

Matter of Tran

2015 NY Slip Op 31008(U)

June 12, 2015

Sur Ct, New York County

Docket Number: 2012-1785

Judge: Nora S. Anderson

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

New York County Surrogate's Court
MISCELLANEOUS DEPT.
JUN 12 2015
FILED
Clerk _____

SURROGATE'S COURT : NEW YORK COUNTY
-----X
Administration Proceeding, Estate of

TRUONG TRAN,
a/k/a TRUONG DINH TRAN,

File No. 2012-1785

Deceased.
-----X

A N D E R S O N , S .

In this contested administration proceeding, the guardian ad litem for unknown distributees ("guardian ad litem" or "movant") seeks an order directing the fiduciary of decedent's estate to advance estate funds to finance discovery regarding the marital status of petitioner Sang Kim Nguyen ("Sang"), decedent's alleged surviving spouse.

The identification of decedent's distributees, the central issue in this administration proceeding, involves complex questions of fact and law. Various alleged distributees have challenged Sang's claim that she is decedent's surviving spouse. Based on the papers it appears that the court will have to determine the validity of the alleged marriage performed in a 1960 religious ceremony in Vietnam, as well as the validity of decedent's alleged marriage in 1950 to a woman other than petitioner. Evidence about the purported marriages is sparse. Facts about these marriages are necessarily subject to discovery. So too will be the claims of at least 28 individuals who assert that they are the issue of decedent by several different women,

as well as possible unknown distributees.

The value of the estate is currently estimated to exceed \$200,000,000. If Sang is found to be decedent's surviving spouse, she will be entitled to an intestate share of one-half of the distributable estate. If, on the other hand, it is determined that decedent died without a spouse, the share of each person found to be a distributee will increase two-fold.

To date, discovery has proceeded on a start and stop basis. While some depositions, production of documents, and motion practice have taken place, discovery was stayed for several months pending a motion to dismiss Sang's petition for letters of administration, which has since been denied (*Matter of Tran*, NYLJ, May 29, 2014 at 25, col. 4 [Sur Ct, NY County], *affirmed*, 2015 NY Slip Op. 02075, 2015 NY App Div LEXIS 2094 [App. Div., 1st Dept., March 17, 2015]). A further stay occurred in July 2014, following the death of the former temporary administrator, after which a successor was timely appointed. Despite the fact that there is now no procedural bar to discovery, the guardian ad litem advises the court that discovery concerning Sang's marital status has stalled because the parties have been unwilling or unable to pay the attendant costs. Movant asserts that she does not have the means to advance these costs.

Some of the cross-petitioning alleged distributees support the guardian ad litem's application and others take no position.

However, Sang, her children, and the temporary administrator all oppose the request for advance payment. They argue that the proposed discovery is unnecessary and beyond the scope of the guardian ad litem's responsibilities. Sang also asserts that a search for the truth of her marital status by the movant would be unfair to her and her children and would unnecessarily complicate the case. The temporary administrator further argues that the request is premature.

The court appointed the guardian ad litem to represent any unknown distributees of decedent who have a direct interest in the determination of Sang's marital status. The guardian ad litem is required by statute to "take such steps with diligence as deemed necessary to represent and protect the interests of the person[s] under disability..." (SCPA § 404). She is further required, at the conclusion of her duties, to "file a report of [her] activities together with [her] recommendation..."

(*id.*) (*Matter of Roe*, 65 Misc 2d 143 [Sur Ct, Suffolk County 1970]; *Matter of Adoption of X*, 84 Misc 2d 770 [Sur Ct, Cattaraugus County, 1975]). Of course, the guardian ad litem's initial mission here is to represent any unknowns on the merits, as opposed to discovery of their existence or whereabouts, and to protect their interest in the determination of the validity of Sang's marriage, as it significantly affects the size of their ultimate entitlement.

Movant reports that most of the prospective witnesses are elderly, and relevant information is in imminent danger of being lost. Respondents' suggestion that the guardian should first try to find unknowns, although she has been appointed to protect their interests, would put the cart before the horse and risk the possible loss of evidence to the detriment of her wards.

The guardian ad litem has identified eight individuals who she believes may have information pertinent to the issue of the validity of Sang's marriage. Her description of their connection to decedent and/or the basis for her belief that they may possess relevant facts, while somewhat sketchy, provides the court with a sufficient basis to determine whether the requested discovery is relevant or useful in the ultimate determination of the issues. The proposed discovery is within the scope of the guardian ad litem's mandate to properly represent the interests of her wards, and is not duplicative of evidence already produced.

