

<b>Matter of Hoffenberg</b>
2014 NY Slip Op 33429(U)
December 19, 2014
Sur Ct, Nassau County
Docket Number: 2010-362502
Judge: Edward W. McCarty III
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SURROGATE'S COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

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Probate Proceeding, Will of

BERNICE HOFFENBERG ,

Deceased.

File No. 2010-362502

Dec. No. 30561

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Before the court is a motion filed by objectant, Steven Hoffenberg, for a commission for the purpose of issuing a subpoena, pursuant to the laws of the State of New Jersey, upon the GMS Group, located in Livingston Township, County of Essex, State of New Jersey, for financial records relating to accounts owned by the decedent, Bernice Hoffenberg.

BACKGROUND

As reviewed in Dec. No. 29519, dated January 23, 2014, and briefly in Dec. No. 29862, issued June 13, 2014, Bernice Hoffenberg died on September 25, 2010, survived by her two sons, Martin and Steven. Martin filed an instrument dated August 17, 2010 for probate. Preliminary letters issued to Martin, and they have been repeatedly renewed.

On August 24, 2011, the court appointed a guardian ad litem for Steven, who was incarcerated. In three reports filed with this court, the guardian ad litem advised the court that all actions taken by him in his representation of Steven were performed in accordance with the instructions of his ward, since Steven had no mental incapacity and maintained the right to direct the course of the proceedings. Pursuant to Steven's instructions, the guardian ad litem conducted discovery, including an SCPA 1404 examination of the attorney-drafter of decedent's will. He also obtained and served a subpoena for and reviewed decedent's medical records; reviewed correspondence; and consulted with Steven and his wife. As a result of his findings

and his communications with Steven, the guardian ad litem filed objections to probate dated November 28, 2012.

On February 27, 2013, at a court-supervised conference, the guardian ad litem and counsel for Martin entered into a pre-trial conference stipulation/order. Under the terms of the stipulation/order, any remaining document discovery and depositions were to be requested and completed in 60 days.

Towards the end of 2013, Steven was released from his incarceration, and the guardian ad litem filed his final report. Based upon the testimony given at the SCPA 1404 examination, as well as the poor health of decedent when she executed the will, the signature of decedent, and the testimony of one of the witnesses, the guardian ad litem felt that a question of fact had been raised as to whether the will was properly executed, and whether the decedent was competent when she executed her will.

New counsel for Steven appeared in February 2014 and served a notice for discovery and inspection dated March 13, 2014. It included 46 demands for documents over a five-year time span between September of 2005 and September of 2010. Proponent's attorney rejected the notice as untimely and further argued that the demands were framed improperly for a probate proceeding, as they sought financial data based on Steven's concerns that assets may have been misappropriated, which would be more pertinent in an accounting proceeding.

Counsel for Steven filed a motion to compel compliance with his discovery demands. In Dec. 29862, issued on June 13, 2014, the court afforded Steven relief in extending the discovery deadlines, based upon all of the circumstances and his adversary's agreement to overlook the passage of the deposition deadline. At the same time, the court found improper any demands made by Steven for documents outside of August 17, 2007 to September 25, 2010 and any

demands relating to assets, except as otherwise indicated. The court noted that there had been no showing of relevancy and nothing raised in the objections concerning Martin's qualifications to serve as executor. The court also pointed out that many of the demands made by Steven were overly broad, completely unspecific and not in search of anything germane to the pertinent issues.

#### MOTION FOR THE ISSUANCE OF A COMMISSION

Counsel for Steven has filed the present motion for an order issuing a commission to The GMS Group ("GMS"), located in New Jersey, for the production of documents and records pertaining to bond account and financial transactions by the decedent, Bernice Hoffenberg, for the three-year period prior to her death. In his supporting affirmation, counsel for Steven argues that in the examination of proponent, Martin, it was disclosed that the decedent owned extensive bond holdings in accounts held and traded by bond brokers, GMS. Martin testified that after the death of decedent in 2010, he threw away all of decedent's papers, some of which may have pertained to the decedent's bonds and her accounts at GMS. Steven argues that these records are pertinent to the probate proceeding because "they will disclose the fact that the Petitioner was controlling, directing, and transferring bonds on or about 2008 through the date of death of the decedent in 2010, because the decedent was not competent to make financial decisions during said time period."

#### AFFIRMATION IN OPPOSITION

Counsel for Martin filed an affirmation in opposition to the motion, arguing that the motion must be denied because this court previously determined that the decedent's financial records do not need to be disclosed in this probate proceeding, and the court's determination is the "law of the case." He cites the Court of Appeals, which stated:

“The law of the case doctrine is part of a larger family of kindred concepts, which include res judicata (claim preclusion) and collateral estoppel (issue preclusion). These doctrines, broadly speaking, are designed to limit relitigation of issues. Like claim preclusion and issue preclusion, preclusion under the law of the case contemplates that the parties had a full and fair opportunity to litigate the initial determination. . . . Accordingly, law of the case has been aptly characterized as “ a kind of intra-action res judicata”

(*People v Evans*, 94 NY2d 499, 502 [internal quotations marks and citations omitted] [2000]).

Counsel for Martin notes that the notice of discovery and inspection previously served by Steven sought all “financial records of the decedent” and “ all brokerage account statements for accounts held in the name of the decedent” as well as similar documents. The court’s decision stated that the demands relating to assets were improper. Steven’s demands for financial records (demand no. 5) and decedent’s brokerage account statements (demand no. 27) were stricken by the court.

