

Matter of Baugher

2017 NY Slip Op 31758(U)

July 31, 2017

Surrogate's Court, Nassau County

Docket Number: 353909

Judge: Margaret C. Reilly

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**SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

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**In the Matter of the Probate of the Last Will
and Testament of**

**DECISION & ORDER
File No. 353909
Dec. No. 32899**

PHEBE H. BAUGHER,

Deceased.

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PRESENT: HON. MARGARET C. REILLY

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

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| Order to Show Cause and Supporting Papers filed by the Respondents. | 1 |
| Letter from Joseph A. Hyland on behalf of the Respondents, dated January 6, 2017. | 2 |
| Letter from Joseph A. Hyland on behalf of the Respondents, dated January 9, 2017. | 3 |
| Petitioner’s Memorandum of Law in Opposition | 4 |
| Affirmation of Colm P. McNerny in Opposition.. . . . | 5 |
| Affidavit of Petitioner in Opposition. | 6 |
| Affidavit of Respondent Jeffrey Baugher in Opposition. | 7 |
| Attorney’s Affirmation in Reply and in Further Support | 8 |
| Petitioner’s Sur-Reply | 9 |
| Letter from Joseph A. Hyland on behalf of the Respondents, dated February 27, 2017. | 10 |
| Letter from Colm P. McNerny on behalf of the Petitioner, dated March 2, 2017 . | 11 |

PROCEDURAL HISTORY

In the context of a contested probate proceeding, the respondents, William Hugh Baugher, Laraine Baugher Stuek, Ralph Edmond Baugher, Richard Scott Baugher, Lisa Baugher Eppley, Whitney Baugher Godfrey, Thomas Spencer Baugher, and Douglas Kyle Baugher, seek an order staying the time by which the respondents have to file objections to the instrument, dated March 11, 2008, propounded by Jonathon Baugher as the last will and testament of Phebe Baugher. The respondents also seek a stay of the CPLR Article 31 discovery in the underlying probate proceeding.

The stay is sought pending the outcome of the petitioner's appeal with the Appellate Division, Second Department, of the order of Justice Jerome C. Murphy, which granted summary judgment to defendant Cullen & Dykman LLP, and dismissed the complaint filed by the petitioner, as the preliminary executor of the estate of Phebe Baugher, which complaint sought disgorgement of legal fees from Cullen and Dykman LLP in an amount in excess of \$500,000.00 (hereinafter referred to as "the Cullen proceeding").

In the original petition, the respondents provided a second prong for seeking a stay, based upon the possibility that the petitioner would appeal this court's decision and order dated December 1, 2016 dismissing the related SCPA § 2103 proceeding (hereinafter referred to as "the Wilson proceeding") filed by Jonathon Baugher, in his capacity as the preliminary executor of the estate of Phebe Baugher. In the Wilson proceeding, Jonathon Baugher sought the turnover of retained earnings from W.S. Wilson Corporation to the decedent's estate in the approximate sum of \$22,000,000.00. He notified the respondents on January 12, 2017 that he would not file an appeal of the court's decision. Consequently, this alternative basis for a stay was withdrawn by the petitioners in an affirmation filed by counsel for the respondents, dated February 13, 2017. However, the underlying facts remain pertinent to the court's consideration of the request for a stay, as explained below.

The order to show cause was signed by the court on January 17, 2017. The Respondents' time to file objections to the will and to proceed with Article 31 discovery were stayed pending the Court's determination of the request by the respondents for a further stay.

BACKGROUND

As noted in previous decisions issued by this court, Phebe Baugher (hereinafter referred to

as “the decedent”) died on November 4, 2008. She was survived by seven children: Jonathon Kirk Baugher, Jeffrey Keith Baugher, Richard Scott Baugher, William Hugh Baugher, Laraine Baugher Stueck, Ralph Edmond Baugher, and Lisa Baugher Eppley. The decedent was predeceased by her son, Harry Leroy Baugher, who left three children, Whitney Baugher Godfrey, Thomas Spencer Baugher and Douglas Kyle Baugher.

In November 2008, Jonathon Baugher (hereinafter referred to as “the petitioner”) offered for probate an instrument dated March 11, 2008 as the decedent’s last will and testament (hereinafter referred to as “the will”). Under the terms of the will, two of the decedent’s children, namely, the petitioner and Jeffrey Keith Baugher, each receive thirty percent (30%) of the residue, and 18 grandchildren, three of whom are still infants, collectively receive forty percent (40%) of the residue.

In response to the probate proceeding, the respondents sought and were granted a stay, pending the conclusion of the Wilson proceeding. As stated in this court’s decision issued on June 22, 2010, the stay was granted “to the extent that the [respondents]s’ objections to the propounded instrument, if any, shall be filed within 30 days of this court’s determination of [the Wilson proceeding], or until further order of this court.” In the interim, the court issued preliminary letters testamentary to Jonathon Baugher.

