

Matter of Nagle

2007 NY Slip Op 34277(U)

December 21, 2007

Surrogate's Court, Nassau County

Docket Number: 0338934/2007

Judge: John B. Riordan

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

-----X

In the Matter of the Petition for a Compulsory Accounting
and Related Relief in the Estate of

File No. 338934

Dec. No. 695

JOSEPH F. NAGLE a/k/a JOSEPH NAGLE,

Deceased.

-----X

In this compulsory accounting proceeding, Kenneth Nagle has moved to restore his prior motion to disqualify the attorney representing his brother, Brian Nagle, in this proceeding.

The decedent, Joseph F. Nagle, died on August 21, 2005 leaving a will dated September 18, 1993. The will was admitted to probate on September 26, 2005, and letters testamentary issued to Kenneth A. Nagle on the same date. The will bequeaths the decedent’s residuary estate equally to his three sons, Joseph D. Nagle, Brian S. Nagle and Kenneth A. Nagle.

By decision dated December 14, 2006, the court suspended letters testamentary issued to Kenneth A. Nagle and issued letters testamentary to Brian S. Nagle upon his duly qualifying under the law. In addition, the matter was scheduled for a hearing on February 2, 2007 at 9:30 a.m. on the issue of removal of the executor.

Prior to the date of the hearing, Kenneth A. Nagle made a motion to disqualify Brian Nagle’s attorney, John Dowd. Thereafter, the parties entered into a written stipulation resolving the various issues. The stipulation provided that Brian would withdraw his motion to have Kenneth removed as executor and for an accounting and Kenneth would withdraw his motion to have the law firm of Dowd & Dowd disqualified. The basis for the withdrawal of these motions was: (a) Kenneth and Joseph agreeing to buy Brian’s interest in their father’s property for \$205,000.00, payment to be made by Brian receiving a ten year purchase money balloon

mortgage; (b) Brian would resign as executor and Kenneth would be reinstated as executor; and (c) Brian, in exchange for the mortgage, agreed to release Kenneth as executor and acknowledge that his interest in the estate had been satisfied. The stipulation further provided that, in the event the closing did not occur within ninety (90) days, the premises were to be listed with a broker selected by Brian. Kenneth and Joseph never executed the mortgage and Kenneth did not exercise his option to execute the mortgage individually.

In view of the fact that the terms of the stipulation have not been satisfied, Kenneth now moves to restore his motion to disqualify the law firm of Dowd & Dowd previously filed with the court. Kenneth argues that John Dowd should be disqualified because he formerly represented Kenneth in connection with the probate of the decedent's will. According to Kenneth, he consulted with Mr. Dowd after his father's death. Kenneth avers that he, along with his two brothers, as well as three other people, met with Mr. Dowd on August 27, 2005 at Mr. Dowd's office. Thereafter, Mr. Dowd prepared a probate petition to have Kenneth appointed as executor of the estate. In fact, Mr. Dowd's name appears on the petition as the attorney for the petitioner, Kenneth Nagle. According to Kenneth, "[o]n August 31, 2005, ... [he] had second thoughts and discharged Mr. Dowd, and picked up the original Last Will and Testament...". Kenneth further argues that Mr. Dowd is disqualified because he may be called as a witness since he was the attorney-draftsman of the will. Kenneth states that the provision in the will concerning the distribution of the residuary estate may be the subject of a construction proceeding, and Mr. Dowd, as the attorney-draftsman, may be called to testify as a witness. Article FIFTH of the will provides, in pertinent part, as follows:

"On the distribution of my residuary estate, one or more of my sons shall be entitled to take as a distribution in kind, the house and real estate located at 15 Forest Avenue, Massapequa, New York."

In addition, Kenneth claims that Mr. Dowd may be a witness on the removal issue as well since, as the draftsman, he may have pertinent information on the decedent's selection of Kenneth as a fiduciary. Kenneth argues that the conflict is clear, and, therefore, not only Mr. Dowd but also his firm, which consists of only one other attorney, must be disqualified.

Mr. Dowd argues that neither he nor his law firm should be disqualified from representing Brian in this proceeding. According to Mr. Dowd, the meeting on August 27, 2005 was attended by Kenneth, Brian, Joseph, Kenneth's girlfriend, Brian's wife, and a friend of Joseph's. At that meeting, Mr. Dowd discussed the procedure regarding the probate of the decedent's will and answered their questions. Mr. Dowd states that they also discussed the building department violations on the decedent's home and estate tax issues. Thereafter, Kenneth called Mr. Dowd to schedule an appointment. On August 31, 2005, Kenneth met with Mr. Dowd at his law office and advised Mr. Dowd that he had decided to handle the estate himself. Kenneth asked for the original will, and Mr. Dowd gave it to him. Mr. Dowd also gave him the executed probate petition, waivers of process and consents to probate and Joseph's renunciation as co-executor, which Mr. Dowd prepared. Mr. Dowd points out that Kenneth, in fact, did not file any of these documents prepared by Mr. Dowd with the court, but instead prepared a new probate petition and related papers, which showed he was acting "pro se". Mr. Dowd argues that Kenneth's motion should be denied because a civil litigant has the right to be represented by legal counsel of his choosing. In addition, Mr. Dowd points out that there is no construction proceeding pending at this time. According to Mr. Dowd, there is no substantial relationship between the probate proceeding and the removal/compulsory accounting proceeding. Mr. Dowd asserts that probate proceeding here was simply a pro forma proceeding since all of the decedent's distributees were in agreement as to the probate of the will. As to whether he

received confidential information, Mr. Dowd points out that there were five other people, including Brian, at the meeting on August 27, 2005, and therefore, any claim of confidentiality was waived.

