

**Supreme Court of the State of New York
Appellate Division: Second Judicial Department**

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_____AD3d_____

Argued - November 13, 2012

PETER B. SKELOS, J.P.
L. PRISCILLA HALL
LEONARD B. AUSTIN
SYLVIA HINDS-RADIX, JJ.

2011-10872

DECISION & ORDER

In the Matter of Richard E. LaMotta, deceased.
Robert Ornstein, et al., petitioners-respondents;
Robert B. Gurian, guardian ad litem for Marika
Nadel-LaMotta, et al., respondents; Katherine Avery
LaMotta, appellant.

(File No. 2225/10)

Vandenberg & Feliu LLP, New York, N.Y. (Bertrand C. Sellier and Kevin Matz of counsel), for appellant.

King & Streisfeld, Lake Success, N.Y. (Jeffrey D. Streisfeld of counsel), and Jeffrey S. Pomerantz, New York, N.Y., for petitioners-respondents (one brief filed).

In a probate proceeding, Katherine Avery LaMotta appeals from a decree of the Surrogate's Court, Westchester County (Scarpino, Jr., S.), dated September 19, 2011, which, inter alia, upon, among other things, the denial of her guardian ad litem's application to conduct examinations and discovery pursuant to SCPA 1404, admitted the decedent's will and codicil to probate.

ORDERED that the decree is reversed, on the law, with costs, the application to conduct examinations and discovery pursuant to SCPA 1404 is granted, and the matter is remitted to the Surrogate's Court, Westchester County, for further proceedings in accordance herewith.

Under SCPA 1404, any party to a probate proceeding, before or after filing objections, "may examine any or all of the attesting witnesses [or] the person who prepared the will . . . as to all relevant matters which may be the basis of objections to the probate of the propounded instrument"

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(SCPA 1404[4]). In addition, the party conducting such examination is entitled to “all rights granted under article 31 of the civil practice law and rules with respect to document discovery” (SCPA 1404[4]). “As a general rule, the right of potential objectants, such as adversely affected distributees or legatees, to examine under SCPA 1404, is unconditional, without any preliminary showing of the need for the examination” (*Matter of Peckolick*, 167 Misc 2d 597, 599; see *Matter of Baker*, 160 Misc 862, 863-864; cf. *Matter of American Comm. for Weizmann Inst. of Science v Dunn*, 10 NY3d 82, 94-95). Here, Katherine Avery LaMotta, the decedent’s granddaughter, was deprived of her unconditional right to examine the attesting witnesses and person(s) who prepared the will, and to related discovery pursuant to SCPA 1404. Accordingly, the decree must be reversed, the application to conduct examinations and discovery pursuant to SCPA 1404 granted, and the matter remitted to the Surrogate’s Court, Westchester County, for examinations and related discovery conducted pursuant to SCPA 1404, and a new determination of the petition.

SKELOS, J.P., HALL, AUSTIN and HINDS-RADIX, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "Aprilanne Agostino". The signature is written in a cursive, flowing style.

Aprilanne Agostino
Clerk of the Court