

Matter of Grillo

2023 NY Slip Op 32626(U)

July 11, 2023

Surrogate's Court, Richmond County

Docket Number: File No. 2021-546/A

Judge: Matthew J. Titone

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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

-----X
In the Matter of the Estate of

DOLORES GRILLO,

File No. 2021-546/A

Deceased.
-----X

In the above referenced proceeding, petitioner Jennie Re (hereinafter "petitioner"), through counsel, filed a petition for letters testamentary on June 28, 2021, seeking to issue to probate the purported Last Will and Testament of decedent dated July 15, 2013. Respondent, Marissa Grillo (hereinafter "respondent"), through counsel, filed a petition for letters of administration on May 11, 2021.

After the filing of the probate petition, a due slip was filed in this matter on July 7, 2021 to notify petitioner's counsel of the remaining items outstanding. On January 6, 2023, respondent's counsel filed a demand for resumption of prosecution. On February 22, 2023 respondent's counsel filed a notice of motion pursuant to CPLR §3216 and SCPA §209 (8), seeking an order dismissing the probate petition on the grounds that petitioner has unreasonably neglected to proceed in the above-entitled proceeding or has otherwise delayed in the prosecution thereof against the respondent, and for such other and further relief as may be just, proper, and equitable.

On May 15, 2023, petitioner's counsel filed additional items requested by the clerk's office in an effort to complete the probate proceeding. Petitioner's counsel filed an affidavit of delay, explaining that the delay in the prosecution of the probate petition was due to counsel's error, believing that the rest of the paperwork necessary for probate had already been filed. On May 17,

2023, respondent's counsel filed an affirmation in opposition to petitioner's affidavit of delay and amended probate petition. On May 30, 2023, petitioner's counsel filed opposition to respondent's motion. Both petitioner's counsel and respondent's counsel appeared before the Surrogate on May 31, 2023, at which time oral arguments on the motion were held.

The primary objective when there is a duly executed will before the court, is to ensure that the testator's intent is honored. Matter of Fischer, 804 N.Y.S.2d 863 [2005]; SCPA 1408[2]; 41 N.Y. Jur. 2d, Decedent's Estates § 1627); In re Est. of Shapiro, 954 N.Y.S.2d 656, 658 (2012). In re Estate of Shapiro, respondent filed objections and moved to dismiss petitioner's probate petition, while having also filed a petition seeking letters of administration. 954 N.Y.S.2d 656, 657 (2012). The court granted respondent's motion to dismiss the probate petition, because the will propounded by petitioner was determined to be a copy rather than the original. Petitioner later filed a second probate petition in which he sought to propound the recently discovered original will. Respondent moved to dismiss, and the court denied. The appellate division affirmed the denial determining that objections as to whether to admit a will to probate are generally "within the sound discretion of Surrogate's court and the court's decision will be upheld absent a showing of abuse of discretion." Matter of Colverd, 860 N.Y.S.2d 254 [2008]. The court in Shapiro, held that in light of all the circumstances and given the overriding objective to honor a testator's intent, they were unpersuaded that Surrogate's Court abused its discretion. *Id.* Here, the court is not presented with a copy, but with what appears to be a original will, which is purported to be the Last Will and Testament of the decedent.

In the probate proceeding, Matter of Apostolidis, fiduciaries petitioned to determine the validity of a claim against decedent's estate. 147 N.Y.S.3d 654 (2021). The appellate division held that the trial court providently exercised its discretion in dismissing fiduciary's petition in the

probate proceeding to determine the validity of a claim against decedent's estate, where fiduciary and his counsel engaged in course of conduct that needlessly prolonged litigation and frustrated disclosure process. Id.

However, the case herein is unlike the Matter of Apostolidis. Here, the court does not have the validity of a claim before it, or facts that a fiduciary and his counsel engaged in a course of conduct that prolonged litigation and frustrated disclosure. We have a delay in filing updated documents requested by the Surrogate's Court clerk's office to complete the probate petition. When alerted to the fact by respondent's counsel, petitioner's counsel filed all the necessary documentation and is solely waiting on a citation to be issued for the probate petition to be complete. Moreover, counsel admitted in his affidavit of delay that the delay was on his error as he believed all the necessary filings for the probate proceeding were submitted to the court. It would be unjust to undermine the decedent's wishes due to an error of counsel, especially when documents have been filed and the delay is no longer.

The mere making of a will creates a presumption against intestacy. In re Manning's Will, 234 N.Y.S. 109 (Surr. Ct. Albany Co. 1929), affd. 227 App.Div. 644, 235 N.Y.S. 835, affd. 252 N.Y. 540, 170 N.E. 135. Provided that a propounded last will and testament is admitted to probate, it is axiomatic that the intent of the testator was to dispose of their estate under the will. In re McGowan's Will, 235 N.Y.S. 484 (Surr. Ct. Kings Co. 1929); In re Potter's Estate, 231 NYS 355 (Surr. Ct. Oneida CO. 1928). A delay in prosecution does not eliminate the existence of the propounded instrument. Until a propounded last will and testament is denied probate, any application for the rules of intestacy to apply to decedent's estate will be deemed premature. Id.

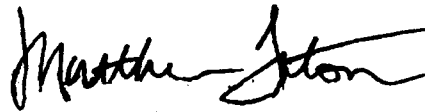
“Moreover, since dismissal of the probate proceeding would terminate the judicial inquiry into decedent's intentions as to how her assets should be distributed, an issue of paramount

importance in Surrogate Court proceedings, the court is disinclined to take such an action.” Matter in Estate of Roberts, 2020 NYLJ LEXIS 1669 (Surr. Ct. New York Co. 2020).

After review of all documents submitted and oral argument, respondent’s motion to dismiss the probate petition for failure to prosecute is denied in its entirety. Respondent’s petition for Administration (See 2021-546) shall be held in abeyance pending the outcome of the probate proceeding.

This decision shall constitute the order of the court.

Dated: July 11, 2023

A handwritten signature in black ink, appearing to read "Matthew Titone", written over a horizontal line.

MATTHEW J. TITONE