

Matter of Nubile

2022 NY Slip Op 33004(U)

September 7, 2022

Surrogate's Court, Bronx County

Docket Number: File No. 2016-1610/A/B/C

Judge: Nelida Malave-Gonzalez

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SURROGATE'S COURT, BRONX COUNTY

September 7, 2022

ESTATE OF DONATO NUBILE, Deceased
File No.: 2016-1610/A/B/C

In this contested probate proceeding (File No.: 2016-1610/B) seeking to probate an instrument and codicil dated June 12, 2013 (collectively "the 2013 will") filed by Lawrence J. Silberman, Esq., the nominated executor ("the petitioner"), the petitioner moves to dismiss the notice of appearance filed by Lorraine Coyle, Esq. ("Ms. Coyle"), on behalf of Nancy Konovalov-Nanna ("Ms. Konovalov-Nanna"), the nominated successor executor named in a prior instrument dated September 28, 2010 ("the 2010 will"), which was filed with the court. The court previously granted the petitioner's motion seeking to dismiss a notice of appearance filed by an alleged daughter after her counsel's removal on the matter and upon the alleged daughter's failure to appear on the return date of the motion and at additional conferences held with the court. The court also determined that the alleged daughter failed to establish kinship and was not a distributee of the decedent.

The petitions seeking probate of the 2013 will and preliminary letters testamentary were filed in November 2016. Counsel for the alleged daughter filed a notice of appearance on November 1, 2016. On February

2, 2017, Ms. Coyle filed a notice of appearance on behalf of Ms. Konovalov-Nanna, the nominated successor executor in the 2010 will and thereafter filed said will with the court. The 2010 will nominates Ms. Konovalov-Nanna as successor executor. The residuary beneficiaries are three charities: fifty percent (50%) to Holy Rosary Church, twenty-five percent (25%) to the Church of St. Clare of Assisi, and twenty-five percent (25%) to the American Cancer Society. The preliminary letters issued to the petitioner herein by decree dated October 5, 2016, which were extended several times up and until July 12, 2022. There is a pending application to extend the preliminary letters. The last report of the preliminary executor indicates the estate assets approximate \$806,951, including realty and personal property.

After the 2010 will was filed with the court, the nominated executor in the 2013 will, the successor executor in the September 2010 will and the alleged daughter all appeared by counsel, and the attorney for the alleged daughter requested SCPA 1404 examinations. Thereafter, petitioner herein filed a motion to dismiss the alleged daughter's notice of appearance for failure to establish her standing as a distributee. At that time, the probate proceeding was stayed to afford the alleged daughter an opportunity to prove standing. To date, no SCPA 1404 examinations have been conducted concerning the 2013 will.

After the petitioner's motion was granted striking the notice of appearance of the alleged daughter, the stay of the proceeding was lifted and notice of the proceeding was given to the beneficiaries of the 2010 will. Thereafter, a conference was held in which the Attorney General's Office

appeared along with attorneys for the three named charities in the 2010 will as well as the other parties. Thereupon, petitioner filed the current motion seeking to strike the notice of appearance of Ms. Coyle, counsel for the successor executor in the 2010 will, for lack of standing. On the return date of the motion seeking to strike the notice of appearance filed by Ms. Coyle that was held on the court's virtual platform, in addition to the attorney for the petitioner, the three charities and the Attorney General appeared remotely and stated on the record that they intend to conduct SCPA 1404 examinations concerning the 2013 will.

In support of his motion to dismiss, petitioner avers that Ms. Konovalov-Nanna lacks standing in this matter because she is not a legatee or beneficiary under the propounded 2013 will and her notice of appearance is filed solely in her capacity as the nominated successor executor of the prior 2010 will. He maintains that, for her to participate in these proceedings, the court would have to first grant her standing for "good cause shown" therein (see SCPA 1410), which the court has not granted to date. He argues that there is no showing of fraud, undue influence, or severe lack of capacity, which might afford a displaced fiduciary standing to object to a later instrument (see *Matter of Meicher*, 54 AD2d 830, 388 NYS2d 97 [1st Dept 1975], see also *Matter of Lerner*, 72 Misc 2d 592 [Sur Ct, Queens County 1973]). He further argues that, in any case, an executor of a prior will has no standing to object to a later instrument after the Attorney General and counsel for the charitable beneficiaries in the prior will appeared in the probate proceeding (see *In re Estate of Baldwin*, 189 Misc 2d 458, 733 NYS

2d 831 [Sur Ct, Fulton County 2001]); see also EPTL 8-1.1[f]). Contending that the displaced nominated executor's interest in facilitating the charitable bequests is unnecessary given the notice of appearances by the Attorney General and counsel for the three charitable beneficiaries and that the Attorney General's authority to represent the charities "is statutory and appears to obviate the need for a separate fiduciary" (see *In re Baldwin*, 189 Misc 2d 458, 459 [Sur Ct, Fulton County 2001]). He concludes that, even if Ms. Konovalov-Nanna were to claim she was able to carry out the intent of the testator, "any contribution the [executor] may make to the Court's determination of the testator's intent is probably best made as a witness" (*id.*).

