to Cunney's accounts because Morgan Stanley

recognized Cunney as the beneficiary on the basis of the information provided by decedent in the "new account profile document" (the Client Data Form). The letter further stated "In light of Ms. Durcan passing away [while her accounts were in] mid transfer, Morgan Stanley has elected to recognize the profile document as the IRA application." A similar explanation was provided by George, who testified that Morgan Stanley identified Cunney as the beneficiary of the new accounts because decedent had completed the Client Data Form in her own writing indicating that Cunney was to be the beneficiary and because he and his team were aware of decedent's wishes from the forms that she had completed in connection with the Merrill Lynch accounts.

Cunney and Morgan Stanley filed verified answers denying the allegation that Morgan Stanley wrongfully paid the proceeds to Cunney and objecting to petitioner's requested relief. Upon the completion of discovery, petitioner and respondent, contending that there are no issues of fact, have each moved for summary determination on the question of ownership of the IRAs (*see Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Relying on EPTL 13-3.2 (e), petitioner argues that decedent failed to execute a valid beneficiary designation for her IRAs after the new accounts were opened at Morgan Stanley and, therefore, that the proceeds of each of the accounts should be paid to decedent's estate to be distributed among her intestate distributees.

In her own motion and in her opposition to petitioner's motion, Cunney asks the court to apply the equitable doctrine of "substantial compliance" and determine that Morgan Stanley's decision to waive its right to require strict compliance with the beneficiary designation provisions of its IRA Plan should not be disturbed. In support of her proposition that Morgan Stanley

properly deemed the Client Data Form a beneficiary designation, Cunney cites to Morgan Stanley's Traditional IRA Plan document and in particular, Article I, Section 1.3 (b), which reads in part:

> "Form of Beneficiary Designation/"Default" Beneficiaries: No designation of Beneficiary shall be effective until received, in writing, in a form acceptable to the Custodian [Morgan Stanley]. The Custodian shall act upon the last dated and signed designation of Beneficiary actually received by the Custodian in an acceptable form during the lifetime of the Participant."

Morgan Stanley did not file papers in support or in opposition to either of the instant motions.

DISCUSSION

EPTL 13-3.2 (e) provides:

> "A designation of a beneficiary or payee to receive payment [under a pension, retirement, death benefit, stock bonus or profit-sharing plan, system or trust or payable by an insurance company] upon death of the person making the designation or another must be made in writing and signed by the person making the designation and be:
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> (1) Agreed to by the employer or made in accordance with the rules prescribed for the pension, retirement, death benefit, stock bonus or profit-sharing plan, system or trust."[1]

The EPTL thus requires that a beneficiary designation be made: a) in a writing signed by the person making the designation; and b) in accordance with the rules prescribed for the pension, retirement, death benefit, stock bonus, profit-sharing plan, system or trust or insurance contract.

The absence of a writing signed by decedent designating a beneficiary for her Morgan Stanley IRAs upon her death makes this case one in which compliance with the first requirement

[1] Courts have held that the provisions of EPTL 13-3.2 are applicable to IRAs (*see Matter of Morse*, 150 Misc 2d 415 [Sur Ct, NY County 1991]).

of the statute is wholly lacking. Morgan Stanley's reliance on the unsigned Client Data Form to honor Cunney's claim to the proceeds of decedent's IRAs might be evidence that Morgan Stanley found this document to be "acceptable" to designate a beneficiary, as Cunney argues. If this is the case, there is, at most, a basis to conclude that there was compliance here with the second requirement of EPTL 13-3.2 (e), *i.e.*, that the beneficiary designation be made in accordance with the retirement account plan. Morgan Stanley's acceptance of this unsigned form as a beneficiary designation, however, cannot make up for the lack of compliance with the first requirement of the statute here.[2]

