

Matter of Smith

2016 NY Slip Op 32161(U)

October 18, 2016

Surrogate's Court, Nassau County

Docket Number: 2015-386348

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
File No. 2015-386348
Dec. No. 31923**

JOSEPH SMITH,

Deceased.

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PRESENT: HON. MARGARET C. REILLY

The following papers have been considered in the preparation of this decision:

Order to Show Cause with Exhibits	1
Affirmation in Opposition	2
Reply Affirmation in Support	3
Sur-reply Affirmation in Opposition	4
Sur-sur-reply Affirmation in Support	5

In this probate proceeding, before the court is a motion by the petitioner Janet Isasi for an order: (1) pursuant to CPLR §3103(a) denying respondent Richard Smith’s application to conduct SCPA §1404 examinations of the petitioner, attorney/drafter, and attesting witnesses; (2) pursuant to CPLR §3103(b) striking respondent’s demand for discovery and inspection; and (3) staying the SCPA §1404 examinations pending determination of the motion.

The decedent Joseph Smith was survived by the petitioner and the respondent, his two children, as his only distributees. The instrument offered for probate is dated March 10, 2009. On that date the decedent also executed a deed conveying his Great Neck residence to the petitioner. The will bequeaths the residue of the estate equally to the two children.

Petitioner argues that because the will leaves her brother his intestate share, he has no right to object to the will's admission to probate and further, relying on *Matter of Wang*, 5 AD3d 785 (2d Dept 2004), and *Matter of Hall*, 12 AD3d 511 (2d Dept 2004), he has no right to object to her appointment as executor. Thus, petitioner argues, having no right to object to the will's admission to probate or to the nomination of the executor, the respondent should be precluded from conducting an SCPA §1404 examination because nothing revealed at the examination could serve as the basis for objecting to probate (SCPA §1404[4]).

The court starts from the premise that “[a]s a general rule, the right of potential objectants, such as adversely affected distributees or legatees, to examine under SCPA §1404, is unconditional, without any preliminary showing of need for the examination” (*Matter of LaMotta*, 101 AD3d 1009 [2d Dept 2012], quoting *Matter of Peckolick*, 167 Misc2d 597, 599 [Sur Ct, New York County 1996]). The “interest” that must be “adversely affected” to give rise to the right to conduct an SCPA §1404 examination and file objections is generally understood to be a pecuniary interest. That is, a beneficiary whose pecuniary interest under the will offered for probate is the same or larger than if the decedent died intestate will not have standing to file objections to probate (*Matter of McGoldrick*, 7 Misc d 1001[A] [Sur Ct, Nassau County 2005]; *Matter of Haddock*, 22 Misc 2d 694 [Sur Ct, Nassau County 1960]).

The petitioner argues that since the residuary clause, the only dispositive provision of the will, provides for distribution of the estate in equal parts to the two

beneficiaries/distributees the respondent has no right to object because he would receive the same one-half of the estate if the decedent had died intestate.¹ However, ARTICLE II of the propounded instrument provides that if at the time of his death the decedent was a joint owner, co-owner, or owner of any real property, bank account, bond, security etc. held jointly with another person or payable to the survivor he bequeaths to such person all his right, title and interest in that property, recognizing the possibility that a true joint tenancy with right of survivorship was not properly created. There has been no discovery taken to date and it is unknown whether or not the decedent died owning any property jointly with the petitioner or any third party. If he did, and if the respondent were to successfully argue that such property is an estate asset rather than the property of the surviving joint tenant, this provision would appear to bequeath that estate property to the surviving joint tenant, depriving him of any interest in that property. In that case, the respondent's pecuniary interest would be adversely affected by the will's admission to probate and he should be given the opportunity to contest it (*see Matter of Basile*, 63 Misc 2d 845, 848-849 [Sur Ct, Suffolk County 1970])[recognizing that if there is even a possibility that the intestate share would be larger than the distributee's bequest under the will, he is entitled to object]).

The court also notes that the propounded instrument, unlike the decedent's prior will on file with the court, contains an *in terrorem* clause which will result in the forfeiture of the respondent's bequest in the event he is unsuccessful in a potential will contest. Recognizing

¹The court notes that the will provides that the petitioner serve as executor without commissions.

the draconian nature of *in terrorem* clauses, in 2011 the legislature amended SCPA §1404 and EPTL §3-3.5² following the Court of Appeals' decision in *Matter of Singer* (13 NY3d 447 [2009]) by expanding the so-called “safe harbor” provisions of those two statutes to permit, in “special circumstances” the examination pursuant to SCPA §1404 of “any person whose examination the court determines may provide information with respect to the validity of the will that is of substantial importance or relevance to a decision to file objections” (SCPA §1404[4]; EPTL 3-3.5 [b][3][D]). Thus, where the will contains an *in terrorem* clause, the Court of Appeals and the legislature have recognized that pre-objection discovery in probate proceedings should be expanded, not limited as would be the result if the instant motion were granted.

Furthermore, as a “person interested” as that term is defined in SCPA 103[39], the respondent has the statutory right to file objections to the appointment of the nominated executor (SCPA 709, *but see Matter of Wang*, 5 AD3d 785 [2d Dept 2004], and *Matter of Hall*, 12 AD3d 511 [2d Dept 2004], for the proposition that a party may only object to the appointment of the executor where the appointment affects the party's pecuniary interest). The movant's papers recognize that the court in *Matter of Wang* (5 AD3d 785 [2d Dept 2004]) was careful to distinguish that case from a prior Second Department case, *Matter of Brumer* (69 AD2d 438 [2d Dept 1979]), where the respondent had not objected to the admission of the will to probate, but merely to the appointment of the nominated executor.

²L 2011, ch 286.

The movant assumes that the respondent's position is akin to the objectants in *Wang* and *Hall*, rather than the objectant in *Brumer*. Here, however, no objections have yet been filed and no discovery has been had because the order to show cause that issued on the petitioner's motion stayed all discovery pending this decision on the motion.

Accordingly, the branch of the motion to prevent the respondent from conducting SCPA §1404 examinations is denied.

The branch of the motion for a protective order striking the respondent's Notice for Discovery and Inspection on the basis that respondent is precluded from conducting an SCPA §1404 examination is also denied. Petitioner is directed to serve a response to the Notice for Discovery and Inspection within twenty (20) days of the date hereof (CPLR 3122 [a][1]).

This matter will appear on the court's calendar on November 16, 2016 at 9:30 a.m., to schedule a date for the SCPA §1404 examination.

This is the decision and order of the court.

Dated: October 18, 2016
Mineola, New York

E N T E R:

HON. MARGARET C. REILLY
Judge of the Surrogate's Court

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