

Matter of Brown (Pagliugi)

2018 NY Slip Op 34561(U)

August 14, 2018

Surrogate's Court, Suffolk County

Docket Number: File No. 2014-2031/F

Judge: John M. Czygier, Jr.

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This opinion is uncorrected and not selected for official publication.

AUG 14 2018

SURROGATE'S COURT : SUFFOLK COUNTY

In the Matter of the Application of
MATTHEW BROWN and JACQUELINE BROWN to
Require JEAN PAGLIUGHI as Executor of
the Estate of

AMERICO PAGLIUGHI,

Deceased,

to Give a Bond and Return Property of
the Estate Removed from the State.

) MICHAEL CIPOLLINO
) CHIEF CLERK

DECISION/ORDER

) By: HON. JOHN M. CZYGIER, JR.
)
)
)

) Surrogate
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) Dated: AUG 14 2018
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) File #: 2014-2031/F
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In this contested miscellaneous proceeding, the parties have agreed to the submission of this matter for decision based upon the pleadings. For the reasons that follow, petitioners' application is granted.

Background

The above-captioned decedent ("Americo") died testate on February 11, 2014, survived by his wife, Ann Pagliughi ("Ann"), and his three children, Jean Pagliughi, Patricia Brown, and Anthony Pagliughi. His last will and testament, dated February 1, 2014, bequeathed decedent's gun collection to his nephew, Matthew Brown, at the age of twenty-five (25), the residuary of his estate to Ann Pagliughi in trust for life and, upon her death, the remainder to Matthew and Jacqueline Brown. On May 27, 2014, decedent's daughter, Jean Pagliughi, petitioned this court for probate of the aforementioned instrument. Letters testamentary thereafter issued to her on July 22, 2014, to serve as executrix without bond pursuant to the terms of the will.

Ann Pagliughi post-deceased decedent on April 16, 2016. Since then, there have been a number of proceedings in this court regarding both decedent and his spouse. As is relevant here, Jean Pagliughi has also petitioned this court for probate of Ann's last will and testament dated September 22, 2015. Matthew and Jacqueline filed objections thereto, and the parties are currently involved in discovery in that matter. Also pending are two accounting matters filed by Jean Pagliughi, one in which she seeks judicial settlement of an intermediate accounting in Americo's estate, and one in which she seeks judicial settlement of an accounting for the "Ann Pagliughi Living Trust" (or the "Trust"). Matthew and Jacqueline Brown have appeared in each of those matters

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as well, and litigation is ongoing.

Most immediately, Matthew and Jacqueline Brown ("petitioners") have petitioned the court in the instant matter seeking an order: (1) directing Jean Pagliughi ("respondent") to give a bond pursuant to SCPA 710(3) and (4); (2) directing respondent as executor to return any and all property of the estate that she has removed from the State; and (3) directing respondent to pay petitioners' legal fees and disbursements. Respondent has filed an answer and, with opposing counsel's consent, a supplemental answer. The parties have stipulated to submission on the pleadings.

Discussion

Petitioners base their application upon a number of allegations. Initially, there is no dispute that respondent sold her New York home and is now domiciled in Vermont. Respondent points out that the will dispenses with a bond "in any jurisdiction" (Supp. Ans. ¶ 4). However, SCPA 710(3) provides:

If after the issuance of letters, a fiduciary not required by will to give a bond, who is a citizen of the United States, has become a non-domiciliary, he may be required to give a bond in an amount to be fixed by the court, upon objection filed and proof taken (SCPA 710[3]).

The statutory language is unambiguous, and of significant concern is the ability to "obtain[] and satisfy[] a judgment against a person lacking any presence in this state" (*Estate of Nussbaum*, 26 Misc3d 223 [Sur Ct, Bronx County]). While the issuance of a bond under such circumstances is discretionary, the fiduciary's "'track record' in dealing with estate assets" is a factor (*id.*).

