

<b>Matter of Ackerman</b>
2021 NY Slip Op 31969(U)
July 2, 2021
Surrogate's Court, New York County
Docket Number: 1997-1202/A
Judge: Rita M. Mella
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SURROGATE’S COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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Petition of Andrea Spahn Kramer, Executor of the Will  
of Laura A. Spahn, for: (1) a Preliminary Injunction  
Enjoining the Bailee of a Collection of Carved Ivories  
from Delivering Such Property to Edith A. Wiener, Sole  
Surviving Executor of the Will of

JOHANNA ACKERMAN,

Deceased,

DECISION

File No.: 1997-1202/A

Pending a Determination of the Distribution of Such  
Property, and (2) a Declaration that Such Property Be  
Distributed Equally between Edith A. Wiener, Individually,  
and Petitioner as Executor of the Will of Laura Spahn.

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M E L L A, S.:

The court considered the following submissions in determining the motion for summary  
determination:

	<u>Date Filed</u>
1. Petitioner’s notice of motion	January 31, 2020
2. Affirmation of Lindsay S. Feuer, Esq., in support	January 31, 2020
3. Memorandum of law in support	January 31, 2020

In the estate of Johanna Ackerman, Andrea Spahn Kramer as executor of the will of her  
mother, Laura A. Spahn, has petitioned for a declaration that “certain personal property” —  
which has been held by a bailee for more than two decades — is “included in the Estate of  
Johanna Ackerman [and] should be distributed equally between Petitioner, individually and as  
Executor of the Estate of Laura Spahn, and Respondent Edith Wiener in accordance with the  
provisions of the Last Will and Testament [of] Johanna Ackerman dated July 23, 1996.”<sup>1</sup>

Petitioner’s request for interim relief — the imposition of a restraint on the bailee, Salon Marrow

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<sup>1</sup> Why petitioner seeks a declaration that one-half of the property be distributed to herself,  
as both fiduciary of the estate of Ms. Spahn and individually — and not just to herself as  
fiduciary — is unclear.

Dyckman Newman & Broudy LLC, from delivering or releasing the subject property pending determination of the petition — was granted on March 11, 2019. Petitioner now moves for summary determination (*see* CPLR 3212). Ms. Wiener, who objected to the petition, has not opposed the motion.<sup>2</sup>

Decedent died on January 21, 1997 — twenty-four years ago — survived by her two daughters, Ms. Spahn and Ms. Wiener. On March 28, 1997, letters testamentary issued to decedent’s two daughters, who served as co-executors of decedent’s will until Ms. Spahn died, on March 3, 2018, at age 92.

Article 3 of decedent’s will reads: “I authorize and empower my Executors to sell such of my tangible personal property as they shall determine and I direct that the balance thereof shall be disposed of as part of my residuary estate.” Under Article 6 of the will, decedent bequeathed her residuary estate to her daughters, in equal shares. The instant petition was prompted by Ms. Wiener’s request, following the death of her sister, that the bailee turn over the tangibles in its

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<sup>2</sup> A July 24, 2020 order set an August 17, 2020 deadline for the filing of any answer or opposition to this motion by Edith A. Wiener. On September 4, 2020 and again on September 14th, Edith A. Wiener, who is *pro se*, left a voice mail message at Surrogate Mella’s Chambers, requesting a return call from the judge. The court responded with a letter, dated October 5, 2020, addressed to Ms. Wiener with a copy to movant’s counsel, which reads:

“If the purpose of your calls was to request an extension of the deadlines set in the court’s July 24, 2020 order, you may make such request in a letter, in which you explain the reason for the request, along with your proposed answer or opposition to petitioner’s motion; provided, however, that: (1) you indicate that you have sent a copy of both your letter and proposed answer or opposition to petitioner’s counsel, and (2) your letter and proposed answer or opposition are delivered to the judge’s chambers by November 2, 2020.”

Eight months after the November 2, 2020 deadline, no submission has been received from Ms. Wiener.

custody to Ms. Wiener's son, presumably as agent for the nonagenarian surviving executor.

For the 21 years during which decedent's two daughters served as co-executors, they failed to agree on a distribution between them, individually, of certain of decedent's tangibles. As aforementioned, these items of personal property are being held by the bailee. An exhibit to the instant motion is a December 26, 2018 e-mail, from Richard P. Romeo, of Salon Marrow Dyckman Newman & Broudy LLC, to which is attached a one-page purported inventory of estate assets held by this entity. The items, listed by "package" — twelve in all — include "2 Wooden Statues," "Two Glass Bottles with Asian Design," "Small Elephant on Base," "22 various coins," and a number of carved ivory pieces, some of which, for example — the "Ivory Buddha with Children," the sole contents of Package 8 — are noted individually.

The main focus of the pleadings here, however, is the "collection of carved ivory pieces." Petitioner's most specific description of the collection is, as follows: "Among the tangible personal property in Decedent's estate . . . was a collection of carved ivory pieces, the most valued of which was a carved ivory Buddha. Petitioner is advised that this piece alone is worth many tens of thousands of dollars and, together with the rest of the collection, worth in excess of \$100,000."<sup>3</sup> Ms. Wiener's objections discuss at length her dispute with Ms. Spahn about the distribution of the ivory Buddha.

