

Matter of Robert

2014 NY Slip Op 34078(U)

January 10, 2014

Surrogate's Court, New York County

Docket Number: File No. 2013-3225

Judge: Rita Mella

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

New York County Surrogate's Court
DATA ENTRY DEPT.
JAN 10 2014
DECISION

-----X
Petition to Unseal the Record of Adoption of :
 :
 ROBERT, :
 :
 Adoptee. :
-----X

File No.: 2013-3225

M E L L A, S.:

Kenneth J. Rose, son of "Robert," an adoptee, seeks an order directing the unsealing of his father's pre-adoption birth certificate.¹ Robert, who was born in 1917 — 96 years ago — and adopted in this court, is deceased, as are his adoptive parents. Robert's birth parents are presumed deceased (*see Young v Shulenberg*, 165 NY 385, 389 and 390 [1901]; *Matter of Steingardt*, NYLJ, Oct. 16, 1997, at 34, col. 5 [Sur Ct, New York County]). Petitioner hopes to establish, by means of Robert's pre-adoption birth certificate, that the birthplace of Robert's biological father was Italy, which, in turn, petitioner alleges, would allow him and his two adult children to obtain Italian citizenship and thus citizenship in the European Union.² Petitioner states: "We have need to travel and temporarily reside in Italy (and elsewhere in Europe) for business and professional reasons." Petitioner, however, offers no basis for a belief that Robert's biological father: (1) is named in the pre-adoption birth certificate and (2) was born in Italy.

¹ Although the "Wherefore" clause of the petition reads: "I respectfully request access to the sealed adoption records," the "addendum" to the petition makes clear that petitioner seeks only the pre-adoption birth certificate.

² Petitioner has supplied a statement from the "Honorary Vice Consul of Italy, Consulate General of Italy, San Diego and Los Angeles, California," who "assist[s] Americans of Italian descent to apply for and obtain dual citizenship from Italy." It reads: "If the original birth certificate of Mr. Rose's father . . . states that his paternal grandfather was born in Italy, that document will establish that Mr. Rose and his children are qualified for Italian citizenship." There is no reference, however, to the fact that petitioner's father was adopted, much less to the effect of Robert's adoption on petitioner's qualification for Italian citizenship.

Domestic Relations Law § 114 (1) directs that “adoption records shall be sealed and secret.” And Domestic Relations Law § 114 (2) provides:

“No person shall be allowed access to such sealed records and order and any index thereof except upon an order of a judge or surrogate of the court in which the order was made or of a justice of the supreme court. No order for disclosure or access and inspection shall be granted except on good cause shown and on due notice to the adoptive parents and to such additional persons as the court may direct.”³

In 1917, however, the year of Robert’s birth, adoption records were not confidential. The initial inquiry, therefore, is whether the law mandating the sealing of adoption records has retroactive effect. To that end, we look to a history of the sealing of adoption records in New York State and an analysis, by the Court of Appeals, of the policy animating those statutes.⁴

Sealing of Adoption Records: A Historical Perspective

In 1924, the sealing of adoption records was at the discretion of the court (*see* L 1924, ch 323, § 3). Chapter 232, § 3 of the Laws of 1924 amended what was then § 113 of the Domestic Relations Law to provide, in part:

“The written report of the investigation, together with all other papers pertaining to the adoption, shall be kept by the judge or surrogate as a permanent record of

³ The court notes, in passing, that Public Health Law § 4138-c is inapposite. That statute governs the adoption information registry, which, *inter alia*, facilitates the release of information to consenting registrants, that is, the adoptee, either of the adoptee’s birth parents and/or a biological sibling of the adoptee (*see* Public Health Law § 4138-c [6]). In addition, that statute authorizes the disclosure of “non-identifying information,” including the nationality of the adoptee’s birth parents (*see* Public Health Law § 4138-c [3][b]), to an adoptee registrant unless such disclosure “would not be in the adoptee’s, biological sibling’s, or parent’s best interest” (Public Health Law § 4138-c [4][a]). Here, however, petitioner: (a) is not the adoptee and (b) seeks the pre-adoption birth certificate rather than non-identifying information (*cf. Matter of Alice, L.L.T.*, 38 Misc 3d 966 [Sur Ct, Nassau County 2012]).

⁴ This decision includes a discussion of the law in effect between 1917 and 1935, on the assumption that Robert was adopted as a minor.

his court, which may be sealed by him in his discretion and withheld from inspection by a proper order. No person shall be allowed access to such sealed records except upon an order of a court of record and such order shall not be granted except on good cause shown.”

In 1935, sealing became mandatory (*see* L 1935, ch 860, § 1). Chapter 860, § 1 of the Laws of 1935 amended what was then § 113 of the Domestic Relations law to provide, in part:

“The written report of the investigation, together with all other papers pertaining to the adoption, shall be kept by the judge or surrogate as a permanent record of his court and such papers must be sealed by him and withheld from inspection.”

