

**Matter of Hoolan**

2008 NY Slip Op 32702(U)

September 26, 2008

Surrogate's Court, Nassau County

Docket Number: 310028

Judge: John B. Riordan

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

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 Application by Rosanne Cipolla-Keefer, Jeanne Renee Waters,  
 Dawn Cohen and Thomas Cipolla, Jr., for an Order Vacating the  
 Probate Decree in the Estate of

File No. 310028

Dec. No. 446

JEANNE HOOLAN  
 a/k/a JEANNE CAROLINE HOOLAN  
 a/k/a JEANNE CIPOLLA HOOLAN,

Deceased.

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This is a proceeding to vacate a decree of probate and to allow the petitioners to withdraw the waivers of process, consents to probate they executed on May 17, 1999. The petitioners are the decedent's four adult children, Rosanne Cipolla-Keefer, Jeanne Renee Waters, Dawn Cohen and Thomas Cipolla, Jr. Joseph Hoolan, the executor of the estate, opposes the requested relief. Joseph is the decedent's surviving spouse; he and the decedent were married in November 1991. Joseph is not the father of the petitioners.

On February 20, 2008, the court issued a decision and order wherein the court granted the petitioners' counsel's unopposed motion to withdraw as the petitioners' counsel and stayed the proceedings for 30 days after a copy of the order was served by overnight delivery on the petitioners (CPLR 321 [c]; *Green v Gasparini*, 24 AD3d 505 [2d Dept 2005]). A copy of the order was served as directed, and the period of the stay has expired. The petition to vacate the decree granting probate and for other relief has now been submitted for decision.

The decedent died on December 5, 1998 at the age of 57. Her last will and testament dated March 11, 1995 was admitted to probate by decree dated July 29, 1999, and letters testamentary were issued to Joseph. The affidavit of subscribing witnesses annexed to the will states that the will was executed under the supervision of an attorney. The decedent left her

entire estate to Joseph. In the event that Joseph had predeceased the decedent, the decedent bequeathed the estate to the petitioners, per stirpes.

The petitioners have now filed a petition to vacate the decree of probate dated July 29, 1999, permitting the withdrawal of the consents, and allowing petitioners to file objections to probate. In support of the petition, they allege that (1) Joseph told them they had to sign the waivers and consents in order to refinance the decedent's real property or it would be lost; (2) Rosanne, Jeanne Renee and Dawn were not provided with a copy of the will prior to signing the waivers and consents, and they believed that the decedent had died without a will; (3) Rosanne, Jeanne Renee and Dawn were not represented by an attorney when they executed the waivers and consents; (4) Rosanne, Jeanne Renee and Dawn did not sign the waivers in the presence of the notary, an attorney, whose stamp is affixed to the document; (5) Thomas did not sign his name on the waiver and consent that is filed with the court, and evidence "suggests" that his signature was forged; (6) Thomas had no notice that the proceeding to probate the will had been commenced; (7) the petitioners did not contest the probate of the will because they were misled by Joseph; (8) Thomas was not given a copy of the will to review until about February 2007, at which time he became certain that he had been misled by Joseph to believe the will was genuine when it is actually a forgery; (9) they all have become aware that the will is not genuine and the decedent's signature thereon is forgery; (10) Joseph misrepresented the value of the decedent's estate in order to induce Thomas to sign an agreement dated March 6, 2000, which is discussed below; (11) the witnesses to the will committed fraud when they concealed to the court that the will is not genuine; (12) the notary aided Joseph in deceiving the petitioners and the court; (13) as a result of the misrepresentations and concealment of Joseph and the witnesses to the will, the

petitioners acted to their detriment by reasonably relying on the false information they were given; (14) since Joseph, the witnesses to the will and the notary all knew that the will was not genuine and that the decedent's signature on it is a forgery, they intended to deceive the petitioners and the court; and (15) they would not have signed away their right to their inheritance had they known about the existence of a will.

The petitioners further allege that in or about 2003 Jeanne Renee came to this court, saw the will and assumed it to be that of the decedent. Although they had been estranged for a number of years, in 2007, when the petitioners began to communicate with one another, they came to the realization that Joseph "may have" committed a fraud against them. They assert that they then compared the decedent's signature on the will with other documents she had signed and concluded that the signatures on the other documents were significantly dissimilar to the one on the will.

