

Matter of Powers

2018 NY Slip Op 32105(U)

August 1, 2018

Surrogate's Court, Nassau County

Docket Number: 2017-4058

Judge: Margaret C. Reilly

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**SURROGATE'S COURT: STATE OF NEW YORK
COUNTY OF NASSAU**

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Probate Proceeding, Will of

DECISION

**WILLIAM F. POWERS,
a/k/a WILLIAM FRANCIS POWERS,**

**File No. 2017-4058
Dec. No. 34239**

Deceased.

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PRESENT: HON. MARGARET C. REILLY

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

Notice of Motion & Exhibits.	1
Notice of Cross-Motion & Exhibits.	2
Affirmation in Opposition to Cross-Motion (Grafteo)	3
Affidavit (Joanne Griffin)	4
Affidavit (James Griffin, Jr.)	5
Reply Affirmation (Penzer)	6

In this probate proceeding, the respondent Joanne Griffin moves the court for an order pursuant to CPLR § 3211 (a) (2), striking the petition to probate the purported last will and testament of William F. Powers dated July 29, 2014, on the grounds that the court lacks subject matter jurisdiction because the decedent was domiciled in New Hanover County, North Carolina at the time of his death and did not own property in New York.

Petitioners cross-move for an order pursuant to SCPA § 205 (2) transferring this proceeding to the Surrogate’s Court, Suffolk County, in the event the court, having denied respondent Joanne Griffin’s motion to dismiss, determines that the decedent, William F. Powers, a/k/a William Francis Powers, was a domiciliary of Suffolk County, New York on his date of death.

The decedent William F. Powers was survived by five children of his predeceased sister Joan Powers as his only distributees: Kevin Griffin, Maureen Fineman, Robert Griffin, Joanne Griffin and James R. Griffin, Jr.

Kevin Griffin and Maureen Fineman, the nominated executors under a purported will dated July 29, 2014, filed a petition for probate of the instrument in November 2017. The petition alleges that the decedent was domiciled in Baldwin, New York (Nassau County) at the time of his death on September 13, 2017.

It is noted that even if the decedent was not a New York domiciliary, this court would have jurisdiction if there are assets of the estate in New York (SCPA § 206 [1], *Matter of Pingpank*, 134 AD2d 263 [2d Dept 1987]). Petitioners state, however, that there are no assets in New York and the purpose of the filing of the instrument is to permit the exercise of a power of appointment granted to the decedent in a lifetime trust.

Domicile is “a fixed, permanent and principal home to which a person wherever temporarily located always intends to return” (SCPA § 103 [15]). Domicile is established by physical presence in a particular locality with the intent to make it a fixed and permanent home (*Matter of Newcomb*, 192 NY 238 [1908]); *Bikel v Bakertown Realty Group, Inc.*, 157 AD3d 924 [2d Dept 2018]). “An existing domicile continues until a new one is acquired, and it is incumbent on the party seeking to prove a change of domicile to establish such a change by clear and convincing evidence” (*Matter of Pingpank*, 134 AD2d 263, 265 [2d Dept 1987]). “[T]he element of intent is essential” (*Matter of Bonora*, 123 AD3d 699, 702 [2d

Dept 2014]; *Matter of Meyer*, 62 AD3d 133 [1st Dept 2009]).

“The question as to whether there has been a change of domicile is a mixed question of law and fact” (*Matter of Urdang*, 194 AD2d 615, 615 [2d Dept 1993]) and no single factor is determinative (*Matter of Ranftle*, 108 AD3d 437 [1st Dept 2013]; *Matter of Gadway*, 123 AD2d 83 [3d Dept 1987]).

In this case, the decedent lived for many years with his brother, Martin Powers, in a condominium in North Babylon. When Martin Powers died in January 2014, the decedent vacated his home in North Babylon and resided with his nephew, Kevin Griffin, in Baldwin. Between May 2014 and June 2014, the decedent stayed at the home of his niece, Maureen Fineman, in North Carolina. He then returned to Baldwin and remained there from June to November of 2014. From November 2014 to July 2015 the decedent resided at the home of Maureen Fineman. The North Babylon condominium was sold in 2015. In July 2015, the decedent took up residence at “Commons of Brightmore” (hereinafter “Brightmore”), an assisted living facility in Wilmington, North Carolina. He returned to New York several times in 2015. The affidavits submitted by the respective parties are in conflict as to whether the decedent stayed at a vacation home in Ocean Beach, New York in September 2015. However, there is no allegation by any party that the decedent intended to make the Ocean Beach location his domicile. The decedent maintained his residence at Brightmore at the time of his death.

In support of a New York domicile, petitioners submit documentary evidence that

the decedent (1) retained a New York driver's license; (2) maintained bank accounts in New York; and (3) declared a New York State residence in tax returns between 2014 and 2016. The instrument offered for probate and an inter vivos trust agreement, both executed in 2014, state that the decedent's residence is New York.

In support of a North Carolina domicile, respondent submits documentary evidence that the decedent registered to vote in North Carolina. Respondent alleges and it appears undisputed that the decedent (1) maintained his personal possessions in his residence at Brightmore; (2) participated in social activities and attended church in Wilmington; and (3) received medical care from physicians in North Carolina.

The undisputed facts and circumstances surrounding the decedent's movements between New York and North Carolina lead to conflicting inferences regarding domicile.

Where issues of fact are presented regarding the decedent's intention to change his domicile, a hearing must be held (*Matter of Duysburgh*, 154 Misc 2d 82 [Sur Ct, New York County]). This matter will appear on the court's conference calendar on September 19, 2018, at 9:30 a.m. to schedule discovery, if necessary, or a date for hearing.

This constitutes the decision and order of the court

Dated: August 1, 2018
Mineola, New York

E N T E R:

HON. MARGARET C. REILLY
Judge of the Surrogate's Court

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