[*1] In the Matter of the Estate of Margaret Harmse, Deceased.
File No. 619-P/2001

SURROGATE'S COURT OF NEW YORK, BRONX COUNTY

2004 NY Slip Op 50381U; 3 Misc. 3d 1104A; 2004 N.Y. Misc.LEXIS 531

May 11, 2004, Decided

NOTICE:

[1]** THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE OFFICIAL REPORTS.

DISPOSITION: A decree may be settled judicially settling the executor's account without apportioning any portion of the estate taxes against the assets that passed to the objectants by operation of law.

CORE TERMS: decedent, residuary estate, nontestamentary, apportionment, inheritance, succession, exonerate, objectants, recipient, paying, pro rata share, sister, executor, legacy, operation of law, estate tax, exoneration, beneficiary, narrower, testamentary, charities, nonapportionment, preresiduary, charitable, testator, legatee, specific direction, taxes imposed, unrestricted, testate

HEADNOTES: Taxation--Estate Taxes.

COUNSEL: James P. Shea, Esq., for James P. Shea, executor.

Cecile C. Weich, Esq., for Mary and Peter Gallagher, objectants.

Anderson Kill & Olick, P.C. (Abbe I. Herbst, Esq. of Counsel), for Protestant Welfare Agencies, Inc.

Eliot Spitzer, Attorney General of the State of New York by Howard Holt, Assistant Attorney General, for charitable beneficiaries.

JUDGES: Lee L. Holzman, J.

OPINION BY: Lee L. Holzman

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Lee L. Holzman, J.

In this accounting proceeding, the executor alleges that, based upon the value of the nontestamentary assets which passed to the objectants by operation of law upon the decedent's death, the objectants' pro rata share of the estate tax that was paid is $128,255.70. The objectants assert that the will contains a specific direction that all estate taxes are to be paid from the residuary estate, including that portion of the tax that is payable as a result of the assets that passed to them by operation of law. The executor contends that paragraph "FIFTH" of the**[**2]** decedent's will exonerates preresiduary legacies from tax apportionment but fails to contain the specific direction required by *EPTL 2-1.8(d)* to exonerate the recipients of **[*2]** nontestamentary assets from paying their pro rata share of estate taxes.

The decedent died on July 7, 2001. Her will, executed on October 14, 1993, bequeathed her entire estate to her sister, or, if her sister predeceased her, to six charities. The sister predeceased on October 1, 1995. Thereafter, between 1996 and 1998, the decedent transferred in excess of $600,000 to bank accounts held in trust for Mary and/or Peter Gallagher, the objectants, and purchased $190,000 in annuities payable on death to Mary Gallagher. The account reflects that the testamentary assets are valued at $469,391.82.

The decedent's will states that "all estate, inheritance, transfer, legacy, succession and other death taxes of any nature, payable by reason of my death shall be paid out of my residuary estate." *EPTL 2-1.8(a)* provides that "except in a case where a testator otherwise directs in his will," the recipients of assets that are subject to estate taxes, regardless of whether**[**3]** the assets are testamentary or nontestamentary, must pay their pro rata share of the estate taxes. Furthermore, *EPTL 2-1.8(d)* provides that "any direction as to apportionment or nonapportionment of the tax ... contained in a will ... relates only to the property passing thereunder, unless such will ... provides otherwise." Thus, the question presented is whether the decedent's will

specifically exonerates the recipients of assets that did not pass under the will from paying their pro rata share of estate taxes.

The provisions of *EPTL 2-1.8* and its predecessor, Decedent Estate Law § 124, are based upon the presumption that decedents favor tax apportionment. Consequently, "in the absence of a clear, unambiguous direction to the contrary in the will, apportionment pursuant to statute will be directed" (*Matter of Shubert, 10 N.Y.2d 461, 471, 180 N.E.2d 410, 225 N.Y.S.2d 13*). The plethora of cases on the issue of whether a will clearly directs that there be no tax apportionment can be explained by the fact that, as is the case with virtually every will construction issue, each case is to some extent unique. This is so because each determination is based upon**[**4]** the testator's intent, which is gleaned not only from the language of the tax apportionment clause at issue but also from the other provisions in the will and, at least in some instances, the circumstances surrounding the execution of the will (see *Matter of Herz, 85 N.Y.2d 715, 651 N.E.2d 1251, 628 N.Y.S.2d 232*).

