

Matter of Canigiani
2012 NY Slip Op 31897(U)
June 13, 2012
Sur Ct, Nassau County
Docket Number: 2010-363200/A
Judge: III., Edward W. McCarty
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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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In the Matter of the Probate of the Last Will and Testament of

JOSEPH N. CANIGIANI,

Deceased.

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File No. 2010-363200/A

Dec. No. 27865

In this probate proceeding, two of the three preliminary executors move for an order disqualifying their former attorneys from representing the objectants; the motion is opposed.

The decedent, Joseph N. Canigiani, died on November 9, 2010, survived by a spouse and two adult children, Joseph Canigiani and Mary Canigiani. The decedent executed a will dated June 7, 1990, a first codicil dated August 12, 2003, and a second codicil dated October 13, 2010. In the first codicil, the decedent appointed his son Joseph, his attorney Robert Aiken, and his accountant John McIntyre, as co-executors and co-trustees. Objections have been filed by decedent's children only as to the second codicil, the only dispositive provision of which leaves the decedent's residence in Sands Point, New York to the decedent's spouse; the will had merely provided her with the right to occupy the decedent's residence for up to eighteen months after the decedent's death.

Aiken and McIntyre filed a petition for the probate of all three instruments and for the issuance of letters testamentary and preliminary letters testamentary to the two of them, to the exclusion of Joseph Canigiani. As indicated above, Joseph Canigiani and his sister Mary objected to the probate of the second codicil, and also to the prayer for the issuance of preliminary letters solely to Aiken and McIntyre. The dispute regarding the preliminary letters was resolved and preliminary letters testamentary issued to all three nominated executors on

February 2, 2011.

The law firm of Lasky & Steinberg, P.C. represents Joseph Canigiani and Mary Canigiani as objectants to probate of the second codicil. The objections contain the usual allegations of: (1) failure of due execution; (2) lack of testamentary capacity; and (3) fraud and undue influence. The proponents Aiken and McIntyre are represented by the Law Office of Frederick M. Sembler, PLLC.

During the pendency of the probate proceeding, Joseph Canigiani, in his capacity as one of the preliminary executors of the estate, commenced a discovery proceeding against the decedent's spouse, alleging that she had wrongfully obtained certain assets of the decedent. Joseph Canigiani was represented in the discovery proceeding by Lasky & Steinberg, who had previously forwarded to Aiken and McIntyre a retainer agreement, dated September 21, 2011, which they both signed, agreeing to the retention of Lasky & Steinberg as attorneys for the estate in the discovery proceeding. Lasky & Steinberg also prepared a separate letter, also dated September 21, 2011, addressed to all three preliminary executors, acknowledging that Lasky & Steinberg was not only representing all three of them in the discovery proceeding, but also representing Joseph Canigiani and his sister Mary as objectants to the second codicil. The letter contained a paragraph which provides, "Lasky & Steinberg, P.C. is of the belief that there is no conflict of interest in representing the three Executors in any §2103 proceeding and if such a conflict exist[sic], we ask that each of you, and Mary waive any such conflict by executing and returning a copy of this letter." The letter was executed by all the parties, including Aiken and McIntyre.

Joseph Canigiani's position in both the probate and discovery proceedings is that the

decedent lacked capacity. If Aiken and McIntyre had adopted this position in the discovery proceeding, it would conflict with their prima facie burden in the probate proceeding to establish the testamentary capacity of the decedent (*Matter of DiCorcia*, 35 AD3d 463 [2d Dept 2006]). In addition, the decedent's mental and physical condition have a bearing on the allegations of fraud and undue influence (*Matter of Ryan*, 34 AD3d 212 [1st Dept 2006]) which are common to both proceedings.

Despite the attempt by Lasky & Steinberg to relegate Aiken and McIntyre to the status of nominal petitioners in the discovery proceeding, they were, nevertheless, clients of the firm. The conflict which arose at Joseph Canigiani's deposition on October 24, 2011 in the probate proceeding illustrated the inability of Lasky & Steinberg to represent the proponents and Joseph Canigiani simultaneously. Specifically, at the deposition, counsel for Aiken and McIntyre questioned Joseph Canigiani concerning bank accounts owned by the decedent. Steinberg, who was representing Joseph Canigiani at the examination, objected to the questions, ostensibly on behalf of Aiken, stating that "[s]ome of the questioning that has occurred . . . has been way beyond the second codicil and I believe beyond the scope of your representation, and in fact might be contrary to your clients' directions" (transcript p. 195) and "[m]y office is representing Mr. Aiken and Mr. McIntyre in regards to any contemplated turnover proceedings involving these other activities, so if you can limit your questions to actions involved in the second codicil" (transcript p. 196).

