UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

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In re:

Chapter 7

Susan L. Borko,

Case No. 12-44373 (NHL)

Debtor.

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Richard McCord, Chapter 7 Trustee for the Estate of Susan L. Borko,

Plaintiff,

-against-

Adv. Pro. No. 12-1268 (NHL)

Diane R. Borko,

Defendant,

and

Susan L. Borko,

Defendant-Intervener.

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MEMORANDUM DECISION
DENYING MOTIONS FOR SUMMARY JUDGMENT
AND DETERMINING BANKRUPTCY ESTATE'S INTEREST IN PROPERTY

APPEARANCES:

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HONORABLE NANCY HERSHEY LORD
UNITED STATES BANKRUPTCY JUDGE

The plaintiff, Richard McCord ("McCord"), as chapter 7 trustee of the bankruptcy estate of Susan L. Borko (the "Debtor"), commenced an adversary proceeding against Debtor's sister, Diane R. Borko (the "Defendant") to obtain an order of this Court authorizing and directing him to sell real property located at 73-44 195th Street, Flushing, New York (the "Flushing Property") pursuant to the provisions of 11 U.S.C. § 363(h).[1] Both the Debtor and the Defendant oppose the relief sought by McCord and contend that the bankruptcy estate has no rights in the Flushing Property.

Procedural History

Debtor moved to intervene as a defendant in the adversary proceeding. She also sought an order declaring that the Flushing Property is not part of the Debtor's bankruptcy estate and dismissing the complaint. McCord opposed the Debtor's motion in its entirety. Defendant answered and the Court held a Pretrial Conference, at which the Court permitted the Debtor to intervene, but denied her motion to dismiss the complaint. Then, McCord filed a motion for summary judgment (the "Motion"). In response, the Debtor/Defendant-Intervener and the Defendant (the "Cross-Movants") cross-moved for summary judgment. McCord filed an Affirmation in Opposition to the Cross-Motion. A hearing on the Motion and Cross-Motion

[1] On April 18, 2013, Debtor and Defendant, as sellers, and Yiwen Jiang, as purchaser, entered into a contract of sale for the Flushing Property (the "Contract of Sale"). On July 24, 2013, the Trustee filed a Motion to Sell the Property and Approve the Contract of Sale. On August 28, 2013, the Court entered an order approving the Contract of Sale and providing that half of the Debtor's one half share of the net proceeds of the sale shall be dispersed to the Debtor; and one half of the Debtor's one half share of the net proceeds of the sale shall remain in the Trustee's escrow account pending this Decision and Order of the Court. In discussing transfers of the Flushing Property, this Memorandum Decision does not take into consideration the transfer pursuant to the Contract of Sale.

was held, at which hearing the Court reserved decision. For the reasons set forth herein, the Court denies both the Motion and the Cross-Motion for summary judgment and determines that the bankruptcy estate possesses an interest in the Flushing Property.

Jurisdiction

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b), and the Eastern District of New York Standing Order of reference dated August 28, 1986, as amended by Order dated December 5, 2012. This matter is a core proceeding under 28 U.S.C. § 157(b)(2). This decision constitutes the Court's findings of fact and conclusions of law to the extent required by Rule 7052 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

Legal Standard

A Court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. BANKR. P. 7056(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Facts

In accordance with E.D.N.Y. LBR 7056-1, McCord annexed to his Motion a Statement of Undisputed Facts, upon which Cross-Movants likewise rely. The following facts are not in dispute.