Kenneth posits two grounds for disqualification of Brian's counsel: (1) conflict of interest (see Code of Professional Responsibility DR5-102(B) (22 NYCRR 1200.21[B]) and (2) the advocate-witness rule (see 22 NYCRR 1200.21[b]). A party seeking disqualification bears the burden of demonstrating that disqualification is warranted (see *Jamaica Pub Serv Co. v AIU Ins Co.*, 92 NY2d 631, 636 [1998]). Moreover "[d]isqualification of a law firm during litigation implicates not only the ethics of the profession but also the substantive rights of the litigants. Disqualification denies a party's right to representation by the attorney of its choice. The right to counsel of choice is not absolute and may be overridden where necessary ...but it is a valued right and any restrictions must be carefully scrutinized" (*S&S Hotel Ventures Ltd Partnership v S.H. Corp.*, 69 NY 2d 437, 443 [1987]). "A determination of the issue requires a balancing of one party's interest in retaining counsel of his [or her] own personal choice against [the other party's] right to be free from the apprehension of prejudice" (*Murphy v Colbert*, 203 AD2d 619, 620 [3d Dept 1994], see also *Matter of Lambrou*, 208 AD2d 1093 [3d Dept 1994]).

Absent consent, however, an attorney shall not represent an adversary of a former client in "the same or substantially related matter in which that persons's interests are materially adverse to the interests of the former client" (*Matter of Steinberg*, NYLJ, Oct. 4, 1995, 26, col 1 [Sur Ct, New York County]). In *Jamaica Pub Serv Co. v AIU Ins. Co.*, (92 NY2d 631, 636 [1998]), the Court of Appeals explained:

"The Code of Professional Responsibility does not in all circumstances bar attorneys from representing parties in litigation against former clients. Rather, DR 5-108 sets out two prohibitions on attorney conduct relating to former clients.

First, an attorney may not represent “another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client” (Code of Professional Responsibility DR 5-18 [A] [1] [22 NYCRR 1200.27(a)(1)]). Second, an attorney may not use “any confidences or secrets of the former client except as permitted by DR 4-101(c) or when the confidence or secret has become generally known” (Code of Professional Responsibility DR 5-108[A][1] [22 NYCRR 1200.27 (a)(2)])”

In addition, to prevail on the motion to disqualify counsel on the issue of confidentiality, the party seeking disqualification “must at a minimum provide the motion court with information sufficient to determine whether there exists a reasonable probability that DR 5-108(A)(2) would be violated” (*Jamaica Pub. Serv. Co. v AIU Ins. Co.*, (92 NY2d 631, 638 [1998]).

Concerning the advocate-witness rule, an attorney will be disqualified from representing a client when the attorney’s testimony is “necessary” and he or she “ought to be called as a witness” (*Old Saratoga Square Partnership v Compton*, 19 AD3d 823, 824 [3d Dept 2005]). Where a party’s attorney was an active participant in and has personal knowledge of the underlying circumstances, and ought to be called as a witness on behalf of his or her client, it is improper for such attorney to continue the representation, and any doubt concerning the necessity for the attorney’s testimony should be resolved in favor of disqualification (see, *Zagari v Zagari*, 295 AD2d 891 [4th Dept 2002]). However, the Court of Appeals has admonished that “that the Code of Professional Responsibility not be mechanically applied when disqualification is raised in litigation” (*S&S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d 437, 444 [1987]).

In the instant case, Mr. Dowd formerly represented Kenneth Nagle for the purpose of having the will admitted to probate and being appointed as executor, even if only for a brief period of time. Now, Mr. Dowd is representing Brian Nagle in seeking to have Kenneth removed. Clearly, Brian’s interests are materially adverse to the interests of Kenneth and there is

a substantial relationship between the subject of Mr. Dowd's firm's previous representation of Kenneth and the subject proceeding. In addition, given that Mr. Dowd was the draftsman of the decedent's will, he may be called as a witness in the removal proceeding, regardless of whether a construction proceeding is commenced.

Mr. Dowd concedes that if he is disqualified, in light of the small size of his firm, the firm would likewise be disqualified. Accordingly, the motion to disqualify Mr. Dowd and his law firm as attorneys for Brian Nagle is granted.

Pursuant to CPLR §321(c), no further action shall be taken in this proceeding until thirty (30) days after notice to appoint another attorney has been served.

A conference shall be held on February 6, 2008, at 9:30 a.m. to set the matter down for a hearing on the issue of Kenneth Nagle's removal.

This constitutes the decision and order of the court.

Dated: December 21, 2007

JOHN B. RIORDAN
Judge of the
Surrogate's Court

