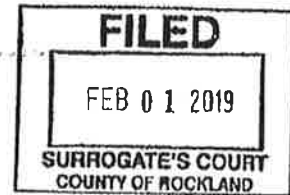


SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND



----- X
In the Matter of the Construction of the Will of :
FRANCINE WECHSLER, :
Deceased, :
Pursuant to SCPA § 1420 :
----- X

File No. 2013-225/G/H

DECISION & ORDER

Hon. Keith J. Cornell, Surrogate:

Before the Court is a motion by Craig Wechsler ("Craig") and Susan Baruch ("Susan") (together "Petitioners") for (1) summary judgment pursuant to CPLR § 3212 on their verified petition for construction of the Last Will and Testament (the "Will") of their mother, Decedent Francine Wechsler; (2) dismissal pursuant to CPLR § 3211(a)(7) of the verified cross-petition filed by Deborah Wechsler Cohen ("Deborah"), Jonathan Wechsler ("Jonathan") and Rodney Wechsler ("Rodney") (together, "Cross-petitioners"), on October 10, 2015, for construction and reformation the Will; and (3) sanctions against Cross-petitioners.

The following papers were considered in deciding this motion:

1. Notice of Motion for Summary Judgment, dated December 13, 2018/ Affidavit of Frank Streng, Esq., dated December 13, 2018, with Exhibits 1-32/ Affidavit of Craig Wechsler, sworn to December 13, 2018, with Exhibits A-BB/ Affidavit of Susan Wechsler Baruch, sworn to December 13, 2018, with Exhibits A-C/ Affidavit of Elise Wechsler Friedman, sworn to December 11, 2018, with Exhibits A-B/ Affidavit of Rhonda Wechsler Soofian, sworn to December 10, 2018, with Exhibits A-B/ Affidavit of Caren Wechsler Litowski, sworn to December 11, 2018, with Exhibits A-B/ Memorandum of Law dated December 13, 2018;
2. Affirmation of Gary E. Bashian, Esq. in opposition, dated January 4, 2019, with Exhibits A-S/ Affirmation of Peter P. Rosato, Esq., guardian ad litem, dated January 4, 2019/ Memorandum of Law dated January 4, 2019;
3. Reply Affidavit of Frank Streng, Esq. in further support, dated January 11, 2019, with Exhibits 1-2/ Reply Memorandum of Law.

Background

Francine Wechsler, mother of the Petitioners and Cross-petitioners, executed the Will on May 4, 2010. The only significant assets held by Ms. Wechsler were two New York City taxi medallions (the “medallions”), which the Will distributed unequally amongst her 13 surviving children and 40 grandchildren per Item One B. Despite inclusion in the Will, the medallions were sold during Decedent’s lifetime at the end of 2012. The net proceeds of the sale of the medallions (the “Proceeds”) were put into a joint bank account held by Decedent and her daughter, Deborah.

Decedent passed away on February 22, 2013, just a few months after the sale of the medallions. After a will contest initiated by Craig and Susan, Decedent’s Will was admitted to probate on February 6, 2014 and Deborah was appointed as the Executor. Petitioners Craig and Susan filed a petition for construction of the Will per SCPA § 1420 on May 13, 2015, arguing that the sale of the medallions by their mother prior to her death had caused an ademption of the bequest. They further argued that the Proceeds should pass pursuant to Item Two of the Will, which directed distribution of the residuary estate evenly among the 13 surviving children and the issue of the one pre-deceased child of Decedent.

Cross-petitioners answered the petition and filed a cross-petition for construction and reformation in October 2015. Cross-petitioners argued that Decedent’s clear testamentary intent to distribute the medallions unequally, as detailed in Item One B of the Will, should apply with equal force to the Proceeds. They argued that the failure to include language in the Will specifying that the Proceeds would pass by Item One B was merely a scrivener’s error and that the Will should be reformed to conform to the testator’s intent. Finally, the Cross-petitioners argued that Craig had exercised undue influence over Decedent to cause her to sell the medallions immediately prior to her death in an attempt to subvert the unequal distribution plan in the Will.