Joseph Canigiani had previously testified that: (1) Aiken refused to help him obtain information concerning the transfer of the bank accounts during the decedent's lifetime (transcript pp. 165, 166, 167); (2) the decedent lacked testamentary capacity; and (3) this fact

was known to Aiken and the surviving spouse (transcript p. 200). At the deposition, counsel for the proponents argued that the bank accounts were the proper subject of inquiry as it was alleged in objectants' bill of particulars that the transfers were part of a plan to defraud the decedent. The examination was suspended to permit proponents' counsel to make this motion to disqualify. The surviving spouse supports the motion.

An attorney may not accept employment if it is likely that he will be representing differing interests (Rules of Professional Conduct 22 NYCRR 1200 [Rule 1200 1.7 (a) (1)]). Disqualification can be mandated not only where there is simultaneous representation of conflicting interests in the same proceeding (*Greene v Greene*, 47 NY2d 447 [1979]), but where there is simultaneous representation in separate proceedings.

In a letter dated October 26, 2011 to McIntyre, Lasky & Steinberg concede that "there could potentially be a conflict of interest" in the representation of Aiken and that the conflict would be rendered moot by their (Lasky & Steinberg's) withdrawal as Aiken's attorneys and continuing the proceeding with McIntyre and Joseph Canigiani as petitioners. Thereafter, by letter dated November 1, 2011, Aiken and McIntyre discharged the firm. Lasky & Steinberg contend there is no longer any conflict as they represent neither of the proponents. Proponents argue that the original representation was improper and the attorneys remain in a position adverse to their former clients.

In response, Lasky & Steinberg contend that any conflicts caused by the initial representation of adverse interests or the current representation of Joseph Canigiani were obviated by the consent of all parties to dual representation. A consent to the simultaneous representation of adverse interests requires full disclosure of the implications of the

representation (*Matter of Metro. Transp. Auth.*, 222 AD2d 340 [1st Dept 1995]) and a reasonable belief on the part of the attorney that he is not in a position of divided loyalty (*Paladino v Safe Skate, Inc.*, 28 Misc 3d 1227 [A] [Sup Ct, Nassau County 2010]). Neither of these requirements are met.

The objectants argue, in the alternative, that there is no prejudice to proponents as former clients (22 NYCRR 1200 [Rule 1.9]) as there were no confidential communications between the proponents and Lasky & Steinberg concerning the bank accounts.

A party seeking disqualification of an adversary's lawyer must prove: (1) the existence of a prior attorney-client relationship between the moving party and opposing counsel; (2) that the matters involved in both representations are substantially related; and (3) that the interests of the present client and former client are materially adverse (*Scafuri v DeMaso*, 71 AD3d 755 [2d Dept 2010]). Proponents have clearly satisfied this test.

Moreover, the rule relating to former clients does not apply under these circumstances. Where there is an initial simultaneous representation of adverse interests and a successive representation, the rule pertaining to simultaneous representation takes precedence (*Caravousanos v Kings County Hosp. AWL*, 27 Misc 3d 237 [Sup Ct, Kings County 2010]). The attorneys must meet the higher standard of no actual or apparent conflict (*Siroty v Nelson*, 200 AD2d 617 [2d Dept 1994]; *Aerojet Properties, Inc. v State*, 138 AD2d 39 [2d Dept 1988]) at the time of the initial representation.

It is not clear whether Steinberg's objections on behalf of Aiken at the deposition were intended to protect Aiken (individually or in his fiduciary capacity), or if the intent was to protect the interests of Joseph Canigiani (in the probate or discovery proceeding). In any case, the

conflict caused by the dual representation was made clear at the deposition.

The court finds that Lasky & Steinberg failed to establish that there was no conflict in their simultaneous representation of the proponents and Joseph Canigiani.

Accordingly, the motion to disqualify is granted.

Settle order.

Dated: June 13, 2012

EDWARD W. McCARTY III
Judge of the
Surrogate's Court