

Matter of Helmus

2015 NY Slip Op 32465(U)

October 22, 2015

Surrogate's Court, Nassau County

Docket Number: 2013-377724

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

File No. 2013-377724

ANNE T. HELMUS,

Dec. No. 30929

Deceased.
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In connection with a probate proceeding, the court has before it a motion brought pursuant to CPLR 1001 by Elizabeth Campbell, Mary Miller Gentry, Robert Miller and Thomas Miller to compel the addition of their names as necessary parties to the probate proceeding. In the alternative, movants ask the court to dismiss the proceeding pursuant to CPLR 1003 and 3211 (a) (10) on the grounds that the court should not proceed in their absence, since they are persons who should have been named as parties to the proceeding but were never subject to the jurisdiction of this court.

BACKGROUND

Anne T. Helmus died on October 16, 2013, survived by three distributees: a maternal first cousin, Mary Lewis, and two paternal first cousins, Virginia Callaghan and Thomas Fiske Timberman. On December 17, 2013, decedent's purported will, dated May 15, 2012 (the 2012 will), was filed for probate by Anastasia E. Miller (petitioner). The 2012 will, which nominates petitioner as executor, directs payment of the estate to the Anne T. Helmus Revocable Trust established on May 15, 2012 and amended on August 8, 2013. Under the terms of the trust, four named individuals are to receive \$10,000 each: Dorothy S. Lewis, Mary Lewis, Meghan Lewis and Caroline Bradley. The balance of the trust, as amended, is payable to petitioner.

Subsequently, petitioner filed an amended probate petition, dated May 8, 2014, which added the names of all of the decedent's distributees. On the return date of the citation, the law

firm of Laurino and Laurino (Laurino), appeared for Mary Lewis and requested SCPA 1404 examinations; there were no other appearances. The examinations were conducted on August 14 and October 22, 2014, and Mary Lewis filed objections to probate dated October 30, 2014. On February 2, 2015, the court issued a citation upon the filing of objections, pursuant to SCPA 1411, returnable on March 4, 2015.

On January 30, 2015, Laurino filed a notice of appearance on behalf of Elizabeth Campbell, Mary Miller Gentry, Robert Miller and Thomas Miller. The present motion was filed on April 27, 2015.

THE MOTION

The motion and affirmation in support are based upon the following facts:

1. Although a purported 2012 will was filed for probate on December 13, 2013, the decedent executed an earlier will dated August 24, 2007 (the 2007 will), which was filed with this court on November 18, 2014.

2. Under the terms of the 2007 will, Mary Lewis is the nominated executor. The 2007 will provides that one-half of decedent's estate is payable to Mary Lewis and one-half is payable to Catharine V. Powell Miller or her issue.

3. Catharine V. Powell Miller predeceased the decedent. Under the terms of the 2007 will, her one-half share became payable to her children, the movants, who would each receive 12.5% of decedent's estate.

On the basis of these facts, Laurino argues that the movants are persons adversely affected by the 2012 will and as such are necessary parties to the probate of the 2012 will. Specifically, Laurino asserts that the filing of the 2007 will on November 18, 2014 created a

jurisdictional defect in the probate proceeding for the 2012 will by triggering an obligation on the part of petitioner to acquire jurisdiction over movants. Based upon the facts before the court, Laurino maintains that petitioner's failure to include necessary parties is grounds for dismissal of petitioner's probate petition under CPLR 1003 and 3211 (a) (10).

In support of the motion, Laurino argues that it is of no import that the 2007 will was not filed with the court until after petitioner commenced the present probate proceeding, and he also claims that petitioner would not be prejudiced if movants were permitted to appear and object to probate of the 2012 will. Laurino notes that the 2007 will was filed with the court prior to the return date of the SCPA 1411 citation.

AFFIRMATION IN OPPOSITION

Counsel for petitioner, the law firm of Moritt, Hock & Hamroff LLP (Moritt) notes that decedent was survived by only three distributees, each of whom was given due notice of the petition for probate of the 2012 will.¹ Only Mary Lewis appeared on the return date of the citation on June 25, 2014, and she requested SCPA 1404 examinations of the attorney draftsman and the attesting witnesses. The examination of the draftsman was conducted on August 14, 2014, at which time Laurino asked the draftsman whether she was aware of a prior will of decedent that gave Mary Lewis 50% of the estate. Following the examination, Moritt requested a copy of the prior will referenced by Laurino during the deposition. Four days later, on August 18, 2014, Moritt received a copy of the prior will from Laurino. Laurino, who did not appear on behalf of movants until January 30, 2015, did not file the prior will for probate or

¹Movants are not the decedent's distributees, although they are decedent's first cousins once removed.

request a stay of the probate proceedings. Instead, on behalf of Mary Lewis, Laurino conducted and completed the SCPA 1404 examinations of the attesting witnesses on October 22, 2014 and filed objections dated October 30, 2014.

Moritt notes that Mary Lewis, as the nominated executor in the 2007 will, had a right to request the original copy of the 2007 will from the draftsman and an affirmative duty to file it after the death of decedent. Despite this, the 2007 will was not filed until November 18, 2014, more than one year after decedent's death and only after completion of the SCPA 1404 examinations of the witnesses to the 2012 will and the filing of objections on behalf of Mary Lewis. Moreover, based upon SCPA 1410, Moritt argues that objections by any party whose interest would be adversely affected by the probate of the 2012 will were due on or before the return date of the probate citation or, where SCPA 1404 examinations are requested, within 10 days after such examinations were completed.

ANALYSIS AND CONCLUSION

Pursuant to SCPA 1403, persons named in another will executed by the same testator "whose rights or interests are adversely affected by the instrument offered for probate" must be served with a probate citation if the other will is on file with the Surrogate's Court (SCPA 1403 [1] [d]). Individuals who are named beneficiaries in another will which is not on file with the court need not be served with citation (*Margaret Valentine Turano & C. Raymond Radigan, New York Estate Administration* § 3.03 [c] n 32 [2015]).

In the present case, the 2007 will was not on file with the Surrogate's Court when the citation for the probate of the 2012 will was issued or served. However, even where a prior will is not on file, it is within the court's discretion to permit the beneficiaries under a prior will to be

added as parties in a probate proceeding for a subsequent will (*see Matter of Bray*, 146 Misc 415, 415 [Sur Ct, New York County 1932]; *see also Matter of Kavanagh*, NYLJ, Sept. 8, 2010 at 28, col 6 [Sur Ct, Suffolk County]). In this instance, the will was subsequently placed on file with the court, and no prejudice to petitioner will result from adding movants as parties, as objections were previously filed by Laurino's other client, Mary Lewis.

The court directs that Elizabeth Campbell, Mary Miller Gentry, Robert Miller and Thomas Miller shall be added as parties to the proceeding for probate of the 2012 will. The motion to dismiss the proceeding pursuant to CPLR 1003 and 3211 (a) (10) is denied. Note that although the parties will be given the opportunity to file objections to the probate of the 2012 will, the court will not permit movants to conduct further examinations pursuant to SCPA 1404, as these examinations were completed by movants' counsel.

A conference will be held on November 16, 2015, at 11:00 a.m.

This constitutes the decision and order of the court.

Dated: October 22, 2015

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