Petitioners filed a verified answer to the cross-petition on July 7, 2016, denying the use of undue influence to cause the sale of the medallions. Prior to discovery, Petitioners moved for summary judgment in August 2017 on their ademption claim. The motion was denied by this Court because significant issues of fact about the cause of the sale of the medallions remained open. Paper discovery was exchanged, and in April and May of 2018, the five Petitioners and Cross-petitioners were deposed. Upon completion of discovery, Petitioners announced their intention to move for summary judgment.¹ A motion schedule was set and the instant motion was marked fully submitted on January 14, 2019.

Petitioners made three arguments in their motion papers. First, they argued that the law of ademption governs this dispute. They pointed out that the item in question, the medallions, was a specific bequest. They then pointed out that the medallions were unquestionably sold prior to their mother's death. Petitioners argued that per the laws of ademption, the testator's intent is irrelevant. Finally, they argued that under the law of ademption, a specific bequest of the medallions per Item One B failed because the medallions were not part of the estate at the time of the testator's death.

Second, Petitioners argued that the allegations that Craig used undue influence to cause the ademption were unfounded. Petitioners noted that Cross-petitioners bear the burden of proof on their claims of undue influence, and they argued that the claims were not proven. Instead, Petitioners pointed to evidence that the sale of the medallions in December 2012 was the culmination of a two-year due diligence process led by Deborah. Petitioners cited evidence of a family meeting held in November in 2010, at which the siblings decided to sell the medallions to provide funding for their Mother's care, the cost of which was increasing due to her ailing health.

¹ Cross-petitioners also expressed an intent to move for summary judgment, but they did not file a motion.

Petitioners pointed to evidence that Deborah hired and met with eldercare financial consultants, lawyers, taxi medallion consultants, and accountants during her two years of research into the tax and other implications of the sale of the medallions. Petitioners also pointed to evidence from Deborah's deposition that she had personally proposed the sale to her mother, who approved the sale of the medallions at Deborah's suggestion. Finally, Petitioners noted that the checks with the Proceeds were sent to Deborah, who gave them to Craig to take to their mother for endorsement and deposit in the joint account held by Deborah and Decedent.

Petitioners argued that, despite the claims by Cross-Petitioners that Craig had a confidential relationship with Decedent, in fact, Deborah was the child with the confidential relationship with their mother. Petitioners pointed to evidence that Deborah handled all of her Mother's finances, including signing checks and sharing a joint bank account. They pointed out that Deborah held a power of attorney from Decedent, was her agent in her healthcare proxy and living will, and was the secretary of Born Taxi, Inc., the corporation that held the medallions. Petitioners argued that Deborah's claim in the cross-petition that Craig had a power of attorney for their Mother was demonstrably false, a fact that Deborah knew or should have known when she signed the cross-petition. Finally, Petitioners argued that they are entitled to sanctions because the cross-petition contained several verifiably false statements about Craig.

Cross-petitioners primarily argued that this Court must decide their cross-petition for reformation prior to deciding the Petitioner's motion for summary judgment on ademption. Cross-petitioners pointed out that Petitioners had failed to make any argument in support of the request for dismissal of the cross-petition.² Cross-petitioners argued that Decedent's clear intent to

² In the reply, Petitioners noted that they did not argue dismissal of the cross-petition in their initial motion papers because they were expecting to make those arguments in their opposition to the cross-petitioners' motion for summary judgment, which cross-motion was not filed.

distribute the medallions pursuant to the schedule in Item One B should also govern distribution of the Proceeds. They argued that the failure to include a provision in the Will to that effect was a mere scrivener's error. Cross-petitioners pointed to the affidavit and deposition testimony of the attorney draftsman in support their claim that their mother intended for the medallions and/or the Proceeds of their sale to be distributed per Item One B. Cross-petitioners did not reply to the ademption argument, except to point out that it would be moot if the Will is reformed in the manner they suggest.

