IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA
CIVIL ACTION

ROGER S. FINLAW,
Plaintiff,
v.

Case Number 17-CA-4038

JEFFREY S. FINLAW, as the Personal Representative of the ESTATE of TWILA FINLAW, deceased,
Defendant.
_____/

FINAL JUDGMENT

THIS CAUSE, having come before the Court on Plaintiff's Complaint (docketed/filed on December 15, 2017) and Defendant's Counter-Claim (docketed/filed April 16, 2018), and this Court, having heard the argument of counsel, the testimony of witnesses and the evidence presented on June 12, 2019, and being otherwise duly advised in its premises, it is hereby FOUND, ORDERED, and ADJUDGED:

Twila Finlaw (the "Decedent") is the mother of Roger S. Finlaw ("Plaintiff") and the grandmother of Jeffrey S. Finlaw ("Defendant"). Twila Finlaw passed away on December 14, 2016. Prior to her death, the Decedent, along with her husband R.I. Finlaw and Constance F. Palmer and Roy E. Palmer, entered into a Partnership Agreement dated November 17, 1986 (the "Partnership Agreement"). The Partnership Agreement formed an Ohio partnership, Palmer-Finlaw Associates (the "Partnership"). Those original partners to the Partnership Agreement wished to maintain the family characteristics of the Partnership including certain language in the Partnership Agreement whereby the partners agreed to execute a Last Will and Testament to transfer their partnership interest to their surviving spouse. More specifically, *see* Article XIX of the Partnership Agreement.

Further showing their collective intention to maintain the familial characteristics of the Partnership, the original partners also agreed that each partner, who would inevitably at some point in time become a surviving spouse, agreed to have prepared and to fully execute a Last Will and

Testament so as to vest or allow for a transfer of his or her respective own interest in the Partnership upon their death in his or her children (their lineal descendants).

Thereafter, the original partners began to pass away and, as agreed, they devised or bequeathed their own individual partnership interests to their surviving spouses respectively. R.I. Finlaw predeceased the Decedent and she inherited his interest in the Partnership. Roy E. Palmer, as well as Constance F. Palmer, passed away, ultimately resulting in a transfer of thier interests in the Partnership to their son, Roy Palmer, Jr. The parties and their counsel do not dispute that the Partnership ultimately was left with only two partners, the Decedent and Roy Palmer, Jr. The Partnership Agreement was admitted into evidence without objection. Likewise, the execution of the Partnership Agreement was uncontested by Defendant.

In 2014, the Decedent made a Last Will and Testament. In her Will, the Decedent devised to her son, the Plaintiff in the instant action, any refund or reimbursement of funds paid or otherwise on deposit for her residence located at Gulf Coast Village that are payable after her death. The Decedent's Will also called for the remainder of her Estate to pass to her grandson, the Defendant in the instant action. No specific provision in the Decedent's Will provided for the transfer of the Decedent's interest in the Partnership to her children, pursuant to the terms of the Partnership Agreement.

Plaintiff filed a Declaratory Action requesting that this Court decide the rights of the parties to the Decedent's interest in the Partnership, and ultimately, to declare Plaintiff to be the sole beneficiary of the Decedent's interest in same. Defendant, on the other hand, contends that he is entitled to the Decedent's interest in the Partnership. Additionally, Defendant filed a counterclaim against the Plaintiff based upon the Plaintiff's deposit of a check that was made payable to the Decedent's estate.

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I. DECLARATORY JUDGMENT

Plaintiff's Complaint raises a single cause of action, for Declaratory Judgement, under Fla. Stat. § 86.011 and § 86.041. More specifically, it prays that this Court "construe and ascertain Article XIX of the Palmer-Finlaw Associates Partnership Agreement, dated November 17 1986, and determine Plaintiff as the sole beneficiary of the decedent's interest in the partnership; Determine that the decedent failed to execute a Last Will and Testament consistent with the terms and conditions of Article XIX of the Palmer-Finlaw Associates Partnership Agreement, dated November 17 1986; award reasonable attorney's fees and costs; and award such other relief as the Court deems just and proper."