Debtor filed a voluntary petition for relief under chapter 7 of the Bankruptcy Code on June 13, 2012. At the time of the proceedings had herein, Debtor resided in the Flushing Property. Defendant resided elsewhere. In Schedule A of her bankruptcy schedules, Debtor

stated that she did not own any real property. In response to Item 19 of Schedule B, which inquires as to whether the Debtor has "[e]quitable or future interest, life estates, and rights or powers exercisable for the benefit of the debtor other than those listed in Schedule A – Real Property," Debtor responded that she has a:

> 50% interest in Testamentary Trust of Abraham Borko, which owns the property at 73-44 195th Street. My mother, as Executor, conveyed the property under the terms of the will of my father in 1998. She retained a life estate. There is no power to sell the property without the consent of the trustees. My parents owned the house since the 1950s.[2]

The testamentary trust that Debtor refers to in Item 19 (the "Trust" or "Testamentary Trust") was established pursuant to Article THIRD of the Last Will and Testament of Debtor's father, Abraham Borko ("Abraham"), dated January 22, 1997. That section provides in pertinent part as follows:

> THIRD: If my wife, MIRIAM BORKO, survives me,
>
> (a) I bequeath to my trustee, IN TRUST NEVERTHELESS, a sum [of money] for the following uses and purposes:
>
> (1) My trustees shall hold, manage, invest and reinvest the principal, shall collect the income therefrom and shall, not less than quarter annually, pay or apply all the net income therefrom to or for the use of my said wife. Upon the death of my said wife, my trustees shall pay the then existing principal of said trust to my issue living at the time of the death of my said wife, in equal shares, by representation.
>
> I direct that this trust shall specifically include any real property located in Queens County, City and State of New York, which I may own at the time of my passing, which real property is not to be sold until after the death of my wife. It is my intention and desire that my wife, MIRIAM BORKO, shall reside in the house which stands on this real property until the date of her death, or until she so desires to vacate said premises. In the event she so desires to permanently

[2] McCord strenuously disagrees with Debtor's legal conclusion regarding the power to sell the Flushing Property.

> vacate, than (sic) the aforementioned prohibition against selling the property shall no longer be applicable.

Under Article SIXTH of Abraham's will, Abraham appointed Miriam Borko ("Miriam") as Executrix of his will and Miriam and his issue, the Defendant and the Debtor, as the trustees "of any trust created hereunder."

Abraham died on February 8, 1997, survived by Miriam and their two daughters: Debtor and Defendant. By deed dated April 7, 1998 and recorded on April 14, 1998, Miriam, in her capacity as Executrix, transferred the Flushing Property to the Defendant, Debtor, and herself as "Trustees under the Last Will and Testament of Abraham Borko" with the proviso that "[s]aid premises are conveyed subject to a life estate for MIRIAM BORKO."

Miriam lived as a life tenant in the Flushing Property until her death on December 22, 2007. She was survived by the Defendant and the Debtor. At the time of Miriam's death, the Flushing Property constituted the sole existing principal of the Testamentary Trust. Debtor and the Defendant, as surviving trustees, did not subsequently transfer the deed of the Flushing Property, and thus did not make any distribution of the principal of the Testamentary Trust. The value of the Flushing Property as of the date of the Debtor's bankruptcy filing was approximately $709,000, unencumbered by any mortgages or other liens.

Legal Arguments

McCord asserts that (i) Abraham's will created a life estate for Miriam, (ii) Debtor and Defendant's interest in the Flushing Property vested upon Abraham's death, and (iii) upon Miriam's death, the Testamentary trust Terminated as a matter of law. Thus, notwithstanding that the Debtor and the Defendant never deeded the Flushing Property out of the Trust to

themselves, McCord argues that Debtor possessed a one half undivided interest as a tenant in common with the Defendant in the Flushing Property at the time of the bankruptcy filing. McCord concludes that, as Debtor's chapter 7 trustee and successor in interest, he may seek to sell the Flushing Property pursuant to 11 U.S.C. § 363.

