

STATE OF RHODE ISLAND

PROVIDENCE, SC.

SUPERIOR COURT

[FILED: June 25, 2024]

IN RE: ESTATE OF HARRY FAIRHURST :
: C.A. No. PP-2021-01654

DECISION

MONTALBANO, J. Before this Court is Appellants’ appeal of the Probate Court Order voiding the sale of the premises located at 101 Scott Road, Cumberland, Rhode Island to William Fairhurst and his wife because it violated G.L. 1956 § 33-19-9. Jurisdiction is pursuant to § 33-23-1.

I

Facts

Harry Fairhurst (Testator) died on February 11, 2019. (Agreed Statement of Facts (Facts) ¶ 1.) Testator executed his Will on August 11, 1981 and executed a codicil on June 18, 1997. *Id.* ¶ 2; Facts Ex. A (Will); Facts Ex. B (Codicil). Testator devised and bequeathed his estate equally to all of his children: William Fairhurst, Mary Fairhurst, George Fairhurst, Robert Fairhurst, James Fairhurst, Carol Whelan, and Elaine Pickering (Devises). (Facts ¶ 4.) Testator’s Will designated Mary and William Fairhurst as Co-Executors of the Estate. *Id.* ¶¶ 3, 6; Will.¹ On April 18, 2019, the Cumberland Probate Court admitted Testator’s Will to probate. (Facts ¶ 6.)

Paragraph four of the Testator’s Will provides that the Co-Executors may sell

¹ Given that all Appellants and Appellees share the same last name, they will be referred to by their first names throughout this Decision. No disrespect is intended by using the parties’ first names.

“any or all of my estate without obtaining permission from the Probate Court, but before exercising said authority, my executors must notify my children that they have the option to purchase, and such notification must be made by mail and an affidavit that they have been so notified will be sufficient for the executors to make a sale if they have not been notified by the children that they intend to purchase within ten days of the mailing of the notice.” *Id.* ¶ 8; Will ¶ 4.

The asset at issue in this probate appeal is Testator’s home located at 101 Scott Road, Cumberland, Rhode Island (property). (Facts ¶ 7.) On July 22, 2020, Richard Foster (Attorney Foster), attorney for the estate, sent out a letter to the Devisees outlining their option to purchase the property. *Id.* ¶ 9; Facts Ex. C. None of the Devisees exercised that option. (Facts ¶ 9.) William subsequently verbally expressed a desire to purchase the property to his siblings at a family meeting. *Id.* ¶ 10. At a subsequent family meeting, the Devisees held a vote with respect to whether the property should be placed on the market. Facts ¶ 10; *see also* Facts Ex. E, at 2. They voted 4-2, with one abstention, not to place the property on the market. Facts ¶ 10; *see also* Facts Ex. E, at 2. On October 23, 2020, Attorney Foster sent the Devisees a letter indicating that William planned to purchase the property for \$260,000 and that the closing date would “occur hopefully within the next week or so.” (Facts ¶ 11; Facts Ex. F.) Mr. Foster encouraged any Devisees who felt unsatisfied with the sale to make their objections known to the Co-Executors or to him, and none of the Devisees did so. (Facts ¶ 11; Facts Ex. F, at 4.)

On November 24, 2020, William and his wife purchased the property for \$260,000. (Facts ¶ 12; Facts Ex. G (Executors’ Deed).) They obtained a mortgage from Pawtucket Credit Union for \$247,000, and William took a \$17,192 advance from his probate share of the estate in order to purchase the property. (Facts ¶ 13; Facts Ex. H

(Mortgage); Facts Ex. I (First Account).) Prior to the closing, Pawtucket Credit Union appraised the property—valuing it at \$330,000 as of July 2, 2020. (Facts ¶ 14; Facts Ex. J.) The Co-Executors had previously obtained a comparative market analysis which recommended a listing price for the property of \$285,000 as of January 8, 2020. (Facts ¶ 15; Facts Ex. K.) In addition, the Co-Executors also obtained a home inspection for the property before the closing indicating that the home needed repairs for the roof, plumbing, water heater, electric system, central heating, and cooling system. Facts ¶ 16; *see also* Facts Ex. L. The Cumberland Water Department notified the Co-Executors prior to the closing that they needed to “replace the existing water service from the curb to the dwelling.” (Facts ¶ 17; Facts Ex. M.) After the closing, the Co-Executors obtained an estimate to replace the water service for \$38,685. (Facts ¶ 17; Facts Ex. N.)