Second, Cross-petitioners argued that material facts remain open about whether Craig exercised undue influence over Decedent to force a premature sale of the medallions. They argued that undue influence is a question of fact that is not properly determined on summary judgment. Cross-petitioners argued that Craig had a confidential relationship with their mother, as evidenced by his role managing the leases of the medallions for Born Taxi and his role in negotiating their eventual sale price. Cross-petitioners then argue that the confidential relationship creates a presumption of undue influence, shifting the burden to Craig to disprove. Cross-petitioners point to testimony that Craig saw the first page of the Will while their Mother was in the hospital as proof of his motive to force an early sale of the medallions with his undue influence. Finally, Cross-Petitioners argued against sanctions.³

In reply, Petitioners argued that no material facts remain in dispute and that Petitioners had made a *prima facie* showing for judgment as a matter of law. Petitioners pointed out that Cross-petitioners did not rebut the ademption argument at all. Petitioners reiterated that Cross-petitioners bear the burden of proof on their undue influence allegations, and that Cross-petitioners have not

³ Cross-petitioners also rehashed the Will Contest, which was already decided in their favor and has no bearing on the current issues before the Court.

met that burden. Petitioners argued that reformation is a tool to be used sparingly, if at all. They argued that reformation is not appropriate in this case because the express words of the Will are clear and unambiguous. Petitioners argue that there was no scrivener's error here for the Court to correct. Finally, Petitioners restated their case for sanctions.

Oral argument was held on January 22, 2019.

Discussion

Generally, "we take wills as we find them, and unless contrary to some statute, give them effect as written." In re Watson's Will, 262 N.Y. 284 (1933). In construction cases, the court is asked to interpret otherwise ambiguous directions. See In re Will of Larkin, 9 N.Y.2d 88 (1961). In a reformation case, the court is asked to take a further step and actually change the language in the will to conform with the testator's intent. This power to change the language of the instrument is exercised with caution by the courts. See Estate of Stahle, 2011 N.Y. Misc. LEXIS 1353, 225 N.Y.L.J. 15 at *3 (Surr. Ct. Onondaga Co. 2001) (citing Matter of Snide, 52 N.Y.2d 193 (1981) (reforming will of husband executed by wife, each of whom mistakenly executed the other's identical will, to change her name to his)).

Reformation has been found appropriate where substantive law has changed between the drafting of the will and probate, thereby thwarting obvious testamentary intent. See, e.g., In re Estate of Offerman, 145 Misc.2d 477 (Surr. Ct. Kings Co. 1989) (will conformed to adjust for changes in spousal deduction tax law); Matter of Kamp, 7 Misc.3d 615 (Surr. Ct. Broome Co. 2005) (reforming a testamentary trust created in 1977 into a supplemental needs trust, which form of trust was not statutorily created until 1993). Reformation is also allowed in cases where a typographical error was made in transcribing the testator's wishes. See, e.g., Matter of Tracey.

1996 NYLJ LEXIS 7777, Mar. 11, 1996 at Pg. 6, (col. 4) (Surr. Ct. Suffolk Co. 1996) (reformation appropriate when all parties agreed that wrong last name was put in bequest).

Here, there is no claim by Cross-petitioners that the Will as written inadvertently caused increased taxes to accrue. Nor is there a claim that Decedent's distribution scheme was not properly transcribed into the instrument – that a child was mis-identified or a percentage amount was transposed. Instead, Cross-petitioners argue that the Decedent's failure to specifically plan for the possibility that she would sell the taxi medallions during her lifetime is a valid ground to reform the Will. Cross-petitioners are incorrect.

The court does not have the power to reform a will to adjust for events that were unforeseen by the testator. See Estate of Dickinson, 1999 N.Y.L.J LEXIS 3904, NYLJ, Aug. 4, 1999 at Pg. 26, (col. 5) (Surr. Ct. NY Co. 1999). As the Court of Appeals said in In re Tamargo, “[w]hen the purpose of a testator is reasonably clear by reading his words in their natural and common sense, the courts have not the right to annul or pervert that purpose upon the ground that a consequence of it might not have been thought of or intended by him.” 220 N. Y. 225 (1917) (declining to reform will). See also Matter of Bellamore, 17 A.D.2d 372 (1st Dept. 1962) (declining to reform residuary clause to conform to testator's intent when “the testator made provision for a contingency that did not occur and made no provision for one that did occur”).

