

Matter of Carey

2016 NY Slip Op 31686(U)

September 12, 2016

Surrogate's Court, New York County

Docket Number: 2012-133/BB

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: September 12, 2016

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SCPA 711 Petition of the Attorney General of the State of
New York for Revocation of Letters Testamentary issued
to Jan Karst, and for Other Relief, Estate of

WILLIAM POLK CAREY,

Deceased.

DECISION

File No.: 2012-133/BB

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M E L L A, S.:

The court considered the following submissions in deciding this motion for summary determination:

Submissions

	<u>Date Filed</u>
1. Notice of Motion for Summary Judgment	April 5, 2016
2. Affirmation of Robert J. Burns in Support of Motion	April 5, 2016
3. Memorandum of Law in Support of Motion	April 5, 2016
4. Affirmation of Harvey E. Corn in Opposition to Motion	April 13, 2016
5. Affidavit of Jan Karst Regarding Response to Summary Judgment	April 13, 2016
6. Reply Memorandum of Law in Support of Motion	April 19, 2016

The Attorney General of the State of New York, on behalf of the ultimate beneficiaries of a charitable bequest under the will of William Polk Carey (*see* EPTL 8-1.1 [f]),¹ has petitioned for revocation of letters testamentary issued to Jan Karst and for related relief (*see* SCPA 711). A motion for summary determination has been made by: (1) Donald MacMaster, trustee of six decanted testamentary trusts, (2) Donald MacMaster and Alexander MacMaster, co-trustees of a seventh decanted testamentary trust, (3) Sterling Trustees, LLC, trustee of an eighth decanted testamentary trust now known as the "Gwendolen Gorman Bond 2015 Irrevocable Trust," and (4) the beneficiaries of the "Gwendolen Gorman Bond 2015 Irrevocable Trust."

Certain facts are undisputed. William Polk Carey died on January 2, 2012, leaving an

¹ Decedent bequeathed fifty percent of the net residuary estate to the W. P. Carey Foundation.

estate of hundreds of millions of dollars. On January 11, 2012, decedent's brother, Francis J. Carey, Jr., a domiciliary of Pennsylvania, and Jan Karst, a domiciliary of Connecticut, petitioned for letters testamentary (and letters of trusteeship). Although Mr. Karst was not a citizen of the United States, he was identified in the probate petition as such. On February 22, 2012, the court issued letters testamentary (and letters of trusteeship) to Francis J. Carey, Jr., and Jan Karst.

The allegation that Mr. Karst was a citizen of the United States was repeated in: (1) each of ten petitions filed on September 18, 2012 by Francis J. Carey, Jr., and Jan Karst — one with respect to each testamentary trust — for permission for the former to resign as co-trustee and for the appointment of his son, H. Augustus Carey, as successor co-trustee; and (2) an amended petition filed on September 23, 2012 by Francis J. Carey, Jr., and Jan Karst for permission for the former to resign as co-executor and for the appointment of his son, H. Augustus Carey, as a successor co-executor.

Underlying Proceeding

After Mr. Karst alleged in a New York State Supreme Court arbitration proceeding that he was, in fact, a citizen of Germany, the Attorney General of the State of New York commenced the instant proceeding, on the basis of SCPA 707 (1) (c), which provides that a “non-domiciliary alien” is ineligible to receive letters testamentary, “except . . . one who shall serve with one or more co-fiduciaries, at least one of whom is resident in this state,” and then only in the discretion of the court. Petitioner contended that Mr. Karst's letters should be revoked, not only because Mr. Karst was ineligible to receive letters along with a sole, non-resident, co-executor (*see* SCPA 711 [1]), but also, because his letters had been obtained by a false suggestion of a material fact (*see* SCPA 711 [4]), rendering him unfit for the execution of the office by reason of dishonesty.

Mr. Karst responded that the inaccuracies in the multiple submissions that he had filed in this court had been inadvertent and that the work of the executors was near completion. Further, he challenged the constitutionality of SCPA 707 (1) (c), but, nevertheless, indicated an intent to cure his statutory ineligibility to serve.

At the October 6, 2015 return day of the citation, the court adjourned the return day until December 4, 2015 and, in the interim, suspended Mr. Karst's letters testamentary pending an ultimate determination of the petition (*see* SCPA 713) and, *sua sponte*, suspended Mr. Karst's letters of trusteeship (*see* 719 [10]). On December 1, 2015, Mr. Karst filed an affidavit in which he averred that he had become a domiciliary of New York as of November 11, 2015.

