

| |
|--|
| Matter of Estate of Penn |
| 2015 NY Slip Op 31612(U) |
| August 26, 2015 |
| Surogate's Court, New York County |
| Docket Number: 2010-2188/F |
| Judge: Rita M. Mella |
| Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office. |
| This opinion is uncorrected and not selected for official publication. |

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

New York County Surrogate's Court
MISCELLANEOUS DEPT.
AUG 26 2015
FILED
Clerk _____

-----x
In the Matter of the Application of William Penn, as
Administrator of the Estate of

STANLEY PENN,

DECISION

Deceased,

File No.: 2010-2188/F

For Turnover of Property.
-----x

M E L L A, S.:

The court declines to issue the attached proposed order to show cause seeking to enforce this court's turnover decree, dated May 27, 2015, by punishing respondent Jeridene Penn-Carpenter (who may also be known as J.D. Penn Carpenter Smith) for contempt for her failure to obey said decree.

Counsel's affidavit and affirmation in support of this application shows that petitioner has not attempted to enforce by execution this decree directing the payment of money and thus has not shown that it "cannot be enforced by execution" as required by SCPA 606(1)(a) (*Matter of Kramsky*, 172 Misc 935 [Sur Ct, Kings County 1939]; see *Matter of Black [Victor]*, 261 App Div 791 [4th Dept 1941]). Although counsel states that it may be difficult to enforce by execution because he is currently unaware of the location of respondent's residence, employment or assets, this does not excuse him from trying to locate such information in order to enforce the decree by execution before seeking contempt as a remedy. Petitioner's reliance on *Matter of Smith [Kneeskern]* (250 App Div 178 [3d Dept 1937]), is misplaced because there the alleged contumacious party was a fiduciary – the fiduciary of a deceased fiduciary. This court's contempt statute, SCPA 606(1)(d), makes an exception to the requirement that a contempt application be accompanied by a showing that this court's decree cannot be enforced by execution when the

party is a fiduciary (*see also* CPLR 5105[2]). Here, the party to whom the payment order was directed, respondent, was not a fiduciary, but an estate beneficiary.

The court also notes that papers in support of the proposed order to show cause did not indicate that a certified copy of the decree sought to be enforced by contempt was personally served on respondent (SCPA 607[2]).

Dated: August 26, 2015



SURROGATE