Fla. Stat. § 86.011 confers jurisdiction on the Court "within their respective jurisdictional amounts to declare rights, status, and other equitable or legal relations whether or not further relief is or could be claimed." As a result, the Court may "render declaratory judgments on the existence, or nonexistence: (1) Of any immunity, power, privilege, or right; or (2) Of any fact upon which the existence or nonexistence of such immunity, power, privilege, or right does or may depend, whether such immunity, power, privilege, or right now exists or will arise in the future." *See*, Fla. Stat. § 86.011. The Florida Legislature has also deemed it prudent to allow a part seeking a declaratory judgment to demand "additional, alternative, coercive, subsequent, or supplemental relief in the same action." *Id.*

Plaintiff has standing to bring the instant action for declaratory judgment pursuant to Fla. Stat. § 86.041, which states, in pertinent part, that "any person interested as or through an executor, administrator, trustee, guardian, or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust, in the administration of a trust, a guardianship, or the estate of a decedent, an infant, a mental incompetent, or insolvent may have a declaration of rights or equitable or legal relations to: [. . .] (3) Determine any question relating to the administration of the guardianship, estate, or trust, including questions of construction of wills and other writings." Plaintiff is an interested person in the estate of the Decedent as he is a devisee of the Decedent per her Will dated December 23, 2014 and admitted to probate on February 20, 2017. Accordingly, Plaintiff has standing to request that this Court make a declaration of rights or equitable or legal relations to

determine any question relating to the administration of the estate, which included the construction of wills or *other writings*.

The Florida Legislature, by and through the enactment of Fla. Stat. § 86.111, made it clear that Plaintiff is not precluded from a remedy provided by this Court through a Declaratory Judgment, simply because another adequate remedy may potentially exist. Fla. Stat. § 86.111 states, "[t]he existence of another adequate remedy does not preclude a judgment for declaratory relief. [. . .] The court has power to give as full and complete equitable relief as it would have had if such proceeding had been instituted as an action in chancery." Thus, even though Plaintiff may have a cause of action for breach of contract, or any other adequate remedy, he is not precluded from seeking a declaratory judgement, nor is this Court barred from rendering full and complete equitable relief as if it would have had such proceeding been instituted as an action in chancery.

The parties do not dispute that Ohio law governs the interpretation of the Partnership Agreement. Under Florida's choice-of-law rules, the "laws of the jurisdiction where [a] contract was executed govern interpretation of the substantive issues regarding the contract". *Blechman v. Estate of Blechman*, 160 So.3d 152, 158 (Fla. 4th DCA)(*citing*, *Lumbermens Mut. Cas. Co. v. August*, 530 So.2d 293, 295 (Fla.1988)).

With regard to agreements to make a Will, Fla. Stat. § 732.701(1) provides that "Such an agreement executed by a nonresident of Florida, either before or after this law takes effect, is valid in this state if valid when executed under the laws of the state or country where the agreement was executed, whether or not the agreeing party is a Florida resident at the time of death," thus, this Court must look to Ohio law. At the time the Partnership Agreement was made, the Decedent was a resident of Ohio. In regards to an agreement to execute a Will, the Ohio Supreme Court has held that, "the agreement shall be signed by the party making it or by some other person by his express direction, in which latter case the instrument must be subscribed by two or more competent witnesses who heard such party acknowledge that it was so signed by his direction." *Sherman v. Johnson*, 159 Ohio St. 209 (1953). The Partnership Agreement admitted into evidence was executed properly in consideration of the same. The subject Partnership Agreement was witnessed by two witnesses and signed by the Decedent in proper format.

Now turning to the Partnership Agreement, Article XIX of the Partnership Agreement is the specific Article at conflict in the instant case. In its entirety, Article XIX provides the following:

"**XIX. DEATH OF A PARTNER**

Any partner shall have the right and privilege of leaving his or her interest in the partnership by Last Will and Testament to his or her spouse or to his or her lineal descendants.

