

<b>Matter of Neumann</b>
2018 NY Slip Op 33192(U)
December 13, 2018
Surrogate's Court, New York County
Docket Number: 2016-4105
Judge: Rita M. Mella
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SURROGATE'S COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

New York County Surrogate's Court

December 13, 2018

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In the Matter of the Probate Proceeding, Will of

DOLORES ORMANDY NEUMANN,

DECISION and ORDER

Deceased.

File No.: 2016-4105

-----X  
In the Matter of the Petition of Belinda Neumann Donnelly,  
as Preliminary Executor, to Determine the Validity and Effect  
of the Notice of Election Filed by Hubert Neumann in the  
Estate of

DOLORES ORMANDY NEUMANN,

File No.: 2016-4105/A

Deceased,

Pursuant to SCPA 1421.

-----X  
M E L L A, S.:

The following papers were considered in determining this motion to dismiss and these three discovery-related motions:

Papers Considered

Numbered

Notice of Motion, dated October 18, 2018, by Respondent Hubert Neumann, to Dismiss the SCPA 1421 Proceeding, together with Affidavit, dated October 18, 2018, of John R. Morken, Esq., Attaching Exhibits A through H	1, 2
Memorandum of Law in Support of Motion to Dismiss	3
Affidavit, dated November 6, 2018, of Gary B. Freidman, Esq., in Opposition to Motion to Dismiss, Attaching Exhibits 1 through 3, and Proponent's Memorandum of Law in Opposition to Motion to Dismiss	4, 5
Supplemental Affidavit, dated November 8, 2018, of Gary B. Freidman, Esq., Attaching Exhibits 1 and 2	6
Reply Affidavit, dated November 12, 2018, of John R. Morken, Esq., Attaching Exhibits A through G	7
Notice of Motion, dated August 14, 2018, to Strike Hubert Neumann's Demand for SCPA 1404 Discovery, together with Affidavit, dated August 14, 2018, of Gary B. Freidman, Esq., in Support, Attaching Exhibits 1 through 5	1, 2
Proponent's Memorandum of Law in Support of Motion to Strike	3
Amended Notice of Cross-Motion, dated September 25, 2018, by Hubert Neumann for an Order Directing the Examination of Ruby Wake, together with Affidavit, dated September 18, 2018, of John R. Morken, Esq., in Opposition to Motion to Strike and in Support of Cross-Motion, with Separately Bound Volumes of Exhibits A through K, and M through X	1, 2

<u>Papers Considered</u> (cont.)	<u>Numbered</u>
Notice of Cross-Motion, dated October 4, 2018, by Melissa Neumann for an Order Directing the Deposition of Belinda Neumann, together with Affirmation, dated October 4, 2018, of Donald Novick, Esq., Attaching Exhibits A through D	1, 2
Memorandum of Law of Respondent Hubert Neumann in Opposition to Motion to Strike and in Support of Cross-Motion	3
Proponent's Memorandum of Law in Further Support of Motion and in Opposition to Cross-Motions	4
Reply Affidavit, dated October 23, 2018, of Gary B. Freidman, Esq., in Support of Motion to Strike and in Opposition to Cross-Motions, Attaching Exhibits 1 through 4	5
Supplemental Affidavit, dated October 31, 2018, of Gary B. Freidman, Esq., Attaching Exhibit 1	6
Second Supplemental Affidavit, dated November 8, 2018, of Gary B. Freidman, Esq., Attaching Exhibits 1 and 2	7
Reply Affidavit, dated November 6, 2018, of John R. Morken, Esq., in Further Support of Cross-Motion	8
Reply Affidavit, dated November 6, 2018, of Donald Novick, Esq., in Further Support of Cross-Motion	9

At the call of the calendar on November 13, 2018, the court denied the motion to dismiss an SCPA 1421 proceeding commenced by Belinda Neumann Donnelly, the preliminary executor of the estate of decedent Dolores Ormandy Neumann. That proceeding seeks a determination that the notice of election filed by Hubert Neumann is invalid and unenforceable because, having abandoned and failed to support decedent during her life, he is disqualified, pursuant to EPTL 5-1.2, from being considered decedent's surviving spouse. Dismissal was not warranted because movant Hubert failed to demonstrate that the preliminary executor, his daughter, was precluded by estoppel from challenging his status as surviving spouse (*see Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]).<sup>1</sup> Movant invoked this doctrine — often referred to as

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<sup>1</sup> For motions to dismiss premised on documents (CPLR 3211[a][1]), such as the motion here, such documents must utterly refute petitioner's factual allegations, conclusively establishing a defense as a matter of law (*see Goshen*, 98 NY2d at 326).

“judicial estoppel” — which is applied to preclude a party who successfully took a factual position in a court proceeding or before the taxing authorities from assuming an inconsistent position in a subsequent proceeding (*see Anonymous v Anonymous*, 156 AD3d 412 [1st Dept 2017]; *Zemel v Horowitz*, 11 Misc 3d 1058[A], 2006 NY Slip Op 50276[U] [Sup Ct, NY County 2006]). The court concluded that, under the circumstances presented, the preliminary executor’s listing of Hubert as surviving spouse in the probate petition and on decedent’s federal estate tax return was insufficient to demonstrate waiver<sup>2</sup> or to make out an estoppel.