In opposition, Cross-Movants argue that (i) the will did not create Miriam's life estate, (ii) the Trust remains in effect, and (iii) the Trust still owns the Flushing Property, which is the corpus of the Trust. Thus, they assert that the Flushing Property can only pass from the Trust to the Debtor and Defendant individually if the Debtor and Defendant, as co-surviving trustees, cause the transfer to be made, an action entirely within their sole and exclusive discretion. Further, they assert that, in the absence of action by the co-trustees, the Trust may only be terminated by application to the New York State Surrogate's Court pursuant to the Estates, Powers and Trust Laws.[3]

Under the Bankruptcy Code, property of the estate does not include "any power that the debtor may exercise solely for the benefit of an entity other than the debtor." 11 U.S.C. § 541(b)(1). A debtor's interest in the distribution of the corpus of a testamentary trust is property of the estate only if the debtor "acquires or becomes entitled to acquire" such interest within 180 days of the petition date. 11 U.S.C. § 541(a)(5)(A). Here, Debtor and Defendant contend that, absent voluntary or judicial termination of the Trust, the corpus of the Trust is not

[3] EPTL **§** 7-1.19 governs judicial termination of an uneconomical trust. Upon application by "[a]ny trustee or beneficiary of a lifetime or testamentary express trust…to the surrogate's courts having jurisdiction over the trust" the court may order the termination of the trust and direct the distribution of the trust assets if "the court finds that the continuation of the trust is economically impracticable, that the express terms of the disposing instrument do not prohibit its early termination, and that such termination would not defeat the specified purpose of the trust and would be in the best interests of the beneficiaries." N.Y. EST. POWERS & TRUSTS LAW **§** 7-1.19 (McKinney 2004).

property of the bankruptcy estate and the bankruptcy trustee therefore has no interest in the Flushing Property.

It is this Court's determination that neither party is entitled to judgment as a matter of law based on the legal arguments presented. However, the Court concludes that the proper application of the law ultimately yields the result urged by McCord, that the bankruptcy estate encompasses Debtor's interest in the Flushing Property.

Analysis

A. The Will of Abraham Borko Created the Trust, but not a Life Estate

McCord cites to *Bergmann v. Lord*, 194 N.Y. 70, 86 N.E. 828 (1909), in support of his contention that the language of Abraham's will created a life estate for Miriam and thus Cross-Movants' interest in the principal of the Trust vested upon Abraham's death. In *Bergmann*, a will established a trust for the decedent's widow, which was to be paid upon her death to the surviving children. The will stated:

> …I give and bequeath to …trustees the sum of Fifty Thousand Dollars, or so much thereof as my said estate shall suffice to pay, in trust to invest and reinvest the same as hereinafter authorized and to collect and apply the net rents, issues and income thereof to the use of my wife (if she shall survive me) for and during her natural life and upon and after her death I give and bequeath the capital of said fund unto such of my children as shall survive me and to the issue of any who shall die before me, leaving issue me surviving.

Bergmann, 194 N.Y. at 74. The *Bergmann* court found that the surviving children's interest in the trust, although subject to use by testator's wife during her life, vested at the time of the testator's death. *Bergmann*, 194 N.Y. at 76 (citing *Smith v. Edwards*, 88 N.Y. 92 (1882) (finding that an absolute gift vests immediately, notwithstanding postponed payment)).

McCord's reliance on *Bergmann* is misplaced, however, because unlike the will in Bergmann, Abraham's will contains language indicative of his intent to defer vesting. Courts find an "indication of the testator's having intended a deferment in vesting" in cases where the testator "qualifies the class of beneficiaries by such an expression as, 'then living', the 'then' clearly referring to the time of the termination of the intervening interest or interests." *In re Shoemaker's Will*, 5 Misc. 2d 1035, 1039-40, 161 N.Y.S.2d 294 (Sur. 1957). For example, the language "I give, devise and bequeath all…my property…to my said wife… for her use and benefit for and during the period of her natural life, and *upon the death of my said wife*…I give, devise and bequeath all of my said real and personal property….to my children…*then living*" was found to defer vesting. *In re Robinson's Estate*, 187 Misc. 489, 490, 62 N.Y.S.2d 373, 375 (Sur. 1946) (emphasis in original). Similarly, where a will "provided a qualification of members of a class designated to take the remainder, viz., that they be persons 'living at the time of the death of my wife,'" the testator "prevented a vesting, as it otherwise would have been, at his own death and deferred the final vestiture of the remainder until the death of his widow and limited the same to otherwise qualified persons '*then living*.'" *In re Bartlett's Will*, 76 N.Y.S.2d 247, 250-51 (Sur. 1948) (emphasis in original), *decree aff'd*, 274 A.D. 136, 80 N.Y.S.2d 375 (App. Div. 1948).

