

SURROGATE'S COURT: STATE OF NEW YORK  
COUNTY OF NASSAU

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In the Matter of the Estate of

GOLDIE HYMAN,

Deceased.

File No. 235680

Decision No. 130

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This is an uncontested proceeding for reformation of Article FIFTH of decedent's last will and testament dated November 21, 1979, as amended by Article II of a codicil thereto dated March 24, 1982 (collectively, the "will"). Decedent died on December 12, 1984. The will was admitted to probate by decree of this court.

Petitioner, the sister of the decedent, is a co-trustee of the trust created under Article FIFTH of the will (the "Trust") for the benefit of decedent's son, Burton Hyman ("Burton"), who suffers from chronic physical disabilities, including malfunctioning kidneys, for which he is receiving dialysis treatment. On July 14, 2006, following the death of Joseph Bender, who had been serving as co-trustee with petitioner, successor letters of trusteeship were issued by this court to Bonnie Linzer, who is petitioner's daughter as well as a remainderman of the trust.

Under Article III of the codicil, a trustee who is also a beneficiary of the trust is prohibited from (1) exercising discretion to pay or not to pay income or principal from the trust; (2) determining whether a beneficiary of the trust is disabled; (3) terminating any trust or life estate thereunder; and (4) exercising discretion to allocate receipts or expenses between principal and income. Petitioner and Ms. Linzer, who are remaindermen of the trust as well as the co- trustees, are thus unable to act in respect to these decisions.

On January 17, 2007, Roger Blane, who is not a remainderman, was appointed to serve as a successor co-trustee. Successor Letters of Trusteeship issued to him on January 19, 2007, and he is now serving as a co-trustee along with petitioner and Bonnie Linzer. Roger Blane has submitted an affidavit in support of the relief requested by petitioner.

Article FIFTH of the codicil provides, in its entirety, as follows:  
Fifth: I give the residue of my estate, real and personal, to my trustee,  
IN TRUST to keep it invested and thereafter:

A. If my son, Burton, survives me, during his lifetime:

1. The net income shall be paid to him, at least quarterly;  
and

2. As much of the principal as my trustee may  
from time  
to time think desirable - taking into account funds

available

from other sources - for the health, support or maintenance  
of my son shall be paid to him or shall be applied  
directly  
for those purposes.

B. After my son's death [or mine if I survive him], the then  
remaining principal and any undistributed income shall  
be paid to my sister, Eila Bender or, if dead, to my niece,  
Bonnie A. Linzer or, if dead, to her issue, per stirpes.

According to petitioner, the Trust is valued at approximately \$572,000, consisting of cash, cash equivalents and marketable securities. Petitioner avers that she is concerned that the language of Article FIFTH will frustrate the decedent's intent that trust funds be available for the duration of Burton's life for his comfort and maintenance. Petitioner states that, although Burton has medical insurance, the cost of his medical care may exceed the amount covered by the insurance and, over time, completely deplete trust

assets prior to Burton's death. For that reason, Petitioner requests that Paragraph A of Article FIFTH be reformed into a special needs trust by eliminating Paragraph [A][2] of

Article Fifth and adding the following language:

2. If the income available for distribution to my son should, for any reason be inadequate, my Trustees are hereby authorized at any time or from time to time, in their sole and absolute discretion, to pay to my son any part or all of the principal of the trust for his care, support, maintenance, education and general welfare PROVIDED HOWEVER AND ONLY IF said payment cannot be paid by any governmental program. My Trustees may also apply the principal for the expense and cost of my son's funeral. My Trustee shall take into consideration in approving or rejecting any expenditures, the principal purpose of the fund, its length of existence, any other resources available to my son, and the lifestyle to which my son has become accustomed. My Trustees shall have the absolute right to reject any request for these funds that are not, in their opinion, needed to enhance the lifestyle of my said son or do not represent extraordinary or exceptional need.

3. None of the principal of the trust shall be used or disbursed for the use or benefit of my son if it will affect, reduce, or make him ineligible to receive full governmental financial assistance benefits or other governmental benefits in the same manner as if no trust existed.

4. In making any distribution to or for the benefit of my son, the Trustee should consider what benefits my son may be entitled to from any governmental agency. I request that my Trustees assist my son in collecting, pending, accounting separately for all such governmental assistance benefits, but not commingle them with the trust fund. The same request shall apply to my son's own assets and income as the Trustees are in a position to assist him individually.

5. The purpose of this trust is to create a fund which qualifies as a trust described under 42 U.S.C. 1396p(d)(4)(B) to enable my son to seek and maintain support and resources for my son from the available public sources, including, but not limited to, state medical benefits, Medicaid, Social Security Administration benefits, Veterans

Administration benefits, Supplemental Security Income (SSI), U.S. Civil Service Commission benefits, and federal Social Security Disability Insurance (SSDI) despite having available income in excess of the amount below which such benefits would otherwise be available to my son.

6. In the event my Trustee is requested or required to pay principal or income of the Trust on behalf of my son to pay for services which such public assistance is authorized to provide, were it not for the existence of this trust, or in the event my Trustee is required to pay for equipment, medication or services which any state or federal agency is authorized to provide (were it not for the existence of the Trust), the Trustee is authorized to deny such request.

