

Matter of Flender
2019 NY Slip Op 33676(U)
December 19, 2019
Surrogate's Court, New York County
Docket Number: 2012-2495
Judge: Nora S. Anderson
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SURROGATE'S COURT: NEW YORK COUNTY

New York County Surrogate's Court
DATA ENTRY, DEPT.
Date: December 19, 2019

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Turnover Petition by Co-Executors of the Will of

NORMA F. FLENDER,

File No. 2012-2495

Deceased.

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ANDERSON, S. :

This proceeding was commenced by the co-executors of the estate of Norma F. Flender ("decedent") for turnover of the estate's real property located in East Hampton, New York (the "premises"). The co-executors, a bank and decedent's son (collectively, "petitioners"), seek an order awarding them possession of the premises and issuing a warrant of eviction against decedent's daughter, her companion, and their two children.¹ The daughter filed objections, alleging that, by withholding estate funds to which she and/or a trust for her benefit was entitled, petitioners in effect deprived her of her right under the will to purchase the premises. After denying petitioners' motion for summary judgment (*Matter of Flender*, NYLJ, June 6, 2017, at 22, col 3 [Sur Ct, NY County 2017]), the court held a three-day evidentiary hearing to determine whether the daughter's failure to purchase the premises within the time limit prescribed by the will was due to petitioners' abuse of their discretion as trustees of trusts in which the daughter had a beneficial interest.

Background

Decedent died on June 14, 2012, survived by her son and daughter. Her will was admitted to probate on July 19, 2012. Apart from several modest pecuniary bequests to various organizations and individuals, decedent left the bulk of her estate in equal shares to two trusts, one for the benefit of the son and his issue (the "Son's Trust") and the other for the benefit of the

¹ The petition also sought an award against respondents of the fair rental value of their occupancy of the premises from September 1, 2012, to the date that possession is turned over to petitioners, as well as the cost of utilities and other charges associated with respondents' use of the premises. However, the parties stipulated to limit the issues to be adjudicated in this proceeding to petitioners' request for turnover of the premises. The remaining requests for relief were discontinued without prejudice to their being renewed in a future accounting proceeding.

daughter and her issue (the "Daughter's Trust"). Under Article EIGHTH of her will, decedent bequeathed an amount equal to "the maximum GST [generation-skipping tax] exemption available at [her] death" to the trusts. In 2012, the GST exemption was \$5.12 million, more than the value of decedent's gross estate. The bank and the son were named as co-trustees of both trusts.

Article FIFTH of the will directs petitioners to sell decedent's residential properties. The Article provides, however, that, if either the son or the daughter wished to purchase the property, he or she could do so at the price at which it was valued for federal estate tax purposes, subject to two conditions: (1) that he or she, within six months after the will's admission to probate, deliver to petitioners a written instrument affirming his or her election to purchase the property, and (2) that the closing of any sale take place within nine months after decedent's death, *i.e.*, by March 14, 2013. The Article further provided that, "The decision of my corporate executor ... as to the terms of sale shall be binding and conclusive on all persons interested hereunder." The premises were valued at \$2,150,000 for federal estate tax purposes.

The son expressed no interest in buying the premises. However, on January 9, 2013, within the deadline set by Article FIFTH, the daughter notified petitioners in writing that she was electing to purchase the premises. On January 18, 2013, petitioners' attorney sent a proposed contract of sale to the daughter and her attorney for their review and asked that, if the terms were acceptable, the daughter sign and return the contract along with a check for \$215,000 as a down payment. Following up with a letter a few weeks later, petitioners' attorney noted that the daughter was continuing to reside at the premises "rent free" and that the estate had been paying her utility expenses. He noted that further delay by the daughter would compromise petitioners' ability to administer the estate properly.

The daughter did not return the contract of sale and continued to reside at the premises with her companion and their two children. Nor did she comply with petitioners' request that she demonstrate her financial ability to pay the purchase price for the premises. The daughter did not

pay property tax or any other expense of carrying the property after having promised to do so pursuant to a settlement agreement with petitioners after they brought an eviction proceeding against her in the Justice Court of the Town of East Hampton, New York. That proceeding was ultimately dismissed on appeal, without prejudice to petitioners' bringing an eviction proceeding in New York County Surrogate's Court.

The record contains no evidence that the daughter had sufficient financial resources to purchase the premises apart from a cash bequest of \$50,000 under decedent's will; another \$50,000 under the will of decedent's predeceased husband; tangibles with a total value of approximately \$380,000; and \$505,000 left to her as one of the two designated beneficiaries of decedent's IRA. Thus, the total value of the assets left outright to the daughter, at most \$990,000, was significantly less than the \$2,150,000 she needed to purchase the premises. Petitioners note that this does not take into account the taxes she owed on her share of the IRA proceeds.

In addition to the foregoing resources, and her stake as a sprinklee of the Daughter's Trust, the daughter had interests as a permissive beneficiary in two other trusts, both governed by the will of decedent's husband. One of those trusts was to be held for the benefit of the daughter and her issue "living from time to time," and was bequeathed half of the sum of the credit shelter and GST exemption amounts available to the husband's estate. The other trust, created by the husband pursuant to his power of appointment over the remainder of a trust established by his mother (the "Grandmother Trust"), was to be held for a class of beneficiaries consisting of both the son and the daughter and their respective issue "living from time to time." Petitioners are the co-trustees of these trusts.

The provisions governing the Daughter's Trust and the two trusts created under the will of decedent's husband, conferred on the trustees "sole and absolute" discretion as to trust invasions. The governing instruments provided that the trusts might continue to the extent allowable under the rule against perpetuities.