Here, Article THIRD of Abraham's will provides that "my trustees shall pay the then existing principal of said trust to *my issue living at the time of the death of my said wife*" (emphasis added). By imposing a limitation on potential takers, to be ascertained at the time of Miriam's death, this language indicates that Abraham intended for his issues' interests to vest,

not on his passing, but at some future date, to wit, Miriam's date of death.

B. The Trust Did Not Terminate Upon Miriam's Death By Operation Of Law

McCord next contends that the Trust terminated upon Miriam's death by operation of law. In *Garland v. Raunheim*, relied upon by McCord, the court held that a trust terminates by operation of law when there are no active duties for the trustee to perform and "there ceases to be a beneficiary capable of calling for enforcement" of the trust. *Garland v. Raunheim*, 29 A.D.2d 383, 388, 288 N.Y.S.2d 417 (1st Dep't 1968). In *Garland*, the life beneficiaries had died and the remaindermen had already been vested with their interest. However, the court noted that the trust would not terminate so long as measuring lives remained and trustees had active duties to perform. *Garland*, 29 A.D.2d at 388. Here, Abraham's will appointed three trustees, and charged them to (1) pay any income from the Flushing Property to one of the trustees (Miriam) while she lived; and (2) retain the Flushing Property until after Miriam's death. Article THIRD, Section (a)(1-2). Because Abraham's will neither specified that the support of Miriam was the sole purpose of the trust, nor explicitly required that the trust be terminated, *Garland* does not support McCord's position. *See* Article THIRD, Section (a)(1).

C. The Proper Disposition of the Trust Principal is Ascertainable by Determining the Testator's Intent

Abraham's will does not expressly state when the Trust was to terminate. Cross-Movants argue that the Trust was to continue indefinitely until such time that the co-trustees took affirmative action to terminate it. Alternatively, the Trust might have terminated upon Miriam's death, in which case the Trust has now ceased to exist. If, however, Abraham's will established the Trust for his daughters' lifetimes, then it remains intact and valid.

In interpreting a testamentary trust created under a will, the intent of the testator controls. *See, e.g. Matter of Wallens*, 9 N.Y.3d 117, 122, 877 N.E.2d 960, 962 (2007) ("[T]he trust instrument is to be construed as written and the settlor's intention determined solely from the unambiguous language of the instrument itself."); *Matter of Jones*, 38 N.Y.2d 189, 193, 341 N.E.2d 565 (1975) ("The standard formulation…is that the courts are to find and implement the intention of the testatrix as that intention may be found to have been manifested in the language of her will."); *Matter of Lepore*, 128 Misc. 2d 250, 251, 492 N.Y.S.2d 689 (Sur. 1985) ("The cardinal rule in all construction proceedings is to ascertain the intent of the testator."). Furthermore, "as a rule extrinsic evidence will not be admissible to vary or contradict the unambiguous expression of the decedent." *Matter of Cord*, 58 N.Y.2d 539, 544 (1983). Thus, the timing of the disposition of the Trust principal – the Flushing Property – hinges on Abraham's intent as expressed through the language of his will.

