

Matter of Chiriacka

2012 NY Slip Op 30576(U)

February 15, 2012

Surrogate's Court, Nassau County

Docket Number: 2010-361284

Judge: III., Edward W. McCarty

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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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Probate Proceeding, Estate of

File No. 2010-361284

ERNEST CHIRIACKA,

Decision No. 27683

Deceased.
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In this probate proceeding, decedent's only son, Leonard Chiriacka (Mr. Chiriacka, or movant), moves for the issuance of limited letters testamentary to him, pursuant to SCPA 702, to obtain disclosure and documents relating to decedent's affairs, both prior to decedent's death and during the administration of his estate by the preliminary executor, decedent's only daughter, Athene Westergaard (Ms. Westergaard, or respondent). Movant intends to locate assets belonging to the decedent and to ascertain the propriety of lifetime transfers of assets from decedent to Ms. Westergaard. Initially, movant also advised the court that limited letters testamentary, if issued, would enable him to obtain decedent's medical records so as to establish a lack of testamentary capacity at the time decedent executed his will and when he transferred or sold his assets to Ms. Westergaard; this portion of the motion was withdrawn by letter dated October 20, 2011, as counsel for respondent supplied the authorization necessary for movant to obtain decedent's medical records.

Counsel for respondent notes that the only proceeding pending before this court is respondent's petition for probate of decedent's will, and that the sole objection to that petition, which was filed on behalf of Mr. Chiriacka by his prior counsel in August of 2010, is lack of testamentary capacity. It is asserted that the financial records sought by movant are irrelevant to decedent's capacity to execute a will. Counsel further notes that the financial documents were demanded twice and objected to twice, due to a change of movant's counsel, and yet both times

counsel for movant did not seek a court ruling on whether the financial records are discoverable. Respondent contends that these demands for financial records are better left to an accounting proceeding.

BACKGROUND

Ernest Chiriacka died on April 26, 2010, at the age of 97. He was survived by two children, Leonard Chiriacka and Athene Westergaard. Ms. Westergaard filed a probate petition in connection with a will executed on June 13, 2008, under which she is the nominated executor. The proffered will directs the distribution of all tangible personal property to Ms. Westergaard. It directs payment of specific bequests to decedent's brother, nephew and grandchildren, all of whom have appeared by the same counsel in connection with the probate proceeding. The balance of the estate is to be divided into two shares, with 50% payable to Ms. Westergaard and 50% payable to a trust for the benefit of Mr. Chiriacka. One-half of trust principal will be paid to Mr. Chiriacka on the first anniversary of decedent's death (which occurred on April 26, 2011). The trust will terminate on the third anniversary of decedent's death (which will occur on April 26, 2013), when Mr. Chiriacka will receive all of the remaining trust principal. Ms. Westergaard and decedent's attorney were named as co-trustees.

Preliminary letters issued to Ms. Westergaard on September 16, 2011. Leonard Chiriacka sought to obtain discovery of decedent's medical records in connection with his testamentary capacity, and decedent's financial records in connection with transactions between the decedent and his daughter during the last years of decedent's life. Counsel for Mr. Chiriacka asserts that the medical records discovered thus far indicate that decedent suffered from dementia, depression and Alzheimer's disease during much of the last five years of his life; it is argued that these records raise

questions about all of decedent's financial transactions during that same time period, including his transfer of property interests to his daughter who, it is asserted, acted as the decedent's primary caregiver during the final five years of decedent's life. Among other information sought, Mr. Chiriacka wants additional information concerning a reverse mortgage in the amount of \$780,000.00 which was taken out by decedent, and Ms. Westergaard's claim against the estate for a \$700,000.00 loan which she alleges she made to her father before his death. Mr. Chiriacka's counsel notes also that one transfer of decedent's interest in real estate to his daughter took place on April 5, 2010, three weeks before his death, under the supervision of the law firm now representing Ms. Westergaard, which firm may have represented both parties to this transaction. Mr. Chiriacka's counsel questions another real estate transfer from decedent to Ms. Westergaard which occurred on February 25, 2010, approximately two months prior to decedent's death.