Ademption occurs when “property that is the subject of a specific disposition by the testator is not in existence at the testator's death” because such property has been “lost, sold, exchanged or destroyed.” 12 Warren's Heaton Surrogate's Court Practice § 204.01[1]. In matters of ademption, the fact that an item no longer exists when the decedent passed is the beginning and end of the inquiry. See In Re Brann, 219 N. Y. 263 (1916). The intent of the testator is not relevant; only the “fact of change.” Id. at 268; see Matter of Wright, 7 N. Y.2d 365, 368-69 (1960) (“What

is significant, therefore, is the fact that the precise thing given by the will is not available for disposition at the time of the testator's death, and it matters not whether this came to pass because of an intentional and voluntary act on the part of the testator, such as abandonment, sale or gift, or because of an occurrence, involuntary and unintended, such as condemnation, fire or theft.”).

Further, when specific property is devised, and that specific property is conveyed during the testator's lifetime, the court cannot substitute the proceeds of the sale in place of the original bequest. See LaBella v. Goodman, 198 A.D.2d 332 (2d Dept. 1993) (real property sold during testator's lifetime not part of estate, devise extinguished by ademption); Matter of Conklin (Gargani), 48 Misc.3d 291, 300 (Surr. Ct. Nassau Co. 2015) (finding ademption when a cooperative apartment was sold by testator's agent as part of Medicaid planning strategy); Estate of Kramp, 100 Misc.2d 724 (Surr. Ct. Niagara Co. 1979) (devise defeated by sale of property prior to testator's death).

There is no dispute that the Will bequeathed the medallions themselves in a very specific manner. However, the Will did not specifically provide for the possibility that the medallions would be sold by the testator prior to her death. Nor did the Will specifically direct that, if the medallions were sold prior to death, that the Proceeds of such sale should be distributed in the same proportions as if the medallions were part of the estate. Whether this contingency was overlooked or forgotten, the result is the same: the law of reformation provides no refuge. Instead, the rules of ademption apply. To make the change requested by the Cross-petitioners “would be not to construe the will, but to construct it.” Tamargo, 220 N.Y. at 232. Therefore, Petitioners motion to dismiss the cross-petition for construction and reformation is granted.

Turning to the motion for summary judgment, Cross-petitioners argue that issues of fact prevent the grant of Petitioners' motion for summary judgement on the ademption claim. The

proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law by tendering sufficient admissible evidence to eliminate any material issues of fact from the case. See Sillman v. Twentieth Century-Fox Film Corporation, 3 N.Y.2d 395 (1957). The movant bears the burden of proving entitlement to summary judgment, and the failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. See Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851 (1985). Once such proof has been offered, the burden then shifts to the opposing party who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form and show that there is a triable issue of fact. See Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

Petitioners have established that the law of ademption applies in this matter. There is no factual dispute that the medallions were sold prior to Decedent's death. Therefore, the burden shifts to Cross-petitioners to offer evidence of a relevant issue of fact that remains open. Cross-petitioners argue that a fact finder must determine whether Craig had a confidential relationship with his mother, which he then used to force the sale of the medallions against his mother's wishes so as to defeat the scheme in the Will. Cross-petitioners argue that this undecided issue of fact prevents a conclusion on the ademption of the medallions.

The Court finds that Cross-petitioners have not met their burden. All of the evidence submitted by the parties establishes that the sale of the medallions was the result of a family meeting in November 2010 at which nine of the siblings, including Petitioners and Cross-petitioners, determined that Decedent's need for additional cash to cover the cost of her care could only be met by selling the medallions. Whether or not Cross-petitioners could establish that Craig had a confidential relationship with Decedent, which seems unlikely at best, there is no evidence that Craig's undue influence over Decedent, if it existed, led to the sale. On the contrary, all of

the evidence points to the fact that Deborah was the primary sibling responsible for the ultimate sale of the medallions, and that the sale occurred with their mother's knowing consent.

