

<p>Matter of Karp</p>
<p>2018 NY Slip Op 31889(U)</p>
<p>August 6, 2018</p>
<p>Surrogate's Court, New York County</p>
<p>Docket Number: 2017-1861/A</p>
<p>Judge: Rita M. Mella</p>
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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Administration Proceeding, Estate of

New York County Surrogate's Court

Date: AUGUST 6, 2018

RUTH KARP,

DECISION

Deceased.

File No.: 2017-1861/A

M E L L A, S.:

The following papers were considered in deciding Petitioner's motion to dismiss objections to her petition for the issuance of letters of administration:

<u>Papers</u>	<u>Numbered</u>
Petitioner's Notice of Motion to Dismiss, Affirmation in Support, with Exhibits	
A – I, including Affidavit of Petitioner in Support, and Affidavit of	
Caroline Karp in Support	1, 2, 3, 4
Objectants' Affirmation in Opposition of Motion to Dismiss, with Exhibits A – F	5
Petitioner's Affirmation in Reply, with Exhibit 1.....	6
Affirmation of Guardian Ad Litem.....	7

Petitioner Jennifer L. Karp is decedent Ruth Karp's niece and one of her five distributees.

In this proceeding, petitioner seeks her appointment as Administrator, the issuance of Letters of Administration to her, and, attendant to her petition, she requests that "the paper writing styled as the Decedent's Last Will and Testament dated May 1, 1995 not be offered for Probate as no party has been able to locate the original."

The 21 named beneficiaries under the 1995 instrument include petitioner and other distributees, but their respective interests under the instrument would be smaller than their intestate shares. Six of the beneficiaries who are not distributees have filed objections to this petition on two grounds: first, that petitioner has not met her legal burden of proving that decedent left no will; and second, that petitioner is unfit to serve as fiduciary. In light of

objectants' assertion that decedent did not revoke her original will, the court permitted objectants to file, by November 24, 2017, a petition to probate the 1995 instrument as a lost will (see SPCA 1407). No such petition was filed, however.

Now pending before the court is petitioner's motion to dismiss these objections on the grounds that: 1) the objection regarding petitioner's burden to prove that decedent left no will fails to state a claim (CPLR 3211[a][7]); and 2) objectants lack standing to challenge the fitness of petitioner to serve as Administrator. Objectants oppose the motion to dismiss. The guardian ad litem appointed to represent the interests of two beneficiaries under the instrument who are under a disability has filed an affirmation in which he supports the motion to dismiss the objections to petitioner's fitness on the ground that objectants lack standing and "consent[s] to the motion insofar as it bars the objectants from pursuing a lost will proceeding." For the reasons stated below, petitioner's motion to dismiss is granted.

Petition for the Appointment of an Administrator

On a petition seeking the issuance of letters of administration in the estate of an intestate decedent, the petitioner must allege that the decedent "left no will" (SCPA 1002[2]). This phrase has been understood to mean "left no *valid* will" (*Matter of Cameron*, 47 App Div 120, 123 [3d Dept 1900] *affd* 166 NY 610 [1901]; *Matter of Dinger*, 150 AD3d 1108 [2d Dept 2017]; *see also* *Matter of Von Ripper*, 95 Misc 2d 952 [Sur Ct, NY County 1978]). There is no presumption of testacy and the statute only requires a petitioner to *allege* that decedent left no will (*Matter of Cameron*, 47 App Div at 123 ["testacy is not presumed, and, therefore, less evidence is necessary to prove intestacy presumptively"]).

Contrary to objectants' assertion, petitioner need not do "a lot more due diligence" to establish that decedent left no valid will. To the extent that petitioner has a duty to perform some level of diligence in searching for any will of decedent, it is certainly not incumbent upon her to leave "no stone unturned" (*see 1-4 New York Estate Administration* § 4.02[c] ["The petitioner should demonstrate that she searched for a will in the decedent's safe deposit box, among decedent's personal papers, and in the files of the Surrogate's Court"]; *see also 2 Warren's Heaton on Surrogate's Court Practice* § 32.01[1]). In any event, the court is satisfied with petitioner's sworn statements—which are not disputed by objectants—regarding her extensive and diligent efforts to locate any original will of decedent, which included contacting the attorney-drafter and searching decedent's two homes located in two separate states, her furnishings, her stacks of documents, and her two safety deposit boxes.

The objections fail to present any cognizable legal claim to the contrary (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Miglino v Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d 342, 351 [2013]). Indeed, the burden of proving that there is a valid will that may be admitted to probate is on the person opposing the issuance of letters of administration and that burden must be fulfilled in a probate proceeding (*Matter of Cameron*, 47 App Div 120; *Matter of Billet*, 187 App Div 309 [2d Dept 1919]; *Matter of Rinder*, 196 Misc 657 [Sur Ct, NY County 1949]). As aforementioned, objectants did not take advantage of the opportunity to seek probate of a copy of the 1995 instrument as a lost will. Petitioner has sufficiently alleged that decedent left no valid will, and her motion to dismiss objectants' objection in that respect is granted (*see Matter of Dinger*, 150 AD3d 1108; *see also Matter of Rinder*, 196 Misc 657).

Issuance of Letters of Administration

Having determined that petitioner's application for the appointment of an administrator and for the issuance of letters of administration to her is properly before the court, the remaining objection must fall for objectants' lack of standing to oppose the issuance of letters of administration (*see* SCPA 709). Objectants, beneficiaries under the 1995 instrument, are not distributees.¹ Nor have they asserted any other basis for concluding that they are "interested" in decedent's intestate estate (*see* SCPA 103[39]), a prerequisite for opposing the issuance of letters pursuant to SCPA 709 (*see Matter of Brumer*, 69 AD2d 438 [2d Dept 1979]; *Matter of O'Brien*, 24 AD2d 779 [3d Dept 1965]). Accordingly, petitioner's motion to dismiss this objection is granted.

On the record before the court, that decedent died intestate may be presumed and, therefore, letters of administration shall issue to petitioner, an individual with a right to letters, upon her duly qualifying according to law (SCPA 1001; *see Matter of Dinger*, 150 AD3d 1108).

Settle decree.

Clerk to notify.

Dated: August 6, 2018

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S U R R O G A T E

¹ The other four distributees executed consents to the issuance of letters of administration to petitioner.