To protect and preserve the family character of this partnership, each of the undersigned partners agree to have prepared and to execute a Last Will and Testament so as to insure that his or her interest in this partnership will, upon his or her death, pass to and vest in his or her surviving spouse. Each partner, who shall ultimately become a surviving spouse, further agrees to have prepared and to execute a Last Will and Testament so as to vest his or her interest in this partnership in his or her children (lineal descendants). Should any partner neglect or fail to execute such Last Will and Testament, so as to ultimately cause his or her partnership interest to pass to and vest in an individual, who is not a spouse or lineal descendant of these partners, then upon such event, the partnership shall be liquidated and dissolved forthwith.

However, should the legatee of any deceased partner, wish to sell the interest in this partnership which he or she has acquired by virtue of the death of a partner, such shall be accomplished in the same manner and form as if the legatee desires to resign as an active partner, all as provided above."

Defendant contends that the first paragraph supports the position that the Decedent's Will dated December 23, 2014, complies with the Partnership Agreement because "[a]ny partner shall

have the right and privilege of leaving his or her interest in the partnership by Last Will and Testament to his or her spouse or to his or her lineal descendants" and Defendant is a lineal descendant of the Decedent. It is undisputed that Plaintiff is the natural-born child of the Decedent and that Defendant is the grandchild/lineal descendant of the Decedent. As a result of this first paragraph of Article XIX, the partners of the Partnership are agreeing that they have the right to leave their interest in the partnership by Last Will & Testament to their spouses or lineal descendants, however, the analysis and the Partnership Agreement does not end there.

Article XIX specifically states that "[e]ach partner, who shall ultimately become a surviving spouse, further agrees to have prepared and to execute a Last Will and Testament so as to vest his or her interest in this partnership *in his or her children* (lineal descendants)." (emphasis added). This language is binding on the partners as they are specifically stating that they "agree to have prepared and to execute a Last Will and Testament so as to vest his or her interest in this partnership in his or her children. " If a contract is clear and unambiguous, then its interpretation is a matter of law and there is no issue of fact to be determined. *Inland Refuse Transfer Co., Browning-Ferris Ind. Of Ohio, Inc.*, 15 Ohio St.2d 321, 322, 15 OBR 448, 474 N.E.2d 271 (1984).

The language of Article XIX is clear that the Decedent, together with the other partners, agreed to prepare and execute a Will to vest their interests in their *children*, who are lineal descendants. This Court construes this provision to state that the partners agreed to leave their interests to their children who are lineal descendants of the partners. This would "protect and preserve the family character of this partnership" by keeping the interests in the Palmer family and the Finlaw family. To expand the plain language meaning of "children" to include any other lineal descendants of the Decedent would unnecessarily expand the standard definition of "child" or "children" beyond its plain meaning. The Decedent's child in the instant case is Roger S. Finlaw. The Court cannot find that Jeffery S. Finlaw, the Decedent's grandson, to qualify as the Decedent's "child" for purposes of the Partnership Agreement.

Furthermore, Ohio Rev. Code Ann. § 1776.49(F) (West 2008) provides that "[a] transfer of a partner's economic interest in the partnership in violation of a restriction on transfer contained in the partnership agreement is ineffective as to a person having notice of the restriction at the time of transfer." Thus, the Decedent's transfer of her interest in the Partnership to the Defendant by

the terms of her Will is ineffective as it violates the restriction on transfer set forth in Article XIX of the Partnership Agreement and Defendant has knowledge of such restriction due to the claim filed by Plaintiff in the Decedent's estate.

Defendant argues that the Decedent's comments and notes to her estate planning attorney are relevant to demonstrate the Decedent's intent that Defendant inherit her interest in the Partnership. This Court, however, does not find the Decedent's or her estate planning attorney's comments compelling. No matter what the Decedent's intent was with regard to her estate planning, it does not obviate or change the Decedent's obligation to perform under and in accordance with the agreed upon terms of the Partnership Agreement.

To that end, Florida and Ohio Courts are in agreement that an agreement between partners, wherein the partners agree on the method and disposition of the partnership interest in the agreement, then such agreement controls the disposition of that interest and the Decedent is unable to provide for a different method by will.