Sang and her children argue that it would be unfair to grant the motion because any evidence uncovered would be used to argue against the validity of Sang's alleged marriage to decedent. They argue that this would favor one set of litigants against another and would violate the movant's obligation to be "objective," citing to *Matter of Roe*, 65 Misc 2d 143 (Sur Ct, Suffolk County, 1970). Respondents' argument mischaracterizes the role and responsibilities of a guardian ad litem, who is

appointed first and foremost to protect the interests of her wards (*Matter of Greene*, 20 Misc 3d 599 (Sur Ct, Westchester County 2008); *Matter of Schrier*, 157 Misc 310 [Sur Ct, Kings County 1935]). Movant is in effect her wards' counsel, and her obligation is to pursue the facts, as they evolve, in furthering their interests. "So far as concerns [the guardian's] relation to the litigation for which he is appointed, he acts purely and solely as the attorney for the particular persons whose interests he is designated to protect [citations omitted]" (*Matter of Schrier, supra* at 312). The guardian ad litem's status as the court's appointee requires her to undertake her responsibility with a high degree of professionalism and objectivity, and to fully and fairly disclose the facts which she discovers (*Matter of Roe*, 65 Misc 2d at 145). There is no merit to Sang's arguments that the duty to remain objective means that the guardian ad litem should refrain from seeking facts which run contrary to Sang's interests, or that she should be relegated to a merely passive role if the other litigants do not adequately address issues which she deems important.

Sang also argues that movant's prayer for relief is unprecedented and without support. However, there are many cases where courts have recognized that a guardian ad litem, as a court appointee, cannot charge her client directly for expenses she incurs, and have authorized disbursement of estate funds to

provide services necessary to fully prosecute the wards' interests (*Matter of Greene*, 20 Misc 3d 599 [Sur Ct, Westchester County 2008] [funds for medical expert to consult with guardian ad litem and review medical records regarding testamentary capacity]; *Matter of Van Der Woude*, NYLJ, Aug. 14, 1995 at 33, col 5 [Sur Ct, Suffolk County] [forensic accountant]; *Matter of Bankers Trust Co.*, NYLJ, Dec. 17, 1996, at 26, col 6, 1996 NY Misc LEXIS 614 [Sur Ct, NY County] [trial expert]; *Matter of Papendorf*, NYLJ, June 15, 2001, at 22, col 6, 2001 NY Misc LEXIS 1371 [Sur Ct, Queens County] [genealogist]; *Matter of Galley*, NYLJ, June 26, 1996, at 31, col 1, 1996 NY Misc LEXIS 613 [Sur Ct, Queens County] [genealogist]; *Matter of Nagel*, NYLJ, Aug. 15, 2006, at 33, col 6, 2006 NY Misc LEXIS 6084 [Sur Ct, Westchester County] [litigation counsel]; *Matter of Kochovos*, NYLJ, Feb. 10, 1989, at 24, col 6 [Sur Ct, Bronx County] [private investigator's fees allowed in part]; see also, *In re Cherniakova [Kolischer]*, NYLJ, July 10, 1992, at 21, col 4 [Sup Ct, NY County] [medical expert in conservatorship proceeding]; cf., *Matter of Wang*, NYLJ, March 10, 2015, at 22, col 6 and Jan. 31, 2011, at 17, col 1 [Sur Ct, NY County] [authorizing the Public Administrator to disburse funds for expenses of a discovery proceeding to recover estate assets]).

Sang's argument that granting the motion would complicate the case by implicating the interests of Sang's unborn

grandchildren is without merit. Decedent's distributees were fixed at the time of his death (EPTL § 4-1.1[a] and [c]) and subsequent developments do not create such new interests.

The temporary administrator's argument that this application is premature due to a pending appeal from this court's decision denying dismissal of Sang's petition is moot.

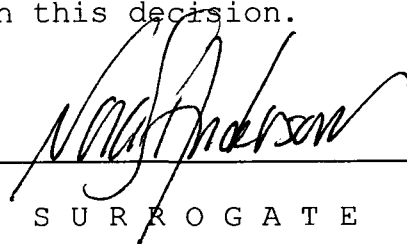
The guardian ad litem notes that her list of eight witnesses is not exhaustive and that new witnesses could yet be identified. Respondents voice concern about the open-endedness of her request, arguing that the court should not give the movant a blank check. The eight persons already identified include individuals in Viet Nam and Guam. Movant estimates daily expenses for video depositions from Vietnam at \$3,000 to \$5,000; the cost of transportation and housing and for Vietnamese interpreters if their testimony is taken in New York is estimated at \$15,000 to \$20,000.

At this juncture, the court directs the temporary administrator to advance to the guardian ad litem sufficient funds to cover the costs of deposing the eight identified witnesses within the financial parameters outlined in her papers. Any requests for additional funds for examining known or additional witnesses must be made on application to the court. In the interests of efficiency, the witnesses may be examined on any issue relevant to this proceeding, including the kinship of

the alleged non-marital children already identified and the identification of unknowns. The court declines movant's request to give an advance ruling that depositions must be conducted by video, but will entertain a motion for such relief on notice as the facts develop.

Sang finally argues that it would be unfair to burden her children with the cost of investigating a position they do not support, and which could lead to a determination that their parents were not married. Although Sang's children are supporting her in this motion, they are legally in the same position as all of decedent's known and unknown issue, in that their direct financial interest is greater if it is shown that decedent was unmarried at the time of his death. Nevertheless, the court declines to address the allocation of the expenses outlined here, and defers this issue until the accounting proceeding.

Settle order in accord with this decision.


S U R R O G A T E

Dated: June 12 2015