STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

NEWPORT, SC. **SUPERIOR COURT**

[Filed: November 29, 2018]

IN RE ESTATE OF PAUL A. BORGES,	**:**	
Alias Paul Alton Borges, resident decedent of	**:**	**C.A. No. NP-2018-0014**
Little Compton, Rhode Island	**:**	

DECISION

NUGENT, J. This matter is before the Court on Appellants' Claim of Appeal from the Probate Court of the Town of Little Compton's Order dated December 18, 2017 granting Appellees' claim against the Decedent Paul A. Borges's Estate for breach of the Marital Settlement Agreement (MSA) that Decedent executed with Appellees' mother, Laurie J. Borges. Jurisdiction is pursuant to G.L. 1956 § 33-23-1(a)(2).

I

Facts and Travel

The Decedent, Paul A. Borges, is survived by his four children: the Appellants, Sara Mendes and Susan Borges (Appellants), and the Appellees, Lindsey J. Borges and Paul A. Borges (Appellees). Statement of Undisputed Facts ¶¶ 1-2. On December 17, 1977, Decedent married Laurie J. Borges, the mother-to-be of Lindsey J. Borges and Paul A. Borges. Laurie Borges (Borges) Aff. ¶¶ 1-2; Statement of Undisputed Facts ¶ 1. The Appellants are the Decedent's children from a previous marriage. Statement of Undisputed Facts ¶ 2. During the marriage, Decedent and Laurie Borges purchased the property located at 24 Maple Avenue in Little Compton, Rhode Island (Property) where they raised Appellees who continue to live there. *Id.* ¶¶ 3-4.

Before the Decedent and Laurie Borges finalized their divorce in 1998, the couple executed the MSA which addressed the disposition of the Property along with other property the couple owned. Statement of Undisputed Facts ¶¶ 5-7; MSA § 7(b); Borges Aff. ¶¶ 4-5. In § 7(b) of the MSA—in exchange for Decedent's promise to devise the Property to Appellees at his death by will, and a one-third interest in the proceeds from the sale of their New Hampshire property, or an optional $30,000 buyout of that interest—Laurie Borges agreed to quitclaim her right, title and interest to the Property and two other parcels of real estate. MSA § 7(b); Statement of Undisputed Facts ¶ 6; Borges Aff. ¶ 5. In the event that Decedent transferred the Property during his lifetime, Decedent would leave a specific bequest in his will to the Appellees of not less than $300,000 in lieu of devising them the Property. MSA § 7(b); Statement of Undisputed Facts ¶ 7; Borges Aff. ¶ 6. Decedent and Laurie Borges further agreed the bequest would be equal to the value of the Property at the time of Decedent's death. Borges Aff. ¶¶ 7-8. The second paragraph of § 7(b) of the MSA states:

> "The Husband agrees ***to execute a will devising all of his right, title, and interest in 24 Maple Avenue, Little Compton, Rhode Island in equal shares to his children Paul Borges and Lindsey Borges upon his death***; in the event, however, that Paul Borges transfers said property before his death, then said Paul Borges shall establish a specific bequest in his said last will and testament for the children, which said specific bequest shall have priority over all other bequests, in an amount not less than Three Hundred Thousand Dollars ($300,000.00)." MSA § 7(b) (emphasis added).

The MSA further stated it was to be incorporated into the divorce decree and "shall, in all respects, survive the same and be forever binding and conclusive upon the parties." MSA § 17.

On March 7, 2012, Decedent created both the "Paul A. Borges Irrevocable Trust" (Irrevocable Trust) and "Paul A. Borges Revocable Trust – 2012" (Revocable Trust). Statement of Undisputed Facts ¶¶ 8-9. In addition to being the Grantor of both trusts, the Decedent served

as the trusts' initial trustee. *See* Irrevocable Trust; Revocable Trust § I. In the event of Decedent's death, both trusts' first successor trustee was Appellee Lindsey Borges with Appellant Sara Mendes as an alternative trustee. Irrevocable Trust § 7.1; Revocable Trust § VII.A.[1] During the Decedent's lifetime under the Irrevocable Trust, both Appellants and Appellees were the beneficiaries of the net income from the trust's assets. Irrevocable Trust § 4. Aside from Decedent's property located at 130 Lawrence Court, Tiverton, Rhode Island—which was to be held "in trust for the benefit of Grantor's companion, Lisa Correia, and shall allow her to reside on the premises for the duration of her life . . ."—both Appellants and Appellees were entitled to equal shares of the Irrevocable Trust's assets upon Decedent's death. Irrevocable Trust § 5.2(a), (b.) This section of the Irrevocable Trust specifically states:

