

Maul v Lee
2016 NY Slip Op 30539(U)
April 4, 2016
Supreme Court, New York County
Docket Number: 2012-3522/C
Judge: Rita M. Mella
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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

New York County Surrogate's Court

Date: APRIL 4, 2016

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Proceeding by Baldwin Maull in the Estate of

PEGGY WU MAULL,

Deceased,

DECISION

File No.: 2012-3522/C

for an Order Directing Michele Lee and Karen Lee Caruso,
as Co-Executors, to Provide Information Concerning Assets
and Affairs and for Turnover of Exempt Property.

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M E L L A, S.:

Decedent Peggy Wu Maull died on January 18, 2012, survived by her spouse, Baldwin Maull (Maull), and two adult children, Karen Lee Caruso (Karen) and Michele Lee (Michele).

The first proceeding in this estate, filed in September 2012, was brought by Michele as nominated co-executor under a will of decedent, dated May 3, 2007, and sought permission to open and search a safe deposit box. No further action was taken in decedent's estate until December 2013, when Maull commenced a proceeding seeking the issuance of letters of administration in decedent's estate, and in which he sought the additional relief that the aforementioned will of decedent not be admitted to probate. On the return date of the supplemental citation, the administration proceeding was held in abeyance pending the conclusion of the probate proceeding, which had been commenced in February 2014.

Letters testamentary were ultimately granted to Michele and Karen by decree issued on July 7, 2014, which admitted decedent's May 3, 2007 will to probate. Despite Maull's request, in his administration proceeding, that this will not be admitted to probate, he did not file objections in the probate proceeding. Decedent's will leaves her entire estate to her daughters, making no provision for Maull.

The present proceeding was commenced by Maull, who is an attorney, *pro se*, in January

2015, approximately six months after the issuance of letters testamentary. Petitioner seeks, pursuant to SCPA 2102(1) and (2), to require the co-executors to supply information concerning estate assets and the turnover of exempt property. The answer of each co-executor alleges that Maull lacks standing to seek this relief because he had failed to exercise his right to elect against decedent's will and, in any event, does not qualify as decedent's "surviving spouse" by reason of his abandonment and failure to support decedent, so that he would have no right to elect. As a result, the co-executors aver, Maull has no interest in decedent's estate.

In his responsive pleading, Maull insists that he timely served and filed his notice to elect and complied with all the procedural requirements. He further asks that, to the extent there is a technical defect or error, he be relieved of such default or mistake, expressly relying on EPTL 5-1.1-A(d)(2) and CPLR 2001. Maull also disputes the co-executors' claims that he abandoned decedent and failed to support her and would be disqualified as surviving spouse pursuant to EPTL 5-1.2. A two-part threshold issue is presented by these pleadings: first, whether Maull complied with the procedural requirements for the exercise of the right of election (EPTL 5-1.1-A[d][1] and [2]); and second, whether Maull qualifies as a "surviving spouse" entitled to elect against decedent's will (EPTL 5-1.2). Following a conference with the parties, and upon their consent, the instant decision addresses the first part.

As relevant here, an election must be made within six months from the issuance of letters testamentary, "but in no event later than two years after the date of decedent's death, except as otherwise provided in subparagraph 2 of this paragraph" (EPTL 5-1.1-A[d][1]). "Written notice of such election shall be served . . . upon a person named as executor in a will on file in the surrogate's court in a case where such will has not yet been admitted to probate, and the original thereof shall be filed and recorded, with proof of service, in the surrogate's court," also within

the timeframe provided for making such election (*id.*). The court may relieve the spouse from his or her default and extend the time to elect upon a showing of reasonable cause, “provided that . . . twelve months have not elapsed since the issuance of the letters, and two years have not elapsed since the decedent’s date of death, in the case of initial application; except that the court may, in its discretion for good cause shown, extend the time to make such election beyond such period of two years” (EPTL 5-1.1-A[d][2]).

