

Matter of Schellbach
2017 NY Slip Op 32059(U)
August 16, 2017
Surrogate's Court, Nassau County
Docket Number: 2017-1639
Judge: Margaret C. Reilly
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**SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

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Administration Proceeding, Estate of

**ELIZABETH D. SCHELLBACH,
a/k/a ANNE SCHELLBACH
a/k/a ELIZABETH SCHELLBACH,**

Deceased.

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PRESENT: HON. MARGARET C. REILLY

**DECISION
File No. 2017-1639
Dec. No. 33155**

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

Petition for Letters of Administration	1
Affidavit of Heirship.. . . .	2
Affidavit of Original Will.. . . .	3
Waivers of Citation, Renunciations and Consent (4).. . . .	4

PROCEDURAL HISTORY AND BACKGROUND

The petitioner, Lewis Carl Schellbach, Jr., asks this court to issue letters of administration in the estate of his mother, Elizabeth D. Schellbach (hereinafter referred to as “the decedent”), who died on December 23, 2016 survived by five children: Lewis Carl Schellbach, Jr. (hereinafter referred to as “the petitioner”); Elizabeth S. Young; Kathryn Schellbach Rogers; Margaret Fraser; and Peter Harned Schellbach. There is no opposition to the petition.

The petitioner filed an affidavit in which he explains that the decedent executed a last will and testament on April 5, 1998. The original will was retained by the decedent’s attorneys. Subsequently, counsel reported that the firm was unable to locate or produce the

original will. The petitioner has a copy of the original will, sent to him by counsel. However, the petitioner brought an administration proceeding, rather than a proceeding to probate a lost will, due to the fact that: (1) an administration proceeding may be more expeditious; and (2) according to New York law, the assets will be distributed in an administration proceeding exactly as they would have been distributed in accordance with the terms of the decedent's lost will. Each of the other residuary beneficiaries and distributees received a copy of the will and filed a waiver expressly consenting that the photocopy of the purported will dated April 5, 1998 not be admitted to probate. A copy of the will was filed with the court, and the court agreed to entertain a petition for letters of administration.

In connection with the petition, an affidavit of domicile was filed with the court by counsel for the petitioner on April 28, 2017. Counsel states that from July 2014 until the decedent's death, she had been living in a medical and nursing care facility in Stamford, Connecticut (hereinafter referred to as "the Connecticut facility"), to which she had been moved by her attorneys-in-fact and health care agent: Lewis Carl Schellbach, Jr.; Elizabeth S. Young; and Peter Harned Schellbach (hereinafter referred to as "the decedent's representatives"). Immediately prior to that move, after showing signs of dementia in 2009, the decedent lived in a New York medical and nursing facility (hereinafter referred to as "the New York Facility") from April 2010 until July 2014. The affidavit does not indicate that the New York facility was located in Nassau County. The move to the New York facility

was immediately preceded by the sale of the decedent's home, located at 40 Dogwood Lane, Manhasset, in Nassau County, where the decedent had resided for 44 years.

ANALYSIS AND CONCLUSION

The initial issue to be addressed is whether the Surrogate's Court of Nassau County can issue letters of administration in the estate of the decedent, who resided in Connecticut at the time of her death. In the affidavit of domicile submitted in support of the relief requested, the attorney for the petitioner notes the following factors in support of a determination that the decedent was a domiciliary of Nassau County at the time of her death: (1) the decedent moved out of Nassau County not by choice, but rather, due to physical necessity and advanced years; (2) the decedent was relocated by the decedent's representatives, and did not participate in the decision to move, as she lacked the capacity to consent and did not consent; (3) the decedent maintained her right to vote in Nassau County and continued to maintain memberships and connections with religious and civic organizations in Nassau County; (4) the decedent filed New York State tax returns until she was moved to Connecticut in 2014; (5) the decedent maintained a bank account at a branch in Nassau County; and (6) after the sale of her home in 2010, the decedent's personal property was maintained in a safe deposit box in Nassau County.