> "(b.) The Trustee shall divide all of the remaining property into as many equal shares as there shall be children of the Grantor then living and children of the Grantor then deceased with issue then living, one (1) share to be set aside for each then living child of the Grantor and one (1) share to be set aside for the then living issue of each child of the Grantor then deceased with any issue then living, and shall dispose of said shares as follows:
>
> "The share set aside for a then living child of the Grantor shall be distributed to such child, outright and free of all trusts. When funding the shares created for Grantor's children in the previous paragraph, the Trustee shall, ***to the extent possible in order to create such equal shares***, fund the shares created for Lindsey J. Borges and Paul A. Borges, Jr. with the real property that I may own at the time of my death located at 24 C & D Maple Avenue, Little Compton, RI and shall fund the shares created for Sarah Mendes and Susan Borges with any real property that I may own at the time of my death located in the State of New Hampshire. ***Said property may be divided between their respective trust shares in the sole and absolute discretion of the Trustee."*** Irrevocable Trust § 5.2(b.) (Emphases added).

[1] There is no allegation that Decedent ever appointed another trustee to either trust during his time as trustee.

On May 4, 2012, the Decedent executed a quitclaim deed transferring title to the Property to the Irrevocable Trust, and he continued to live at the Property until his death. Statement of Undisputed Facts ¶¶ 12-13.

On March 15, 2016, the Decedent executed the Last Will and Testament of Paul A. Borges (Will), but there was no mention of the Property or specific bequest to Appellees. *Id.* ¶¶ 14-15; Will. The Will appointed Appellee Lindsey J. Borges to serve as executor of the Will with Appellant Sarah Mendes as alternative executor. Will § VIII. The Will directs the executor to give Decedent's "tangible personal property to [Appellants and Appellees] then living in as nearly equal shares as practicable." Will § III. The Will directs the executor to "give all the residue of [Decedent's] estate, real and personal, to the trustee then serving under THE PAUL A. BORGES REVOCABLE TRUST – 2012," and, in the event that the Revocable Trust was not in existence at Decedent's death, Decedent "incorporate[d] by reference the terms of such trust." Will § V.

The Revocable Trust included roughly the same disposition of Decedent's property as the Irrevocable Trust. Under the section titled "Distribution of Residue" in the Revocable Trust, the trustee is directed to distribute the assets "in approximately equal shares to such of my children as are then living." Revocable Trust § IV.B. The Revocable Trust provided for the same manner of funding the children's equal shares as the Irrevocable Trust—funding Appellees' shares first with the property "located at 24 C & D Maple Avenue, Little Compton, RI" and funding Appellants' shares first "with any real property that [Decedent] may own at the time of [] death located in the State of New Hampshire." Revocable Trust § IV.C.[2]

[2] Since Decedent transferred the Property to the Irrevocable Trust, it seems this similar language was included in the Revocable Trust in case there was any issue with the Irrevocable Trust.

The Decedent died on April 23, 2016. Statement of Undisputed Facts ¶ 16. Decedent's Will was admitted to probate in the Probate Court of the Town of Little Compton on December 19, 2016. *See* Town of Little Compton Probate Court Decision, Nov. 20, 2017. On February 24, 2017, the Little Compton Probate Court appointed Lindsey Borges as the personal representative of the Decedent's Estate. Statement of Undisputed Facts ¶ 17. On September 1, 2017, the Appellees filed a claim against Decedent's Estate for the Property, or for the value of the Property as the Court determines. *Id.* ¶ 18.[3] In support of their claim in Probate Court, the Appellees argued, as the intended beneficiaries of their parents' MSA, that the Decedent Paul Borges breached the MSA by not devising the Property to the Appellees or leaving them at least $300,000 in his Will, and that the Irrevocable Trust failed to otherwise satisfy Decedent's obligation under the MSA. *See* Appellees' Mem. Supp. of Claim in Probate Court. Appellants filed an objection to this claim, asserting that the use of the Irrevocable Trust was permissible under the MSA and the Appellees were not otherwise harmed by receiving the Property in this manner. *See* Appellants' Mem in Opp'n of Claim in Probate Court.