The Co-Executors did not seek approval from the probate court before selling the property to William. (Facts ¶ 18.) On December 2, 2020, (after the closing), Mr. Foster sent another letter to the Devisees explaining the Co-Executors’ decision to sell the property to William and steps they had taken thus far. Facts ¶ 19; *see also* Facts Ex. O.

II

Travel

On January 19, 2021, the Co-Executors filed the first account with the Cumberland Probate Court. Facts ¶ 20; *see also* First Account. The first account detailed the financial aspects of the sale of the property to William and his wife. Facts ¶ 21; *see also* First Account. On January 21, 2021, James filed a timely objection to the first account. Facts ¶ 22; *see also* Facts Ex. P. On February 3, 2021, Robert filed a timely

objection to the first account. Facts ¶ 23; *see also* Facts Ex. Q. On February 5, 2021, George filed a timely objection to the first account. Facts ¶ 24; *see also* Facts Ex. R.

On February 11, 2021, the probate court held a public hearing on the first account. (Facts ¶ 26.) Without hearing any arguments, the Probate Court Judge denied the approval of the first account *sua sponte* because he found the sale of the property was “invalid and illegal as the Co-Executors failed to comply with G.L. 1956 § 33-19-9.” (Facts ¶ 26; Facts Ex. S (Order, Feb. 24, 2021 (Roszkowski, J.)). The Probate Court Judge declared that the Testator’s property remains vested in the Testator’s estate. (Order, Feb. 24, 2021 (Roszkowski, J.)). Thereafter, the Co-Executors appealed the order of the Probate Court Judge to the Superior Court. (Facts ¶¶ 27, 28; Facts Ex. T (Claim of Appeal); Facts Ex. U (Reasons of Appeal).)

On March 10, 2021, Appellants filed their Reasons of Appeal. (Reasons of Appeal.) On March 25, 2021, Appellee James filed an Answer. (James’ Answer.) On June 13, 2023, James filed a Motion for Summary Judgment with an accompanying memorandum. (James’ Mot. for Summ. J.) On June 27, 2023, Appellees George and Robert filed a Motion for Summary Judgment along with an accompanying memorandum. (George and Robert’s Mot. for Summ. J.) On July 11, 2023, Appellants filed an Objection to Appellees James, George, and Robert’s Motions for Summary Judgment. (Appellants’ Obj.)

On July 25, 2023, Appellants filed a Motion for Summary Judgment with an accompanying memorandum. (Appellants’ Mot. for Summ. J.) On August 24, 2023, James filed an Objection to Appellants’ Motion for Summary Judgment with an accompanying memorandum. (James’ Obj.) On September 13, 2023, George and Robert

filed an Objection to Appellants' Motion for Summary Judgment with an accompanying memorandum. (George and Robert's Obj. to Appellants' Mot. for Summ. J. (George and Robert's Obj.))

On October 12, 2023, after appearing for a conference before the motion judge, the parties entered a consent order to assign the case to the Formal and Special Cause Calendar "because the case is to be decided as a matter of law." (Order, Oct. 12, 2023 (Smith, J.)) Additionally, the order states that "this matter shall pass off the jury calendar at this time since there are no genuine issues of material fact and the parties are not requesting a jury trial." *Id.* The justice presiding over the Formal and Special Cause Calendar assigned the matter to this Justice for decision. (Order, Oct. 23, 2023 (Smith, J.))

On November 14, 2023, this Justice entered an order requiring the parties to submit an agreed statement of facts and briefs. (Order, Nov. 14, 2023 (Montalbano, J.)) On January 25, 2024, the parties e-filed the agreed statement of facts which will be referred to throughout this Decision. *See* Facts. This case will be decided in the context of a probate appeal because there are no disputed facts. *See id.*

On April 5, 2024, Appellants filed a Supplemental Memorandum in Support of their Appeal. (Appellants' Suppl. Mem.) On the same day, James also filed a Supplemental Memorandum in Support of his Objection to Appellants' Appeal. (James' Supplemental Mem. in Supp. of his Obj. to Appellants' Appeal (James' Suppl. Mem.))