In opposition, Ms. Konovalov-Nanna argues that she has the right to discovery because "[any] party to the proceeding, before or after filing of objections to the probate of the will, may examine any or all of the attesting witnesses" as well as the will drafter (SCPA 1404). As she is a party to the proceeding until the court says otherwise, she has a right to examine the witnesses and the attorney draftsman of the 2013 will. She avers that SCPA 1410 only applies to objections which have not been filed and need not be filed until after the 1404s are conducted, at which time the testimony provided may indicate fraud. She alleges that the petitioner took substantial sums from the decedent prior to his death, when he lacked capacity, which would undermine petitioner's credibility and would "go a long way" towards defeating the 2013 will. She continues that her interest is not solely financial given the fact the 2010 will gives the executor discretionary

powers, including, a provision that provides that all personal property will be “sold or given away by the executor,” affording her discretion to give away tangible personal property to whomever or wherever she chooses. The 2010 will also grants the discretionary power to appoint a successor executor. These factors enhance the need for her to be involved to preserve the testator’s intent which is separate from her own pecuniary interest (see SCPA 1410; see also *Matter of Kramer*, NYLJ, Aug. 9, 2000, at 21, col. 3 2000 NY Lexis 3643 [Sur Ct, Queens County 2000]) .

She notes that the Attorney General did not join in the instant motion filed by petitioner thereby differentiating this matter from *In re Baldwin* (189 Misc 2d 458, 459, 733 NYS2d 831 [Sur Ct, Fulton County 2001]) where the court found that the prior executor may not participate in later hearings. Although the Attorney General’s office has been involved in the matter for two years, the instant motion was only recently filed, the time to request such relief has passed and the petitioner will suffer no loss if the motion is denied. The petitioner’s delay has caused her to incur substantial legal expenses, which establishes a laches defense and precludes the relief requested.

Ms. Konovalov-Nanna concludes that the nominated successor executor has an interest in the later instrument and the right to SCPA 1404 examinations and she should not be precluded from appearing in these proceedings pursuant to SCPA 1410 as it has not been determined whether objections will be filed. She further avers that this motion is premature at best and is made in bad faith since the window to request preclusion closed nearly two years ago.

In reply, the petitioner avers that each of the claims made by Ms. Konovalov-Nanna are baseless and without merit. He argues that Ms. Konovalov-Nanna lacks standing to conduct discovery and file objections because the Attorney General has appeared in the matter to act as fiduciary for the charities. He further notes that counsel for the charities also appeared, which obviates the need for Ms. Konovalov-Nanna to act as a “separate fiduciary” (see *In re Estate of Baldwin*, 189 Misc 2d 458, 733 NYS 2d 831 [Sur Ct, Fulton County 2001]). He urges that Ms. Konovalov-Nanna is not entitled to conduct 1404 examinations, stating she is not a necessary party to the proceeding. While a necessary party is any person designated as an executor in any other will of the same testator filed in the Surrogate’s Court of the County in which the propounded will is filed, petitioner argues there is no proof that the prior 2010 will is filed with the court (see SCPA 1403(1)(d); see also *In re Bennett’s Will*, 109 NYS2d 315 (NY Sur Ct, 1951), [“legatee named in unfiled prior will is unnecessary party to a probate proceeding”]).

He further states that the fact that the instant motion is filed by the proponent of the will and not the Attorney General is of no consequence in determining the standing of Ms. Konovalov-Nanna. Arguing that the claim that the respondent is uniquely situated to carry out the intent of the testator is obviated by the fact that she may be called as a witness (*In re Baldwin*, 189 Misc 2d 458, 459, 733 NYS2d 831 [Sur Ct, Fulton County 2001]). Further, the testator made his intent clear and expressly revoked the 2010 will in the 2013 will.

The petitioner argues that Ms. Konovalov-Nanna's claim that the motion should be denied because of "laches" on the part of the petitioner must be rejected. Petitioner states that there can be no showing that there has been any injury, change in position, loss of evidence or any disadvantage to the respondent to give rise to "prejudice" from the making of the instant motion. Additionally, any delay that occurred herein was a result of the Covid-19 health crisis, and there was no significant or unwarranted delay herein.