In 1936, the sealing of the pre-adoption birth certificate by the New York State Commissioner of Health was required (*see* L 1936, ch 854, § 2). Chapter 854, § 2 of the Laws of 1936 amended § 387 of the Public Health Law to read, in part:

“The state commissioner of health shall place the original certificate of birth and all papers pertaining to the new certificate of birth under seal. Such seals shall not be broken except by order of a court of competent jurisdiction. Thereafter when a certified copy of the certificate of birth of such a person is issued, it shall be a copy of the new certificate of birth, except when an order of a court of competent jurisdiction shall require the issuance of a copy of the original certificate of birth.”

In 1938, Article 7 of the Domestic Relations Law, which governed adoptions, was repealed and a new Article 7 was inserted in its place (*see* L 1938, ch 606, § 1). The mandate for sealing adoption records was included in the new § 114 of the Domestic Relations Law, and the procedure for gaining access to such documents was modified. Section 114 of the new Domestic Relations Law provided, in part:

“The written report of the investigation, together with all other papers pertaining to the adoption, shall be kept by the judge or surrogate as a permanent record of his court and such papers must be sealed by him and withheld from inspection. No person shall be allowed access to such sealed records except upon an order of a judge or surrogate of the court in which the order was made or of a justice of the supreme court. No order for access and inspection shall be granted except on due notice to the foster parents and on good cause shown.”

Retroactive Application of Law Mandating Sealing of Adoption Records

The Court of Appeals, in *Matter of Walker* (64 NY2d 354 [1985]) and *Golan v Louise Wise Services* (69 NY2d 343 [1987]), has ruled, at least implicitly, that the law mandating the sealing of adoption records has retroactive effect.

Matter of Walker (64 NY2d 354 [1985]) was a will construction proceeding, commenced by the two adopted children of former Mayor James J. “Jimmy” Walker of New York City. At issue was whether testator’s bequests to them of all personal property as well as his residuary estate included a bequest of copies of the decrees of their respective adoptions, which were in the possession of a lawyer who had succeeded the law firm that represented the testator. The testator and his wife had adopted the two children in Cook County, Illinois, one in 1936, the other in 1937, then entrusted copies of the two decrees to his lawyer. The testator died in 1946 and his will, executed in 1945, was admitted to probate. The Court of Appeals noted that: (1) the requirement, in Domestic Relations Law § 114, that adoption records be sealed, was not in effect when the adoptions occurred (*id.* at 360),⁵ (2) in any case, Domestic Relations Law § 114 does

⁵ The Court of Appeals observed:

“From 1873 until 1924 the Legislature permitted public access to adoption records [citation omitted] but in 1924 the Legislature authorized the court, in its discretion, to order adoption records sealed (L 1924, ch 323, § 3 [Domestic Relations Law § 113]). Confidentiality became mandatory in 1938 (L 1938, ch 606, § 1 [Domestic Relations Law § 114]) and since then the Legislature on several occasions has adopted amendments to assure it [citations omitted].”

Id. at 360.

At the time the adoptions occurred in *Matter of Walker*, however, it seems there was a requirement that adoption records be sealed, but it was included in Domestic Relations Law § 113, not § 114 (*see* L 1935, ch 860, § 1, *supra*).

not apply to foreign adoptions (*id.* at 360), and (3) “Petitioners are at liberty to seek disclosure of the contents of the records in Illinois, of course” (*id.* at 356, footnote).⁶ Further, the Court of Appeals stated: “we determine that [testator] intended to bequeath the adoption decrees to petitioners” (*id.* at 358). Nevertheless, the Court of Appeals held: “the legacy may not be given effect because we conclude that to do so would be contrary to the public policy of New York” (*id.* at 358-359). The Court of Appeals reasoned:

“Relevant here is . . . the assurance acquired by the natural mother or mothers that their identity and privacy will not be disturbed. It is irrelevant that the information was available to petitioners at one time or that testator could have transferred the decrees to them during his lifetime because neither course was actually pursued. Petitioners seek the aid of the courts to obtain the decrees and discover their contents. Disclosure violates the existing public policy of New York, however, and the machinery of the courts is not available to them for that purpose.”

Id. at 361 (citations omitted).

In *Golan v Louise Wise Services* (69 NY2d 343 [1987]), petitioner, who was adopted — also in Cook County, Illinois — in 1932, before the sealing of adoption records was mandated by the Domestic Relations Law (either former § 113 [L 1935, ch 860 § 1] or § 114 [L 1938, ch 606, § 1]), sought permission to examine and reproduce records relating to his biological parents. The Court of Appeals observed in a footnote:

“By its terms, the statute [Domestic Relations Law § 114] applies only to the records of a New York adoption proceeding. In *Matter of Walker*, however, we held that section 114 expresses this State’s public policy of confidentiality, and that this policy applies to records of foreign adoption proceedings as well, even when the foreign proceeding did not require confidentiality at the time of adoption.”