Counsel for Ms. Westergaard asserts that these questions can await a judicial accounting proceeding. However, by recent letter to the court, counsel for Mr. Chiriacka advises that MetLife Bank, N.A., as successor to Everbank Reverse, has served his client with process in connection with a foreclosure action being brought against decedent's real property as a result of the above-mentioned reverse mortgage of \$780,000.00 issued shortly before decedent's death. Counsel for movant notes that the preliminary executor has yet to explain the disposition or whereabouts of those funds. He further asserts that respondent is currently living in decedent's home, an estate asset maintained by estate funds. The pending foreclosure action, movant argues, is sufficient for the court to immediately grant limited letters to enable movant to protect the real property from foreclosure.

ANALYSIS

Form of Proceeding

Counsel for respondent argues that SCPA Article 10 requires that: (1) a proceeding for letters must be commenced by petition; (2) a citation must be served upon all interested parties, who must then be given the opportunity to object to the relief requested; and (3) the petitioner must qualify according to the law. On this basis, respondent's counsel argues that the motion before the court is procedurally and jurisdictionally defective and presently cannot be considered on its merits. Movant's counsel responds that when all interested parties are before the court and represented by counsel, as in this case, there is no need to file a petition for limited letters; counsel can proceed by motion practice. In support of this, he cites SCPA 702 and unspecified West McKinney's forms.

Despite movant's assertion, SCPA 702 makes no mention of proceeding by motion. "The procedure for issuance of limited or restricted letters of administration is the same as with unlimited and unrestricted letters" (Warren's Heaton on Surrogate's Court Practice § 35.08 [2011], referring to § 35.04 [which lists the contents of a petition for letters] and § 35.05 [which lists the persons who must be served with process in connection with a petition for letters]).

At the same time, CPLR 103 (c) provides that "[i]f the court finds it appropriate in the interests of justice, it may convert a motion into a special proceeding, or vice-versa, upon such terms as may be just, including the payment of fees and costs." Under this section, the Legislature has empowered and directed the courts to convert a proceeding brought in an improper format to a proceeding in proper form, rather than dismiss the improperly formatted proceeding (*First Nat. City Bank v City of New York Finance Administration*, 36 NY2d 87, 94 [1975]). A "court is required, wherever possible, to disregard the form of the proceeding and to deal with the merits of the

application if an adequate basis for an alternative form of proceeding is set forth in the moving papers” (*McArdle v Board of Estimate*, 74 Misc 2d 1014, 1015 [Sup Ct, Westchester County 1973]).

Issuance of Limited Letters

Section 702 of the SCPA was originally created for the issuance of limited letters in estates where there was no need for the issuance of full letters (*Matter of Stoller*, 4 Misc 3d 538, 539 [Sur Ct, New York County 2004]). However, as amended in 1993, the section now provides the court with the authority, in specified circumstances, to grant limited letters to a fiduciary even when another fiduciary has been granted full letters. Subdivision (9) of SCPA 702 provides that the court may issue limited letters where there may be a need for litigation on behalf of the estate against the fiduciary in her individual capacity. “The courts have liberally applied [SCPA] section 702 to enable a person who may have a stake in a decedent’s estate to protect it where the interests of the estate are in some respects different from the fiduciary’s individual interests” (*id.*, at 540).

The court in *Stoller* cites five precedent decisions in which limited letters were granted under SCPA 702, noting that in each of the decisions the court found circumstances in which application of the statute was necessary to protect the estate from potential harm which might result from a fiduciary’s act or failure to act. In *Matter of Rosasco* (19 Misc 3d 1109 [A] [Sur Ct, New York County 2008]), the court addressed the petition of a distributee who sought limited letters in order to set aside an agreement in which the decedent allegedly transferred an interest in real property at less than its fair market value to the preliminary executor under the proffered will. The court found that there was a pressing reason to grant the limited letters, namely, to protect petitioner’s claim against the preliminary executor’s inaction. The claim would have been barred by

the applicable statute of limitations were the court to hold the petition in abeyance pending a determination of the merit of the claim.

CONCLUSION

Based on the facts and documents presented, this court finds it appropriate, in the interest of justice, to deem the present motion a special proceeding. Jurisdiction has been acquired in that respondent's attorney has appeared before this court in connection with this motion and filed opposition to its contents.

Limited letters of administration will issue to Leonard Chiriacka for the purpose requested, upon his payment to the court of the fee associated with a petition for limited letters and his qualification (SPCA 708).

A conference will be held with a member of the law department on February 29, 2012, at 2:30 p.m.

This constitutes the decision and order of the court.

Dated: February 15, 2012

EDWARD W. McCARTY III
Judge of the
Surrogate's Court