

APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, THIRD DEPARTMENT

Matter of Bordell

2017 NY Slip Op 03823 (N.Y. Ct. App. 2017) · No. 523198 · Decided May 11, 2017

SUMMARY

The New York Appellate Division, Third Department, affirmed an order denying a guardian ad litem's motion for summary judgment concerning the validity of a surviving spouse's waiver of her elective share. The court held that the waiver substantially complied with EPTL 5-1.1-A despite referencing an outdated statutory provision, and that alleged lack of legal advice or financial disclosure did not establish invalidity as a matter of law. The court also concluded that the unresolved cross-motion was effectively denied.

CASE DETAILS

COURT	Appellate Division of the Supreme Court of the State of New York, Third Department
WRITING FOR THE COURT	Mulvey, J.; McCarthy, J.P.; Garry, J.; Egan Jr., J.; Rose, J.
JURISDICTION	New York
DECIDED	May 11, 2017
DOCKET	523198
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from an order of the Madison County Surrogate's Court denying Jennifer M. Basic's motion for summary judgment seeking to invalidate a waiver of the surviving spouse's elective share and validate the spouse's notice of election.
STANDARD OF REVIEW	Summary judgment is proper where there are no triable issues of fact and the movant makes a prima facie showing of entitlement to judgment as a matter of law. The burden shifts to the nonmovant only after the movant satisfies that initial obligation.
PRECEDENTIAL VALUE	published appellate memorandum decision

PARTIES

Jennifer M. Basic, as Guardian ad Litem of Denise H. Bordell v.
Michael Bordell, as Executor of the Estate of Maurice J. Bordell, M.
Kathleen Lynn, as Guardian ad Litem of Kaleb Stephenson et al., other
respondents

TOPICS

elective share

probate procedure

summary judgment

estate litigation

standard of review

PRACTICE AREAS

trusts and estates

probate

civil procedure

QUESTIONS PRESENTED

1. Whether the surviving spouse's written waiver of rights in the decedent's estate was invalid as a matter of law because it referred to the superseded statutory provision EPTL 5-1.1 rather than EPTL 5-1.1-A.
2. Whether the waiver was invalid as a matter of law because the surviving spouse allegedly made a false statement concerning consultation with counsel and was not provided information about the decedent's assets before signing.
3. Whether the Surrogate's Court properly denied the guardian ad litem's motion for summary judgment.

HOLDINGS

1. A written waiver of a surviving spouse's elective-share rights is not invalid merely because it cites the former statutory provision, EPTL 5-1.1, rather than the applicable provision, EPTL 5-1.1-A, when the instrument otherwise substantially complies with the statutory requirements and demonstrates an intent to waive rights in the decedent's estate.
2. A waiver of a surviving spouse's elective-share rights is not invalid as a matter of law solely because the spouse was not advised by counsel or was not provided information concerning the decedent's assets; absent fraud or other misconduct, parties are bound by their signatures.
3. Summary judgment was properly denied because the moving party failed to establish as a matter of law that the waiver was invalid and failed to overcome the presumption that it was properly executed.

KEY QUOTATIONS

"must be in writing and subscribed by the maker thereof, and acknowledged or proved in the manner required by the laws of this state for the recording of a conveyance of real property" (*2)

"a failure to disclose does not, standing alone, constitute fraud or overreaching sufficient to vitiate" the waiver (*3)

"this dereliction may have caused [her] to be ignorant of the precise terms of the waiver, [but] the fact remains that, absent fraud or other misconduct, parties are bound by their signatures" (*3)

FACTUAL BACKGROUND

Denise H. Bordell was married to Maurice J. Bordell for more than 40 years, although they lived separately for much of the marriage, and she was his sole distributee. Maurice's will left most of his property to a revocable trust benefiting his paramour and her three minor children. Denise had signed a written waiver of rights in Maurice's estate, and the waiver was acknowledged before a notary. Denise's guardian ad litem later filed a notice of election seeking Denise's elective share, leading the executor to commence a proceeding concerning the validity of the election and waiver.

PROCEDURAL HISTORY

After Maurice J. Bordell's will was admitted to probate, his executor commenced a proceeding under SCPA article 14 to determine the validity of Denise H. Bordell's notice of election. Basic, acting as guardian ad litem for Denise, moved for summary judgment declaring the waiver invalid and the elective share valid. Lynn cross-moved for summary judgment declaring the election invalid. The Surrogate's Court denied Basic's motion without ruling on Lynn's cross-motion, and Basic appealed. The Appellate Division affirmed.

DISPOSITION

affirmed

CASES CITED

- William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh, 22 NY3d 470, 475 (2013)
- Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986)
- Andre v Pomeroy, 35 NY2d 361, 364 (1974)
- Lacasse v Sorbello, 121 AD3d 1241, 1241-1242 (2014)
- Matter of Menahem, 63 AD3d 839, 839-840 (2009)
- Matter of Seviroli, 44 AD3d 962, 962 (2007)
- Hoffman v Hoffman, 100 AD2d 704, 705 (1984)
- Matter of Schuellain, 269 AD2d 864, 865 (2000)
- Matter of Garbade, 221 AD2d 844, 846 (1995), lv denied 88 NY2d 803 (1996)
- Pommer v Trustco Bank, 183 AD2d 976, 978 (1992), lv dismissed and denied 81 NY2d 758 (1992)
- Dickson v Slezak, 73 AD3d 1249, 1251 (2010)