A hearing to determine the factual issues raised in the petition of the Attorney General of the State of New York has been scheduled for September 22, 2016.

Instant Motion

Movants request a summary revocation of Mr. Karst's letters testamentary.² They argue that, at the time the letters were issued, Mr. Karst was ineligible to receive them, and they maintain that his remedy — were he to “cure” his ineligibility — would be to petition for supplementary letters testamentary (*see* SCPA 1415).³ In the alternative, movants seek, by way

² In addition, movants request a summary revocation of Mr. Karst's letters of trusteeship; however, such relief was not requested in the pleadings and, accordingly, cannot be addressed in a motion.

³ SCPA 1415 provides:

“If the disability of . . . an alien named as an executor in a will be removed before the administration of the estate is completed he shall be entitled on petition showing the facts to supplementary letters testamentary to be issued in the same manner as the original letters to join in the completion of the administration of the estate with the person or persons previously appointed.”

of a partial summary determination, dismissal of Mr. Karst's defense of a retroactive "cure," arguing that Mr. Karst "cannot retroactively, or *nunc pro tunc*, 'cure' his undisputed ineligibility under SCPA § 707 (1) (c) at the time the Letters Testamentary . . . were issued."

Mr. Karst opposes the motion. He contends that whether the inaccurate statements of his citizenship are the product of his misconduct or of his counsel's inadvertence is a factual issue that must be determined after a trial. He further contends that if he were to prevail on a challenge to the constitutionality of SCPA 707 (1) (c), or if the court, in its discretion, were to allow him to continue in office, then his service as a co-executor would be deemed to have been uninterrupted.

Analysis

Contrary to movants' argument, in a proceeding to revoke letters issued to a person who was ineligible at the time the letters were issued (*see* SCPA 711 [1]), revocation is not mandatory. Rather, upon the return of process, the court "may make a decree suspending, modifying or revoking the letters issued to or removing the respondent or modifying the terms of his appointment or may dismiss the proceeding upon such terms as justice requires" (SCPA 713). In *Matter of Stolz* (7 NY2d 269 [1959]), the Court of Appeals observed that, in enacting (in 1920) Surrogate's Court Act §§ 99-101 — the predecessors to SCPA 711 (1), SCPA 712, and SCPA 713, respectively — the Legislature recognized that "revocation of letters calls for the exercise of a discriminating discretion by the Surrogate" (*id.* at 273), and that "each particular case [should] be judged by its own peculiar circumstances and conditions and disposed of in the words of the statute 'as justice requires'" (*id.* at 273-274 [citing *Matter of Clark*, 136 Misc 459 [Sur Ct, Otsego County 1930]]). Here, the court must determine facts which are now in dispute, specifically, whether Mr. Karst deliberately misled the court, before the court can exercise such

discretion.

In addition, movants ask the court to revoke Mr. Karst's letters testamentary as a matter of law. Yet the validity of the very law on which movants rely — SCPA 707 (1) (c) — has been challenged by Mr. Karst. Accordingly, the court cannot determine the petition as a matter of law without evaluating the constitutionality of SCPA 707 (1) (c). The court, however, is obliged to avoid constitutional questions, to the extent possible. As the Court of Appeals has observed, "Under established principles of judicial restraint . . . courts should not address constitutional issues when a decision can be reached on other grounds" (*Syquia v Bd. of Educ. of Harpursville Cent. Sch. Dist.*, 80 NY2d 531, 535 [1992][citations omitted]). In this case, the court will not need to address the constitutionality of SCPA 707 (1) (c) if, after a hearing, the court were to determine that Mr. Karst had wilfully misled the court and, therefore, is unfit, on other grounds, to serve as a fiduciary.

Movants ask, in the alternative, that a reinstatement of Mr. Karst's letters testamentary be prospective, only. Consideration of that request is, at best, premature. If, after a hearing, the court were to determine that Mr. Karst had wilfully misled the court and, therefore, is unfit to serve as a fiduciary, there would be no reinstatement of Mr. Karst's letters.

Movants having failed to demonstrate that the petition should be granted as a matter of law, the motion for a summary determination is denied.

This decision constitutes the order of the court. Clerk to notify.

Dated: September 12, 2016


S U R E O G A T E