In the end, the evidence submitted in support and opposition to this motion establishes that when the sale of the medallions was planned and carried out, the children anticipated that their mother would continue to live for many years and that she would fund her in-home health aides from the Proceeds. In light of the decision to sell the medallions, Decedent could have revised her Will to reflect the change in her testamentary plan. She did not. Therefore, when she passed away soon after the sale, leaving almost all of the Proceeds in cash, the funds were subject to the residuary clause of her Will.

ORDERED, the motion to dismiss the petition for reformation is GRANTED for failure to state a claim on which relief can be granted; and it is further

ORDERED that the motion for summary judgment on the petition of Craig and Susan is GRANTED, based on the finding that the bequest of the medallions adeemed; and it is further

ORDERED that the motion for sanctions is DENIED.

This constitutes the Decision and Order of the Court.

Dated: New City, New York
January 31, 2019



HON. KEITH J. CORNELL
Rockland County Surrogate

To:
Frank W. Streng, Esq.
Dina M. Aversano
Attorneys for Petitioners
11 Martine Avenue, 12th Floor
White Plains, NY 10601

Gary Bashian, Esq.
Bashian & Farber, LLP
Attorneys for Cross-Petitioners
235 Main Street
White Plains, NY 10601

Hon. Peter P. Rosato (ret.)
Collier, Halpern & Newburg, LLP
Guardian Ad Litem
1 Lexington Avenue, 15th Fl.
White Plains, New York 10601

AT A SURROGATE'S COURT held in and for the County of Rockland, located at 1 South Main Street, New City, NY 10956, on the 19th day of Feb., 2019

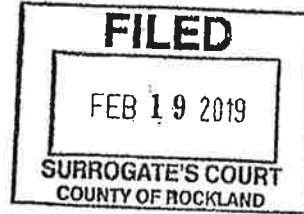
PRESENT:

HONORABLE KEITH J. CORNELL

-----X

In the Matter of the Construction of the Will of

FRANCINE WECHSLER,



File No. 2013-255/G & H

Deceased

DECREE

Pursuant to SCPA § 1420.

-----X

A Verified Petition made pursuant to SCPA § 1420 having been filed with this Court by McCarthy Fingar LLP on behalf of co-petitioners Craig Wechsler and Susan Wechsler Baruch (hereinafter "co-petitioners" or "Craig" and "Susan"), duly verified on May 13, 2015 (hereinafter the "Verified Petition"), praying that a decree be made and entered by the Court determining that two New York City Tax Medallions (hereinafter "Taxi Medallions") solely owned by Decedent Francine Wechsler (hereinafter "Decedent") during her lifetime and the subject of a specific bequest under Item One B of Decedent's May 4, 2010 Last Will and Testament (hereinafter the "Will") adeemed by virtue of the December 2012 *inter vivos* sale of the Taxi Medallions, and the proceeds from that sale are assets of Decedent's estate to be distributed according to the terms of Item Two of the Will; and Deborah Cohen, Rodney Wechsler and Jonathan Wechsler (hereinafter "cross-petitioners"), by their attorneys, Bashian &

{00912958.docx.}

Farber, LLP, having filed a Verified Cross-Petition for Construction and Reformation of the Will, verified on October 10, 2015 (hereinafter "Verified Cross-Petition"), and a Verified Answer to the Verified Petition, dated October 14, 2015, and co-petitioners having filed a Verified Answer to the Verified Cross-Petition on July 7, 2016, and Peter P. Rosato, Esq, having been appointed by the Court as the guardian ad litem for the minor beneficiaries under the Will;

AND, jurisdiction having been obtained over all interested parties;

AND, following a conference in chambers with Surrogate Keith J. Cornell on October 9, 2018, during which the Court set forth a briefing schedule with respect to co-petitioners' proposed motion for summary judgment and cross-petitioners' proposed cross-motion for summary judgment;

