

Matter of Demetrious
2013 NY Slip Op 32128(U)
August 28, 2013
Surrogate's Court, Nassau County
Docket Number: 2013-373359
Judge: Edward McCarty
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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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Probate Proceeding, Will of

MICHAEL DEMETRIOU,

Deceased.

-----x

File No. 2013-373359

Dec. No. 28966

In this probate proceeding, respondent James P. Demetriou, Esq. (self-represented), one of decedent's surviving four children, moves for an order compelling the petitioning nominated co-executors, Koula Demetriou (the decedent's wife) and Paul Demetriou (decedent's son) to respond to movant's first demand for discovery and inspection dated April 22, 2013 (hereinafter "the D&I"); setting new dates for the SCPA 1404 examinations; and confirming that the petitioning nominated co-executors will be examined thereat. The motion is partially opposed and decided as set forth herein.¹

The decedent, Michael Demetriou, died a resident of Nassau County on December 15, 2012. An instrument dated February 1, 2010, purported to be the last will and testament of the decedent, leaves the decedent's entire estate to the petitioner widow and Paragraph SIXTH thereof states no provision is intentionally made in the will for movant. Upon the return of the citation, movant requested SCPA 1404 examinations which were scheduled and have now been adjourned *sine die* to address the document production issues. Formal objections have yet to be filed.

In a response dated May 10, 2013, petitioners timely raised general and specific objections to the D & I and did provide some documents.

¹ There is no opposition to setting new dates for the SCPA 1404 examinations and the fact that the petitioning nominated co-executors will be examined given the *in terrorem* clause.

Disclosure in New York civil actions is guided by the principle of “full disclosure of all matter material and necessary in the prosecution or defense of an action” (CPLR 3101 [a]). The words “material and necessary” are “to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason” (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968] [internal quotation marks omitted]; see *Tower Ins. Co. of N.Y. v Murello*, 68 AD3d 977 [2d Dept 2009]). The Court of Appeals’ interpretation of “material and necessary” in *Allen* has been understood “to mean nothing more or less than ‘relevant’” (Connors, Practice Commentaries, McKinney’s Cons. Laws of N.Y., Book 7B, CPLR C3101:5).

The issues presented in a probate proceeding are statutorily prescribed as: the genuineness of the instrument; whether it was executed as required by law; that the propounded instrument was freely and voluntarily made or executed by the decedent, and not procured by fraud or undue influence; and, that on the date of the making of the instrument, decedent was competent to make a will.

A party cannot be compelled to produce documents which do not exist or are not in her possession (*Euro-Central Corp. v Dalsimer, Inc.*, 22 AD3d 793 [2d Dept 2005]).

With these general principles stated the court turns to the two categories of issues presented, the first being agreed-upon demands and/or the more standard types of document demands in a probate proceeding.

Demands # 1, 6, 22 and 23

On consent, proponents will provide copies of all prior drafted wills of the decedent,

powers of attorney, health care proxies and health care declarations, whether executed or not, within 20 days following service of a copy of this decision and order.²

Demand #8

This item seeks copies of the attorney-draftperson's file and while the item had been objected to in the response to the demand it is not addressed in the opposition to the motion to compel. Accordingly, proponents are directed to produce a copy of the file.

Demands ## 11 and 12

These demands seek exchanges of correspondence between the deceased, the proponents and the beneficiaries during the defined 5-year period set forth in the demand. The court does not concur with proponents that these demands are overly broad or burdensome and can readily see the potential relevance. Copies of this correspondence should be produced.

Demand # 13

Proponents aver they do not have possession or control of any communications amongst those in the attorney-draftperson's office and the balance of this demand is somewhat ambiguous and may well be subsumed by # 8. There is nothing to be separately produced under this demand.

Demand # 14

Proponents aver they do not have possession or control of any notes taken by counsel or the witnesses at the execution ceremony. Some of the demand is obviously subsumed by # 8 and movant can pursue the issue of notes with the witnesses. There is nothing to be separately

² In all further directions regarding document production same shall be due within that same time frame.

produced by proponents under this demand.

Demands # 16, 19 and 24

Photographs of the decedent are probative of nothing and this demand is stricken.

Decedent's personal diary, address book, calendar or appointment books are similarly situated.

This demand is stricken. Decedent's life insurance and health insurance coverage are irrelevant.

This demand is stricken.

Demand #20

This item seeks a host of medical records and documents concerning decedent's health care services during the defined 5-year period set forth in the demand which petitioners' counsel states they do not have possession or control over. A debate ensues over which side may or may not be obliged to secure these records. Petitioners are directed to provide movant with duly executed HIPPA compliant authorizations for the records for such healthcare providers they are aware of for the defined 5-year period including sufficient contact information regarding the providers.

The second category of demands - ## 3, 4, 5, 9, 10, 17, 18 and 21 - might be deemed more "out of the box" than the usual documents demanded in a probate contest in seeking extensive and expansive information regarding decedent's income, assets, business interests and affiliations; federal and state income and gift tax returns for the foregoing; documents reflecting decedent's receipt of government or private benefits [Social Security, disability, Medicare Medicaid]; and documents regarding attorneys' fees [including retainers and time sheets] as well showing payment of same. Movant's legal support for the propriety of these demands is the holding of the Appellate Division, Third Department in *Matter of DeLisle* (149 AD2d 793 [2d

Dept 1989)) and its progeny. Indeed in looking at that decision as it enumerates the demands that the Surrogate and the Appellate Division sustained, it appears that movant framed his ## 3, 4, 5, 9, 10, 17, 18 and 21 to parrot that list. *DeLisle*, however, is very factually driven in the allowance of extraordinary document production, as that court observed: “. . . the propounded will represents a dramatic deviation from decedent’s earlier pattern of advancements and testamentary dispositions made in prior wills, spurning respondents and giving rise to reasonable suspicion [of the validity of the proffered instrument].” That is not the circumstance at bar. Thus, unlike the situation in *DeLisle*, there is no “dramatic deviation” nor any “new objects of [decedent’s] bounty” to warrant these demands. They are therefore stricken.

The proponents contend that movant was estranged from the decedent for approximately 15 years and was disinherited in prior wills of the decedent, copies of which have been provided to him. The propounded instrument leaves the entire estate to the surviving spouse, movant’s mother or, in the event she predeceased, which she did not, then to the decedent’s children, except the movant.

The SCPA 1404 examinations shall go forward on October 31, 2013 and November 1, 2013, at 9:30 a.m.

This is the decision and order of the court.

Dated: August 28, 2013

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