

Matter of Walsh
2016 NY Slip Op 32044(U)
March 21, 2016
Surrogate's Court, Nassau County
Docket Number: 2013-373534
Judge: Margaret C. Reilly
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**SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

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Probate Proceeding, Will of

DECISION

SUZANNE MARGUERITE PATRICIA WALSH,

Deceased.

**File No. 2013-373534
Dec. No. 31515
31516**

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PRESENT: HON. MARGARET C. REILLY

The following papers were considered in the preparation of this decision:

Motion to Quash a Subpoena, filed January 4, 2016.	1
Cross-Motion and Opposition to Motion to Quash Subpoena, filed January 11, 2016.	2
Affirmation in Opposition to Cross-Motion and in Reply to Motion to Quash, filed January 15, 2015	3
Reply Affirmation to Motion, filed January 26, 2016.	4
Amended Affidavit of Due Diligence.....	5

I. PROCEDURAL HISTORY

In the context of a contested probate proceeding, before the court is:

(1) a motion for an order pursuant to CPLR §2304 to quash a subpoena served upon AT&T and pursuant to CPLR 3103 for a protective order denying or limiting the subpoena served on AT&T Subpoena Center for the cell phone records for Marc deVenoge; and

(2) a cross-motion in opposition to the motion which seeks an order: (a) denying the motion to quash; (b) directing movant to comply with outstanding discovery demands pursuant to CPLR 3124; (c) imposing spoliation sanctions for the intentional destruction of evidence; (d) sanctioning movant by dismissing the petition for probate or issuing an order rescinding the presumption of capacity and due execution afforded an attorney supervised will, and further imposing an adverse inference charge on the movant for the destruction of evidence; and (e) appointing a guardian ad litem for unknown heirs or the Public Administrator as an interested party to represent the rights of unknown heirs.

II. BACKGROUND

Suzanne Marguerite Patricia Walsh (the decedent) died on January 11, 2013, leaving a will dated October 3, 2012. Under the terms of the will, the decedent left her real property in Plandome to her friend, Marie Pellegrino, and her Fulton and Garoga Lake properties to her friends, Charles and Helen Johnson. The decedent bequeathed her personal property to her friend, Vincent Callaghan, and her cars to her friend, Marc deVenoge. In her will, the decedent asked her friend, Alice King, and Marie Pellegrino to look after her books and give what is possible to Vincent Callaghan. She bequeathed her jewelry and property to Marie Pellegrino and Alice King. Finally, the decedent recommended that her remaining assets and residuary estate be distributed to Vincent Callaghan (70%), her friend, Frank Pellegrino (20%) and Alice King (10%). The will nominates Marc deVenoge as executor, and he offered the will for probate. Preliminary Letters issued to Marc deVenoge on March 1, 2013 and have since been renewed.

An affidavit of due diligence was filed in support of the probate petition. The genealogist identified only one living first cousin of the decedent, Rita Walsh Olkes, who suffers from advanced Alzheimer's Disease and resides in a nursing home in New Jersey. All of the decedent's other first cousins were identified as having predeceased the decedent, except paternal first cousins John F. Walsh and Joan T. Walsh. The genealogist reported that she had been unable to determine whether John F. Walsh and Joan T. Walsh were deceased, other than stating that she was told by the decedent's first cousin once removed that John F. Walsh died in World War II.

On November 19, 2013, counsel for Helen C. Dodick, Esq., the Public Guardian for Elderly Adults in New Jersey, as the guardian for Rita Walsh Olkes, filed a notice of appearance in the probate proceeding and requested examinations pursuant to SCPA § 1404. On March 28, 2014, the preliminary executor amended his petition for probate, and on March 31, 2015, Helen C. Dodick filed objections to the probate of the proffered will.

Examinations of the witnesses to the will were conducted, and a court conference followed on June 10, 2015. Depositions of the preliminary executor and the other beneficiaries named in the will were conducted. In a subsequent court conference, various discovery issues were addressed, including the decedent's utilities records and medical records, but according to counsel for Marc deVenoge, objectant's counsel did not indicate that he needed access to Marc deVenoge's personal cell phone records, or that he intended to subpoena these records.

III. MOTION TO QUASH

Presently before the court is a motion filed on behalf of Marc deVenoge for an order pursuant to CPLR § 2304 to quash a subpoena served upon AT&T, and pursuant to CPLR § 3103 for a protective order denying or limiting the subpoena served on AT&T Subpoena Center, for the cell phone records for Marc deVenoge. The subpoena, a copy of which is attached as Exhibit E to the motion, seeks "all Billable, Local (LUD), and Toll calls concerning MARC DEVENOGE . . . for the period of 2009-2013, Together with all such records which you have in your custody or power, concerning the aforesaid individuals."

Counsel for Marc deVonege reports that a good faith effort was made for the withdrawal of the subpoena, as required by CPLR § 2304, but that although objectant's counsel agreed to modify a parallel subpoena of the phone records of Alice King,¹ there was no agreement to modify or withdraw the subpoenaed records of Marc deVenoge.