D. The Bankruptcy Court May Construe the Will to Determine the Testator's Intent

1. There is no statutory bar against a review of the will by this Court

The laws of New York State do not forbid courts other than Surrogate's Court from construing a will. Here, though the Cross-Movants have not requested review by the Surrogate's Court of Queens County, they contend that the contemplated review may only happen there. It is their position that only the Surrogate's Court has the power to terminate a testamentary trust.[4] However, the Cross-Movants do not cite any statutes that would bar this

[4] *See* Cross-Mot. ¶¶ 11, 13, 14. In support of this contention, Cross-Movants cite to N.Y. EST. POWERS & TRUSTS LAW § 7-1.19, discussed at footnote 3, *supra*, and N.Y. EST. POWERS & TRUSTS LAW §§ 10-3.1 and 10-6.6, discussed at footnote 5, *infra*. Cross-Movants also cite N.Y. EST. POWERS & TRUSTS LAW § 7-2.3, which governs the appointment of a successor trustee by the Supreme Court or Surrogate's Court upon the death of a sole surviving

Court from interpreting the will to determine its implications on the Debtor's bankruptcy case.

Cross-Movants are correct that New York law grants trustees discretion in administering trusts. However, this discretion may only be exercised to the extent that a trustee's actions are consistent with the testator's intent.[5] Thus, Abraham's intent remains the critical inquiry because, if the Debtor and Defendant's actions with respect to the Flushing Property were contrary to Abraham's intent, then those actions would fall outside of their discretion as trustees. *See In re Gallet*, 196 Misc. 2d 303, 305, 765 N.Y.S.2d 157, 159-60 (Sur. 2003) (holding that in the "absence of a clear expression [of intent] by the settlor," the trustee lacked the discretion to pay a certain debt of the decedent's estate from funds held in a testamentary trust).

Federal courts have been tasked before with construing a will to determine the testator's intent. *See, e.g.*, *Allen v. U.S.*, 242 F. Supp. 687 (E.D.N.Y. 1965) (construing a will to determine the testator's intent and finding a life estate in an appeal regarding granting the marital tax exemption), *aff'd,* 359 F.2d 151 (2d Cir. 1966) (ignoring questions about will construction). In particular, bankruptcy courts have interpreted wills to resolve issues pertaining to trusts and property of the estate. For example, in *Conner v. Wesbanco*, the alleged termination of a trust turned, in part, on the use of the word "child" in the Debtor's grandfather's will. *Conner v. Wesbanco Bank*, 233 B.R. 358, 363-64 (Bankr. N.D. W.V. 1999). The court interpreted and

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trustee, an issue not raised on these facts.

[5] *See*, *e.g.* N.Y. EST. POWERS & TRUSTS LAW § 10-3.1 (McKinney 2013) (defining a "power of appointment," as "an authority created or reserved by a person having property subject to his disposition, enabling the donee to designate, within such limits as may be prescribed by the donor, the appointees of the property or the shares or the manner in which such property shall be received" and applying those statutory provisions pertaining to a power of appointment to "a power to disburse the principal of a trust"); N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(h) (McKinney 2011) (stating that an "authorized trustee may not exercise the power under this section If there is substantial evidence of a contrary intent of the creator and it cannot be established that the creator would be likely to have changed such intention under the circumstances existing at the time of the exercise of the power.").

applied the testator's intent to determine that the testator intended "child" to refer to both his issue and his grandchildren and thus, intended that the trust continue in effect. *Conner*, 233 B.R. 364-36. On different facts, the court in *In re Wachter* determined that the testator intended that the debtor be fully vested with legal title after the termination of a residuary trust created under the testator's will. *In re Wachter*, 314 B.R. 365, 374 (Bankr. E.D. Tenn. 2004). Likewise, *In re Page* involved an adversary proceeding brought by creditors seeking a declaratory judgment that the debtor's interest in a trust was property of the estate. On the facts of that case, the court concluded that the trust was terminated when the Debtor "became the sole trustee and sole beneficiary" and thus the "corpus of the Debtor's Trust is property of the estate under § 541(a)." *In re Page*, 239 B.R. 755, 765 (Bankr. W.D. Mich. 1999). The court reached this determination based on its application of state law, including the principle that "every trust 'shall be liberally construed by the court so that the intentions of the creator thereof shall be carried out whenever possible." *In re Page*, 239 B.R. at 261.