In Florida, case law has held "[a]s to the construction of the Agreement, the parties have provided no New Jersey law to contradict the general principle that express language in a contractual agreement "specifically addressing the disposition of [property] upon death" will defeat a testamentary disposition of said property." *Murray Van & Storage, Inc. v. Murray*, 364 So.2d 68, 68 (Fla. 4th DCA1978).

Ohio case law supports the idea that a partnership agreement ultimately controls the disposition of a partner's partnership interest, rather than a subsequent Will. *See Swanda v. Paramount Commercial Real Estate Inv'rs*, 2004-Ohio-2576, ¶ 8; *Barnecut v. Barnecut*, 3 Ohio App. 2d 132, 209 N.E.2d 609 (Ohio Ct. App. 1964).

While the partners of the Partnership possessed the "right and privilege" to leave their interests to their spouse or lineal descendants, each partner specifically agreed, however, upon becoming a surviving spouse, to create a Will to leave said interest *to his or her children*. The Decedent did not do this, as she essentially left virtually everything in her estate to Defendant, her grandson, instead of Plaintiff, her surviving son. Accordingly, the Court finds that the Decedent breached the Partnership Agreement and further, that Plaintiff should have received the Decedent's partnership interest under the Will dated December 23, 2014.

II. TERMINATION OF PARTNERSHIP

Defendant also contends that even if the Decedent breached the Partnership Agreement, Defendant would still be entitled to the Decedent's interest in the Partnership by virtue of the dissolution provision in the Partnership Agreement. This particular provision states as follows:

> "Should any partner neglect or fail to execute such Last Will and Testament, so as to ultimately cause his or her partnership interest to pass to and vest in an individual, who is not a spouse or lineal descendant of these partners, then upon such event, the partnership shall be liquidated and dissolved forthwith. [Art. XIX, 2]."

A plain reading of this provision defeats Defendant's argument that the Partnership should be dissolved. This dissolution provision is meant to enforce and maintain the familial characteristics of the Partnership. If a Partner were to leave a Last Will and Testament that would cause his or her partnership interest to pass to or vest in an individual, **who is not a spouse or lineal descendant of these partners**, then the partnership shall be liquidated and dissolved. This provision is not operative based on the facts before the Court. The Decedent left her partnership interest to Defendant, who is her grandson – not her surviving son. The Decedent did not devise her partnership interest to someone who is *not* a spouse or lineal descendant. The Decedent, instead, *did* putatively attempt to leave her interest to a lineal descendant.

Plaintiff may dispute that the Decedent breached the Partnership Agreement by leaving her interest to the Defendant, but he is a lineal descendant and therefore the partnership should not be dissolved.

This Court holds that the dissolution provision of the Partnership Agreement is inapplicable to the facts before the Court and therefore, the Defendant is not entitled to the Decedent's interest in the Partnership by virtue of dissolution.

III. EQUITABLE REMEDY

Once this Court has declared that the Decedent breached the Partnership Agreement and that Plaintiff is the rightful beneficiary of the Decedent's interest in the Partnership, the Court must look to how it equitably remedy the situation.

As stated previously, this Court is granted broad discretion under Florida Statutes, Chapter 86. Fla. Stat. § 86.111 grants this Court "power to give as full and complete equitable relief as it would have had if such proceeding had been instituted as an action in chancery." Furthermore, "[a]ny person claiming to be interested or who may be in doubt about his or her rights under a deed, will, contract, or other article, memorandum, or instrument in writing or whose rights, status, or other equitable or legal relations are affected by a statute, or any regulation made under statutory authority, or by municipal ordinance, contract, deed, will, franchise, or other article, memorandum, or instrument in writing may have determined any question of construction or validity arising under such statute, regulation, municipal ordinance, contract, deed, will, franchise, or other article, memorandum, or instrument in writing, or any part thereof, and obtain a declaration of rights, status, or other equitable or legal relations thereunder."