The overwhelming majority of tax apportionment cases deal with one or more of the following three issues: 1) whether the will clearly exonerates the recipients of nontestamentary assets from paying any portion of the estate tax; 2) whether the will clearly exonerates the preresiduary legatees from paying any portion of the estate tax; and 3) whether the will clearly exonerates the residuary legatees from apportionment of estate taxes amongst themselves. Cases deciding one of these issues are of little value as precedent for determining either of the other two issues.

The drafter of the decedent's will could have used language of narrower scope that was more explicit with regard to the issue at hand. For example, the tax apportionment clause could have contained the language "without apportionment and without contribution from any recipient of nontestamentary assets" (see *Matter of Bruce, 131 A.D.2d 670, 516 N.Y.S.2d 748*).**[**5]** However, the function of the court is to ascertain the decedent's intent and not to determine whether the drafter could have used narrower or broader language to reflect the same intent. In *Matter of Halle, 270 A.D. 619, 61 N.Y.S.2d 694*, the decedent directed that "all inheritance, estate, transfer and succession taxes be paid out of my residuary estate." In holding that this clause exonerated the recipient of joint bank accounts from paying her pro rata share of estate taxes, the Appellate Division, First Department, stated:

The direction in the will for the payment of taxes is as broad and comprehensive as would seem possible. It directs the payment of 'all' estate, transfer and succession taxes as well as inheritance taxes. We do not consider that the intention of testator to include taxes on the bank account was made uncertain or rendered doubtful because broad and all inclusive language was used. Conceding that more explicit words of narrower scope could have been used, skillful draftsmanship frequently calls for the use of broad language in preference to a narrower form (*270 App. Div. at 622*).

In *Matter of Phipps, 272 A.D. 229, 70 N.Y.S.2d 746*, affd. **[**6]** *297 N.Y. 1012, 80 N.E.2d 535*, the Appellate Division, First Department, had to determine the effect of a tax exoneration clause providing that "I direct that all estate, inheritance, transfer and succession taxes imposed upon my estate (emphasis added) ... be paid out of my general estate." The court in holding that this clause did not exonerate the recipient of nontestamentary assets from paying a pro rata share of estate taxes distinguished *Matter of Halle, supra*, as follows: The decision of this court in *Matter of Halle (270 App.Div. 619, 623*) heavily relied on by the appellants, is not here applicable. As we there said:

'The matter of intention is to be determined in each case upon a consideration of the language used in the light of surrounding circumstances.' In that case the decedent directed without any qualifying phrase or words that all inheritance, estate, transfer and succession taxes be paid out of my residuary estate. There the direction was unrestricted; there was no limitation such as that found in the will before us; viz., that the taxes so to be paid were only those imposed upon 'my estate', a phrase that had the uniform meaning throughout **[**7]** the will of the true or testamentary estate (*272 App. Div. at 234*).

Here, the tax exoneration clause employed by the decedent is strikingly similar to the clause that was construed in *Matter of Halle, supra*. Moreover, unlike in Matter of Mills, **[*3]** supra, the clause at issue herein does not limit the nonapportionment direction to the taxes imposed upon "my estate" (construed in Mills to mean testamentary estate) but instead contains the unrestricted direction that "all estate ... and other death taxes of any nature, payable by reason of my death shall be paid out of my residuary estate." Here, any portion of the estate taxes that is attributable to the nontestamentary assets passing to the objectants by operation of law upon the decedent's death clearly falls within the decedent's direction that all estate taxes and other death taxes of any nature payable by reason of his death are to be paid out of his residuary estate.

