

Matter of Gilbert

2016 NY Slip Op 32011(U)

September 20, 2016

Surrogate's Court, Nassau County

Docket Number: 2013-375176

Judge: Margaret C. Reilly

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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 NASSAU**

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

**AMENDED
DECISION**

SYLVIA GILBERT,

**File No. 2013-375176
Dec. No. 32095**

Deceased.

-----X
PRESENT: HON. MARGARET C. REILLY

The following papers were considered in the preparation of this decision:

Petitioner’s motion to compel disclosure and exhibits	1
Affirmation in opposition to petitioner’s motion and exhibits	2
Petitioner’s affirmation in reply	3
Objectant’s motion to compel disclosure and exhibits	4
Affirmation in opposition to objectant’s motion and exhibits	5
Stipulation dated 5/19/16	6

The court sua sponte vacates its decisions numbered 31322 and 31323 and replaces it with the following:

In this contested probate proceeding, petitioner moves for an order (1) directing the continued deposition of objectant, pursuant to the order of this court, dated June 26, 2014; (2) an order pursuant to CPLR §3042(d), CPLR 3126 and 22 NYCRR §207.23, imposing sanctions against Jeremy Marlowe for refusing to interpose a proper bill of particulars and (3) for an order pursuant to CPLR §3124 and 22 NYCRR §207.23, compelling the objectant to interpose a proper bill of particulars. The objectant moves for an order compelling the production of medical and financial records.

The decedent died May 5, 2013. The instrument offered for probate, dated August 14, 2012, bequeaths the entire estate to the decedent’s daughter, Helene Carniello, and disinherits

the decedent's son, Richard Gilbert. Objections to probate have been filed by Jeremy Marlowe, executor of the estate of Richard Gilbert.

In a previous decision (Dec. No. 29858), dated June 26, 2014, the court extended the 3-2 rule set forth in 22 NYCRR §207.27, to permit discovery as to an alleged altercation between Helene Carniello's husband and the decedent in 2003 and the subsequent state of affection between the decedent and Helene Carniello.

The parties appeared in court for a conference on September 9, 2015, at which time they executed a stipulation which was "so ordered." They subsequently entered into a stipulation dated May 19, 2016, in order to clarify the prior stipulation, which was ambiguous. The parties further agree that both petitioner and objectant are entitled to the extension of discovery pertaining to the alleged 2003 event. It is further agreed that the following questions were left open upon a motion to the court: (1) whether petitioner is entitled to the continued deposition of Jeremy Marlowe; and (2) whether objectant is entitled to medical records for the period 2003-2013 and financial records beyond the previous extension.

The court finds that petitioner is entitled to take the deposition of Jeremy Marlowe. The parties shall schedule the date for a deposition to take place on or before October 28, 2016. The deposition shall go day to day until completed and cannot be adjourned without court approval.

The objectant seeks the medical records of the decedent for the period 2003-2013.

The objectant is entitled to the medical records of the decedent for the three year period prior to the date of the propounded instrument and for period after the date of the propounded instrument until the decedent's death. In addition, the medical records for 2003, the year of the alleged altercation. The objectant is entitled to the decedent's financial records for the three year period prior to the date of the propounded instrument and for period after the date of the propounded instrument until the decedent's death.

Petitioner seeks an order compelling objectant to comply with a demand for a bill of particulars. As to demands #1 and #2 which relate to fraud and undue influence, the objectant failed to furnish a bill of particulars which satisfies the requirements of 22 NYCRR §207.23, which reads in relevant part as follows:

(a) In any probate proceeding in which objection to probate is made upon the grounds that the execution of the propounded instrument was procured by fraud or undue influence and the proponent demands or moves for a bill of particulars, the proponent shall be entitled as of course to the following information:

(1) the specific act or acts or course of conduct alleged to have constituted and effected such undue influence; the person or persons charged therewith and the time or times and place or places where it is alleged to have taken place;

(2) the particular false statements, suppressions of fact, misrepresentations, or other fraudulent acts alleged to have been practiced upon the decedent, the place or places where these events are claimed to have occurred and the persons who perpetrated them;

(3) whether such acts were accompanied by an act of physical violence or mistreatment of the decedent or threats, and if so, the nature thereof.

(b) If it is claimed by the contestant that the instrument offered for probate is not the last will of the deceased, the proponent shall be entitled to a bill of particulars as of course which shall state:

(1) whether it is claimed that there is an alleged testamentary instrument of later date than the instrument offered for probate;

(2) whether it is claimed that the instrument offered for probate was revoked, and if so, the method by which the alleged revocation was accomplished;

(3) whether it is merely claimed that the instrument offered for probate was not executed in accordance with the prescribed statutory formalities.

(c) In the demand or notice of motion it shall not be necessary for the proponent to set forth at length the foregoing items; he or she may, in lieu thereof, refer to the items specified in this rule. As to any other desired particulars, the proponent shall set them forth at length in the demand or notice of motion.

(d) Nothing contained in the foregoing shall be deemed to limit the court in denying, in a proper case, any one or more of the foregoing particulars, or in a proper case, in granting other, further or different particulars.

The objectant is directed to provide a bill of particulars on or before October 20, 2016.

Objectant is not required to furnish a bill of particulars as to demands #3 and #4, contained in the bill of particulars, dated July 28, 2015, which related to testamentary capacity and due execution (*see Matter of Lenfestey*, 28 Misc 2d 302 [Sur Court, Nassau County 1961]).

Accordingly, it is

ORDERED, that objectant's motion to compel disclosure of financial records is **GRANTED, TO THE EXTENT** that petitioner must furnish or authorize the release of the records for the period set forth in 22 NYCRR §207.27; and it is further

ORDERED, that objectant's motion to compel disclosure of medical records is **GRANTED, TO THE EXTENT** that the objectant is entitled to decedent's medical records for the period set forth in 22 NYCRR §207.27 and for the year 2003 and petitioner will authorize release of the same if he has not already done so and will also produce any medical records furnished to him in response to those authorizations; and it is further

ORDERED, that objectant's motion to impose sanctions is **DENIED**; and it is further

ORDERED, that petitioner's motion for an order directing the continued deposition of objectant is **GRANTED** and the deposition will be scheduled for a date on or before October 28, 2016 and may not be adjourned without court approval; and it is further

ORDERED, that petitioner's motion for an order directing compliance with a demand for a bill of particulars is **GRANTED** as to demand #1 and demand #2. A bill of particulars will be furnished on or before October 20, 2016; and it is further

ORDERED, that petitioner's motion for an order directing compliance with a demand for a bill of particulars is **DENIED** as to demand #3 and demand #4; and it is further

ORDERED, that petitioner's motion for an order imposing sanctions is **DENIED**.

Dated: September 20, 2016
Mineola, New York

E N T E R :

HON. MARGARET C. REILLY
Judge of the Surrogates Court

cc: Cohen & Schwartz, LLP
Attorneys for Jeremy Marlowe, as Administrator
for the Estate of Richard Gilbert
1180 Northern Boulevard, Suite 201
Manhasset, New York 11030

Hynes & Chu
Co-Counsel for Robert & Helene Carniello
114 Old Country Road, Suite 690
Mineola, New York 11530

Law Offices of Kenneth J. Weinstein, P.C.
*Co-Attorneys for Helene Carniello, Prel. Executor of
the Estate of Sylvia Gilbert*
100 Garden City Plaza, Suite 408
Garden City, New York 11530