

Matter of Osburg

2017 NY Slip Op 33565(U)

March 8, 2017

Surrogate's Court, Queens County

Docket Number: File No. 2016-3015

Judge: Peter J. Kelly

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Present: HON. PETER J. KELLY
SURROGATE

SURROGATE'S COURT: QUEENS COUNTY
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Probate Proceeding, Will of,

MARIE OSBURG,

File No. 2016-3015

Deceased.

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The decedent, Marie Osburg, passed away leaving an attorney-drafted instrument dated September 18, 2013 purported by petitioner to be decedent's Last Will and Testament. Examinations pursuant to SCPA section 1404 were requested by decedent's niece and by the guardian ad litem for decedent's incapacitated niece. As of this date, the 1404 examinations have not been completed.

By notice of motion, petitioner now seeks to disqualify Sylvie L.F. Richards, Esq., and her firm, the Law Office of Sylvie L.F. Richards PLLC (collectively "Richards") from continuing to represent decedent's niece in this proceeding. According to petitioner, Richards must be disqualified on the basis of an inherent and non-waivable conflict of interest arising from Richards' prior representation of decedent in matters "impacting the [d]ecedent's estate."

In opposition, Richards claims because the petitioner waited five months before seeking the within relief, he has effectively waived any potential conflicts and that he further lacks standing to bring the within motion in the first instance. Richards

also denies the existence of an attorney-client relationship between herself and the decedent, contending that neither she, nor anyone in her firm, has met, spoken with, or corresponded with the decedent. Richards does state, however, that she maintained an “attorney-client relationship” with Kim Trigoboff (“Trigoboff”) who was the decedent’s attorney.

Addressing the standing issue first, although Richards has never represented petitioner, it is apparent that petitioner seeks the within relief not in his individual capacity, but rather as the nominated executor of the decedent’s estate. The attorney-client privilege survives death and the right to waive that privilege is exercisable by the decedent’s personal representative (*see Mayorga v. Tate*, 302 AD2d 11 [2d Dept 2002]). Therefore, petitioner does have standing to make the within motion.

As to Richards’ contention that petitioner’s delay in making the motion amounts to waiver of any potential conflict, the law provides that where the party moving for disqualification was aware or should have been aware of the alleged conflict for an extended period of time before bringing the motion, the party may be deemed to have waived any objection to the other party’s representation (*see Hele Asset, LLC v. S.E.E. Realty Assoc.*, 106 AD3d 692 [2d Dept 2013]). Here, SCPA 1404 examinations have not concluded and objections to probate have not yet been filed. The motion has been brought during the early stages of litigation, prior to issue being joined. Accordingly, the court does not find such an extended or prejudicial

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period of time has elapsed so as to constitute a waiver on the part of petitioner (see e.g. *Markowits v Friedman*, 2014 NY Misc Lexis 347 [Sup Ct, Kings County 2014]).

Turning to the merits of the motion, disqualification rests with the sound discretion of the court, and consideration must be given to both the valued right of a party to be represented by counsel of his or her choosing, and the duties of loyalty and confidentiality owed to the former client (see *Kassis v Teacher's Ins. & Annuity Ass'n*, 93 NY2d 611 [1999]; *Goldstein v Held*, 52 AD3d 471 [2d Dept 2008]).

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The burden is on the party seeking disqualification to show that there was a prior attorney-client relationship; that the matters involved in both representations are substantially related; and that the interests of the attorney's past and present clients are materially adverse (see Rules of Professional Conduct [22 NYCRR 1200.00] rule 1.9; *Falk v Chittenden*, 11 NY3d 73 [2008]; *Jamaica Pub. Serv. Co. v AIU Ins. Co.*, 92 NY2d 631 [1998]). Where an attorney is precluded from representing a client due to a conflict of interest, disqualification will generally include the other attorneys in the disqualified attorney's firm (see Rules of Professional Conduct [22 NYCRR 1200.00] rules 1.9; 1.10). In proper circumstances, disqualification can extend beyond associates and partners of the firm to attorneys with an "of counsel" relationship (see e.g. *Kelly v Paulsen*, 145 AD3d 1398 [3d Dept 2016]). An "of counsel" relationship has been described as including those in which an outside lawyer "is available to the firm for consultation and advice on a regular and continuing basis" (see *D.B. v M.B.*, 39 Misc 3d 1205(A) [Sup Ct, Westchester County 2013]).

