

Nelson

2013 NY Slip Op 31712(U)

June 28, 2013

Sur. Ct., Nassau County

Docket Number: 334736

Judge: III., Edward W. McCarty

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

-----x
 Probate Proceeding, Will of

File No. 334736

MURRAY NELSON,

Dec. No. 28664

Deceased.
 -----x

In this contested probate proceeding, the decedent's daughter, Eleanor Nelson Greenberg, moves for the issuance of letters of administration to the Public Administrator. The decedent's son, Arnold Nelson, opposes the motion and asks that letters of administration issue to him instead. The motion is supported by the petitioner, Marie Soljour, described in the purported will as the decedent's "friend and companion" and also by the guardian ad litem for Sabrina Nelson, a minor, who is described in the purported will as the decedent's daughter.

The decedent, Murray Nelson, died on September 5, 2004. The decedent's wife, Rose Nelson, predeceased him. The decedent left a purported will dated July 28, 2004. The decedent died approximately five weeks after executing the purported will. Under Article FOURTH of the purported will, the decedent's residence located in Greenvale, New York is devised to Marie Soljour, together with all furniture and furnishings. Under Article FIFTH, the balance of the decedent's tangible personal property is bequeathed to Marie Soljour. The decedent's residuary estate is bequeathed as follows: (i) an amount equal to the lesser of 30% or \$150,000.00 to Marie Soljour; (ii) the lesser of 50% or \$250,000.00 to Arnold Nelson; (iii) the lesser of 10% or \$50,000.00 to Sabrina Nelson, in trust; (iv) the lesser of 4% or \$20,000.00 to Carlene Lefleur; (v) the lesser of 2% or \$10,000.00 to Markery Soljour; (vi) the lesser of 2% or \$10,000.00 to Dominique Soljour; and (vii) the lesser of 2% or \$10,000.00 to Rene Cadet.

A guardian ad litem was appointed for Sabrina Nelson. The guardian ad litem has

submitted an initial report on the issue of Sabrina Nelson's status in the proceeding. Sabrina Nelson was conceived through in-vitro fertilization. At the time of her birth, the decedent was 89 years of age. The decedent and Ms. Soljour met with a doctor for the purpose of performing assisted reproductive procedures through in-vitro fertilization process, which is the process of fertilizing an egg outside the body in a laboratory setting. Mrs. Soljour's eggs were ultimately fertilized by the sperm of an anonymous donor, producing Sabrina Nelson. The decedent and Ms. Soljour were never married. The decedent never adopted the ward; however, he is identified as Sabrina's father on her birth certificate. In addition, the decedent signed a consent accepting paternity in the event a child was born through the in-vitro process.

When the purported will was offered for probate, Ms. Soljour identified Arnold and Sabrina as children of the decedent on the petition. After SCPA 1404 examinations were conducted, Arnold filed objections to the will. Petitioner then made a motion for summary judgment which was unopposed and granted. After the court's decision was rendered, Arnold obtained new counsel who advised the court by letter dated March 27, 2008 that the decedent had two other children from a prior marriage, a son, Herbert Nelson, who was deceased and survived by three children, and a daughter, Eleanor Nelson Greenberg.

Arnold moved to reargue the court's decision granting summary judgment on the basis that Arnold had been served at the incorrect address. A hearing was held, and the court found that Arnold had not been properly served. The motion for reargument was granted and the court vacated its prior decision. In addition, based upon the newly revealed information regarding the decedent's additional distributees, the probate proceeding was found to be jurisdictionally defective and petitioner was directed to file an amended petition for probate of the purported

will. An amended petition subsequently was filed and citation issued to the interested parties. Thereafter, objections were filed by Eleanor Nelson Greenberg.

Preliminary letters testamentary were issued to Marie Soljour and were subsequently extended on October 19, 2005, May 30, 2006, May 29, 2007, November 30, 2007 and March 27, 2008. The movant asserts that, upon information and belief, Marie Soljour has been using the estate assets without authority and for her own benefit. The movant also notes that Ms. Soljour's preliminary letters have long since expired and she has failed to renew them, leaving the estate without a fiduciary. The movant asks that the Public Administrator be appointed to protect the assets of the estate.

