Matter of Rafic
2017 NY Slip Op 31264(U)
May 31, 2017
Surrogate's Court, Nassau County
Docket Number: 2016-389806
Judge: Margaret C. Reilly

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Petition for the Issuance of Letters of Administration in the Estate of

FLEURETTE RAFIC,

Deceased.

DECISION

File No. 2016-389806
Dec. No. 32957

Cross-Petition by Mary Rafic and Michele Rafic for the Issuance of Letters of Administration in the Estate of

FLEURETTE RAFIC,

Deceased.

DECISION

File No. 2016-389806
Dec. No. 32958

PRESENT: HON. MARGARET C. REILLY

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

Petition and Exhibits. 1
Objections 2
Cross-petitions. 3
Motion and Exhibits 4
Affirmation in Opposition. 5

The decedent was survived by two children, Mary Rafic and Michele Rafic and Mahrous Grase to whom she was married.

Mahrous Grase filed a petition for his appointment as administrator of the estate [File No. 2016-389806]. Mary Rafic and Michele Rafic filed objections to the petition alleging that Mahrous Grase is disqualified to serve as administrator by reason of "substance abuse, improvidence and/or want of understanding" (SCPA §707[l][e]). Mary Rafic and Michele Rafic filed a cross-petition for letters of administration [File No. 2016-389806/A]. Mahrous Grase filed objections to the cross-petition.

The attorney for Mary Rafic and Michele Rafic filed a motion for a court ordered subpoena, directing the production of hospital records from Plainview Hospital and police records from the Nassau County Police Department [the subpoenas are attached to the Motion as Exhibits "A"]. The attorney for Mahrous Grase filed an affirmation in opposition to Mary Michele Rafic's motion.

CPLR §3101(a)(1) reads in relevant part as follows:

> "...Generally, there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by:
> (1) a party..."

Kooper v. Kooper, 74 AD3d 6 [2d Dept 2010] reads in relevant part as follows:

> Disclosure in New York civil actions is guided by the principle of full disclosure of all matter material and necessary in the prosecution or defense of an action (CPLR §3101[a]). The phrase "material and necessary" is "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Allen v. Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]; *see Tower Ins. Co. Of N.Y. v. Murello*, 68 AD3d 977 [2009]). The Court of Appeals' interpretation of "material and necessary" in Allen has been understood "to mean nothing more or less than 'relevant' " (*Conors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B*, CPLR C3101:5)."
>
> To withstand a challenge to a discovery request, therefore, the party seeking discovery must first satisfy the threshold requirement that the disclosure sought is "material and necessary," whether the request is directed to a party (*see* CPLR §3101 [a][1]) or a nonparty (*see* CPLR §3101[a][4]). Entitlement to discovery of matter satisfying the threshold requirement is, however, tempered by the trial court's authority to impose, in its discretion, appropriate restrictions on demands which are "unduly burdensome" (*Scalone v. Phelps Mem. Hosp. Ctr.*, 184 AD2d 65, 70 [1992]; *see Kaye v.*

> *Kaye*, 102 AD2d 682, 691 [1984]) and to prevent abuse by issuing a protective order where the discovery request may cause "unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts" (CPLR §3103 [a]). Where a request for discovery from a nonparty is challenged solely on the ground that it exceeds the permissible scope of matters material and necessary in the prosecution or defense of the action, a motion to quash is properly denied if that threshold requirement is satisfied (*see Samide v. Roman Catholic Diocese of Brooklyn*, 16 AD3d 482, 483-484 [2005]), or properly granted if the discovery sought is not material and necessary (*see Mendelovitz v Cohen*, 49 AD3d 612 [2008]).

In the instant case, the issues are elegibility to receive Letters (SCPA § 707) and constructive abandonment.

Mary Rafic and Michele Rafic seek to subpoena hospital records and the records of the Nassau County Police Department relating to an incident on October 23, 2012. Counsel for the movants states in his affirmation that decedent was the victim of domestic abuse, requiring an order of protection in favor of the decedent against Mahrous Grase, in l998. Further, as a result of call to 911 on October 23, 2012, to "check on the decedent," a police officer (or EMT) advised that "the decedent be removed from the home." Counsel states that the incident caused the decedent to move to Florida. He concludes that the conduct of Mahrous Grase resulted in a "constructive abandonment" of the decedent.

SCPA § 4-1.1 sets forth the categories of distributees of an estate. A surviving spouse is disqualified for purposes of SCPA § 4-1.1 where he/she has abandoned the decedent and such abandonment continued to the time of death (SCPA § 5-1.2 [a] [1] [5]). Neither the objections filed nor the submissions in support of the cross petition, allege an actual

abandonment.

As to constructive abandonment, there is no provision for disqualification in SCPA § 5-1.2 on these grounds. Notwithstanding, the submissions do not allege facts which would be proof of constructive abandonment. The criteria are those applied in the Supreme Court, in an action for separation or divorce (*see Matter of Yengle*, 113 AD3d 918 [3rd Dept 2014]).

The movants also seek police records in order to establish that Mahrous Grause is disqualified for substance abuse. Movants allege that the police (or EMT) advised that there were drugs everywhere in the home. Mahrous Grause denies the allegation. In order to disqualify a fiduciary for substance abuse, it must be established that there is a current and habitual use of the substance which will impair his ability to discharge the office (*Matter of Cugini*, 24 Misc 3d 1234 [A] [Sur Court, Richmond County 2009]). Records of an incident in 2012 or before that date, would not establish a basis for disqualification.

The motions to "so order" a subpoena for the records of the Nassau County Police Department is **DENIED**. The motion to "so order" the subpoena for the records of the Plainview Hospital is also **DENIED**.

This constitutes the decision and order of the court.

Dated: May 31, 2017
Mineola, New York

E N T E R:

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Judge of the Surrogate's Court

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