The pleadings raise two liminal issues. The first is whether the ivory Buddha and the rest

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<sup>3</sup> In her objections, Ms. Wiener questions the source of this valuation. Nevertheless, in light of restrictions, both federal (*see* 50 CFR 17.40 [e]) and New York State (*see* ECL § 11-0535-a) on the sale of an article of ivory — restrictions which neither party addresses — query whether the "collection of carved ivory pieces" has any commercial value. The pleadings construct a narrative in which the collection of ivories looms almost as an abstraction, but the Buddha looms large.

of the carved ivories are estate assets.

Ms. Wiener contends in her objections that the ivory Buddha — if not, by default, the entire collection of carved ivories — belongs to her.

Specifically, Ms. Wiener alleges:

“My mother, Johanna Ackerman, at home in a hospital bed, near death, gave me the ivory Budha [sic]. I was too emotional to take it feeling that moment was the end of her life. Trying not to break down I chose to retrieve the Budha [sic] at a less stressful time. My sister, Laura Spahn, . . . refused to allow me the Budha [sic] after my mother’s death. . . . As a consequence, John D’Angelo, the attorney who executed my mother’s Will, was called upon to divide the Salon, Marrow held pieces.

“Mr. D’Angelo, my sister, and I met at my mother’s apartment. Although, unwilling, I agreed to include my Budha [sic] in the division. Mr. D’Angelo gave us a piece of paper on which to write a number. The person whose number he picked would have first choice and then we would alternate our choices until completed. Laura and I agreed. He put the pieces in the bowl, shook it many times and picked my number, which was 4, my lucky number at that time. As per our agreement, Mr. D’Angelo asked Laura to choose next. She said she wanted the Budha [sic] and refused to continue thereby renegeing on her agreement. This was the second time I was deprived of the Budha [sic]. I was advised that as a result, she forfeited any future rights to the aforementioned pieces. Laura stormed out of the apartment and John D’Angelo returned the pieces to Salon, Marrow.”

On the one hand, Ms. Wiener contends that decedent gave the ivory figure of a Buddha to her. On the other hand, Ms. Wiener fails to support her contention with an allegation that delivery of the Buddha, actual or constructive — an essential element of an inter vivos gift — was effectuated during decedent’s lifetime (*see Mirvish v Mott*, 18 NY3d 510, 518 [2012]). Moreover, Ms. Wiener — an estate fiduciary — admits to having treated the Buddha as an estate asset. Also unsupported is Ms. Wiener’s contention that Ms. Spahn forfeited her interest in decedent’s tangible personal property.

The other issue raised by the pleadings is whether distribution of the tangible personal

property held by the bailee is subject to a prior order or enforceable agreement.

In 1999, more than two decades ago, Ms. Spahn as co-executor commenced an SCPA 2103 turnover proceeding against Ms. Wiener, individually. The SCPA 2103 proceeding was resolved informally with the assistance of a court attorney-referee. Attached as an exhibit to the instant motion is a handwritten agreement that reads:

“Jan. 28, 2000

“Application of Laura Spahn File # 1202/97

“It is stipulated between Petitioner and Respondent that the jewelry, silverware and ivory property appraised and inventoried by Doyle Galleries[,<sup>4</sup>] shall be distributed by Salon, Marrow, Dyckman & Newman, LLP equally with Salon Marrow to determine who chooses first by flip of a coin alternating thereafter. This shall occur by April 3, 2000.

“Any discrepancies in the amount of the distribution including the earlier distribution by John D’Angelo shall be determined by Salon Marrow and every attempt shall be made to equalize the distributions including by the return of items previously taken at the choice of the party returning the property.”

The agreement was signed by William Paul Nolan, counsel for petitioner, and by respondent, Ms. Wiener, *pro se*. Beneath their signatures, the court attorney-referee handwrote and signed the following statements:

“The respondent, Edith Wiener, swore under oath before me that she is the respondent, that she chose to proceed without an attorney, that she understands the terms of the stipulation and enters into the stipulation of her own free will.”

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<sup>4</sup> William Doyle Galleries, Inc., prepared an appraised inventory of the contents of decedent’s home, on March 10, 1997, as of January 21, 1997. The total appraised value of the tangibles was \$36,236. The appraised inventory includes neither a “collection” of ivories nor an ivory Buddha. Among the decorative items, however, listed under the heading “Contents of the Georgian style vitrine” in the dining room, were a number of pieces of ivory, including the most valuable piece in the vitrine, a “JAPANESE CARVED IVORY FIGURE. Of Hotei,” valued at \$450, which movant identifies as the Buddha at issue.

And:

“Mr. Nolan, Esq. affirmed before me that he has the authority to enter into the stipulation on behalf of his client, the petitioner.”

The settlement, however, was only as to the methodology to be employed in distributing the tangibles between the two legatees. Agreement as to the actual distribution of decedent’s tangible personal property eluded the co-executors.

Petitioner has provided evidence in admissible form that the items of personal property held by the bailee are estate assets and, therefore, has established, prima facie, her entitlement to judgment as a matter of law. As mentioned previously, Ms. Wiener has failed to oppose the motion.

Accordingly, the motion for summary determination of the petition is granted and the court determines that the tangibles held by the bailee are estate assets and are to be distributed equally between Ms. Kramer as executor of the will of Ms. Spahn and Ms. Wiener, individually, pursuant to decedent’s will.

This decision constitutes the order of the court.

The Clerk of the Court is directed to mail a copy of this decision to counsel for movant and to respondent, pro se.

Dated: July 2, 2021

  
S U R R O G A T E