2. This Court's review of Abraham's will is a core proceeding

The Bankruptcy Court's jurisdiction encompasses "all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11." 28 U.S.C. § 157(b)(1). The statute does not define "core proceedings," but provides a non-exclusive list of examples, including "matters concerning the administration of the estate," "orders to turn over property of the estate," and "other proceedings that affect the liquidation of the assets of the estate." 28 U.S.C. § 157(b)(2). Determining the scope of property falling within the bankruptcy estate is an essential part of administering the estate. Here, to determine whether the Flushing Property

is property of the Debtor's bankruptcy estate, the Court must interpret Abraham's will. Consequently, the interpretation of the will directly implicates property of the bankruptcy estate and is a core proceeding.

3. Construction of Abraham's will does not implicate the federal probate exception

The federal probate exception is the principle that "a federal court has no jurisdiction to probate a will or administer an estate." *Markham v. Allen*, 326 U.S. 490, 494 (1946). Specifically "the probate exception reserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate; it also precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court." *Marshall v. Marshall,* 547 U.S. 293, 311-12 (2006). It does not, however, "bar federal courts from adjudicating matters outsides those confines and otherwise within federal jurisdiction." *Marshall,* 547 U.S. at 312. Thus, the federal probate exception is narrow. *Marshall,* 547 U.S. at 305. Even where the issues before a federal court are "intertwined with and binding on" state court proceedings, as long as the property is not in the custody of a state probate court, the probate exception does not preclude federal jurisdiction. *Lefkowitz v. Bank of N.Y.*, 528 F.3d 102, 106 (2d Cir. 2007).

This Court is mindful that the federal probate exception may bar a federal court from entering an order directing the sale of assets situated within a trust. *See Abercrombie v. Andrew Coll.,* 438 F. Supp. 2d 243, 251 (S.D.N.Y. 2006). Disposing of "property that is in the custody of the probate court or the fiduciary of an estate" falls within the probate exception, and such authority may not be exercised by the federal court. *Carvel Found., Inc. v. Carvel*, 736

F.Supp.2d 730, 741 (S.D.N.Y. 2010); *see also Marcus v. Quattrocchi*, 715 F.Supp.2d 524, 534 (S.D.N.Y. 2010) (stating that requests to dispose of property currently in a trust would be within the probate exception). Here, McCord requested authorization to sell property allegedly held in trust. If this Court were to order the sale of the Flushing Property directly from the Testamentary Trust without any predicate findings, such decree might violate the federal probate exception. But, if in construing the will, which the Court concludes it has the power to do, the Court declares Debtor's share of the Flushing Property to be a part of the Debtor's bankruptcy estate, as a result of finding that Abraham intended for the Trust principal to be transferred to the Debtor, an order authorizing a sale would be proper and not violate the federal probate exception.

E. Neither Mandatory nor Permissive Abstention Apply

While it is established that the Court has jurisdiction, the Court can find that it must or should abstain under 28 U.S.C. § 1334(c). Here, mandatory abstention is not implicated because "if an action is a core proceeding, then mandatory abstention is not required by § 1334(c)(2)." *In re Int'l Tobacco Partners, Ltd.*, 462 B.R. 378, 390 (Bankr. E.D.N.Y. 2011). Nonetheless, "in the interest of comity with State courts or respect for State law," a court may find permissive abstention applies. 11 U.S.C. § 1334(c)(1). In deciding whether permissive abstention applies, a bankruptcy court considers:

> (1) the effect or lack thereof on the efficient administration of the estate if a Court recommends abstention, (2) the extent to which state law issues predominate over bankruptcy issues, (3) the difficulty or unsettled nature of the applicable state law, (4) the presence of a related proceeding commenced in state court or other nonbankruptcy court, (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334, (6) the degree of relatedness or remoteness of the proceeding

> to the main bankruptcy case, (7) the substance rather than form of an asserted "core" proceeding, (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court, (9) the burden on the court's docket, (10) the likelihood that the commencement of the proceeding in a bankruptcy court involves forum shopping by one of the parties, (11) the existence of a right to a jury trial, and (12) the presence in the proceeding of nondebtor parties.