There is ample authority, in addition to *Matter of Halle, supra*, to construe the clause at issue as exonerating the recipients of nontestamentary assets from paying any portion of the estate tax (*Matter of Staheli, 57 N.Y.S.2d 185* **[**8]**affd. *271 A.D. 788, 66 N.Y.S.2d 271*, "I direct that all transfer, estate, inheritance and succession taxes be paid out of my residuary estate;" *Matter of Greenwald, 186 Misc. 654, 53 N.Y.S.2d 937*, "I direct that all Inheritance,

Transfer, Estate and Succession taxes be paid out of my residuary estate;" *Matter of McGee, 73 N.Y.S.2d 190*, "I direct that all inheritance taxes, estate taxes and other similar taxes, both State and Federal, shall be paid out of my residuary estate;" *Matter of Haliday, 184 Misc. 668, 53 N.Y.S.2d 934*, "all inheritance and succession taxes payable by my estate or on account of any legacy therein shall be paid out of my residuary estate"). The cases in which the tax exoneration clauses were held to exonerate preresiduary legatees from paying their pro rata share of estate taxes but failed to exonerate nontestamentary beneficiaries relied upon the logic of Matter of Mills, supra, that the words "imposed upon my estate", or similar language in the exoneration clause, reflected an intent to limit the nonapportionment of taxes to the testate estate (see *Matter of Leonard, 9 A.D.2d 1, 189 N.Y.S.2d 422*, "I direct my executors ... to pay all of my just debts, funeral**[**9]** and administration expenses, including such estate and inheritances taxes (sic) as may be assessed against my estate (emphasis added);" *Matter of Israel, 26 Misc. 2d 904, 208 N.Y.S.2d 58*, "All estate, transfer, succession, legacy and death taxes (both State and Federal) upon the transfer of my estate (emphasis added) or any part thereof, shall be paid out of my residuary estate so that no part thereof shall be charged against any legatee, devisee or beneficiary other than those entitled to my residuary estate").

To the extent that any of the above cases might be interpreted as being inconsistent with *Matter of Halle, supra*, this court is bound by the law enunciated by the Appellate Division, First Department. The executor contends that this case is distinguishable from *Matter of Halle, supra*, because here, unlike Halle, the nontestamentary assets at issue were created after the will was executed and because the residuary beneficiaries are charitable entities. Although the Halle court noted that the bank accounts at issue "were in existence at the time the will was made" (*270 App. Div. at 622*), there is no indication that this observation was**[**10]** a determinative factor. To the contrary, it is well settled that "in the absence of the expression of a contrary intention (citations omitted), a will speaks from the time of death (citations omitted)" (*Matter of Whipple, 42 N.Y.2d 1031, 369 N.E.2d 9, 398 N.Y.S.2d 1009*). The argument that it is significant that the nontestamentary transfers were created after the will was executed was raised and rejected *in Matter of Staheli, supra*. Furthermore, where a will explicitly directs against tax apportionment, the fact that the failure to apportion results in a diminution of charitable legacies is of no moment (*Matter of Herz, supra*).

Here, it appears that the charities were never the primary objects of the decedent's bounty. While her sister was alive, the charities would not have received any portion of the decedent's testate estate. After her sister's death, it appears that the objectants became the primary objects of the decedent's bounty. This is reflected by the fact that the nontestamentary assets that she created for their benefit have a significantly greater value than the testamentary estate that she bequeathed to the charities. In summary, although it appears that the decedent**[**11]** had a desire to benefit the charitable beneficiaries named in her will, her concern for them was always secondary to the people she cared about on a daily basis, i.e., first her sister and, after her sister's death, the objectants.

For the reasons stated above, a decree may be settled judicially settling the executor's account without apportioning any portion of the estate taxes against the assets that **[*4]** passed to the objectants by operation of law.

Decision Date: May 11, 2004