

Matter of Hughes

2013 NY Slip Op 34270(U)

March 20, 2013

Surrogate's Court, New York County

Docket Number: File No. 2008-2257

Judge: Rita Mella

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

New York Court of Surrogate's Court
FILED
MARCH 20, 2013

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Probate Proceeding, Estate of :
 :
 PHILIP HUGHES, : DECISION
 : File No.: 2008-2257
 :
 Deceased. :
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M E L L A, S.

A motion and a cross-motion have been filed in the probate proceeding in the estate of Philip Hughes. Petitioners in that proceeding, Teresa Moran and James Moran (“movants”), have moved for: (1) a protective order against informal demands made by distributees Howard R. Duffy, III, and James Philip Duffy for production of documents relating to a January 1, 2007 accident in which decedent was involved or, in the alternative, an order directing Howard R. Duffy, III, and James Philip Duffy to pay the costs of producing documents or post a \$15,000 bond; (2) a protective order against informal demands made by distributees Howard R. Duffy, III, and James Philip Duffy for depositions of movants plus the attesting witnesses to the propounded instrument or, in the alternative, an order requiring Howard R. Duffy, III, and James Philip Duffy to pay the cost of deposing movants; and (3) the issuance of a probate decree. Howard R. Duffy, III, and James Philip Duffy (“cross-movants”) have cross-moved for: (1) an order (A) compelling production of documents, purportedly to clarify a patent ambiguity in the will; (B) denying movants’ request that cross-movants post a \$15,000 bond; (C) compelling depositions of witnesses to “The Philip Hughes 2003 Revocable Trust” (assuming such a trust instrument exists and was witnessed) and “the Philip Hughes 2004 Revocable Trust,” (although such instrument was not witnessed), without expense to cross-movants; and (2) a determination that the issuance of a probate decree at this juncture would be premature.

Decedent died on May 28, 2008, at age 84, leaving a \$9 million estate, survived by 36 issue of predeceased siblings. The propounded instrument, dated February 5, 2004, contains a patent ambiguity. It directs disposition of the residuary to the trustees of the “Philip Hughes 2003 Revocable Trust, as created by a certain Trust Agreement, dated the date hereof, heretofore executed by me, between myself, as ‘Grantor’, and myself and JAMES MORAN, as ‘Trustees’ ” (emphasis added). Petitioners have submitted a copy of a trust instrument, entitled: “The Philip Hughes 2004 Revocable Trust” (emphasis added), executed on February 5, 2004, the same date as the propounded instrument.

The petition states that the whereabouts of cross-movants and their sister, Catherine Duffy, are unknown. The guardian *ad litem* appointed to represent their interests located all three of them: cross-movants, in New Jersey, and their sister, in Florida. A supplemental citation was directed to all three.

At the April 21, 2009 return day, cross-movants appeared and requested discovery pursuant to SCPA 1404(4). In correspondence with petitioners’ counsel during the summer of 2009, cross-movants requested the depositions of petitioners/movants, in addition to depositions of the three attesting witnesses to the propounded instrument, and production of documents relating to a January 1, 2007 car accident, in which decedent was injured, and to the medical treatment decedent received thereafter. For three years, nothing happened. Then, on December 4, 2012, petitioners/movants settled a proposed decree, which prompted the instant motion and cross-motion.

Rulings on Motion

To the extent that movants seek a protective order against cross-movants’ demand for

document production, the motion is granted. The documents demanded relate to an accident that occurred more than two years after the propounded instrument was executed and, as such, are beyond the scope of SCPA 1404(4) discovery (*see also* 22 NYCRR 207.27).

To the extent that movants seek a protective order against cross-movants' demand to depose petitioners/movants, the motion also is granted. The propounded instrument does not contain an *in terrorem* clause; accordingly, depositions of the proponents and nominated fiduciaries are beyond the scope of SCPA 1404(4).

To the extent that movants seek a protective order against cross-movants' demand to depose the three attesting witnesses, the motion is denied. SCPA 1404(4) permits the examination of "any or all of the attesting witnesses." Movants state that there were only two attesting witnesses to the propounded instrument and that Susan B. Slater-Jansen, the attorney who supervised the execution of the propounded instrument, was not an attesting witness. Movants are incorrect. There were three attesting witnesses, and Susan B. Slater-Jansen was one of them.

To the extent that movants seek a decree admitting the propounded instrument to probate, the motion is denied as premature. Not only is the requested discovery incomplete (due, in large measure, to petitioners' admitted failure to prosecute their petition for three years), but also, petitioners' submissions are incomplete. Petitioners have yet to file a second amended petition listing the respective addresses of cross-movants and their sister, Catherine Duffy. In addition, in view of the requirements of SCPA 1409, if not SCPA 1411, petitioners must file an affidavit stating whether decedent executed a trust instrument in 2003 or otherwise executed a trust instrument entitled: the "Philip Hughes 2003 Revocable Trust."

Rulings on Cross-Motion

To the extent that cross-movants seek a resolution of the patent ambiguity in the propounded instrument, the cross-motion is denied. The underlying proceeding is one for probate, not construction.

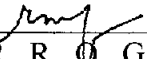
To the extent that cross-movants seek to depose persons who purportedly acted as attesting witnesses to the "Philip Hughes 2004 Revocable Trust" and to the "Philip Hughes 2003 Revocable Trust," the cross-motion also is denied. The 2004 trust instrument was not witnessed. It is unclear whether decedent executed a 2003 trust instrument. In any event, the requested depositions would be beyond the scope of SCPA 1404(4). Cross-movants' request that petitioners/movants pay for the cost of producing such witnesses, therefore, is moot.

To the extent that cross-movants seek a determination that the admission of the propounded instrument to probate at this juncture would be premature, the cross-motion is granted.

Additional Ruling

SCPA 1404(4) examinations shall be completed within 45 days.

This decision constitutes the order of the court. The clerk of the court is directed to mail a copy of this decision to counsel for movants and to each of the two cross-movants.


S U R R O G A T E

Dated: March 20, 2013