In this instance, there is no inconsistency between a declaration that a decedent was survived by a spouse and one seeking a determination that the spouse should be disqualified. EPTL 5-1.2(a)(5) explicitly provides that, until there has been a judicial determination of abandonment, a “husband or wife is a surviving spouse,” for the purposes of statutory provisions governing a determination of the identity of a decedent’s distributees (EPTL 4-1.1) or of those governing a determination of a spouse’s elective share (EPTL 5-1.1-A).

This court concurs with Surrogate Anderson’s holding in *Matter of Tran* (NYLJ, May 29, 2014, at 25, col 4 [Sur Ct, NY County], *affd Matter of Tran*, 126 AD3d 544 [1st Dept 2015]), that, as a mixed question of law and fact, marital status determinations can be complicated by factors unknown to even the party alleged to be in the marital relationship and that an inconsistent prior position as to marital status in tax returns, therefore, should not provide a basis for estoppel. Additionally, status questions for federal tax purposes may reference state law, and

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<sup>2</sup>To the extent that movant was arguing waiver, the court held there was no knowing waiver by the preliminary executor of her right to seek a determination of the surviving spouse’s disqualification in this case. Decedent died more than two years ago but the proceeding to probate the March 4, 2015 instrument as her will, which, by its terms, seeks to disinherit Hubert, is still in its early stages as objections have yet to be filed.

here, as mentioned above, pursuant to EPTL 5-1.2, a “husband or wife is a surviving spouse” until there has been a judicial determination to the contrary.<sup>3</sup>

When it comes to allegations of marital status in probate petitions, the policy of the Surrogate’s Court is to encourage disclosure of possible distributees – without risking forever binding admissions – in order to provide a means of ensuring service of process on all possible parties, with any challenge to a decedent’s marital status to be deferred to a later time. In any event, for judicial estoppel to apply in the context of court proceedings, the prior factual position of a party must have been used to secure a judgment or decree in her favor (*see Anonymous*, 156 AD3d at 412). Here, there has been no decree in the probate proceeding, and there can thus be no argument that petitioner previously obtained a judgment in her favor by relying on facts that she now seeks to contradict. Finally, regarding the motion to dismiss, the court noted that the preliminary executor has amended both her probate petition and the estate tax return filing (Form 706), making explicit the challenge to Hubert’s status as decedent’s surviving spouse.

Three other motions were also before the court on November 13, 2018, in the separate, but related, pre-objection probate proceeding. In one motion, the proponent-preliminary executor sought an order striking Hubert’s demand for SCPA 1404 discovery on the ground that he lacked standing in view of his disqualification under EPTL 5-1.2 for abandonment of the decedent.

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<sup>3</sup>Movant relies on several cases that have precluded by estoppel or “quasi estoppel” a party from taking a factual position contrary to one expressed in a filed tax return (*Mahoney-Buntzman v Buntzman*, 12 NY3d 415 [2009]; *Naghavi v N.Y. Life Ins. Co.*, 260 AD2d 252 [1st Dept 1999]; *Rubin v Rubin*, 33 Misc 3d 1214[A], 2011 NY Slip Op 51931 [U] [Sur Ct, NY County, Oct. 17, 2011]). However, none of the cases on which movant relies involved representations in tax returns as to marital status. Instead, they involved representations that an asset has a particular character or owner, and consequently, they are distinguishable from the instant situation before the court (*see Tran, supra*, NYLJ, May 29, 2014, at 25, *affd* 126 AD3d 544).

While somewhat similar circumstances might prompt the court, in its discretion, to hold a probate proceeding in abeyance, in this case, there is reason to allow SCPA 1404 discovery to continue to conclusion. At a conference with counsel after the calendar, it became apparent that the completion of SCPA 1404 discovery will sharpen the issues and clarify the positions of the parties. In this regard, the court notes that several SCPA 1404 examinations have already been held and that it is not only Hubert, but also another child of his and decedent's, Melissa Neumann, who has requested and participated in this discovery.<sup>4</sup> Consequently, the motion to strike is denied and the cross-motions, one by Hubert to examine non-party Ruby Wake, and one by Melissa to depose proponent-preliminary executor, are granted.

Regarding Ms. Wake, the court found special circumstances for her examination pursuant to EPTL 3-3.5(b)(3)(D), in that she is alleged to have been involved in the drafting and possible execution of a will for decedent some 13 days prior to the date of the instrument currently offered for probate as decedent's will (*see Matter of Weintraub*, NYLJ, July 19, 2013, at 32 [Sur Ct, Nassau County]; *see generally Matter of Singer*, 13 NY3d 447 [2009]). SCPA 1404 discovery from this non-party will not trigger the clause in the propounded instrument that imposes a forfeiture for contesting its probate (*see* EPTL 3-3.5[b]).

In sum, the motion to dismiss the SCPA 1421 proceeding is denied; the motion to strike the demand for SCPA 1404 discovery in the probate proceeding is denied; and the cross-motions for examination of proponent and non-party Ruby Wake are granted as set forth in this decision.

All remaining SCPA 1404 discovery shall conclude no later than February 28, 2019, and


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<sup>4</sup>Melissa's counsel indicated that, regardless of the ultimate determination of Hubert's status as surviving spouse, Melissa would conduct SCPA 1404 discovery here.

objections to probate, if any, shall be filed and served no later March 15, 2019. In the SCPA 1421 proceeding, all discovery demands shall be made as soon as possible, but in no event later than February 28, 2019, and all discovery shall conclude no later than August 30, 2019. These deadlines are subject to extension on the stipulation of all parties filed before a deadline or further order of the court.

This decision, together with the transcript of the November 13, 2018 proceedings, constitutes the order of the court.

Dated: December 13, 2018

  
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