

<p><b>Matter of Walegur</b></p>
<p>2016 NY Slip Op 30952(U)</p>
<p>May 25, 2016</p>
<p>Surrogate's Court, New York County</p>
<p>Docket Number: 2013-998/B/C</p>
<p>Judge: Rita M. Mella</p>
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SURROGATE'S COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

New York County Surrogate's Court

Date: MAY 25, 2016

In the Matter of the Petition of Thomas R. Walegur and Patricia A. Baltrus for an order directing a Genetic Marker Test pursuant to EPTL 4-1.2(a)(2)(C), and to Suspend and Revoke the Letters of Administration Issued to Lyndsey Walegur, in the Estate of

EDWARD J. WALEGUR,

Deceased,

DECISION and ORDER

File No.: 2013-998/B/C

Pursuant to SCPA 711, and for the Appointment of an Administrator dbn.

M E L L A, S.:

The following papers were considered in resolving the motion to dismiss this proceeding, as well as a motion to suspend respondent's letters of administration:

<u>Papers Considered</u>	<u>Numbered</u>
Amended Notice of Motion to Dismiss, Affirmation of Alham Usman, Esq., Affidavit of Laura Parker, with Exhibits	1, 2, 3
Petitioners' Memorandum of Law in Opposition to Motion to Dismiss and in further Support of Verified Petition, Affirmation of Mary E. Mongioi, Esq., in Opposition to Motion to Dismiss and in further Support of Petition, with Exhibits	4, 5
Reply Affirmation of Alham Usman, Esq., Affidavit of Laura Parker, with Exhibits	6, 7
Emergency Affirmation in Support of Order to Show Cause, Affirmation in Support of Order to Show Cause, with Exhibits, both by Mary E. Mongioi, Esq.	1, 2
Application for Extension of Time to File Opposition to OSC dated 03/29/16, Affirmation in Opposition to OSC 03/29/16	3, 4

In this proceeding, brought by Thomas R. Walegur and Patricia A. Baltrus (Petitioners), two of decedent Edward Walegur's siblings, Petitioners challenge Respondent Lyndsey

Walegur's status as the biological child and distributee of decedent, request that a genetic marker test be ordered, and ask for Respondent's removal as Administrator of decedent's estate. Respondent filed a pre-answer motion to dismiss, which was returnable before the court on April 5, 2016. Also returnable on that date was Petitioners' motion, brought by order to show cause, wherein they asked for immediate suspension of Respondent's letters of administration, or, alternatively, for the imposition of a bond or other restrictions on her authority to act.

After extensive oral argument, the court denied both motions as follows.

Respondent's motion to dismiss pursuant to CPLR 3211(a)(1), (3), and (7) was denied. First, the documents supplied by Respondent on her motion to dismiss, even if they had been decidedly clear, reliable and accurate, did not qualify as "documentary evidence" conclusively establishing a defense to the claims presented by Petitioners (*see* CPLR 3211[a][1]). In other words, nothing supplied by Respondent is determinative of this proceeding and the claims made by Petitioners.

Second, Respondent's assertion that Petitioners lack legal capacity to sue (CPLR 3211[a][3]) is without merit. Petitioners, in essence, assert that Respondent is not a distributee of decedent and should not inherit from his estate. If the factual allegations upon which they assert this conclusion are proven to be true, Petitioners would be decedent's distributees, entitled to inherit his estate and to serve as or designate the administrator of his estate (EPTL 4-1.1; SCPA 1001), and they therefore have standing to raise their claims for relief herein.

The court also ruled that Petitioners have stated a claim upon which relief could be granted (*see* CPLR 3211[a][7]). Petitioners claim that Respondent is not decedent's next of kin, that she is not his biological child, not a distributee, and not entitled to inherit his estate or serve as administrator. Petitioners further make allegations for the purpose of rebutting the presumption of legitimacy afforded marital children, and ask that the court order a genetic marker

test. Petitioners allege that decedent and Respondent's mother, although married, were living apart and had limited to no access to each other at the time of Respondent's conception, and finalized their divorce shortly after Respondent's birth. Petitioners additionally assert that decedent represented to each of them and other family members that he did not have children.

On a motion to dismiss for failure to state a claim, the court affords the pleadings a liberal construction and accepts as true the facts as alleged in the petition, accords Petitioners the benefit of every possible inference, and determines only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Miglino v Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d 342, 351 [2013]). Applying this liberal standard, the court must conclude that Petitioners have presented a claim. Petitioners' use of EPTL 4-1.2—which addresses inheritance rights of *non-marital* children—in seeking to challenge Respondent's right to inherit from decedent, regardless of whether or not it is ultimately appropriate, applicable, or relevant here, would not subject their petition to dismissal in light of the standard afforded them on a motion to dismiss and the factual allegations they present in order to rebut the presumption of legitimacy. Whether Petitioners can ultimately establish their allegations is not part of the calculus in determining a motion to dismiss (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

Lastly, the court held that assertions of Respondent that she should be protected by equitable estoppel and the presumption of legitimacy are in the nature of affirmative defenses. Respondent has presented no legal authority that provides for either principle as a basis for dismissal at this juncture.

After denying the motion to dismiss, the court directed Respondent to serve and file her verified answer by April 29, 2016, and directed any verified reply from Petitioners to be served

and filed by May 13, 2016.

The court, on April 5, 2016, also denied Petitioners' motion seeking the immediate suspension of Respondent's letters of administration, or, alternatively, the imposition of a bond, but indicated that a restriction would be imposed on Respondent's authority to sell, transfer, or otherwise dispose of the shares of stock associated with the cooperative apartment that is an asset of this estate, without permission from the court. It is therefore

ORDERED that the administrator, Lyndsey Walegur, is hereby restrained from selling, mortgaging, or otherwise disposing of the shares of stock associated with Apartment 3F, located at 407 East 91st Street, New York, NY, 10128 until authorized by the court.

This decision together with the transcript of the April 5, 2016 proceedings constitutes the order of the court.

Dated: May 25, 2016

  
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