Here, petitioners' allegations regarding respondent's track record abound. For instance, they also allege that respondent removed Americo's gun collection from a gun store in New York, where they were being stored, with the intention of bringing the guns to Vermont. Respondent admits that she indeed removed rifles from New York to Vermont during the period of March 29, 2018 to April 5, 2018 (Ans. ¶ 2). Though she explains that she did so following an apparent dispute between petitioners and the gun shop, and that the guns have been returned to New York (Ans. ¶¶ 2-3; Supp. Ans. ¶ 4), this is a clear violation of her fiduciary duties (SCPA 710[4] ["No fiduciary shall remove property of the estate without the state without the prior approval of the court and upon filing a bond if required by the court."]). These facts, and

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respondent's status as a non-domiciliary, alone are sufficient grounds upon which to grant petitioners' application requiring a bond and directing respondent to return any estate property that she has removed from the State. As such, respondent shall post a bond in the amount of \$132,000.00, the balance on hand listed in the intermediate accounting for this estate, and shall immediately return any estate property removed from the State (File No. 2014-2031/E).

Further allegations raise some additional concerns for the court. The parties' pleadings also demonstrate that respondent commenced an action in Supreme Court, Suffolk County, under index number 15200/2014, as executrix of Americo's estate, alleging his wrongful death. This is troubling because, despite allegations that respondent was a witness to the claimed medical malpractice which forms the basis of the action (Pet. ¶ 3), respondent failed to include any such claim in her petition for probate of Americo's will (see Supp. Ans. Ex. 1). Furthermore, there is no dispute that respondent, who is also an attorney, has appeared in that matter as plaintiff's counsel. The court agrees with petitioners that respondent's various roles as executrix, plaintiff's counsel, and beneficiary are a significant cause for concern. Any recovery in a wrongful death action belongs to the distributees and passes outside of the estate (see 9 Warren's Heaton on Surrogate's Court Practice 122.02). Therefore, as a distributee, respondent has an interest in discouraging allocation for personal injury, which would pass through the estate, toward wrongful death. This stands in stark contravention to her fiduciary duties as executrix. As an aside, the court also cannot overlook petitioners' allegations that respondent may seek to settle the action in Supreme Court without obtaining approval of the settlement allocation in this court pursuant to EPTL 11-1.1, as her letters testamentary contain no limitations.

Finally, petitioners also claim that respondent commingled funds of the Trust with assets from both Americo and Ann's estates as well as with respondent's personal funds. To the extent that respondent addresses this issue in her supplemental answer, she admits that she withdrew money from the Trust, depositing said funds into her personal account until she was later advised to return it (Supp. Ans. ¶ 14).

In fact, rather than disputing petitioners' myriad assertions, respondent maintains that the court has already decided many of these issues and has essentially approved of her actions (see *generally* Supp. Ans.). To the contrary, petitioners have previously sought to have respondent removed or her letters suspended, and this court held such proceedings in abeyance pending resolution of respondent's accountings (see Supp. Ans. Ex. 2).

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Presently, new facts have come to light regarding respondent's removal of estate property from the State and, despite the filing of accounting proceedings and continued litigation, it is now clear that respondent wholly admits to many of the egregious acts alleged. Accordingly, the parties shall appear for a hearing regarding respondent's suspension or removal, both as executor of Americo Pagliughi's estate and as trustee of the Ann Pagliughi Living Trust.

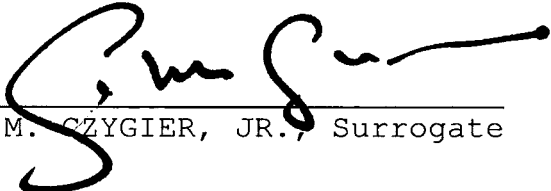
Conclusion

For the foregoing reasons, petitioners' application is granted. It is

ORDERED that respondent post a bond in the amount of \$132,000.00 (the amount listed in her accounting as the current balance of assets in Americo's estate), within thirty (30) days, and file proof with this court forthwith; and it is further

ORDERED that respondent immediately return any estate property removed from the State; and it is further

ORDERED that the parties appear for a hearing on the suspension, modification, revocation, and/or removal of respondent in the Estates of Americo Pagliughi and Ann Pagliughi on Wednesday, September 19, 2018 at the Suffolk County Surrogate's Court, 210 Center Drive, Riverhead, New York.



JOHN M. CZYGIER, JR., Surrogate

John Newman, Esq.
Attorney for Petitioners
1776 East Jericho Turnpike, Suite 2
Huntington, NY 11743

Jean Pagliughi, Esq.
Respondent
210 Rachel Road
Chester, VT 05143

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MICHAEL CIPOLLINO
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