Given the unknowns inherent in the early stages of this estate's administration, the values

of the trusts could not have been gauged with certainty within the tight deadline set for the purchase of the premises by one of decedent's children. But according to the estimates offered by the daughter herself in her pretrial brief, the combined value of the trusts under the will of decedent's husband was about \$2.2 million.² And the federal estate tax return filed for decedent's estate in September 2013 shows that the Daughter's Trust was valued at \$1,673,909 at her death. Thus, the combined value of all three trusts in which the daughter had a beneficial interest would have been less than \$4 million.³

By letter dated April 2, 2013, the daughter's attorney suggested that petitioners exercise their discretion and invade the trusts to the extent needed to enable the daughter to pay the son one-half of the appraised value of the premises (\$1,075,000) and then transfer the house to the Daughter's Trust. On other occasions, the daughter had asked that petitioners distribute sufficient funds to her from the trust to enable her to purchase the premises in her own name. In order to bridge the gap between the approximately \$1 million that she inherited from her parents outright, on the one hand, and the purchase price, on the other, the daughter would have needed distributions amounting to more than \$1.1 million dollars from three trusts with a combined value of less than \$4 million.

The central issue before the court is whether petitioners abused their discretion when they refused to implement either of the daughter's two proposals. In its determination, the court must

² The daughter estimates the value of the credit shelter trust at decedent's husband's death to be \$2,321,000. This trust was to be divided into two equal shares at decedent's death, one held in trust for the son and his issue, and the other held in trust for the daughter and her issue. Thus each trust was to receive about \$1,160,500. The daughter estimates the value of the Grandmother Trust created for the benefit of *all* of decedent's issue was \$1,043,000. Thus according to the daughter's estimates, the total value of the two trusts under decedent's husband's will in which she had a beneficial interest was \$2,203,500.

³ The amounts bequeathed by decedent to the daughter both outright and in trust are somewhat overstated to the extent that they do not reflect the daughter's share of estate tax liabilities with respect to her interests in the Daughter's Trust and in the decedent's IRA.

consider the terms of the will and the record as developed at trial.

First, decedent's will expressly directed that the premises be sold to either one of decedent's children or to a third party. This provision foreclosed petitioners from retaining the premises indefinitely even if, *arguendo*, they had deemed such course a prudent investment choice that would allow adequate protection for the trust beneficiaries as a whole. Second, the will expressly conferred on petitioners "absolute discretion" as to how and when to invade the funds with which they were entrusted. This is not to suggest that even so broad a latitude cannot be abused (*see Matter of Wallens*, 9 NY3d 117, 123 [2007]; *Matter of Vare*, NYLJ, April 24, 2013, at 22, col 3 [Sur Ct, NY County 2013]). But where fiduciary discretion is exercised in good faith and is supported by relevant considerations, it may not be superseded by a court's own sense of what might be wiser or fairer (*see e.g., Matter of Hoppenstein*, NYLJ, Oct. 13, 2017, at 23, col 3 [Sur Ct, NY County 2017] [noting that courts generally do not interfere with a trustee's exercise of discretion except in cases of abuse, dishonesty, or baseless judgment]).

Here, there is no evidence of bad faith or misconduct in petitioners' refusal to make a substantial invasion of trust principal in order to enable the daughter to purchase property which was demonstrably beyond her means. Indeed, the daughter (only one of a number of beneficiaries) provided no evidence that she would have had the means to maintain the premises even if she was able to obtain the necessary funds by surrendering her entire outright inheritance. According to the testimony of the trust officer at the co-petitioner/bank who was directly involved in administering the trusts, the daughter's failure to provide petitioners with information concerning her financial wherewithal, coupled with her failure to pay for her use and occupancy, added to petitioners' concern about the daughter's ability to maintain the premises. The record amply supports petitioners' conclusion that the daughter and the other beneficiaries of the trusts

(including the daughter's adult child who did not reside with her) would be better served if the trust assets remained at that early point in the fiduciaries' hands rather than substantially reduced in order to allow the daughter to remain in the premises. Moreover, decedent's direction that the premises be sold soon after her death reflected her intention that the premises constitute a source of liquidity for both the Daughter's Trust and the Son's Trust in order to benefit the beneficiaries of both trusts. The daughter's proposed purchase would have run entirely counter to that objective, immediately reducing the fund to a fraction of the amount that decedent had taken pains to set aside in trust.

The daughter points out that, had decedent died in 2004, the same year she executed her will, when the GST exemption was only \$1.5 million, the amounts bequeathed to the Daughter's Trust and the Son's Trust would have been considerably smaller and, concomitantly, there would have been a sizeable residuary estate, half of which was bequeathed to the daughter outright. Accordingly, she reasons that decedent must have intended to leave her a substantial amount outright. However, decedent's intent must be gleaned from the terms of the testamentary instrument. Decedent could have pegged the formula for funding the Son's Trust and the Daughter's Trust to the exemption amount prevailing at the time she executed her will, or to some other fixed amount. Similarly, she could have subsequently amended her will to reduce the amount bequeathed to the two trusts. Since she chose to do neither, the daughter's argument fails.

For the foregoing reasons, the court concludes that petitioners are entitled to turnover and possession of the premises. Settle order recognizing such entitlement, providing for issuance of a warrant of eviction, and directing the Suffolk County Sheriff to remove respondents from the premises no earlier than sixty days of the date of service of this decision upon them.

Dated: *December 19, 2019*

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