Counsel for Marc deVenoge makes the following arguments in support of the motion to quash:

¹Service of a subpoena duces tecum for the telephone records of Alice King is also mentioned in the opposition to the motion. Further, Alice King sent a letter to the court requesting that she be granted the same relief as that sought by Marc deVenoge in his motion to quash. However, Alice King was advised that in order to obtain the same relief as that requested by Marc deVenoge she, too, would have to file a motion to quash, but she chose not to do so. Accordingly, the subpoena served on Alice King will not be addressed in this decision.

(1) A subpoena duces tecum may not be used to ascertain the existence of evidence, but can only be used to compel the production of specific documents that are relevant and material.

(2) In the subpoena and accompanying notice, objectant failed to state the circumstances or reason for the subpoena, as required.

(3) There is no legitimate purpose for obtaining the personal cell phone records of Marc deVenoge, who testified that he made telephone calls on behalf of the decedent to settle bills, arrange for the payment of taxes, and connect the decedent with a physician to discuss medical issues. Marc deVenoge agreed to provide an affidavit with the discovery sought by objectant's counsel, and there are no outstanding discovery issues that can be resolved through the disclosure of Marc deVenoge's personal cell phone records.

(4) The time frame in the subpoena, 2009-2013, is more expansive than permitted under the three/two year rule (22 NYCRR § 207.27), which would limit discovery to October 3, 2009 to the decedent's date of death, January 11, 2013.

Counsel for Marc deVenoge argues that the subpoena is a delay tactic designed to pressure the estate to settle debts and increase their initial settlement offer. Counsel asks that the court vacate the subpoena, or modify the subpoena so as to limit the time frame to the three/two year rule, or direct that the records be provided only to the court for a review in chambers to determine the appropriateness of disclosure of these records.

IV. CROSS-MOTION AND OPPOSITION TO MOTION TO QUASH

In response to the motion, counsel for the objectant filed a cross-motion and opposition to the motion to quash the subpoena, asking the court to: (1) deny the motion; (2) direct the petitioner to comply with outstanding discovery demands; (3) impose spoliation sanctions for the intentional destruction of evidence that the decedent was unable to manage

her own financial affairs due to hoarding and indicia of the profound nature and extent of her psychiatric impairments; (4) sanction Marc deVenoge by either dismissing the petition for probate or issuing an order rescinding the presumption of capacity and due execution afforded an attorney supervised will and further imposing an adverse inference charge on Marc deVenoge for the destruction of evidence; and (5) appointing a guardian for the unknown heirs or appointing the Public Administrator to represent the interest of the unknown heirs.

Counsel for the objectant argues that based upon the deposition testimony of Marc deVenoge, his cell phone records are material and necessary to the objections, because deVenoge testified that he discussed the decedent's estate plan with her and with the attorney/draftsperson, who was suffering from dementia when he was deposed, and who is now deceased. It is argued that the records will show how frequently and when Marc deVenoge spoke with the attorney/draftsperson, and whether Marc deVenoge spoke with the other beneficiaries around the same time. It is further argued that the timing and frequency of the telephone conversations between deVenoge and the decedent bear upon: (a) capacity, since deVenoge testified about the decedent's understanding of the provisions contained in her prior will; and (b) undue influence. It is also pointed out that the subpoena has been narrowed to request only telephone records between October 3, 2009 through January 11, 2013.

Counsel for the objectant also requests that the court issue an order imposing sanctions for spoliation of evidence, based upon the intentional destruction of two hundred boxes of the decedent's papers and other evidence of hoarding. If, as claimed by the petitioner, the prior and now deceased attorney/draftsperson advised the petitioner to destroy the decedent's papers, then objectant's counsel asks for an alternative sanction of striking the presumption of capacity and due execution afforded an attorney-supervised will, and adopting an adverse inference charge, and imposing a monetary sanction for the cost of the cross-motion and the expenses of duplicating the evidence.

In addition, the objectant asks the court to direct the petitioner to comply with the outstanding discovery demand. Specifically, petitioner “has not provided any information regarding the 190 boxes and containers which were destroyed, nor the ten boxes and containers previously deemed ‘important’”. Further, objectant states that Marc deVenoge “should be compelled to produce the documents he received and sent under the power of attorney granted to him by the decedent.”

Finally, counsel for the objectant submits that jurisdiction is incomplete because the genealogist was unable to determine the dates of death of the decedent’s first cousins, John F. Walsh and Joan Walsh, leaving their possible interests in the estate of the decedent unresolved. Counsel asks for the completion of proof as to the existence or death of these two individuals, or the appointment of a guardian ad litem to represent their interests in the probate proceeding.