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Thus, the first issue is whether an attorney-client relationship existed between Richards and the decedent, or in the absence of that, whether Richards' association with decedent's attorney, Trigoboff, warrants imputation of a conflict. From the outset, Richards emphatically denies having ever represented the decedent and the existence of an "of counsel" or "co counsel" relationship with Trigoboff. According to Richards, her involvement was merely to "protect Kim Trigoboff and her law practice by acting as her attorney to communicate...procedural aspects of the intervivos gifts that her client [the decedent] wished to make." Richards goes on to state that only Trigoboff is required to maintain the decedent's confidences to which Richards claims, in any event, she has never been privy

In support of her argument, Richards includes a copy of the retainer agreement she entered into with Trigoboff. In Richards' estimation, it was Trigoboff, and not the decedent, who retained Richards "with respect to estate planning consultation" at the rate of \$350.00 per hour. Additionally, both Richards and Trigoboff deny the existence of an "of counsel" or "co counsel" relationship. Petitioner, however, points to invoices and time sheets generated by Richards and Trigoboff, as well as various communications, which he contends contradicts Richards' characterization. For the following reasons, the court is inclined to agree.

That no retainer agreement was entered into between Richards and the decedent is not determinative. Formality in the creation of an attorney-client relationship is not crucial, and a written retainer agreement between the attorney and the client is not required (*see McLenithan v McLenithan*, 273 AD2d 757 [3d Dept

2000]; *Tropp v Lumer*, 23 AD3d 550 [2d Dept 2005]). Rather, it is the words and the actions of the parties that will determine whether such a relationship is formed (see *id*). Certainly “[a]n attorney-client relationship is established where there is an explicit undertaking to perform a specific task” (*Wei Cheng Chang v Pi*, 288 AD2d 378 [2d Dept 2001]).

Here, a retainer agreement was entered into between Richards and Trigoboff whereby estate planning and consultation services were to be provided for the benefit of Trigoboff’s clients, not Trigoboff personally. One of those clients ultimately was the decedent. That Richards expressly undertook a specific task for the decedent is not subject to reasonable dispute. Both Trigoboff’s invoices and Richards’ invoices reflect that Richards was specifically providing legal advice for the decedent at the rate of \$350.00 per hour. Indeed Trigoboff’s invoices, directed to decedent, expressly refer to “[s]ervices of Sylvie Richards, Esq.,” in the itemization of disbursements and are included in the total amount due from the decedent. Richards’ invoices were apparently “attached” to Trigoboff’s invoices and forwarded to the decedent for payment. Whether Richards was paid by Trigoboff, as opposed to the decedent directly, is irrelevant.

In addition, there are express references to both the existence of an attorney-client relationship between Richards and the decedent and an “of counsel” relationship between Richards and Trigoboff, plainly contradicting their sworn statements. This includes a letter executed by decedent on December 16, 2012,

which was notarized and prepared by Trigoboff. The letter states, in pertinent part: "Kindly send a copy of your correspondence to . . . my counsel, Kim Trigoboff, Esq., *Ms. Sylvie Richards, of counsel to Ms. Trigoboff*" (*emphasis added*).

Further undermining Richards' position are letters forwarded from Trigoboff to decedent's relatives in December of 2012 which state: "Ms. Sylvie Richards and I are intervening in our capacity as *counselors for your aunt, Marie Osburg*" (*emphasis added*). Richards' contact information is included in the correspondence and she, as well as the decedent, are copied on the letter.

It is abundantly clear that Richards, in the course of her arrangement with Trigoboff, collaborated with and/or advised Trigoboff specifically with respect to decedent's gifting and tax planning concerns, and otherwise rendered services necessary to effectuate those plans for which the decedent was charged. It is also clear that Richards was held out to others as being one of decedent's attorneys or as being "of counsel" to Trigoboff in rendering services for the decedent. In sum, the documentary evidence sufficiently demonstrates the existence of an attorney-client relationship between Richards and the decedent.

Less clear is whether the matters involved in Richards' prior representation are substantially related to her current representation, whether the services to be provided by Richards in this proceeding are materially adverse to decedent's interests, and whether Richards' representation of decedent in 2012 will ultimately lead to her disqualification in any event, on the grounds that she will be called as a

witness in this proceeding (see Rules of Professional Conduct [22 NYCRR 1200.00] rule 3.7; see e.g. *Matter of Mack*, 2010 NYLJ Lexis 4842 [Sur Ct, Suffolk County 2010]).

As the parties have not sufficiently developed the factual information necessary for the court to make a determination, an evidentiary hearing will be held to resolve these issues. (See *Elghanayan v Elghanayan*, 107 AD2d 594 [1st Dept 1985]; see also *Lightning Park v Wise Lerman & Katz, P.C.*, 197 AD2d 52 [1st Dept 1994]).

Accordingly, this motion is set down for a hearing and final disposition on April 5, 2017 at 11:00 a.m.

The Clerk of the Court is directed to mail a copy of this decision to the parties that have appeared in this proceeding.

Dated: March 8, 2017


SURROGATE