On May 7, 2024, the parties presented oral arguments. *See* Tr. May 7, 2024 (Tr.). Appellants aver that § 33-19-9 does not apply to the facts of this case. (Tr. 4:4-6.) Appellants contend that they were denied due process when the Probate Court Judge

ruled on the applicability of § 33-19-9 *sua sponte* absent a hearing and notice. *Id.* at 14:12-15:3. Appellants argue that the Testator’s Will gave the Devises an option to purchase, and the Testator’s intent was for his property to remain in the family. *Id.* at 7:6-8; 18:10-13. Finally, Appellants argue laches—that the other six Devises did not respond to the July 2020 notice that they had the option to purchase the property and only objected after the filing of the first account. *Id.* at 21:19-24:4. Appellants contend that this resulted in William changing his position when none of the Devises objected to the sale initially, which prejudiced him. *Id.* at 24:13-17. Appellants contend that the sale of the property was voidable rather than void; therefore, the Probate Court Judge acted in excess of his authority when he declared that the sale of the property to William was void. *Id.* at 24:22-25:6.

Conversely, Appellees argue that § 33-19-9 is applicable to the facts of this case. *See id.* at 26:4-22. Appellees aver that the Testator’s Will did not create a right of first refusal or option to purchase due to a lack of adequate conditions. *See id.* at 27:21-28:7. Appellees argue that they complained about the proposed price for the sale of the property to William prior to formally objecting to the first account in rebuttal to Appellants’ laches argument. *Id.* at 32:3-6.

III

Standard of Review

This Court’s review of the Probate Court's Order is governed by § 33–23–1. Subsection (a) provides in pertinent part: “[a]ny person aggrieved by an order or decree of a probate court (hereinafter ‘appellant’), may, unless provisions be made to the contrary, appeal to the superior court for the county in which the probate court is

established by taking the following procedure . . .” To qualify as an aggrieved person under this probate appeals statute, the Probate Court Order must “adversely affects [*sic*] in a substantial manner some personal or property right of the [Appellant] seeking review or impose [] some burden or obligation upon him.” *Vermette v. Cirillo*, 114 R.I. 66, 68, 328 A.2d 419, 420 (1974). Pursuant to subsection (b), “[a]n appeal under this chapter is not an appeal on error but is to be heard de novo in the superior court.” Section 33-23-1(b).

The Rhode Island Supreme Court has stated that in probate appeals the Superior Court acts as a “court for retrial of the case de novo.” *In re Taylor’s Estate*, 114 R.I. 562, 564, 337 A.2d 236, 238 (1975) (quoting *Malinou v. McCarthy*, 98 R.I. 189, 192, 200 A.2d 578, 579 (1964)). The probate appeals statute further provides that if the record of probate court proceedings is introduced on appeal, “[t]he findings of fact and/or decisions of the probate court may be given as much weight and deference as the superior court deems appropriate, however, the superior court shall not be bound by any such findings or decisions.” Section 33-23-1(b).

IV

Analysis

A

Testator’s Intent

James argues that the Testator’s intent in his Will was not to create an option to purchase or right of first refusal in favor of the Devises due to a lack of precise terms. (James’ Suppl. Mem. at 1-3.) Conversely, Appellants aver that the Testator’s Will created an option to purchase. *See* Appellants’ Suppl. Mem. at 3-4.

Testator's Will provided, as mentioned *supra*, that the Co-Executors may sell

“any or all of my estate without obtaining permission from the Probate Court, but before exercising said authority, my executors must notify my children that they have the option to purchase, and such notification must be made by mail and an affidavit that they have been so notified will be sufficient for the executors to make a sale if they have not been notified by the children that they intend to purchase within ten days of the mailing of the notice.” Will ¶ 4.

A right of first refusal “merely requires the owner, when and if he decides to sell, to offer the property first to the person entitled to the [right of first refusal] at the stipulated price.” *Hood v. Hawkins*, 478 A.2d 181, 185 (R.I. 1984) (citing *Mercer v. Lemmens*, 230 Cal.App.2d 167, 170, 40 Cal. Rptr. 803, 805 (1964)). This Court finds that in this case the Testator did not intend to create a right of first refusal in favor of the Deviseses.

