

Matter of Weiss

2017 NY Slip Op 31441(U)

July 10, 2017

Surrogate's Court, New York County

Docket Number: 2016-387/A

Judge: Nora S. Anderson

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SURROGATE'S COURT: NEW YORK COUNTY

New York County Surrogate's Court
Date: July 10, 2017

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Probate Proceeding, Will of

File No. 2016-387/A

RALPH B. WEISS,

Deceased.

-----X
ANDERSON, S.

In this probate proceeding are two motions brought by paternal first cousins of the decedent: (1) Carl Hauser asks the court to set aside his waiver and consent to probate, and (2) both Hauser and Elaine Solomon seek to compel the testimony of the nominated executor and sole beneficiary of the propounded instrument (SCPA 1404).

Ralph Weiss died on December 8, 2015, leaving no known relatives other than the above movants. In the propounded instrument, dated June 7, 2014, Ralph's entire estate passes to Christine Yost, a non-relative. Proponent Stephen Lustig, the nominated executor, opposes both motions.

Motion to vacate Hauser's waiver and consent

On January 25, 2016, Hauser executed a waiver and consent to probate ("waiver") which was filed with the court shortly thereafter. He now asks the court to set aside his waiver so that he may conduct SCPA 1404 discovery and file objections.

Proponent's attorney sent Hauser a waiver form, along with a copy of the propounded instrument. Hauser states that he signed the waiver without the advice of independent counsel and without understanding its legal ramifications. He alleges that had he known that he would be foreclosed from conducting pre-objection discovery, he would not have executed the waiver.

An instrument containing a waiver and consent to probate should not be set aside lightly. The party seeking its annulment must make a showing of good cause, that is, excusable circumstances such as fraud, collusion, mistake, or accident. He must also demonstrate a reasonable probability of success, and that the parties can be returned to the status quo (*Matter of Frutiger*, 29 NY2d 143 [1971]; CPLR 5015[a]). The Court of Appeals in *Frutiger* indicated that a more relaxed standard of good cause might apply in cases where the probate decree had not issued and where upholding the waiver would promote injustice (*id.* at 150; *see Matter of Morse*, NYLJ, May 19, 1998, at 25, col 5 [Sur Ct, New York County]).

The fact that Hauser did not seek legal guidance before signing the waiver does not, by itself, warrant setting aside the waiver (*Matter of Anderson*, 22 Misc 2d 662 [Sur Ct, Suffolk County 1960]). A party is charged with knowledge of the contents of a waiver as well as its legal effects (*id.* at 363; *Matter of Hall*, 185 AD2d 322 [2d Dept 1992]; *Matter of Wright*, 271 AD2d 201 [1st Dept 2000]). Failing to understand or appreciate the significance of the waiver does not constitute sufficient cause to permit its withdrawal (*Matter of Coccia*, 59 AD2d 716 [2d Dept 2009]; *Matter of Hall* at 323). Moreover, although proponent's attorney had no obligation to explain the waiver to Hauser (*Matter of Anderson* at 663; *Matter of Martucci*, NYLJ, Sept. 10, 2004, at 17, col 2 [Sur Ct, Suffolk County]), he nonetheless included a letter with the waiver form which clearly set forth the significance and consequences of the instrument: "You alone possess a right to contest the will. However, this does not mean you must contest the wills [sic]. Please examine the wills [sic] enclosed. If you have no objection to the probate of these instruments [sic], please sign the enclosed Waiver . . .". Lastly, Hauser does not allege that he suffered from a disability when he executed the waiver, nor does he submit evidence that the

waiver was procured by fraud or misrepresentation.

Precedents indicate that the less substantial the excuse for avoiding an executed waiver, the more substantial the basis must be for objection (*see Matter of Culley*, NYLJ, Feb. 14, 1996, at 31, col 3 [Sur Ct, Nassau County] [distributees who alleged that they were misled into signing consents without advice of counsel were permitted to withdraw their consents where it was shown that codicil, signed shortly after decedent entered a nursing home and less than a month before his death, added a bequest for the religious organization affiliated with such residence]; *Matter of Engelberg*, NYLJ Oct. 1, 1991, at 24, col 3 [Sur Ct, Westchester County] [son who alleged confusion and lack of counsel when he signed a consent to probate was permitted to withdraw his consent where it was shown that decedent allegedly executed will while in hospital and under heavy sedation]).

As to the purported merit of the objection that he would raise here, Carl notes: (1) that a lawyer was not present at the instrument's execution, (2) that the identity of the draftsman is unknown, (3) that decedent had rushed around his neighborhood haphazardly with the witnesses in tow searching for a notary public, (4) that decedent suffered from physical and mental ailments, as reflected by his squalid living conditions, and (5) that there may have been undue influence exerted against decedent by proponent and Christine Yost given their personal relationship. These observations do not add up to an arguable case against probate, much less a potentially meritorious one. Without passing on the ultimate outcome of a possible will contest, the court notes that the testimony of one of the attesting witnesses, a superintendent in decedent's building, does not give rise to inferences of improper execution of the propounded instrument.

In view of the foregoing, Hauser has not established sufficient grounds to warrant setting

aside his waiver. Accordingly, his motion is denied.


SCPA 1404 Motion

Elaine Solomon¹ seeks the court's permission to examine Stephen Lustig, the proponent of the will and nominated executor, and Christine Yost, the residuary beneficiary. A party to a probate proceeding has the right to examine the attesting witnesses and the draftsman, either before or after filing objections (SCPA 1404[4]). In addition, the nominated executor and the proponent of the will may be examined if the instrument contains an *in terrorem* clause (*id.*). Only upon a showing of special circumstances may a party obtain permission of the court to examine other persons and then only if the court determines that such examination may provide information concerning the validity of the will which might be relevant or important to a party's decision whether or not to file objections (*id.*). In this case, the instrument does not contain an *in terrorem* clause.

At the call of the calendar, the court granted the discovery motion, in part, allowing the examination of proponent Stephen Lustig, and denying the request to examine Christine Yost, without prejudice. The fact that the identity of the draftsman is unknown constitutes "special circumstances" within the meaning of SCPA 1404(4). However, movant's sheer speculation about the relationship between Yost and proponent is not enough to show that Yost's testimony would be "of substantial importance or relevance" for purposes of section 1404(4).

This decision constitutes the order of the court.

Dated: July 10, 2017



SURROGATE

¹Carl Hauser no longer has standing to make such a motion.