SCPA 1404 (4) provides in part that "[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" as well as the will drafter (SCPA 1404). An executor named in an earlier will on file is a party (see SCPA 1403[d]). SCPA 1410 provides in pertinent part, "if the interest a person has in the estate is the statutory fiduciary's commissions . . . she does not have standing to object to a will unless the court allows her to do so for good cause." Good cause depends on the circumstances of each case, and allowing the nominated fiduciary of a prior instrument to participate in 1404s allows the party to discover "matters which may be the basis of objections" and help the court determine whether she has good cause to object (see SCPA 1404 [4]; see also *Matter of Lerner*, 72 Misc 2d 592, 339 NYS2d 492 [Sur Ct, Queens County 1973]).

Although courts have imposed SCPA 1410 analysis to determine whether a party can participate in 1404s and have found that the fiduciary lacked standing to participate in further hearings, those instances

occurred when the propounded instrument offered for probate was consistent with the prior instruments and distributed the estate assets in the same manner, showing that the sole interest of the executor was to recoup statutory commissions (see *In re Estate of Peckolick*, 167 Misc 2d 597, 639 NYS2d 675 (Sur Ct, New York County, 1996]). A named executor has the duty to protect the instrument which nominates him by seeing that no alleged fraudulent will is admitted to probate without objections, thus frustrating the intention of the deceased as expressed in a proper will or codicil (*Matter of Browning*, 162 Misc 244, 246 [Sur Ct, New York County 1937], *affd* 250 App Div 712, *affd* 274 NY 508; see also *Matter of Lerner*, 72 Misc 2d 592, 339 NYS2d 492 [Sur Ct, Queens County 1973]).

Here, the nominated executor under the 2010 will states that testimony from the 1404s may elicit evidence of possible fraud which would give rise to good cause for objections by her (see *Matter of Lerner*, 72 Misc 2d 592, 339 NYS2d 492 [Sur Ct, Queens County 1973]). Even where such facts have not been raised by a nominated executor, courts have found that such executor should be given the opportunity to examine the proponent, the attorney-draftsman and the witnesses to determine whether there is, in fact, any basis for filing objections (see *id.*). At this time, both counsel for the Attorney General and counsel for the charities, who are beneficiaries under the will have each requested 1404s which have not yet taken place and to date, no objections have been filed. Additionally, the nominated successor executor under the 2010 will, Ms. Konovalov-Nanna, has expended her own funds in defending this matter, and was given additional discretionary powers

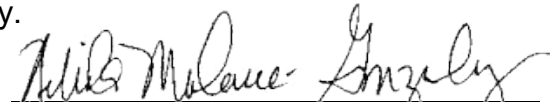
under that instrument, including the right to give personal tangible property to individuals of her choice and to nominate a successor executor, demonstrating that her interest in this matter is not solely pecuniary or for purposes of receiving statutory commissions, but rather to ensure the intention of the decedent is upheld.

The facts herein differ from those of *In re Baldwin* (189 Misc 2d 458, 733 NYS2d 831 [Sur Ct, Fulton County 2010]). In that estate, the Attorney General appeared and filed objections on behalf of the charities, who were beneficiaries of the prior will. After the Attorney General filed the motion to preclude the nominated executor of the prior will from further participation in the proceedings and filing objections, those charities joined in the motion. Here, there have been no objections filed concerning the probate of the 2013 will, nor has the Attorney General or the charities sought to preclude the nominated executor of the 2010 will from participating in the proceedings concerning the 2013 instrument.

On this state of the record, there is no demonstrated reason to preclude the nominated executor of the 2010 will from participating in the 1404 examinations concerning the 2013 instrument, as the testamentary bequests in each instrument differ significantly and the nominated executor under the 2010 will is given discretionary powers that do not engender statutory commissions or other financial gains, and her stated intent to participate in the SCPA 1404 examinations is necessary to determine whether “good cause” exists for her to file objections to the 2013 instruments. It also appears that the motion to strike the notice of appearance of

Ms.Konovalov-Nanna and her counsel, Ms. Coyle, pursuant to SCPA 1410 is, at best, premature. Accordingly, this decision constitutes the order of the court denying the motion without prejudice to renewal after the completion of the SCPA1404 examinations concerning the 2013 instrument.

Proceed accordingly.


HON. NELIDA MALAVE-GONZALEZ
SURROGATE