At the same time, counsel for the petitioner acknowledges that: (1) the decedent's accountant filed Connecticut tax returns for part of 2014 and all of 2015, although counsel maintains that this was done despite the decedent's non-participation in her move to

Connecticut; (2) the decedent's death occurred at the facility in Connecticut where she was living; (3) the decedent's death certificate reflects that she resided at the Connecticut facility. Counsel for the petitioner argues that the decedent's place of residence should not be confused with her domicile, which remained her most recent real property address in Nassau County, prior to the sale of her home and her relocation to the New York facility and subsequent relocation to the Connecticut facility.

The definition of domicile is "[a] fixed, permanent and principal home to which a person wherever temporarily located always intends to return" (SCPA § 103 [15]). An individual's domicile is not changed simply by being absent, even for an extended period, unless the absence is accompanied by a clear intention to change the domicile. "[A]n existing domicile continues until a new one is acquired" (*Matter of Urdang*, 194 AD2d 615, 615 [2nd Dept 1993]). "An established domicile presumptively endures until a person clearly intends and acts to establish a new domicile" (*Matter of Lowenburg*, 53 Misc 3d 1214 [A], [citation omitted] [Sur Ct, Queens County 2016]). Thus, even if an individual abandons a domicile with no plan to return, the domicile remains unchanged until a new domicile is established (49 NY Jur. 2d Domicil and Residence § 23).

Determining where an individual is domiciled "is generally a mixed question of fact and law' and is based upon 'conduct manifesting an intent to establish a permanent home with permanent associations in a given location.' 'No single factor is controlling and the unique facts and circumstances of each case must be closely considered'" (*Matter of King*,

147 AD3d 1286, 1288 [citations omitted] [3d Dept 2017]). “The determination of an individual's domicile is ordinarily based on conduct manifesting an intent to establish a permanent home with permanent associations in a given location” (*Clute v Chu*, 106 AD2d 841, 843 [3d Dept 1984]). To demonstrate that a change of domicile occurred, a party must “must establish the decedent's intention to effect a change of domicile from her acts, statements, and conduct” (*Matter of Urdang*, 194 AD2d 615, 615 [2d Dept 1993])

In the present proceeding, the domicile of the decedent is at issue because although the unopposed petition seeks the issuance of letters of administration in Nassau County, the decedent moved out of Nassau County in 2010 and never returned. Her home in Manhasset was sold. Due to the decedent’s advanced age and physical condition, she spent the remaining years in medical and nursing facilities, first in New York and then in Connecticut, where she resided at the time of her death.

The sale of an individual’s home while she is at a nursing facility may preclude the individual from returning to that home. It does not, however, preclude the individual from moving back to the community in which her home was located, and where she continued to maintain connections in the event that her health would allow her to return (*see, Matter of Urdang*, 194 AD2d 615 [2d Dept 1993]). Moreover, “[i]t is generally held that an incapacitated person's admission into a health-care facility does not cause a change of domicile if the incapacitated person is unable to express an intention to establish a new domicile” (*id.* at 616).

The petitioner asserts that the decedent lacked the capacity to consent to her move to

Connecticut and, presumably, to form an intention to change domicile, but has offered no evidence regarding the decedent's capacity to form an intention to change her domicile. Accordingly, the court makes no finding regarding the capacity of the decedent (*see Matter of Lowenburg*, 53 Misc 3d 1214 [A] [Sur Ct, Queens County 2016]). At the same time, the record provides no indication that the decedent had any intention to change her place of domicile from Nassau County to Connecticut (*see Matter of King*, 147 AD3d 1286, 1288 [3d Dept 2017]; *Matter of Lowenburg*, 53 Misc 3d 1214 [A], [Sur Ct, Queens County 2016]). As there is no evidence of the decedent's intention to establish a new domicile in Connecticut, the court finds that her domicile remained in Nassau County. Accordingly, this court may issue letters of administration in the decedent's estate.

All interested parties have agreed that a bond may be dispensed with. Accordingly, the court waives the requirement that the petitioner file a bond.

Letters of administration will issue to the petitioner, Lewis Carl Schellbach, Jr., upon his duly qualifying according to law.

Submit decree.

Dated: August 16, 2017
Mineola, New York

E N T E R :

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

cc: John O. McManus, Esq.
Attorney for Petitioner
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