

Matter of Aretakis

2019 NY Slip Op 30765(U)

January 30, 2019

Surrogate's Court, Nassau County

Docket Number: 2016-389248/A

Judge: Margaret C. Reilly

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**SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

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**In the Matter of the Probate of the Last
Will and Testament of**

DECISION & ORDER

**EMANUEL A. ARETAKIS,
a/k/a EMANUEL ANTHONY ARETAKIS,**

**File No. 2016-389248/A
Dec. No. 35315**

Deceased.

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PRESENT: HON. MARGARET C. REILLY

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

Order to Show Cause dated September 4, 2018.	1
Affirmation in Support and Exhibits	2
Memorandum of Law in Support	3
Affidavit in Opposition	4

This is a motion brought by order to show cause in a pending probate proceeding. The movants are Colleen Cosmo Scherrer and Yvonne Cosmo Maida (potential objectants) who seek an order: directing the examination of John A. Aretakis a/k/a John A. Aretakis, III (petitioner) , Anthony M. Aretakis (petitioner) and Nia C. Cholakis, Esq. pursuant to SCPA 1404 (4). The motion is opposed.

The decedent died on April 10, 2014. He was survived by two brothers, Agamemnon Aretakis, who survived the decedent, and Aristomenis Aretakis, who post deceased the decedent, and thirteen nieces and nephews. The petitioners are nephews of the decedent and the potential objectants are nieces of the decedent. Both the petitioners and the potential objectants are residuary beneficiaries under the will offered for probate.

The decedent's last will and testament dated April 2, 2012 and a codicil dated April 24, 2013 have been offered for probate. Pursuant to Article Three of the proffered will, the decedent's two brothers receive \$300,000.00 each and various cash bequests are made to five additional individuals and one church in the total amount of \$63,500.00. Article Four divides the residuary between nineteen people. The decedent nominated John Aretakis and Anthony Aretakis (petitioners) as co-executors. The petitioners estimate the assets of the estate to be less than \$500,000.00.

The codicil dated April 24, 2013 offered for probate provides in pertinent part the following:

“John Aretakis (son of Aristomenis) has full authority and discretion to take any action, and/or make any and all claims, lawsuits or commence any actions on my behalf, or in my stead, and has an assignment of rights to take any legal or other action in his own name for me or my Estate that he deems or believes is appropriate, and he may pay all the costs, expenses and legal fees of same or perform the work involved and if successful, John Aretakis may keep any proceeds of the same as if his, in consideration of the work and expenses involved.”

Examinations pursuant to SCPA 1404 have been taken of the following: Marcia Hall, witness to the April 2, 2012 will; and Douglas John McDougal, alleged witness to the codicil dated April 24, 2013. Objections have not yet been filed.

The potential objectants argue that the examinations of petitioners and Nia Cholakis, the wife of petitioner, John Aretakis, may provide information with respect to the validity of the codicil that are of substantial importance and relevant to the decision on whether to file objections. Specifically, the potential objectants argue that the codicil is invalid because one

of the witnesses, Dennis McDougal, was not present when the codicil was purportedly executed and his signature was forged. The potential objectants further argue that Nia Cholakis notarized the signature of Dennis McDougal on an affidavit of attesting witness to the codicil. Dennis McDougal, in his affidavit dated December 14, 2016, avers that he did not witness the decedent sign the codicil and he returned the affidavit of attesting witness unsigned to the petitioner, John Aretakis. The potential objectants argue that special circumstances exist due to the fraudulent and egregious actions of petitioners to allow the requested examinations.

SCPA 1404 (4) provides:

“Any party to the proceeding, before or after filing objections to the probate of the will, may examine any or all of the attesting witnesses, the person who prepared the will, and if the will contains a provision designed to prevent a disposition or distribution from taking effect in case the will, or any part thereof, is contested, the nominated executors in the will and the proponents **and, upon application to the court based upon special circumstances, any person whose examination the court determines may provide information with respect to the validity of the will that is of substantial importance or relevance to a decision to file objections to the will**” (SCPA 1404 [4] emphasis added).

EPTL 3-3.5 (b), in turn, provides:

“A condition, designed to prevent a disposition from taking effect in case the will is contested by the beneficiary, is operative despite the presence or absence of probable cause for such contest, subject to . . . [t]he preliminary examination, under SCPA 1404, of a proponent’s witnesses, the person who prepared the will, the nominated executors and the proponents in a probate proceeding **and, upon application to the court based upon special circumstances, any person whose examination the court determines may provide information with respect to the validity of the will that is of substantial importance or relevance to a decision to file objections to the will**” (EPTL 3-3.5 [b] [3] [D] emphasis added).

Both SCPA 1404 (4) and EPTL 3-3.5 (b) (3) (D) were amended in 2011 to include the highlighted language. EPTL 3-3.5 (b) (3) (D) and SCPA 1404 (4) are considered the “safe harbor” provisions which “allows the beneficiary to weigh the merits of his objections against the risk of losing his bequest, helps to avert some contests and facilitate settlements in others, and allows the court, having heard the testimony of the executor, proponent, drafter and attesting witnesses, to discharge its SCPA 1408 obligation more easily” (Margaret Valentine Turano, Practice Commentaries, McKinney’s Cons Laws of NY, Book 17B, EPTL 3-3.5). The Memorandum in Support of Legislation sets forth

“[t]his measure would clarify the scope of disclosure authorized where a will contains a no contest clause” and “[t]his measure therefore expands the safe harbor at the discretion of the Surrogate so long as special circumstances exist which indicate that the examination of a person not expressly included in the statutory safe harbor may produce information respecting the validity of the will that is of substantial importance or relevance to a decision to file objections” (Assembly Mem in Support, 2011 NY Assembly Bill A 6838A).

There is a paucity of decisions where a potential objectant to a will, that does not contain a no contest clause, seeks to expand the examination of witnesses. In *Matter of Mark*¹, the potential objectants sought to examine the proponent of the will (the granddaughter of the decedent and nominated executor). The court found that the potential objectants did not establish “a right to depose proponent prior to filing objections to the propounded instrument, which does not contain an in terrorem clause . . .” (*Matter of Mark*,

¹ 2015 NY Misc LEXIS 5184 (Sur Ct, New York County 2015) and 2017 NY Slip Op 30939 (U) [Sur Ct, New York County 2017].

2015 NY Misc LEXIS 5184 * 1 [Sur Ct, New York County 2015]). In *Matter of Walter*², however, the court found that special circumstances existed to examine a nominated executor even though the will did not contain an in terrorem clause (*see also Matter of Weiss*, 2017 NY Slip Op 31441 (U) [Sur Ct, New York County 2017] where the will did not contain an in terrorem clause and the court allowed the examination of the proponent of the will to get information regarding the person who prepared the will whose identity was unknown).

In the instant proceeding, there is no in terrorem clause. There is no reason to expand the pre-objection examinations to determine if there is validity to file the objections because the potential objectants will not forfeit anything by filing objections. They are free to examine the attesting witnesses and the attorney-drafter.

The motion is therefore **DENIED**.

This constitutes the decision and order of the court.

Dated: January 30, 2019
Mineola, New York

E N T E R:

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

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² 49 Misc 3d 363 [Sur Ct, Erie County 2015].

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