

Matter of Butner

2012 NY Slip Op 33017(U)

September 27, 2012

Sur Ct, Nassau County

Docket Number: 2011-363692

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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 In the Matter of the Probate of the Last Will and Testament
 of

File No. 2011-363692

BARRY BUTNER,

Dec. No. 28176

Deceased.

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In this contested probate proceeding, the executor moves for an order directing objectants to comply with discovery demands (CPLR 3124). Objectants move for a protective order (CPLR 3103 [a]) and for an order directing the executor to comply with their discovery demands.

The executor's amended interrogatories, dated May 17, 2012, contain 124 interrogatories. Objectants had responded, in part, to the initial set of interrogatories by stating that the information had been supplied in the deposition testimony, exhibits and the objections to probate. The same objection is raised with respect to the amended interrogatories.

The objectants' position that the information was previously supplied is occasioned by the fact that they have filed atypical objections. Traditionally, there are no more than five objections filed to a petition for probate. The scope of the objections are almost invariably expressed in broad and general terms in order to avoid limiting objections that may be raised later in discovery (3 Warrens Heaton on Surrogate's Court Practice, §42.04 [7th ed.]). In this case, objectants have asserted the specific factual allegations in support of their objections in the objections themselves. Thus, there are 48 numbered paragraphs in the objections and much of the information sought in the interrogatories was furnished in the objections.

Objectants contend that the first set of interrogatories #1 through #4 were overly broad, in that they did not provide a time frame. The amended interrogatories, which request the same

information, appropriately ask for the facts in support of the allegations of undue influence and fraud. Objectants must provide the time of the alleged acts of fraud and undue influence. Additional interrogatories likewise request the alleged facts in support of the allegation of lack of testamentary capacity.

To the extent that the objections and the testimony at the depositions do not furnish the information requested concerning the allegations of lack of testamentary capacity, due execution, fraud and undue influence, objectants should supply the same in response to the interrogatories.

Interrogatories #18, #19, #20 and #21 are overly broad and burdensome in the request for information as to each visit with decedent, the location and persons present (without a time frame). Interrogatories #47 through #67 and #70 through #72, which request information as to when the objectants became aware of certain acts and what action they took, are stricken. Proponent has not established that the information is material and necessary to the probate proceeding (*Auerbach v Klein*, 30 AD3d 451 [2d Dept 2006]). Interrogatory #79 relates to the allegation of a constructive trust which is not a proper objection to probate and it is therefore stricken. Interrogatories #108 through #114 are stricken on the grounds that the information is not material and necessary.

Therefore, the motion for a protective order is granted to the extent that interrogatories #18 through #21, # 47 through #67, #70 through #72, #79, and #108 through #114 are stricken. Objectants are required to answer the balance of the interrogatories to the extent that information was not previously supplied.

With respect to the “discovery demand” dated April 4, 2012, objectants seek a protective

order contending that the demand, which incorporates 74 numbered items, is overly broad, burdensome and contains demands for confidential and privileged documents. In addition to a demand for documents, the executor demands information and evidence in support of the objections.

Tax returns are not discoverable in the absence of a showing that they are indispensable to a claim (*Benfeld v Fleming Propos, Inc.*, 44 AD3d 599 [2d Dept 2007]). School records are not privileged, but have not been shown to be material and necessary.

The discovery demand is in large measure duplicative of the interrogatories. In addition, as depositions have been completed, the executor should be able to reasonably identify documents in a notice for discovery and inspection.

The court finds the demand is overly broad (*Downing v Moskovits*, 58 AD3d 671 [2d Dept 2007]; *Paradis v F. L. Smithe Machine Co., Inc.*, 25 AD3d 594 [2d Dept 2006]) and burdensome (*Wesche v Wesche*, 51 AD3d 909 [2d Dept 2008]). For all of the foregoing reasons, the “discovery demand” is stricken.

Objectants cross move for an order directing the executor to comply with a notice for discovery and inspection dated May 10, 2012. As to the following demands, the executor states in her response that she previously supplied the information: #2 (a), #2 (b), #7, #8 (a), #8 (b) The executor is not required to produce documents previously supplied (*EIFS, Inc. v Morie Co., Inc.*, 298 AD2d 548 [2d Dept 2002]).

The executor’s response, signed by her attorney, indicates that she is not in possession, custody, or control of documents responsive to: #1 (a), #2 (c), #3 (a), #3 (d),

#3 (e), #3 (f), #3 (g), #3(h), #4 (a), 4# (b), #5 (a), 5# (b), 5# (c), #6 (a), #6 (b), #11, #13 (a), #13 (b). The executor is directed to file her own affidavit stating which documents are not in her possession, custody, or control and what efforts she made to search for such documents (*Castillo v Henry Schein, Inc.*, 257 AD2d 651 [2d Dept 1999]), within 30 days of service with notice of entry of the order following this decision.

Demands #3 (a) part 2, #5 (d), #9 (a) and #9 (b) are overly broad. Demand #10 requests a document which is a public record. Demands #3 (a), #3 (b), #3 (c) and #11 are the records of Comprehensive, which is a counseling center. It is not clear why a subpoena was not issued to Comprehensive. Patient information is protected by a privilege (CPLR 4504). As to demand #14, the executor states that she supplemented previously produced records. All of the demands on this paragraph are stricken for the reasons stated.

As to the balance of the demands, the court grants the motion to produce.

Objectants seek an order directing proponent more fully answer 21 interrogatories. Proponent gave detailed responses to a substantial number of the interrogatories.

The interrogatories are overly broad, burdensome and oppressive, for example, seeking: (1) an accounting of all clothing purchased for decedent; (2) any statements made by the decedent at any time concerning the value of Comprehensive; and (3) information concerning all electronic equipment owned by the decedent. The interrogatories are stricken.

Questions remain as to the relevancy of the finances of Comprehensive to the instant proceeding and the confidentiality of its records. In addition, it is necessary to address the

scope of the objections which include matters unrelated to the validity of the instrument.

Accordingly, this matter will appear on the court's calendar on October 25, 2012 at 2:00 p.m. for a conference.

Settle order.

Dated: September 27, 2012

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