V. AFFIRMATION IN OPPOSITION TO CROSS-MOTION AND REPLY TO MOTION TO QUASH

In petitioner’s affirmation in opposition to the cross-motion and reply to motion to quash, counsel for the petitioner argues that the subpoena is facially defective because pursuant to CPLR § 3101 (a) (4), neither the subpoena nor the accompanying affidavit specify the circumstances or reasons the disclosure is required. It is argued that the subpoena is overly broad, and although the time frame for which it seeks cell phone records was subsequently narrowed, it is still not limited to records of telephone calls between the petitioner and the decedent, the attorney/draftsperson, or other beneficiaries under the decedent’s will. In any event, counsel for the petitioner maintains that the records sought are not probative to the claims asserted because it is impossible to know the content of the phone calls and whether they pertained to the decedent and her will, especially because the petitioner and the attorney/draftsperson shared a personal friendship, apart from their respective relationships with the decedent.

It is further asserted that the arguments made by objectant concerning undue influence and lack of capacity are improper in a motion for sanctions for spoliation and should be dismissed. Counsel for the petitioner points to the objectant's references to the decedent's prior will which, counsel for petitioner argues, are also improper in the context of a cross-motion for sanctions for spoliation. Similarly, counsel argues that the objectant's multiple references to the decedent's diagnoses and prescription medication do not establish a lack of capacity.

With respect to the objectant's request that the court order the petitioner to comply with all discovery demands, the petitioner's counsel maintains that his client is in full compliance. Counsel volunteers that the delay in providing the tax documents to objectant's counsel was his error, since he forgot that he had been given a box of documents at the start of his representation of the petitioner. He also argues that since there was no malicious or wanton destruction of evidence, there is no call for spoliation sanctions based upon these facts.

With respect to the challenge to jurisdiction over all of the interested parties, counsel for the petitioner states that a genealogy firm made an exhaustive search of the decedent's family tree and was unable to confirm the deaths of the decedent's alleged paternal first cousins, John F. Walsh and Joan T. Walsh. Counsel continues: "If the Court deems it necessary to protect a potential class of individuals born in the early 1920's, one of which is rumored to have died in World War II, then a guardian ad litem should be appointed to represent their interests."

VI. REPLY AFFIRMATION TO MOTION

Objectant's counsel replied to the affirmation of the petitioner's counsel by noting that the petitioner does not dispute that the class of potential distributees was not closed. Counsel

further argues that it was necessary to raise many facts surrounding the execution of the will in connection with the cross-motion for sanctions for spoliation, because the decedent's vulnerability and inability to handle her financial affairs establishes the relevance of the evidence that was destroyed after the petitioner was on notice of the will contest. Once again, the objectant seeks (1) appointment of a guardian ad litem for unknown distributees;² (2) sanctions for spoliation; and (3) a direction that the petitioner comply with discovery demands.

VII. ANALYSIS AND CONCLUSION

The court must begin by first addressing the objectant's assertion that jurisdiction in this matter is incomplete. If there is no jurisdiction over John F. Walsh and Joan Walsh, the court cannot presently address the other prayers for relief in the motion and cross-motion.

The court has carefully reviewed the amended affidavit of due diligence filed by Susan Caruso, a genealogist, in connection with the probate petition. In her affidavit, Susan Caruso states the following:

“Searches were conducted for both John F. and Joan T. . . . A death index search was conducted for John F. Walsh who was born circa 1922 with an unknown date of death we were unable to determine the date of death of John F. Walsh. . . . we were unable to develop further information for Joan. Patricia Corbett [decedent's first cousin once removed] believed that John F. Walsh had died during World War II. She had no further information with regard to Joan Walsh.”

There is no further information in the affidavit concerning these two distributees, or information concerning further searches to locate them.

²Although the papers filed refer to these distributees as “unknowns,” their status is actually that of known distributees whose whereabouts are unknown. The distinction affects the payment of distributive shares. Payment for an unknown heir is made to the New York State Comptroller, pursuant to SCPA § 2222. Payment for a known but missing heir is made to the Treasurer of Nassau County pursuant to SCPA § 2223, with the funds paid into the court.

Accordingly, the court finds that jurisdiction over these two interested parties is incomplete. As noted above, the genealogist was unable to determine when, or even if, John F. Walsh and Joan T. Walsh died. Further, the affidavit does not provide any details about the searches, if any, she conducted to find these two missing distributees.

Counsel for the petitioner is directed to supply the court with a supplemental affidavit of due diligence, by April 29, 2016, advising the court in detail of the steps taken to search for the two missing parties. If the affidavit indicates that the whereabouts of these distributees remain unknown despite diligent efforts to locate them, the petitioner shall also submit an order for substituted service by publication. Once jurisdiction has been completed, the court will appoint a guardian ad litem to represent the interests of any distributee whose whereabouts remain unknown.

Until such time, the court will not address the prayers for relief in the motion and the cross-motion. The probate proceeding is stayed, including all discovery, with the exception of the preliminary letters issued to Marc deVenoge, which remain in force.

This constitutes the decision and order of the court.

Dated: March 21, 2016
Mineola, New York

E N T E R:

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Judge of the Surrogate's Court

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