The matter was heard by the Little Compton Probate Court on October 16, 2017. Statement of Undisputed Facts ¶ 19. In the decision issued on November 20, 2017, the Probate Court ruled:

> "The [Appellees] are entitled to the value of the Little Compton real estate outright as a specific bequest (or the proceeds from the sale of said real estate, in the event the real estate is sold by the estate), and then a one quarter share each of the residue of the remaining estate and trust assets." Town of Little Compton Probate Court Decision, Nov. 20, 2017.

[3] Since Lindsey Borges was the only personal representative of the Estate when bringing forth this claim, "the probate court shall examine and determine the claim." Sec. 33-11-8.

On December 18, 2017, the Little Compton Probate Court entered an Order allowing the Appellees' claim, stating:

> "1. The [Appellees'] claim is ALLOWED.
>
> "2. The [Appellees] are entitled to the value of the Little Compton real estate located at 24 Maple Avenue, Little Compton Rhode Island outright as a specific bequest (or the proceeds from the sale of said real estate), and in addition thereto a one quarter share each of the residue of the remaining estate assets.
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> "3. In the event the real estate is not sold, then the Court will require testimony as to the value of the real estate, unless an agreement is reached by the parties as to its value." Town of Little Compton Probate Court Order, Dec. 18, 2017.

Appellants filed a Claim of Appeal on January 3, 2018 and the Reasons for Claim of Appeal on January 17, 2018. Statement of Undisputed Facts ¶ 20. In their Reasons for Claim of Appeal, Appellants contend the Probate Court erred in allowing the Appellees' claim against the Estate because the Decedent complied with the terms of the MSA; ordering a distribution to Appellees equal to the value of the Property, or the proceeds from the Property's sale as a specific bequest; and that the relief ordered otherwise exceeded the jurisdiction of the Probate Court. Appellants' Reasons for Claim of Appeal 2-3. It is noteworthy that the Probate Court's Decision of November 20, 2017 included the "residue of the remaining estate *and* trust assets." Town of Little Compton Probate Court Decision, Nov. 20, 2017 (emphasis added). In the Probate Court's December 18, 2017 Order, the second paragraph included the "residue of the remaining estate assets" only. Town of Little Compton Probate Court Order, Dec. 18, 2017.

II

Standard of Review

"Any person aggrieved by an order or decree of a probate court . . . may, unless provisions be made to the contrary, appeal to the [S]uperior [C]ourt." Sec. 33-23-1(a). In this

capacity, "the Superior Court is not a court of review of assigned errors of the probate judge, but is rather a court for retrial of the case *de novo*." *In re Estate of Paroda*, 845 A.2d 1012, 1017 (R.I. 2004); § 33-23-1(b). "The findings of fact and/or decisions of the probate court may be given as much weight and deference as the [S]uperior [C]ourt deems appropriate, however, the [S]uperior [C]ourt shall not be bound by any such findings or decisions." Sec. 33-23-1(b). Appellants are entitled to a trial *de novo* of the Probate Court's allowance of Appellees' claim against the Estate. The parties have submitted a statement of undisputed facts, memos of law, and had oral argument before this Court on October 5, 2018.

III

Discussion

The Rhode Island Supreme Court has held that "when a Family Court justice incorporated by reference, but explicitly did not merge, a property settlement agreement into the final divorce judgment, the property settlement agreement retains the characteristics of a contract." *Andrukiewicz v. Andrukiewicz*, 860 A.2d 235, 238 (R.I. 2004) (citing *Riffenburg v. Riffenburg*, 585 A.2d 627, 630 (R.I. 1991)). "When one party for valuable consideration, engages another by contract to do some act for the benefit of a third party, the latter who would enjoy the benefits, may maintain an action for breach of contract." *Davis v. New England Pest Control Co.*, 576 A.2d 1240, 1242 (R.I. 1990). "In order to prevail on a contract claim as a third-party beneficiary, the claimant must prove that he or she is an intended beneficiary of the contract." *Glassie v. Doucette*, 157 A.3d 1092, 1097 (R.I. 2017). With respect to property settlement agreements between parents, the Rhode Island Supreme Court has repeatedly recognized that the children of the contracting parties "may sue on a contract made for his or her

benefit." *Curato v. Brain*, 715 A.2d 631, 634 (R.I. 1998) (citing *Davis*, 576 at 1242; *Elliott Leases Cars, Inc. v. Quigley*, 118 R.I. 321, 330, 373 A.2d 810, 814 (1977)).