Counsel argues that Steven had a full and fair opportunity to litigate the relevancy of his demands in his prior motion to compel compliance with discovery demands. On this basis, counsel maintains that the issue was fully litigated and cannot now be relitigated. Counsel also argues that Steven’s new argument for the relevancy of the bond statements, which is that the statements will disclose that Martin “was controlling, directing and transferring bonds” in these accounts in the three years prior to decedent’s death “because the decedent was not competent to make financial decisions during said period of time” is “so outrageous that it defies logic.” Counsel for Martin points out that brokerage statements do not reflect at whose direction trades are made.

In his final argument in opposition to the motion, Martin’s counsel notes that the motion is based upon CPLR 3108 for a commission to issue a subpoena. However, CPLR 3108

addresses the use of written questions for deposing a witness who is outside New York and does not cover out-of-state subpoenas.

#### REPLY AFFIRMATION

In his reply affirmation in response to the opposition and in support of the motion for the issuance of a commission, counsel for Steven argues that when the court denied Steven's prior motion to compel compliance with discovery demands, Martin had not yet been deposed. At the subsequent examination, Martin testified that he threw out decedent's bank statements and financial records. Counsel for Steven claims that Martin was evasive with regard to the monetary value of the bonds, which Martin claimed decedent transferred into a revocable trust shortly after she executed the proffered will. Counsel advises the court that it is Steven's belief that his parents "had millions of dollars of bonds which were not to be disposed of until such time as both parents were deceased." Because Steven was incarcerated in the years preceding his mother's death, he cannot testify as to her competence at the time the proffered will was executed. Counsel argues the following: (1) if the court allows Steven to subpoena records from GMS, the records may demonstrate that Martin transacted business on behalf of decedent, which may contradict Martin's testimony concerning his involvement in making financial decisions on his mother's behalf; and (2) if the subpoenaed records reflect that the decedent did not engage in bond transactions in the years prior to her death, that might be a factor for a jury to consider in determining decedent's competency to make a will.

Counsel for Steven disputes the relevancy of *People v Evans (id.)*, cited by opposing counsel for the doctrine of the "law of the case," asserting that it stands for the limited proposition that the law of the case will not bind a second trial judge in exercising his right to revisit a Sandoval issue. He notes that the court stated that the "law of the case" is "a concept

regulating pre-judgment rulings made by courts of coordinate jurisdiction in a single litigation” and that the “law of the case is necessarily amorphous in that it directs a court’s discretion but does not restrict its authority” (*People v Evans*, 94 NY2d 499, 502, 503 [internal quotations marks and citations omitted] [2000]). While Steven’s counsel concedes that this court’s prior order pertained to basically the same subject matter, he maintains that the court has the discretionary authority to grant the relief requested.

#### ANALYSIS

New York requires full disclosure of all matter material and necessary in the prosecution or defense of an action (CPLR 3101 [a]). Case law has broadly construed the scope of material that is discoverable, ruling that “the words material and necessary are to be interpreted liberally to require disclosure of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay ... the test is one of usefulness and reason” (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 406-407 [1968] [internal citations omitted]). The Court of Appeals’ interpretation of “material and necessary” has been understood “to mean nothing more or less than ‘relevant’” (Connors, Practice Commentaries, McKinney’s Cons.Laws of NY, Book 7B, CPLR C3101:5). Discovery of documents is permitted even if they are not admissible in evidence, provided that the production of such documents may lead to disclosure of admissible evidence (*Fell v Presbyterian Hospital in New York at Columbia-Presbyterian Med. Ctr.*, 98 AD2d 624, 625 [1st Dept 1983]). Courts have broad discretion in supervising discovery and the setting of reasonable terms and conditions therefor (*Matter of U.S. Pioneer Execs. Corp.*, 47 NY2d 914, 916 [1979]; *Mattocks v White Motor Corp.*, 258 AD2d 628, 629 [2d Dept 1999]).

In the decision issued by this court on June 23, 2014, the court denied Steven's request for financial and brokerage statements. Counsel for Steven now argues that based on the testimony given by Martin in his SCPA 1404 examination, the court should revisit this issue, because if the court allows Steven to subpoena the out-of-state records, and if the records show that Martin was involved in his mother's bond transactions, and if the records show that decedent was not engaged in bond transactions, then the records could be used to contradict Martin's testimony about the degree of his involvement in his mother's financial affairs and to raise questions about decedent's capacity to execute a will.

Counsel for Steven is correct in noting that the doctrine of the "law of the case" is generally cited for the proposition that a court should not disturb rulings made by courts of coordinate jurisdiction (*see People v Evans*, 94 NY2d 499 [2000]). He is also correct in his assertion that this court has the discretionary authority to grant the relief requested. "Every court retains a continuing jurisdiction generally to reconsider any prior intermediate determination it has made" (*International Assn of Bridge, Structural & Ornamental Ironworkers, Local Union No. 6, AFL-CIO, et al., v State of New York et al.*, 280 AD 2d 713 [3d Dept 2001]). However, "in the absence of a statutory exception and in order to prevent vexatious and repeated applications on the same point, a motion once fully heard and decided cannot be revived again or renewed unless with leave of the court or Judge who denied it or if made upon presentation of new facts which have occurred since the denial of the previous motion" (*Dondi v Jones*, 40 NY2d 8 [1976]). This court denies the motion for a commission to issue a subpoena for the decedent's financial statements because no new facts or extraordinary circumstances have been presented and the request for relief is, in substance, the same as a prior request for decedent's

financial records, which request was previously denied.

CONCLUSION

The motion for a commission is denied.

This constitutes the decision of the court.

Dated: December 19, 2014

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