Matter of Mallin
2014 NY Slip Op 33066(U)
June 30, 2014
Sur Ct, Nassau County
Docket Number: 29661
Judge: Edward W. McCarty III

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

File No. 2010-360597

HANNAH P. MALLIN,
a/k/a HANNAH MALLIN,

Dec. No. 29661

Deceased.

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In this contested probate proceeding, objectants move for an order compelling disclosure.

Before the court is a petition for the probate of an instrument dated April 29, 2005. The primary beneficiary of the estate, Richard Harduwar (a/k/a Richard Lakhram), was an employee of the decedent. Harduwar was her driver and the decedent resided with proponent and his family prior to her death. The instrument offered for probate provides for the exercise of a power of appointment in favor of Harduwar and he is also the beneficiary of tangible personal property and devisee of real property. The estate is estimated at $13 million. The proponent is Steven K. Meier, the decedent's attorney, who is also the beneficiary of a bequest of $100,000.00.

At his examinations before trial, Harduwar testified that he was charged with smuggling (Tr. 8/22/13 p.129), that he used a false birth certificate to obtain naturalization papers (Tr. 11/18/13 p. 593), that he obtained social security numbers under different names (Tr. 11/18./13, p. 613) and was the subject of a deportation hearing (Tr. 11/18/13 p. 593]). Related documents have already been produced and marked as exhibits at the examinations before trial.

Objectants now seek an order directing Harduwar to authorize the release of naturalization and immigration records in the custody of the federal government. A state court cannot direct the federal government to release records. A state court can only direct a party to authorize the release of his own records. Where the relief sought is an authorization, the court

must determine whether the movant has established that the documents in question are material and necessary to the proceeding (CPLR 3101). Objectants contend that the documents are necessary to challenge proponent's credibility and as proof of his character. The preliminary executor argues that Harduwar's character is not an issue in this proceeding and that Harduwar's credibility will not be tested as the executor will not call him as a witness.

Evidence of character is generally not admissible in a civil case (*Wolff v Mahrer*, 273 AD2d 812 [4th Dept 2000]). However, evidence of character is admissible: 1) to impeach a witness, or 2) where it is an issue of substantive law in a case (*Kravitz v Long Island Jewish Hillside Medical Ctr*., 113 AD2d 577 [2d Dept 1985]).

In order to establish the admissibility of character evidence based upon the nature of the case, it must established that character is an "essential element" (3 Jones on Evidence, § 15:4 [7th ed. 2013]). The reputation of the party must be a fact in issue, as opposed to a collateral issue.

Generally, evidence of a person's character is not admissible to prove that on a particular occasion he acted in accordance with that trait (McCormick on Evidence, § 186 [2013]). There are some exceptions. Where it is alleged that a party engaged in fraud, proof of similar prior acts of fraud are admissible to establish intent (*1515 Summer St. Corp. v Parikh*, 13 AD3d 305 [lst Dept 2004]). In this case, however, the alleged prior acts of fraud are dissimilar.

In an action for negligence against a landlord, the Court of Appeals held that the evidence of plaintiff's alleged fraud in connection with the receipt of benefits from the Social Services Department was collateral. Proof of fraud would only show that she acted deceitfully on an unrelated matter *(Badr v Hogan*, 75 NY2d 629 [1990]). Likewise, in this case, objectants would

not be entitled to offer proof of deceit in connection with unrelated matters.

The second ground for discovery is for the purpose of challenging the credibility of the proponent. The testimony of a witness may be impeached by proof of immoral or deceitful conduct *(Badr v Hogan*, 75 NY2d 629 [1990]; *McNeill v LaSalle Partners*, 52 AD 3d 407 [1st Dept 2008]; *Crowe v Kelly*, 38 AD3d 435 [1st Dept 2007]). However, extrinsic evidence cannot be used to impeach on a collateral matter (*Bar v Hogan*, 75 NY2d 629 [1990]; *Huff v Rodriguez*, 88 AD3d 1274 [4th Dept 2011]; The New Wigmore Impeachment and Rehab., § 2.2 [2014]). Therefore, documents obtained from federal agencies would not be admitted into evidence over objection.

Whether the preliminary executor will decline to call Harduwar as a witness cannot be ascertained until the trial. In addition, if the objectants call Harduwar as a witness, they may have the opportunity to challenge his credibility. Under certain circumstances, a party can impeach his own witness (The New Wigmore Impeachment and Rehab., § 2.1 [2014]).

As previously noted, the potential use of the documents to challenge credibility is limited by the rule regarding extrinsic evidence. In addition, objectants have extensive information regarding the proponent's conduct (*Crowe v Kelly*, 38 AD3d 435 [lst Dept 2007]) through the examinations before trial and documents which have already been produced and marked as exhibits in the examinations before trial.

Further, where the documents in question are classified as confidential by statute or regulation, the court must weigh the necessity for disclosure against the public policy which limits disclosure of the particular information (*Espady v City of New York*, 40 AD3d 475 [lst Dept 2007]). Federal statutes and regulations protect the confidentiality of records pertaining to

immigration. The preservation of confidentiality is deemed to be in the public interest. For example, 22 CFR § 171.36 restricts disclosure of records of the Department of State, pertaining to visas and extradition "to protect the interest of national defense and foreign policy."

Objectants seek documents from "all relevant federal agencies." Objectants would have had to specify the federal department and agencies and their corresponding statutes and regulations concerning confidentiality. Certain federal statutes relating to immigration require release of confidential documents following a court's finding that they are necessary in a proceeding. In that case, prior notice would have to be given to the custodian of the records before directing a party to authorize their release (*see Susan W. v Ronald A.*, 147 Misc 2d 669 [Sup Ct, Queens County 1990]). These omissions are rendered academic, as the court determines that disclosure is not required.

For all of the foregoing reasons, the motion is denied.

This is the decision and order of the court.

Dated: June 30, 2014

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

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