⁶ It is observed, in a footnote in the dissenting opinion: “Illinois, the State with the most significant contacts with the adoptions at issue, did not establish the confidentiality of adoption records until 1961” (*id.* at 363, footnote [Jasen, J., dissenting]).

Id. at 348, note 2 (citation omitted).

Noting that, “As a result of biological parents’ fears for their anonymity, society’s interest in the adoptive process would be thwarted by rules of ready access to confidential adoption documents” (*id.* at 347 [citation omitted]), the Court of Appeals deemed the adoption records confidential and applied the “good cause” standard enunciated in Domestic Relations Law § 114.

Accordingly, this court must recognize the retroactive application of Domestic Relations Law § 114, based on the strong public policy of this State to keep confidential the identity of the biological parents of an adopted child. Therefore, the court must proceed to the second prong of the analysis, that is, a determination of whether petitioner has demonstrated “good cause” for unsealing the pre-adoption birth certificate of his father.

“Good Cause” Analysis

Petitioner relies on *Matter of Victor M.I.I.* (23 Misc 3d 1103[A] [Sur Ct, Nassau County 2009]), in which petitioner sought, and was granted, certified copies of his pre-adoption birth certificate, which allowed him to establish his Hungarian lineage and thus Hungarian citizenship. Unlike petitioner in the instant case, however, that petitioner not only had a relationship with his biological mother and, therefore, knew she was a citizen of Hungary, but also, furnished the court with an affidavit sworn to by his biological mother, consenting to the requested relief. (His adoptive parents were deceased and his biological father was “unknown.”) Notably, the court cautioned that its ruling was “limited to the unusual set of facts with which it is presented.” Thus, petitioner’s reliance on *Matter of Victor M.I.I.* is misplaced.

Similarly, in *Matter of S.P.*, 27 Misc 3d 1217[A] [Sur Ct, Bronx County 2010]), petitioner, whose adoptive parents were deceased, had a “close relationship with his birth

mother,” a Turkish citizen who planned to retire to Turkey. Petitioner was granted a copy of his pre-adoption birth certificate to “facilitate frequent visits with his biological mother in Turkey.”

As in *Matter of Victor M.I.I.*, petitioner’s birth mother consented to the requested relief. (His birth father was not named on the pre-adoption birth certificate.) The court reasoned: “a copy of the petitioner’s pre-adoption birth certificate is requested for a legitimate purpose and does not contain any information that is not already known to the petitioner”

And, in *Matter of Regine* (NYLJ, April 14, 2010, at 34, col. 4 [Sur Ct, New York County]), in which the court granted petitioner’s request for copies of her pre-adoption birth certificate and other documents, so that she could inherit under the law of Israel the intestate estate of her biological mother, the court observed:

“Unlike many persons seeking access to their sealed adoption records in order to learn the identity of their biological parents and the facts about their history, petitioner has long been aware of the facts relating to her adoption. Petitioner’s adoptive parents, who are now deceased, informed her during her childhood that she was adopted and gave her copies of relevant documents in their possession, including the Order of Adoption issued by this court. Further, petitioner had a relationship with her biological mother which included visits and correspondence over more than 30 years.” (Emphasis added.)

Petitioner’s biological father was “unknown.” The court, therefore, reasoned that granting petitioner access to the pre-adoption birth certificate implicated no “privacy rights.”


In each of the three cases, the biological father apparently was not named on the pre-adoption birth certificate, and the identity of the biological mother was known to petitioner. Indeed, each petitioner had had a relationship with the biological mother and requested certification of facts already known to petitioner from petitioner’s relationship with the biological mother.

Conclusion

The Court of Appeals has observed: “an application for access to confidential adoption records may be granted only after the utmost care and attention” (*Golan*, 69 NY2d at 347). Here, the court must weigh petitioner’s ultimate objective — obtaining an “extra” citizenship for himself and his children — and his speculative basis for achieving that goal, against the certain violation of confidentiality. While petitioner’s ultimate objective is similar to that of petitioner in *Matter of Victor M.I.I.* (23 Misc 3d 1103[A] [Sur Ct, Nassau County 2009]), it does not — and did not in *Matter of Victor M.I.I.* — compel violation of the confidentiality of the adopted person’s birth parents. Petitioner having failed to establish “good cause” (*see* Domestic Relations Law § 114 [2]), the petition is denied.

This decision constitutes the order of the court.

Dated: January 10, 2014


S U R R O G A T E