Matter of Cont'l Airlines, Inc., 156 B.R. 441, 443 (Bankr. D. Del. 1993); *see also Lothian Cassidy, LLC v. Lothian Exploration & Dev. II, L.P.*, 487 B.R. 158, 165 (S.D.N.Y. 2013); *Baker v. Simpson*, 413 B.R. 38, 45 (E.D.N.Y. 2009); *In re Int'l Tobacco Partners, Ltd.*, 462 B.R. at 392. Although the above twelve factors are those generally considered, a court may utilize any number of factors in determining if it should abstain. *See, e.g.*, *Allstate Ins. Co. v. CitiMortgage, Inc.*, Slip Copy, 2012 WL 967582, * 6 (S.D.N.Y. 2012) (considering only 4 factors); *In re Cody, Inc.*, 281 B.R. 182, 190 (S.D.N.Y. 2002) (noting courts "have considered one or more (not necessarily all) of twelve factors").

Here, the balance of factors weighs heavily against permissive abstention. Resolution of testator's intent directly impacts the efficient administration of this bankruptcy case, as it will determine whether or not the bankruptcy estate includes Debtor's interest in the Flushing Property. While state law predominates the inquiry, the state law issues are not novel, complex, or unsettled. This Court can adjudicate the issues raised in this proceeding in a timelier manner than a proceeding not yet commenced in state court. In addition, having the matter determined here and now will be less costly for all of the parties to the proceeding and the bankruptcy estate. Thus, the vital considerations of judicial economy and efficiency are best served by having this Court determine the issue of testator intent.

F. Abraham Intended the Flushing Property to be Distributed Following Miriam's Death

The language of Abraham's will expresses his expectation that the Debtor and the Defendant would receive their interests in the Flushing Property in their individual capacities once Miriam died. Clearly, Abraham intended that the Flushing Property remain in the Trust for the duration of Miriam's life. With regards to the administration of Trust property during Miriam's life, Abraham specified that his "trustees shall hold, manage, invest and reinvest the principal, shall collect the income therefrom and shall…pay or apply all the net income therefrom to or for the use of my said wife." Article THIRD (a)(1). When Miriam died, however, Abraham's will directed that his "trustees (the Debtor and the Defendant) shall pay the then existing principal of said trust to my issue living at the time of the death of my said wife (the Debtor and the Defendant)." Article THIRD. The will does not provide for the use of Trust income after Miriam's death.

It is a well-established tenet of common law that "[a] fiduciary has an obligation to protect and preserve assets which have been placed in his care." *Will of Mead*, 90 Misc. 2d 144, 146, 394 N.Y.S.2d 123, 125 (Sur. 1977). At the time of Miriam's death the "then existing principal" of the Trust was the Flushing Property – no other money was held in trust for its maintenance. Abraham could not have expected the Debtor and the Defendant to continue performing their duties as trustees after Miriam's death, because the Trust lacked assets to protect and preserve the Flushing Property. In actuality, Cross-Movants have paid all of the expenses related to maintaining the Flushing Property from their personal funds. Hearing Transcript at 47:17-24. Therefore, the practical reality of Cross Movants' conduct proves

consistent with Abraham's intent – that the Debtor and Defendant possess the Flushing Property in their individual capacities after Miriam's death. The Court thus finds that Debtor's interest in the Flushing Property vested prior to the date of the bankruptcy filing and is part of the bankruptcy estate.

Conclusion

For the reasons set forth above, the Motion for Summary Judgment and the Cross-Motion for Summary Judgment are denied. A separate order in conformity with this Memorandum Decision shall be issued forthwith, which shall provide that Debtor's share of the Flushing Property, or the proceeds thereof, is property of the Debtor's bankruptcy estate.

Dated: September 29, 2013
Brooklyn, New York

Nancy Hershey Lord
United States Bankruptcy Judge