Cunney's reliance on the "substantial compliance" doctrine to justify Morgan Stanley's payment of the proceeds to her does not fare any better. Pursuant to this doctrine, courts may resort to equity to determine whether payment to a beneficiary should be directed even though the plan participant has failed to strictly comply with the plan's change of beneficiary designation provisions (*McCarthy v Aetna Life Ins. Co.*, 92 NY2d 436 [1998]; *Sun Life & Health Ins. Co. v Colavito*, 14 F Supp 3d 176 [SDNY 2014]). But Cunney has not provided, nor has the court's own research been able to find, any authority for the application of the substantial compliance doctrine to excuse the complete absence of a beneficiary designation signed by the insured or plan participant, or, for that matter, to excuse a complete failure to comply with the requirements of

[2] Knowledge by George and his team that Cunney was the intended beneficiary of decedent's Merrill Lynch accounts was apparently one of the factors considered by Morgan Stanley in making its determination to pay the proceeds of the IRAs to Cunney's accounts. Decedent's wishes as to those accounts, however, are not conclusive evidence of her intentions as to the Morgan Stanley accounts in the absence of a signed writing designating a beneficiary. Nor can the beneficiary designations completed by decedent in connection with her Merrill Lynch accounts be effective as to the Morgan Stanley accounts. The latter were new accounts and the former were closed upon the transfer of the assets to Morgan Stanley. Hence Morgan Stanley's attempt to secure beneficiary designations for the newly-opened IRAs.

EPTL 13-3.2 (e) for the designation of a beneficiary. In fact, courts have refused to extend the doctrine to allow payment of benefits upon death to individuals named in testamentary instruments as the beneficiaries of specific insurance policies or annuity contracts when the plan participant or insured, even though capable of following the procedures established by the plan or contract to effect a change of beneficiary, failed to do so prior to death (*McCarthy*, 92 NY2d at 441-442; *Lincoln Life and Annuity Co. of New York v Caswell*, 31 AD3d 1 [1st Dept 2006]; *Kane v Union Mut. Life Ins. Co.*, 84 AD2d 148 [2d Dept 1981]). Similarly, payment of benefits to individuals named in a change of beneficiary designation form that was properly completed and signed but not filed with the plan prior to death as required by the plan rules has not been permitted (*Barnum v Cohen*, 228 AD2d 957 [3d Dept 1996]).

The court is mindful that the proof offered by Cunney, and in particular, the testimony of Curley and George that decedent told them that she wanted her sister to be the beneficiary of the new accounts and that she was completing the beneficiary designation forms included in the Adoption Agreement and was prepared to mail them, could be sufficient to create an issue of fact as to decedent's intent. This evidence, however, fails to create an issue of fact as to the relevant question here: whether Cunney was designated as a beneficiary in a signed writing that was received by Morgan Stanley (*McCarthy*, 92 NY2d at 440 [mere intent to change a beneficiary designation is not enough and there must be some affirmative act on the part of the plan participant or insured to accomplish the change]). Under these circumstances, the court must reluctantly conclude that compliance with the statutory requirement that a beneficiary designation be in writing and signed by the designator may not be disregarded. As explained by the Court of Appeals in *McCarthy*, such requirement is critical to serve the "essential goal of preventing the

courts and parties from speculating regarding the wishes of the deceased" (*McCarthy*, 92 NY2d at 442). Additionally, the delays and uncertainty that allowing unsigned beneficiary designations to be effective would cause must be avoided if the public interest of ensuring prompt compliance with contracts directing payment of benefits upon death is to be protected (*McCarthy*, 92 NY2d at 441). Finally, without questioning the bona fides of the witnesses in this case, the court notes that EPTL 13-3.2 (e) represents the legislative choice of protecting an insured or retirement plan participant from the possibility of fraud after her death by forgoing even persuasive testimonial evidence in favor of a formal requirement that has the virtue of objectivity and can be easily satisfied.

Accordingly, petitioner's summary judgment motion is granted and respondents Cunney and Morgan Stanley are directed to turn over to petitioner, as administrator of decedent's estate, the proceeds of the IRAs that decedent owned at the time of her death. It follows that Cunney's motion for summary judgment is denied.

This decision constitutes the order of the court.

Clerk to notify.

Dated: April 11, 2018

SURROGATE