

Matter of Knee
2014 NY Slip Op 33982(U)
April 15, 2014
Surrogate's Court, Richmond County
Docket Number: 2014-106
Judge: Robert J. Gigante
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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

-----X
In the Matter of the Estate of

MARIE STARACE KNEE

File No. 2014-106

Deceased.
-----X

In this probate proceeding, the children of Marie Starace Knee (hereinafter "Decedent"), have moved to vacate their waivers of process and consents to probate in order to object only to the appointment of Alan Knee as executor. The motion is opposed by the surviving spouse of the Decedent, Alan Knee, who is also the nominated executor under the instrument dated October 14, 2004.

According to the Decedent's children, they executed the waivers of process and consents to probate based upon an assurance from Alan Knee's first retained attorney that probate would proceed promptly and smoothly and that he would cooperate with their desire to retain the Decedent's twenty-five (25%) interest in real property located in Brooklyn, New York.

Alan Knee fired his first retained attorney and subsequently retained Philip J. Fitzpatrick, Esq. on or about January 30, 2014. The Decedent's children were aware of this change in counsel and of Mr. Fitzpatrick's intention to proceed with the filing of the probate petition. However, on February 6, 2014, counsel for the Decedent's children sent a letter by facsimile and electronic mail to Mr. Fitzpatrick, stating that they revoked their waivers of process and consents to probate.

Mr. Fitzpatrick had already prepared the petition for probate and had given it to service for filing with the Court on February 5, 2014, and such filing was completed on February 7, 2014. Mr. Fitzpatrick did not receive the correspondence regarding the Decedent's children's revocation of their waivers until his return to the office on February 7, 2014.

In their motion papers, counsel for the Decedent's children alleges that they should be permitted to withdraw their waivers because they have meritorious objections to the issuance of letters pursuant to SCPA 707 (1)(e), they have demonstrated a reasonable probability of success on said objections, and that it is in the interest of justice to restore all parties to their former position. According to affidavits in support of the motion submitted by the Decedent's daughter, Marietta Stapleton, Alan Knee removed and has retained valuable items, including cash and jewelry, from a safe deposit box that she owned with the Decedent.

Alan Knee opposes the motion, asserting that had there been no delay due to his substitution of attorneys, Letters Testamentary would already have been issued to him, and the distribution of estate assets completed. Pursuant to an affidavit submitted by Alan Knee, he claims that the allegations of misappropriation of funds made against him are false. The property from the safe deposition box he held jointly with the Decedent became his by operation of law, and Marietta Stapleton's name was added to a box that contained items of the Decedent's as a matter of convenience, so that she would have access to the Decedent's important papers. Further, Knee notes the need to bring a wrongful death action on behalf of the Decedent's estate and several hospital and physician's invoices to be paid.

The test for determining whether to grant leave to withdraw a waiver and consent to probate differs, depending on whether or not a probate decree has issued (Matter of Frutiger, 29 NY2d 143 [1971]). Where, as in this matter, the application is made prior to the entry of a probate decree, the courts liken the waiver and consent to a stipulation, and treat the application accordingly (Matter of Bono, 29 Misc3d 1211(A), Surr. Ct. Bronx Cty. [2010]). The court may relieve the parties from its terms if the consent was entered into inadvisedly or if it would be inequitable to hold the parties to its terms (see Frutiger, supra; Matter of Dowling, NYLJ May 11, 1998 (Bronx Cty. Surr. Ct.)). Moreover, where the will has not been admitted to probate, an application to withdraw a waiver and consent should be granted if it appears that none of the parties will be prejudiced, and can be restored to substantially the same former position (see Frutiger, Dowling, supra).

In the instant case, the Decedent's children moved expeditiously to withdraw their waivers and consents to Alan Knee's appointment as executor. Had there not been a missed communication between counsel, the need for this motion may not have arisen. Further, the Decedent's children object to the appointment of Alan Knee as the executor of their mother's estate, but not to the probate of the will. Should Alan Knee be appointed as the executor at this stage, the Court anticipates a motion to revoke his letters pursuant to SCPA 707 would shortly follow, thereby delaying the inevitable determination regarding his eligibility to serve as a fiduciary.

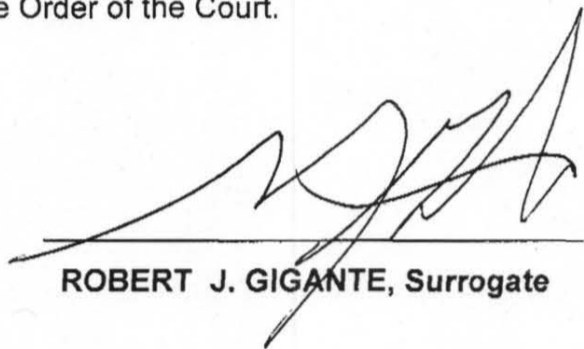
Accordingly, the Court finds that it would be inequitable to hold the Decedent's children to the terms of their waivers and consents, and that no prejudice will result by permitting the waivers and consents to be withdrawn.

Based on the foregoing, the application is granted, and the waivers and consents are hereby deemed withdrawn.

This matter is restored to the Court's calendar of April 30, 2014 at 9:30 a.m. for control purposes.

This decision shall constitute the Order of the Court.

Dated: April 15, 2014



Handwritten signature of Robert J. Gigante, consisting of stylized initials and a surname, written in black ink over a horizontal line.

ROBERT J. GIGANTE, Surrogate