The application is opposed by Arnold Nelson who is now self-represented and has submitted his own affidavit. Essentially, Arnold agrees with the movant that the estate is in need of a fiduciary to safeguard the assets; however, he requests that the court appoint him instead of the Public Administrator. Arnold asserts that "Marie Soljour has grossly mishandled the assets of the estate throughout the past eight years." Mr. Nelson's papers are replete with allegations of fraudulent and "opprobrious" conduct by Ms. Soljour, however, Mr. Nelson argues that "[t]he appointment of a public administrator could subject the estate to a loss of hundreds of thousands of additional dollars, a significant and severe degree of irreversible damage equal to or exceeding that which petitioner has already caused." Furthermore, Arnold argues that he is the decedent's son and a distributee, who resides on Long Island and is "intimately and uniquely familiar with [his] father's home."

Although the movant asks that letters of administration issue to the Public Administrator, the application is more properly a request for the issuance of temporary letters of administration

and the court will treat the application as such. SCPA 901 (1) provides that temporary administration may be granted if the court finds it is in the best interests of the estate “[w]hen for any cause delay occurs in the grant of letters on the estate of a decedent or a person alleged to be deceased or in the probate of his or her will.” “While the court has little discretion in the statutorily mandated appointment of eligible distributees in an administration proceeding, appointment of a temporary administrator is in the sound discretion of the surrogate (*Estate of Tiffany*, NYLJ, Jul. 20, 2000 at 30, col 3 [Sur Ct, Westchester County]). Unlike in the selection of an administrator, no class of persons is entitled to a priority in the selection of temporary administrator (*Matter of McGuire*, 47 Misc 2d 158, 261 N.Y.S.2d 974 [Sur Ct, Nassau County 1965])” (*Matter of Walker*, 22 Misc 3d 1127A [Sur Ct, Kings County 2009]).

SCPA 902 (7) sets forth who may petition for temporary administration. In relevant part, the statute provides that the petition may be presented by any person interested in the estate of a decedent, any beneficiary or nominated executor under a will on file in the court, a public administrator, a county treasurer, or a creditor. “While the statute does not specifically provide for who may receive temporary letters of administration, the court has discretion both on who may become the temporary administrator and whether to appoint one (*see Matter of Carvel*, NYLJ, April 1, 1999, at 38, col 1). That discretion is very broad, extending even to a person disinterested in the estate (*see Matter of Watson*, 209 App Div 876 *appeal dismissed*, 239 NY 506)” (*Matter of Astor*, 2007 N.Y.Misc. LEXIS 8143 [Sur Ct, Westchester County]).

Here, the nominated executor under the purported will, Marie Soljour, has joined in the movant’s request for the appointment of the Public Administrator as temporary administrator.

The only issue, therefore, is whether the court should appoint Arnold Nelson or the Public Administrator as temporary administrator. It does not appear to be in the best interests of the estate or the estate beneficiaries for Arnold Nelson to be appointed temporary administrator. Regardless of whether there is conflict between petitioner and Arnold Nelson, which Arnold Nelson disputes, the court notes that Arnold Nelson, despite having appeared in the proceeding from the time the original citation issued, did not disclose the existence of his father's children from his first marriage until after the court's decision on the motion for summary judgment, four years after his father's death. Thus, the court has serious concerns about Arnold Nelson's honesty in this proceeding and his ability to act as fiduciary of an estate where he failed to disclose the identity of interested parties. Moreover, the court notes that Arnold Nelson has failed to appear at court conferences, claiming not to have received communications from the court although such correspondence was addressed to addresses which he provided.

In view of these issues and concerns, it appears that appointing Arnold Nelson as temporary administrator would not be in the best interests of the estate. Accordingly, the court exercises its discretion to appoint an independent temporary administrator pending the probate contest herein (*see Matter of Beharrie*, 84 AD3d 1227 [2d Dept 2011]; *Matter of Scamardella*, 169 Misc 2d 55 [Sur Ct, Richmond County 1996]). Letters of temporary administration shall issue to the Public Administrator upon his duly qualifying.

This constitutes the decision and order of the court.

Dated: June 28, 2013

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