

<b>Matter of Bronsky</b>
2018 NY Slip Op 32608(U)
October 12, 2018
Surrogate's Court, New York County
Docket Number: 2013-3472
Judge: Rita M. Mella
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Date: October 12, 2018SURROGATE'S COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

Probate Proceeding, Estate of

ANDREW BRONSKY,

Deceased.

DECISION

File No.: 2013-3472

## M E L L A, S.:

The court considered the following submissions in determining the instant motion and cross-motion:

	<u>Date Filed</u>
1. Petitioner's Notice of Motion	February 28, 2018
2. Affirmation of Sabino Biondi, Esq., in support	February 28, 2018
3. Objectant's Notice of Cross-Motion	April 24, 2018
4. Affirmation of Jay B. Zimner, Esq., in opposition to motion and in support of cross-motion	April 24, 2018
5. Affidavit of Anat Galia Bronsky in opposition to motion and in support of cross-motion	April 24, 2018
6. Reply Affirmation of Sabino Biondi, Esq.	April 30, 2018
7. Reply Affirmation of Jay B. Zimner, Esq.	May 22, 2018
8. Sur-Reply Affirmation of Sabino Biondi, Esq.,	May 29, 2018
9. Affirmation of Jeffrey A. Asher, Esq., (former) guardian ad litem for decedent's infant son, in support of motion <sup>1</sup>	June 8, 2018

Jonathan Bronsky, petitioner in a probate proceeding in the estate of his brother, Andrew Bronsky, has moved for dismissal of the objections of decedent's spouse, Anat Galia Bronsky. He contends the objections fail to state a basis on which relief may be granted (*see CPLR 3211 [a] [7]*). Objectant has cross-moved for an order: (1) dismissing the probate petition, either because "there are other proceedings pending in the Superior Court of Arizona, Maricopa County[,] between the same parties for probate" (*see CPLR 3211 [a] [4]*), or else because the court, in the exercise of its discretion, declines to accept original jurisdiction over the

<sup>1</sup> On May 30, 2018, the court vacated Jeffrey A. Asher, Esq.'s, appointment as guardian ad litem and appointed James Valentino, Esq., as guardian ad litem in his place.

estate of a non-domiciliary, or, in the alternative, (2) granting objectant an extension of time in which to exercise her spousal right of election.

At the call of the May 15, 2018 calendar, the court denied the second prong of objectant's cross-motion. A request for an extension of time in which to exercise a spousal right of election must be made by petition (*see* EPTL 5-1.1-A [d] [2]). The court now determines the balance of objectant's cross-motion and petitioner's motion.

Decedent died on July 18, 2013 in New York, survived by his wife, Anat. The following year, decedent's son was born in Israel.

On September 12, 2013, Jonathan petitioned for original probate of a March 14, 2007 instrument that decedent had executed (in Oregon) before his marriage. (Decedent and Anat were married in Oregon on October 4, 2010.) The probate petition indicates that decedent died a domiciliary of New York and left an estate composed of personal property valued at \$750,000 and real property in New York State valued at \$1.2 million. The persons with a beneficial interest under the instrument are decedent's seven nieces and nephews. Jonathan is the nominated executor and trustee.

On October 11, 2013, objectant petitioned for original probate of that same instrument in Maricopa County, Arizona. The Arizona court — in deference to this court, in which a probate proceeding had been filed first — held, and continues to hold, that proceeding in abeyance.

On December 16, 2013, Anat objected to the instant petition. Alleging that decedent died a domiciliary of Arizona but recognizing that this court, nevertheless, could assume original jurisdiction, Anat objected — not to the validity of the instrument offered for probate — but only to this court's entertaining original jurisdiction over decedent's estate. Her articulated rationale

for objecting to probate: As a person who married decedent after he had executed his will, she would fare better under the law of Arizona, under which she would be entitled to the entire estate (*see* ARS § 14-2301 [A] and ARS § 14-2102 [1]), than under the law of New York.

Objectant's counsel argues in the cross-motion that this court should decline to accept original jurisdiction because: (1) "Although the New York property may be the single most valuable asset, the total of the other assets is reportedly of similar value." (2) Although petitioner, nominated executor and trustee, is a domiciliary of New York, the nominated successor fiduciary is a domiciliary of Florida, as are three of the seven persons with a beneficial interest under the instrument. (3) Anat and decedent's son "are Arizona residents."<sup>2</sup> (4) Anat's petition and Jonathan's cross-petition "are already underway in Arizona, and discovery has already been had there." Also, "The Arizona proceedings "are further along and can move more quickly there." Nevertheless, Anat's counsel acknowledges: "Although the Court in Arizona is prepared to act expeditiously[,] . . . the proceedings there are being held in abeyance pending the proceeding in this Court . . . because this proceeding was filed first." (5) Finally, Anat's counsel argues: "The potential for Anat to get nothing in New York from her husband's estate, a terrible and an unjust result, also weighs heavily against this Court['s] exercising jurisdiction."

Anat's objections go to the effect of the propounded instrument. She contends that the effect of the propounded instrument is governed by the law of decedent's domicile which, she argues, is Arizona (*but see* EPTL 3-5.1 [b] [1] [the disposition of real property determined by law of jurisdiction where land situated]); implicit in her contentions is the notion that only Arizona can apply the law of its state (*but see* EPTL 3-5.1 [b] [2] [disposition of personal property

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<sup>2</sup> The court observes that, while the probate petition lists Anat's domicile as Israel, Anat alleged in her objections, filed on December 16, 2013, that she was domiciled in Arizona.

determined by law of decedent's domicile].

The effect of an instrument offered for probate can be determined only after it has been admitted to probate. Moreover, this court may assume original jurisdiction over a probate proceeding, in the estate of a decedent who died leaving testamentary assets in this state (*see* SCPA 1605), without determining decedent's domicile (*see Matter of Downing*, NYLJ, Oct. 19, 2017, at 26, col 6 [Sur Ct, NY County]).

Assuming *arguendo* that decedent died a non-domiciliary, petitioner has made a showing that, nevertheless, would justify this court's entertaining original jurisdiction (*see Matter of Heller-Baghero*, 26 NY2d 337 [1970]), that is: (1) the "relative substantiality of the assets in New York" (*id.* at 345), (2) the New York residence of the nominated fiduciary and many of the persons with a beneficial interest under the instrument, (3) the good faith commencement of the probate proceeding in New York and the absence of any attempt to thwart the laws of Arizona (*see id.*).

Objectant concedes the first two points but disputes petitioner's good faith; however, as nominated executor, petitioner was entitled to petition for probate. Whether decedent died a domiciliary of New York remains an open question.

To the extent objectant seeks dismissal of the petition on the basis of the later filed probate proceeding in Arizona (CPLR 3211 [a] [4]), the cross-motion is denied. The Arizona court has deferred to this court. It has held its proceedings in abeyance pending this court's determination of the probate petition underlying the instant motions. Accordingly, justice requires this court's determination of the petition (*see* CPLR 3211 [a] [4]). To the extent objectant asks this court, in the exercise of its discretion, to decline to accept original jurisdiction

over the estate of a non-domiciliary, the cross-motion also is denied. Petitioner has made a showing that would justify this court's assumption of original jurisdiction — even if decedent were not a domiciliary of New York. The objections having been determined to be without merit, are dismissed, and it follows that petitioner's motion is thereby granted.

Upon settlement of a proposed decree, the March 14, 2007 instrument shall be admitted to probate without a determination of decedent's domicile.

This decision constitutes the order of the court.

Dated: October 12, 2018

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