Under the MSA, Decedent "agree[d] to execute a will devising all of his right, title and interest [in the Property] in equal shares to his children Paul Borges and Lindsey Borges upon his death." MSA § 7(b). Within this same MSA subsection, Laurie Borges relinquished her claim of ownership in multiple parcels of land. *Id.* Aside from a one-third share of the New Hampshire property's proceeds through sale—or Decedent's optional buyout of Thirty Thousand Dollars ($30,000.00) for her interest in that same New Hampshire property—Laurie Borges retained no real property interest, but instead obligated the Decedent to leave their children, the Appellees, his ownership of the Property. It is clear that the Appellees are the intended beneficiaries of this obligation, and they have standing to enforce this provision of the MSA. *See Curato*, 715 A.2d at 635 ("[T]here is no question that an intended third-party beneficiary, in this case the children, may sue on a contract made for his or her benefit.").

Since the Appellees do have standing to enforce the relevant provision of their parents' MSA, the issue in this case is whether Decedent's alternative method of transferring his interest in the Property to Appellees is a breach of Decedent's promise under the MSA. The parties do not dispute that the MSA is unambiguous in this respect. Instead, the parties' dispute centers on whether Decedent's method of transferring his interest in the Property to the Appellees through the Irrevocable Trust constitutes a breach of the MSA.

A breach of contract occurs when there is a "violation of a contractual obligation, either by failing to perform one's promise or by interfering with another party's performance." *Demicco v. Med. Assocs. of Rhode Island, Inc.*, No. C.A.99-251L, 2000 WL 1146532, at *2 (D.R.I. July 31, 2000) (citing *Black's Law Dictionary* 182 (7th ed. 1999)). "In the absence of

ambiguity, the interpretation of a contract is a question of law, and its interpretation will be reviewed by this Court *de novo*." *Andrukiewicz*, 860 A.2d at 238 (citing *Singer v. Singer*, 692 A.2d 691, 692 (R.I. 1997) (mem.)). "When contract language is clear and unambiguous, words contained therein will be given their usual and ordinary meaning and the parties will be bound by such meaning." *Singer*, 692 A.2d at 692 (citing *Aetna Cas. & Sur. Co. v. Graziano*, 587 A.2d 916, 917 (R.I. 1991)). '"When a contract is unambiguous . . . the intent of the parties becomes irrelevant."' *Hilton v. Fraioli*, 763 A.2d 599, 602 (R.I. 2000) (per curiam) (quoting *Vincent Co. v. First Nat'l Supermarkets, Inc.*, 683 A.2d 361, 363 (R.I. 1996) (per curiam)).

The MSA is unambiguous. The MSA provides that Decedent was obligated to "execute a will devising all of his right, title and interest [in the Property] in equal shares to his children Paul Borges and Lindsey Borges upon his death." MSA § 7(b). The MSA provides an alternative method for Decedent to satisfy his obligation to the Appellees by will in the event Decedent transferred the Property before his death, *i.e.*, by bequest of at least $300,000 to Appellees in equal shares. The Decedent did neither. Decedent's transfer of the Property to the Irrevocable Trust before his death triggered the obligation to leave a bequest by will of at least $300,000 to the Appellees. Therefore, the Estate is liable for this obligation to Appellees.

The Appellants' argument that the Decedent's breach of the MSA is immaterial because the Appellees are receiving the Property under the Irrevocable Trust is without merit. The Irrevocable Trust's method of disposition of the Property is in breach of the MSA. The Irrevocable Trust provides for each child to receive a one-quarter share of the Irrevocable Trust's assets—including the Property. In order for the Irrevocable Trust's method of disposition to satisfy the Decedent's obligation under the MSA, the Appellees together should have been entitled to 100% combined or one-half each of the value of the Property and not have it included

with the Irrevocable Trust's remaining assets that are distributed equally to each of the Decedent's four children. The funding of the Appellees' shares by selling the Property does not affect the one-quarter share distribution of all of the Decedent's assets to each child under the terms of the Irrevocable Trust.

As to Appellants' claim that the Probate Court exceed its jurisdiction by its November 20, 2017 Decision, the Probate Court's December 18, 2017 Order, which governs, addressed only the Estate's assets.

IV

Conclusion

The Appellants' appeal is denied and dismissed. The Little Compton Probate Court's Order of December 18, 2017 remains in effect. Prevailing counsel is directed to present an order.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	In Re Estate of Paul A. Borges, Alias Paul Alton Borges, resident decedent of Little Compton, Rhode Island
CASE NO:	NP-2018-0014
COURT:	Newport County Superior Court
DATE DECISION FILED:	November 29, 2018
JUSTICE/MAGISTRATE:	Nugent, J.
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