On November 7, 2016, the Supreme Court granted a motion to dismiss the Cullen proceeding. The petitioner moved to reargue that decision, and has also filed a Notice of Appeal with the Appellate Division, Second Department.

On December 1, 2016, this court dismissed the Wilson proceeding, thereby triggering the requirement that objections, if any, to the will be filed within 30 days. The petitioner did not appeal the decision to dismiss the Wilson proceeding, which is now final.

On December 27, 2016, following the dismissal of the Wilson proceeding, the guardian ad litem representing the interests of the infant grandchildren filed objections to probate. The respondents did not. Instead, they filed the present order to show cause, seeking a further stay of the time by which they must file objections to probate, pending the petitioner's appeal of the decision in the Cullen proceeding.

SUPPORT FOR, AND OPPOSITION TO, THE REQUESTED STAY

The petitioner argues that the request for a stay should be denied because there has already been a stay of six and one-half years pending the outcome of the Wilson proceeding, which proceeding has now been dismissed and concluded. While there may have been approximately \$22,500,000.00 in dispute before the conclusion of the Wilson proceeding, there is now only \$500,000.00 in dispute remaining, in the Cullen proceeding. The petitioner maintains that the respondents have offered no compelling argument for a further stay pending the outcome of the appeal filed by the petitioner in the Cullen proceeding. Moreover, any additional stay would prejudice the petitioner because it would needlessly delay the court's determination as to whether the will can be admitted to probate and full letters testamentary can be issued.

The respondents argue that it is they who will be prejudiced if they are required to file objections without knowing the full value of the estate, which may or may not include an additional \$500,000.00, depending on the outcome of the petitioner's appeal in the Cullen proceeding. While it is true that the guardian ad litem already filed objections to the will, the respondents note that his objections do not trigger the in terrorem clause contained in the will. This differs from the potential consequences of objections filed by the respondents, which may trigger the in terrorem clause in the event the objections are unsuccessful, and may cause the forfeiture of their children's interests under

the will, pursuant to Paragraph Fifth.

In a sur-reply, the petitioner notes that if the court grants the present application, the result may be that although the probate proceeding has already been pending for more than eight years, a further stay might extend it for an additional four or five years, pending the final outcome of the Cullen proceeding which, if the motion to reargue or the appeal is granted, may require discovery and a trial. Moreover, a further stay will undermine the purpose of the in terrorem clause, even though the court, in Dec. No. 26334, issued on June 22, 2010, previously denied the respondents' request for a stay pending the court's determination of the clause.

ANALYSIS AND CONCLUSION

The court has carefully reviewed and considered all of the papers submitted in support of, and in opposition to, the order to show cause for an order staying the time by which the respondents have to file objections to the propounded will and a stay of the CPLR Article 31 discovery in the underlying probate proceeding. "[O]bjections [to probate of a will] must be filed on or before the return day of the process or on such subsequent day as directed by the court" (SCPA § 1410). "[T]he court has the discretion to allow the filing beyond the time limitation in SCPA § 1410" (2 Harris N.Y. Estates: Probate Admin. & Litigation § 24:64 [6th ed.]).

In connection with the consideration of the respondent's request for a further stay of the CPLR Article 31 discovery, the court has "broad discretion in supervising discovery and the setting of reasonable terms and conditions therefor (*Matter of U.S. Pioneer Execs. Corp.*, 47 NY2d 914, 916 [1979]; *Mattocks v White Motor Corp.*, 258 AD2d 628, 629 [2d Dept 1999]).

In the present proceeding, a stay was granted in 2010, pending the court's determination in the Wilson proceeding. Once a determination was reached, objections to probate, if any, were to be

filed within 30 days. On December 1, 2016, this court granted a dismissal of the Wilson proceeding, which activated the 30-day deadline for the filing of objections. The deadline for objections, and the CPLR Article 31 proceeding, were then further stayed until the court issued a decision in connection with the respondents' request for an additional stay.

The respondents have now had more than seven years in which to determine whether they will file objections, and what form, if any, the objections will take, and ample time to prepare for discovery under CPLR Article 31.

The request for a further stay is **DENIED**.

Objections to probate, if any, will be due no later than September 8, 2017.

A scheduling conference will be held on September 14, 2017, at 9:30 a.m., in connection with discovery under CPLR Article 31.

This is the decision and order of the court.

Dated: July 31, 2017
Mineola, New York

E N T E R :

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

cc: Colm P. McInerney, Esq.
Skadden Arps Slate Meagher & Flom LLP
4 Times Square
New York, New York 10036

Ronald J. Rosenberg, Esq.
Rosenberg Calica & Birney LLP
100 Garden City Plaza #408
Garden City, New York 11530