Defendant argues that the Plaintiff should have brought a claim for breach of contract seeking monetary damages, and that a declaratory judgement is not available where the relief sought is in essence a money judgement based on an alleged breach of contract. Defendant's argument does not comport with Florida law. Specifically, Defendant argues that Declaratory relief is not proper where there is another adequate remedy available, however, this is directly contradicted by Fla. Stat. § 86.111 which states "[t]he existence of another adequate remedy does not preclude a judgment for declaratory relief." Furthermore, the Florida Supreme Court has held "[t]he purpose of a declaratory judgment is to determine the rights and duties of the parties without the need to resort to a tort or contract action as a prerequisite to a judicial determination. *Price v. Tyler*, 890 So. 2d 246, 251 (Fla. 2004).

Thus, this Court finds that the Plaintiff's Complaint seeking declaratory relief is proper and that the existence of another adequate remedy does not preclude Plaintiff from bringing the instant action.

As a general rule, "contractual obligations may be classified as affirmative, where one agrees that something has been or will be done, or negative, where one agrees that something has not been or will not be done. *Seaboard Oil Co. v. Donovan*, 99 Fla. 1296, 128 So. 821, 823 (1930). The Florida Supreme Court in *Seaboard* stated that the equitable remedy for breach of an affirmative contractual obligation is a "decree for specific performance". *Id.* at 823.

In the instant action, the Decedent agreed to create a Last Will & Testament so as to vest her interest in the Partnership in her children. This is an affirmative contractual obligation. As a result, by not preparing and executing a Last Will & Testament so as to vest her interest in the Partnership to Plaintiff, her only living child, the Decedent breached the affirmative obligation. The Court therefore finds that specific performance of the Partnership Agreement would be an adequate equitable remedy to make Plaintiff whole as a result of the Decedent's breach. Further, as stated before, this Court has the power to grant such equitable relief under Fla. Stat. § 86.111.

Since the Decedent's Will fails to specifically devise her interest in the Partnership to her children, her surviving son in this instance, the partnership interest is now part of her estate. In light of the foregoing, this Court declares that Defendant, as the Personal Representative of the Estate, is hereby ordered to specifically perform the Decedent's affirmative obligations of the Partnership Agreement by assigning the partnership interest from the Estate of the Decedent, to Plaintiff.

IV. COUNTER-CLAIM FOR CONVERSION

Defendant, Jeffrey S. Finlaw, as Personal Representative of Decedent's estate, filed a Counterclaim for conversion against Roger Finlaw. It is undisputed that Roger Finlaw cashed a check made payable to the Estate of Twila Finlaw of deposited the money into his own checking account. It is undisputed that Roger Finlaw was requested to return the money and he has refused to do so.

Conversion occurs where a person refuses to relinquish property to which another has the right of possession. *Joseph v. Chanin*, 940 So.2d 483 (Fla. 4th DCA 2006). To recover for civil conversion, a plaintiff generally must demonstrate by a preponderance of the evidence: (1) the

right to property; (2) a demand for return of that property; and (3) the defendant's refusal to return property. *Ginsberg v. Lennar Florida Holdings, Inc.*, 645 So.2d 490 (Fla. 3d DCA 1994).

Based on the forgoing findings it is therefore **ORDERED AND ADJUDGED** as follows:

1. Declaratory Judgement is entered for Plaintiff on Plaintiff's Complaint for Declaratory Relief and the Defendant, as Person Representative of the Estate of Twila Finlaw, is ordered to assign any and all interest and rights in the Partnership to Plaintiff.

2. That judgment is entered for Counterclaim Plaintiff, Jeffrey Finlaw, as Personal Representative, and against Roger Finlaw, on the Counterclaim for $49, 060.16, that shall bear interest at the legal rate established pursuant to section 55.03, Florida Statutes, ***ALL FOR WHICH LET EXECUTION ISSUE.***

DONE AND ORDERED in Fort Myers, Lee County, Florida on July 12, 2019.

Keith R. Kyle 7/12/19

KEITH R. KYLE
CIRCUIT COURT JUDGE

JUL 12 2019

Conformed Copies furnished to the following attorneys of record by U.S. Postal Service:

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