The petitioners refer to a two-page document entitled, "Agreement in Settlement," dated March 6, 2000. It contains the acknowledged signatures of Joseph and Thomas. The agreement recites the fact that the agreement is between Thomas and Joseph, in his capacity as executor, that the decedent had died leaving a will dated March 11, 1995 in which she named Joseph as executor, that a probate petition had been filed and the petitioners had executed waivers and consents, that letters testamentary had issued to Joseph, that Thomas had indicated that he wished to rescind his waiver and consent and file objections to the probate of the will and that the parties to the agreement wished to resolve any disputes about the validity of the will. The agreement provides that Thomas reaffirmed the waiver he signed on May 17, 1999 and waived any and all

objections to the probate of the will and that Joseph would pay Thomas \$12,000.00<sup>1</sup> in lieu of any distributive share to which Thomas might have been entitled. The agreement also contains a provision whereby Thomas released and discharged Joseph, individually and as executor of the decedent's estate, and also released the estate, as well as any heirs, executors, administrators, successors and assigns from all causes of action, suits and the like.

Joseph asserts that the petition should be dismissed because the claims contained therein are barred by a six-year statute of limitations. However, there is no statute of limitations barring a party from moving to vacate a decree (*see Matter of Gori*, 129 Misc 541 [Sur Ct, Bronx County 1927]). The Surrogate's Court has the discretion to open decrees at any time in the interest of justice. However, a decree admitting a will to probate will not be disturbed lightly because such a vacatur disrupts the orderly process of administration and creates uncertainty (*see Matter of Arnold*, NYLJ, Oct. 29, 1993, at 22, col 5 [Sur Ct, New York County]). While SCPA 509 and CPLR 5015 authorize the court to vacate one of its decrees, such vacatur must be based on excusable default, fraud or newly discovered evidence. Further, for the court to vacate a decree, "it must appear that there is a substantial basis for the contest and a reasonable probability of success on the part of the petitioner" (*Matter of Greene*, 240 AD2d 745, 745 [2d Dept 1997]).

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<sup>1</sup>Joseph asserts that, after the decedent's death, he allowed Rosanne, Jeanne Renee and Dawn to take any of the decedent's possessions that they wanted and that he voluntarily paid to each of them one-quarter of the total the sum of \$556,761.31 (\$139,190.33 each) from the wrongful death proceeding that he commenced individually and as executor of the decedent's estate against Long Beach Medical Center and certain physicians. Annexed to Joseph's affidavit in opposition are copies of the statement that was filed by Joseph's attorneys with the Office of Court Administration showing the net amount payable to Joseph of \$556,761.31, copies of the checks to Rosanne, Jeanne Renee and Dawn and copies of their affidavits consenting to the settlement and to the discontinuance of the portion of the action seeking damages for the decedent's pain and suffering.

As this court stated in *Matter of Gordon*, NYLJ, December 18, 2002, col 3 [Sur Ct, Nassau County], applications to vacate a probate waiver and consent are governed by *Matter of Frutiger* (29 NY2d 143 [1971]). In *Frutiger*, the Court of Appeals likened a waiver and consent to a stipulation, subject to vacatur upon a showing of good cause, such as fraud, collusion, mistake, accident, or some such similar ground (*id.* at 150). The Court of Appeals distinguished applications made post-decree from those made pre-decree (*id.* at 149), presumably because there is a lesser likelihood of prejudice if the will has not yet been admitted to probate. The court also noted that a “stricter test” is applied to applications made post-decree (*id.* at 149).

Although the petitioners allege fraud and forgery, their allegations are conclusory at best and are largely belied by the record. For example, they allege that they were not provided with a copy of the will and did not know of its existence when they signed the waivers and consents, yet the waivers and consents that they signed explicitly state that they consented to the court “admit[ting] to probate the decedent’s Last Will and Testament dated March 11, 1995, a copy of which testamentary instrument has been received by me . . .” The petitioners allege that Thomas’ signature on the waiver and consent and the decedent’s signature on the will are forgeries, yet they have not come forward with a shred of evidence to substantiate these conclusory allegations. As with the rest of their allegations, they have wholly failed to support the allegations that Joseph, the witnesses to the will and the attorney who notarized the waivers and consents all knew the will was a forgery and deceived the petitioners and the court. Further, many of Thomas’ factual allegations are belied by the language in the Agreement in Settlement that he executed in 2000. In sum, the court finds that the petitioners have failed to establish a basis for the court to vacate the decree granting probate.

Accordingly, the petition is dismissed in its entirety.

Joseph's request for costs under NYCRR § 130-1.1 (a) is denied.

Settle decree.

Dated: September 26, 2008

JOHN B. RIORDAN  
Judge of the  
Surrogate's Court