An option is defined as “a unilateral contract in which the optionor agrees with the optionee that he has a right to buy the optionor's property according to the precise terms and conditions of the contract.” *Id.* (quoting *Butler v. Richardson*, 74 R.I. 344, 350, 60 A.2d 718, 722 (1948)). “Corbin describes an option for the purchase of property as a situation in which the buyer has a legal power of acceptance—a power by tendering money to create in himself a right to an immediate conveyance of the property and in the owner a duty of such conveyance.” *Id.* (citing 1A *Corbin on Contracts* § 259 at 460 (1963)).

Looking to the language in the Testator's Will, it is clear that the Will provision regarding an option to purchase is unambiguous. *See* Will. Specifically, the Will explicitly states that prior to placing the property on the market the Deviseses have an option to purchase. *Id.* “The only rule of universal and uniform application in the

construction of wills is the fundamental rule that the testator's intent, as expressed in the will, is to be ascertained and, if not contrary to law, is to be given effect so far as possible.” *Glassie v. Doucette*, 159 A.3d 88, 94 (R.I. 2017) (quoting *Rhode Island Hospital Trust Co. v. Thomas*, 73 R.I. 277, 281, 54 A.2d 432, 434 (1947)). Clearly, the Testator intended to create an option to purchase in favor of the Devisees.

The notice provided to the Devisees was defective in part, however, because the notice lacked precise terms. (Facts ¶ 9; Facts Ex. C.) The required precise terms include the price for the property, fees, and other conditions of the sale. *See Butler*, 74 R.I. at 347, 60 A.2d at 722. Even assuming *arguendo* that the notice was not defective, William, as one of the Devisees having an option to purchase, did not give written notice of his intent to purchase the property “within ten days of the mailing of the notice.” Will. The record is devoid of William providing written intent to purchase the property.

Appellants made a tangential argument concerning the doctrine of laches in which they aver that Appellees did not take any steps to halt the sale. (Appellants’ Obj. at 9-10.) Consequently, Appellants argue that this failure to act prejudiced William, who nevertheless proceeded to purchase the Testator’s property. (Tr. at 24:13-17.) This argument is unavailing because Appellees had expressed displeasure with the terms of the proposed sale to William and his wife and were not given an adequate opportunity to object prior to the first account. *See* Facts ¶ 19; *see also* Facts Ex. O. Specifically, Attorney Foster sent a letter dated October 23, 2020 to the Devisees that he anticipated the sale of the property to William and his wife to close within a week or two. (Facts Ex. F, at 1-2.) While the closing did not occur until November 24, 2020, the expeditious

timeline did not give the Devises sufficient time to object to the sale of the property to William and his wife. *See* Facts ¶ 12.

This Court holds that the Decedent’s Will created a valid option to purchase the property in all seven Devises. Nevertheless, the Testator’s intent to create an option to purchase the property was not complied with, because the notice given to the Devises was defective for lack of specifying required conditions of the sale, including the purchase price.

B

Applicability of § 33-19-9

Appellants argue that § 33-19-9 did not apply to the sale of Testator’s property to William and was not properly before the probate court on February 11, 2021. *See* Order, Feb. 24, 2021 (Roszkowski, J.); Reasons for Appeal ¶¶ 20, 21. In addition, Appellants aver that the probate court’s procedure violated their due process rights because the Probate Court Judge did not hold a hearing before issuing the order. (Tr. at 14:12-15:3.) Appellants contend that the Probate Court Judge exceeded his authority by declaring the sale of the property to William void without holding a hearing. *See id.* Appellants further argue that § 33-19-9 only confers authority for a Probate Court Judge to declare a sale voidable. *See id.* at 24:22-25:6.

James contends that § 33-19-9 does apply to the facts of this case, and the Probate Court Judge properly considered that applicability. (James’ Mot. for Summ. J. at 10-12.) Robert and George argue that Appellants sold the Testator’s property to William at a price that the Co-Executors chose—which amounts to a self-dealing transaction, and that the purpose of § 33-19-9 is to avoid such a transaction. (George and Robert’s Mot. for

Summ. J. at 5-6.) Further, Robert and George aver that § 33-19-9 was properly before the probate court in the context of the court's consideration of the first account. *Id.* at 8.