A description of the claims and the facts, disputed and undisputed, is necessary. First, it is true, as the co-executors state, that the court’s electronic record of the documents filed in this estate does not reflect the filing and recording of the notice of election. In light of Maull’s response that he had filed his notice, a review of the files in this matter was conducted. What appears to be the original notice of election was located by the court staff in the physical court file of Michele’s application to search decedent’s safe deposit box. The single-page notice, acknowledged by Maull on December 20, 2013, does not contain a Surrogate’s Court “FILED” date stamp, and it is undisputed that the notice was not recorded, as required by EPTL 5-1.1-A(d)(1). Nor was the fee required for recording the notice paid.

Appended to the notice are affidavits of service of the notice of election personally on Karen on December 30, 2013, and by mail on December 31, 2013, and by affixing a copy on the door of Michele’s dwelling place and mailing to her a copy on January 16, 2014, which service complies with the requirements of EPTL 5-1.1-A(d)(1).¹ One of these affidavits of service bears a Surrogate’s Court “FILED” date stamp, indicating the date as January 17, 2014, one day shy of

¹Respondents do not dispute service on them of the notice of election, and affidavits of service in the file for Maull’s administration proceeding state that Karen and Michele were served with a notice of election in March 2014, along with the papers filed by Maull in that proceeding. This is in addition to affidavits of service of the notice of election above-described.

the second anniversary of decedent's death, and prior to the filing of any probate proceeding in her estate (*see* EPTL 5-1.1-A[d][1], [2]). However, a portion of this stamp was altered by covering over, with correction liquid, the name of the Department of the Surrogate's Court in which the document was stamped and the word "FILED."

Mauil's attempt and intent to file the notice and proofs of service on January 17, 2014 are corroborated by the affidavit of the process server filed in this proceeding and in response to the co-executors' claims. In his affidavit, the process server – a paralegal employed by Undisputed, Legal, Inc. whose services were retained by Mauil to file his papers in this court – states under oath that he reviewed his employer's business records, "which show that on . . . January 17, 2014, [he] visited [this court], and filed papers . . . as a group and brought back to the office the following documents, stamped and unstamped by the court clerk, but all scanned as one file in [their] office upon [his] return." A numbered list is attached, identifying six documents, four of which are the notice of election and related proofs of service, the two remaining are documents related to Mauil's administration proceeding (which *are* reflected in the court's record as having been filed on January 17, 2014, in the administration proceeding).


Under these circumstances, and to the extent that the failure to record the notice of election filed in this court and to pay the corresponding fee may constitute a default by Mauil under EPTL 5-1.1-A(d)(1) and not merely a defect that may be corrected (CPLR 2001), the court finds reasonable cause to relieve Mauil of the default (*see Matter of Sylvester*, 107 AD3d 903 [2d Dept 2013]; *cf. Matter of Cavallo*, 98 AD3d 1115 [2d Dept 2012] [no reasonable cause for relief more than eight years after decedent's death and spouse's appearance in related litigation, where spouse was represented by counsel and clearly aware of her right of election prior to expiration of time period]; *see generally Matter of Goldstein*, 192 AD2d 532 [2d Dept 1993] [right of election

statute shall be given a liberal interpretation to forgive defaults and protect interests of the surviving spouse]). Additionally, good cause has been demonstrated here, meriting the court's exercise of its discretion to extend Maull's time to elect beyond the two-year period that commenced on decedent's date of death and expired just after Maull's filing of his notice of election and before any letters issued in decedent's estate (*see* EPTL 5-1.1-A[d][2]; *see also* *Matter of Riveiro*, NYLJ, Jan. 25, 2013, at 34 [Sur Ct, Queens County]). There is no showing of any prejudice or injury to anyone interested in decedent's estate. The co-executors, who are the sole beneficiaries of the estate, do not dispute having actual notice of Maull's election, or the service upon them of such notice in compliance with the requirements of EPTL 5-1.1-A(d)(1). Accordingly, Maull is granted leave to properly file and record such notice and pay the corresponding recording fee in compliance with EPTL 5-1.1-A(d)(1), no later than April 25, 2016.

This decision constitutes the order of the court. The parties shall appear for a conference on **June 1, 2016, at 2:30 p.m.**, in room 503, regarding the balance of the threshold inquiry: the effect of Maull's election, in light of respondents' claims that Maull should be disqualified (EPTL 5-1.2).

Clerk to notify.

Dated: April 4, 2016



SURROGATE