Courts are generally loathe to reform testamentary instruments and, as a rule, will not, unless reformation effectuates the testator's intent (*see Matter of Snide*, 52 NY2d 193 [1981]). When construing a will, the testator's intent is to be gleaned from a sympathetic reading of the instrument in its entirety and not from a single word or phrase (*Matter of Fabbri*, 2 NY2d 236 [1957]). It is of paramount importance that the testator's actual purpose be determined and effectuated to the extent it comports with the law and public policy (*id.* at 240).

In *Matter of Escher*, (94 Misc 2d 952 [Sur Ct Bronx County 1977], *aff'd* 75 AD2d 531 [1st Dept 1980], *aff'd sub nom. Matter of Gross*, 52 NY2d 1006 [1981]), the trustee of a discretionary trust established under a will brought a proceeding to judicially settle his account. The New York State Department of Mental Hygiene filed objections to the disallowance by the trustee of its claim for reimbursement from the trust for the cost of the care of the trust's lifetime beneficiary, the testator's daughter, who had been a patient at the Rockland Psychiatric Center since 1947. Surrogate's Court, Bronx County, dismissed the objections, finding that "under the terms of the trust at issue, it is not an abuse of discretion for the trustee to decline to invade corpus for the purpose advocated by objectant" (*id.* at 961).

In reaching its conclusion, the court relied on the language of the testator's will and codicil, which the Court found evidenced the testator's knowledge of his daughter's disabilities and his apparent intent to provide for her ongoing needs during her lifetime within the framework of a continuing trust (*id.* at 957). The Court also reasoned that in recent years the view of public assistance had changed from that of a "gift" to a "right" and that the stigma attached to it had, for the most part, disappeared, particularly with respect to programs "designed to meet the astronomical cost of illness or institutional care of any sort. . . . It is divorced from the realities of life to presume that if the testator were aware of the facts as they now exist, he would desire to pay the immense cost for his daughter's care in preference to having society share his burden" (*id.* at 959). When the case reached the Court of Appeals, it held that, as a matter of law, the trustee did not abuse her discretion by refusing to invade the trust's corpus to reimburse the Department of Mental Hygiene (*Matter of Gross*, 52 NY2d 1006 [1981]).

Enacted in 1993, EPTL 7-1.12, in essence, codified the holding in *Escher*. The statute authorizes the creation of non-self-settled, testamentary supplemental needs trusts when the following requirements are satisfied: (1) the person for whose benefit the trust is established suffers from a "severe or chronic or persistent disability"; (2) the trust evidences the intent that the assets be used to supplement, not supplant, government benefits; (3) the trust prohibits the trustee from using assets in any way that may jeopardize the beneficiary's entitlement to government benefits or assistance; and (4) the beneficiary does not have the power to assign, encumber, direct, distribute or authorize distribution of trust assets (EPTL 7-1.12[a][5][i]-[iv]). The policy of the State of New York is to encourage the creation of supplemental needs trusts for people who are mentally or physically disabled (*Matter of Kamp*, 7 Misc 3d 615, 622 [Sur Ct Broome County 2005]).

Courts have shown a willingness to reform wills to obtain the benefits of an SNT where the testator's intent to supplement, rather than supplant, government benefits is evident from the language of the testamentary instrument (*see e.g. Matter of DeRosa*, NYLJ, April 20, 2006, at 30, col 2 [Sur Ct Kings County]; *Matter of Kamp*, 7 Misc 3d 615 [Sur Ct Broome County 2005]; *Matter of Ciraolo*, NYLJ, February 9, 2001, at 31, col 4 [Sur Ct Kings County]; *but see Matter of Rubin*, 4 Misc 3d 634 [Sur Ct New York County 2004]) and such reformation would not change the testator's dispositive plan (*see e.g. Matter of Choate*, 141 Misc 2d 489 [Sur Ct New York County 1988]).

The proposed reformation of the trust for Burton's benefit meets the criteria enunciated in *Escher* and later in EPTL 7-1.12. Burton, the income beneficiary, suffers from chronic disabilities. The will evidences decedent's intention to provide for Burton to the extent that his needs are not met by government assistance and that the trust's assets be used to supplement, not supplant, government benefits. In that regard, Article FIFTH [A][2] currently directs that principal may be paid to, or on behalf of, Burton from time to time for his health, support or maintenance "taking into account funds available from other sources." Burton has no power to dispose of any trust assets. The requested reformation does not alter decedent's testamentary plan and the court finds the requested reformation to be in Burton's best interests. Significantly, the Nassau County Department of Social Services was cited in this proceeding and did not appear or object. Finally, all other interested parties have consented to the relief requested in the petition.

Accordingly, the petition to reform the trust under Article Fifth of the will is granted. The co-trustees should be mindful of the restrictions imposed on petitioner and Bonnie Linzer by Article III of the codicil.

This constitutes the decision of the court.

Submit decree.

Dated: February 16, 2007

JOHN B. RIORDAN

Surrogate's Court

Judge of the