In Rhode Island, trustees have long been prohibited from engaging in self-dealing. *Butman v. Whipple*, 25 R.I. 578, 578, 57 A. 379, 380 (1904). Executors of estates owe many of the same duties as trustees including the prohibition against self-dealing. *See Wickes' Estate v. Stein*, 107 R.I. 260, 265-66, 266 A.2d 911, 914 (1970). Validating this common law principle, Rhode Island's legislature enacted § 33-19-9.

Section 33-19-9 states, in pertinent part,

“The probate court may authorize executors . . . at their option, to sell real estate of a deceased or of a ward, either at public auction or by private contract. The court, on petition with notice, if satisfied that the action will not be prejudicial to the interests of the estate, may authorize the petitioner to become the purchaser of the real estate, at public or private sale; provided, however, that, in any instance, if a sale be made by private contract, the sale shall be made for not less than the sum fixed by the court in its decree authorizing the sale.

The Probate Court Judge held that the sale of the property was “invalid and illegal as the Co-Executors failed to comply with G.L. 1956 § 33-19-9.” (Order, Feb. 24, 2021 (Roszkowski, J.))

This Court finds that a Co-Executor must seek and receive probate court approval for any sale of real estate to the Co-Executor by private contract pursuant to § 33-19-9. The Probate Court Judge must be satisfied that the private sale will not be prejudicial to the interests of the estate. Ultimately, it is the probate court, and not the devisees, which must approve the sale price of the property and set forth that sale price in its decree authorizing the sale. Section 33-19-9 confers authority on a probate court judge to find the sale of the property void without holding a hearing. The public policy behind § 33-19-

9—to prevent self-dealing transactions—is applicable here as well.² *See* Facts ¶ 18; *see also* § 33-19-9. Neither did William get probate court approval to credit himself with a \$17,192 advance from his share of the estate and apply it to the purchase price. (Facts ¶ 13.)

The purpose behind § 33-19-9 was frustrated by William selling the property to himself without probate court approval. *See* Facts ¶ 18. William also engaged in self-dealing by reducing the price for the sale of the property for necessary repairs without probate court approval of the amount of the credit for the value of said repairs. *Id.* ¶ 17; *see also* First Account at 4. Absent an agreement between all seven Devisees in this case, sale of the property, upon remand, will require compliance with the Testator’s intent to create an option to purchase in all seven Devisees, and in the event that it is William who exercises the option to purchase created in paragraph four of the Last Will and Testament of Harry Fairhurst, a petition to sell the property must be filed in the probate court in compliance with § 33-19-9.

² Massachusetts has a similar statute that provides:

“[a]ny sale or encumbrance to the personal representative . . . is voidable by any person interested in the estate except one who has consented after fair disclosure, unless

“(1) the will or a contract entered into by the decedent expressly authorized the transaction or transactions in general; or

“(2) the transaction is approved by the court after notice to interested persons.” MASS. GEN. LAWS ANN. CH. 190B, § 3-713 (West 2012).

This Court notes that the Massachusetts statute contemplates in cases with facts such as these, that absent a decedent expressly authorizing the transaction in general, that a sale to a personal representative of an estate would need to be approved by the probate court.

V

Conclusion

This Court affirms the Order of the Cumberland Probate Court voiding the sale of the Testator's property to William and his wife in violation of § 33-19-9. After *de novo* consideration of this probate appeal, this Court declares the sale of the property to William and his wife void. Funds currently held in escrow are to remain in escrow. Prior to any sale of the property, all seven Devisees will be given proper notice of their option to purchase. If either Co-Executor wishes to exercise his or her option to purchase, a petition to sell must be filed in the probate court with notice to the remaining Devisees, in compliance with § 33-19-9. This Court remands this Case to the Cumberland Probate Court for further proceedings consistent with this Decision. Counsel shall prepare an order consistent with this Decision.



RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE: In Re: Estate of Harry Fairhurst

CASE NO: PP-2021-01654

COURT: Providence County Superior Court

DATE DECISION FILED: June 25, 2024

JUSTICE/MAGISTRATE: Montalbano, J.

ATTORNEYS:

For Plaintiff: Michael F. Horan, Esq.
[for Co-Executors Mary L. Fairhurst and
William H. Fairhurst]

For Defendant: Paul J. Votta, Jr., Esq. [for George Fairhurst]
Jerome V. Sweeney, III, Esq. [for James
Fairhurst]