

96PR401 (5/18/98)

PROBATE COURT, CITY AND COUNTY OF DENVER, COLORADO

Case No. 96PR401

IN THE MATTER OF

The Estate of Sheldon K. Beren,

Deceased.

ORDER

THIS MATTER comes before the Court on the Personal Representative's Petition for Instructions Concerning the Obligation of the Testamentary Charitable Trust to Contribute to the Satisfaction of the Elective-Share Amount.

Sheldon K. Beren (the "Decedent") left a Will disposing of his estate. Subsequent to probate of the will his surviving spouse, Miriam Beren (the "Spouse") elected to take her statutory share of the augmented estate pursuant to Colo. Rev. Stat. § 15-11-201 (1997).

Colo. Rev. Stat. § 15-11-203 (1997) ("Section 203") sets out a plan for satisfying the share of an electing spouse from the assets of the estate. The devisees disagree on the meaning of the statutory language when applied to the facts of this case.

Section 203(2) provides, in part,

The decedent's probate estate and [a defined] portion of the decedent's nonprobate transfers to others are so applied that liability for the . . . elective share amount is equitably apportioned among the recipients of the decedent's probate estate and of [a defined] portion of the decedent' nonprobate transfers to others in proportion to the value of their interests therein.

Colo. Rev. Stat. §15-11-203(2) (1997).

Some of the devisees argue that all devisees under the will are required, by this statutory language, to contribute to the surviving spouse's elective share amount. Some beneficiaries of a charitable trust established under the provisions of decedent's will (the "Charitable Trust") argue that the Charitable Trust is exempt from the contribution requirement of section 203. The issue was briefed and, on May 4, 1998, oral arguments were presented.

Two arguments are advanced to exonerate the Charitable Trust from the contribution requirement of Section 203.

First, the beneficiaries argue that the decedent intended the Charitable Trust not be diminished to satisfy the elective share and his intent overrides any statutory direction. The Court first examines the issue of a decedent's intent in this context.

In the construction of every will the intent of the testator controls. 95 C.J.S. Wills §590 (1957). Although Section 203 does not expressly acknowledge this governing principle in connection with satisfaction of an elective share, and there is no controlling Colorado precedent, the Court here holds that where there is evidence of the testator's intent regarding distribution of the property if the surviving spouse elects against the will, the testator's expressed intent controls over statutory language. 5 Bove-Parker: Page on Wills, §47.44 (Supp. 1998). Accord, Estate of Cole, 491 A.2d 770 (N.J. Super. 1984) and In re Estate of Ziegenbein, 519 N.W.2d 5 (Neb. App. 1994).

In *Barton v. Kelly*, 41 Colo.App. 316, 584 P.2d 640 (Colo. App. 1978), where the apportionment of taxes was in dispute, the Colorado Court of Appeals held that the "testator must make a clear, unambiguous manifestation of his intent to avoid [statutorily mandated] apportionment" *Id.* at 318, 641. An expression of intent sufficient to alter the statutory order of abatement or priority among beneficiaries in satisfaction of the elective share must be "clearly indicated by the will when read as a whole in the light of the surrounding circumstances" 6 Bove-Parker: Page on Wills, § 53.3 (3rd ed. 1962). See also 5 Bove-Parker: Page on Wills, §47.44 (3rd ed. 1962), and 6 Bove-Parker: Page on Wills, §53.3 at 207, n.11 (3rd ed. 1962).

There are no words in the will of Sheldon Beren addressing the impact of a spousal election on the funding of the Charitable Trust.

The Court must determine whether his intent is otherwise apparent from the language of the will. The charities argue that decedent's will manifests an intent to favor the charitable trust by imposing a single condition sufficient to defeat a full funding of the trust; i.e., if the "adjusted gross estate" were less than \$30,000,000 the charitable trust would be reduced. Otherwise, argue the charities, the charitable trust is to be funded with a full \$5,000,000 in ALL events.

The other devisees argue that this language shows instead that the charities were disfavored. It would be improper, they assert, to infer from this condition an intent to exonerate the Charitable Trust from contribution to the elective share.

The Court concludes that the entirety of the will, including this language, does not manifest any intent regarding the funding of the Charitable Trust in the event the spouse elected against the will. The Court cannot find the clear expression of intent required to avoid the application of Section 203. The statutory language controls.

Secondly, the charities argue that the 1994 adoption of new Section 203, including addition of the words "equitably apportion," gives this Court authority to avoid the pro rata contribution rule of Section 203 by finding an equitable basis to exonerate the Charitable Trust. They argue that a legislative amendment is presumed to intend to affect a change of law and the Court is required to give effect to the intended change. Here, because the legislature adopted this language verbatim from a proposed uniform law, the Court rejects the presumption. See 82 C.J.S. STATUTES § 384(b)(2) (1953), and Uniform Probate Code (U.L.A.) §2-209(b) (Supp. 1997).

Arguably, "equitably apportion" could be read to suggest an alternative to strict, proportional contribution from all devisees, but to construe it literally would require the Court in virtually every case to review and weigh a myriad of considerations to test the ultimate fairness of the

statutory apportionment plan as applied to individual cases. The total absence of legislative history to suggest that the Colorado legislature considered this interpretation or application of the language when it was adopted, suggests that it would be error for this Court to do so now.

The Court FINDS

Section 203 requires that all devisees contribute to the spouse's elective share in proportion to their interests in the estate, and

Sheldon Beren did not manifest an intent to vary from this statutory mandate.

May 18, 1998
C. Jean Stewart
Judge, Probate Court