AND, on December 14, 2018, co-petitioners having filed a motion for summary judgment (hereinafter "Summary Judgment Motion"), pursuant to CPLR § 3212 and based upon the undisputed evidence in the record, on the relief requested in the Verified Petition determining that Decedent's specific bequest of her two Taxi Medallions in her Will adeemed by virtue of her *inter vivos* sale of the Taxi Medallions and directing that the proceeds of that *inter vivos* sale be distributed pursuant to the residuary provision of Item Two of the Will, and dismissing the Verified Cross-Petition in its entirety pursuant to CPLR 3211 (a)(7), and granting sanctions and attorneys' fees against cross-petitioners and their counsel, Bashian & Farber, LLP, pursuant to 22 N.Y.C.R.R. § 130-1.1;

AND, in support of its Summary Judgment Motion, co-petitioners filed: a Notice of Motion, dated December 13, 2018; the Affidavit of Frank W. Streng, sworn to on December 13, 2018, with Exhibits 1-32; the Affidavit of Craig Wechsler, sworn to on December 13, 2018, with Exhibits A-BB; the Affidavit of Susan Wechsler Baruch, sworn to on December 13, 2018,

with Exhibits A-C; the Affidavit of Elsie Wechsler Freedman, sworn to on December 11, 2018, with Exhibits A-B; the Affidavit of Rhonda Wechsler Soofian, sworn to on December 10, 2018, with Exhibits A-C; and the Affidavit of Caryn Wechsler Litkowski, sworn to on December 11, 2018, with Exhibits A-C; and a memorandum of law, dated December 14, 2018;

AND, cross-petitioners having filed: an affirmation in opposition of Gary E. Bashian, Esq., dated January 4, 2019, with Exhibits A-S; and the affirmation in opposition of Peter P. Rosato, Esq., Guardian Ad Litem, dated January 4, 2019; and a memorandum of law in opposition, dated January 4, 2019, and cross-petitioners did not to file a cross-motion for summary judgment;

AND, co-petitioners having filed a Reply Affidavit of Frank W. Streng in further support of the Summary Judgment Motion, sworn to on January 11, 2019, with Exhibits 1-2, and a memorandum of law in further support of the Summary Judgment Motion, dated January 11, 2019;

AND, the Summary Judgment Motion was marked fully submitted on January 14, 2019, and oral argument was held on January 22, 2019;

AND, the Court having rendered a Decision and Order in writing dated January 31, 2019, and entered on February 1, 2019

NOW, on Motion of McCARTHY FINGAR LLP, attorneys for the co-petitioners, it is

ORDERED, ADJUDGED and DECREED, that co-petitioners' motion to dismiss the verified cross-petition for construction and/or reformation is **GRANTED**; and it is further

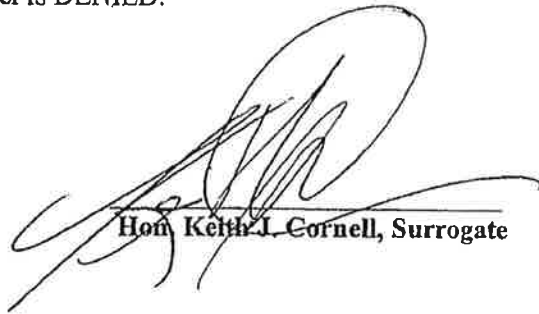
ORDERED, ADJUDGED and DECREED, that co-petitioners' motion for

summary judgment on the Verified Petition for Construction of the Will of Decedent Francine Wechsler is GRANTED, based on the Court's finding that the Decedent's specific bequest of the Taxi Medallions adeemed; and, it is further

ORDERED, ADJUDGED and DECREED, that the proceeds from the sale of the Taxi Medallions should pass pursuant to Item Two of the Will, which directs distribution of the residuary estate evenly among the 13 surviving children and the issue of the one predeceased child of the Decedent; and it is further

ORDERED, ADJUDGED and DECREED, that co-petitioners' motion for sanctions against cross-petitioners and their counsel is DENIED.

Dated: New City, New York
February 19, 2019



Hon. Keith J. Cornell, Surrogate