Bin Sultan Bin Abdul-Aziz Al Saud v New York and Presbyt. Hosp.
2019 NY Slip Op 32153(U)
July 15, 2019
Supreme Court, New York County
Docket Number: 155151/17
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

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In the Matter of

TALAL BIN SULTAN BIN ABDUL-AZIZ AL SAUD

Petitioner

Index No. 155151/17

v

DECISION, ORDER AND JUDGMENT

THE NEW YORK AND PRESBYTERIAN HOSPITAL

Respondent.

MOT SEQ 002

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NANCY M. BANNON, J.:

I. INTRODUCTION

In this proceeding pursuant to CPLR 3102(c) and CPLR 3102(e), the petitioner seeks leave to obtain pre-action disclosure from the respondent in order to establish his filiation in a paternity action in Lebanon. By decision and order dated June 15, 2018, the court denied the petition without prejudice to renewal upon proper papers. The petitioner now moves pursuant to CPLR 2221 to renew the petition, or in the alternative, to reargue the petition. The respondent opposes the motion, and the petitioner has replied.

II. BACKGROUND

As set forth in greater detail in the court's decision and order dated June 15, 2018, the petitioner, Talal Bin Sultan Bin

Abdul-Aziz Al Saud, now 35-years-old, alleges that he is the son of Sultan bin Abdul-Aziz Al Saud (the decedent), who was the Crown Prince of Saudi Arabia at the time of his death in 2011. The decedent died at the New York Presbyterian Hospital (NYPH) in or about October 2011. As part of his treatment at NYPH prior to his death, the decedent underwent surgery, during which his tissue and blood samples were taken and preserved pursuant to the business practices of NYPH. NYPH is the only source known to the petitioner that has a "readily available" tissue sample taken from the decedent.

The petitioner seeks to obtain the results of a U.S.-based DNA test utilizing DNA samples in the custody of NYPH, to be used in connection with a paternity action in Lebanon. At the time of the court's June 15, 2018, decision and order, no paternity action had been commenced, nor did the petitioner confirm the country in which he intended to file such an action, stating only his intention to file a paternity action "in Lebanon or elsewhere." The petitioner asserted that he had "legitimate concern that he would likely not receive the results of the paternity test prior to the conclusion of the Lebanese proceedings if he were to commence the action in Lebanon or elsewhere prior to obtaining the results of the DNA test."

The petitioner further averred that NYPH was informed of his petition for pre-action disclosure "and consented to it." NYPH

disputed the petitioner's assertion. In any event, the petitioner, apparently considering himself exempt from the requirement that he submit proof of his entitlement to pre-action disclosure in light of NYPH's "consent," submitted only an attorney's affirmation in support of his application. When it became clear that NYPH intended to oppose the petition, the petitioner attempted to address the deficiencies of his petition by improperly submitting a number of new documents for the first time on reply. The court did not consider these documents in rendering its decision.

The court determined that the petitioner did not meet his burden of establishing entitlement to pre-action disclosure under either CPLR 3102(c) or (e). In reaching its determination, the court considered, among other things, the petitioner's failure to establish the cause of action he intended to bring and what elements he would be required to prove in such action, the lack of evidence of a meritorious cause of action, and the absence of controlling authority supporting the petitioner's claim that he was entitled to pre-action disclosure pursuant to CPLR 3102(e) before his claims had developed into a formal proceeding. The instant motion ensued.

The motion is granted to the extent that renewal is granted, and, upon renewal, the petition is granted in part.

III. DISCUSSION

A. RENEWAL

A motion to renew may be granted where a party presents "new facts not offered on the prior motion[s] that would change the prior determination[s]," or demonstrates that "there has been a change in the law that would change the prior determination[s]." CPLR 2221(e)(2), (3); see Foley v Roche, 68 AD2d 558, 567 (1st Dept. 1979). The petitioner's prior application was denied without prejudice to renewal. In denying that application, the court declined to consider a number of items submitted by the petitioner for the first time in his reply. Those items are now properly submitted by the petitioner in support of his motion to renew the petition. In addition, the petitioner presents new information with regard to a filiation action he commenced in Lebanon (the Lebanese action) since the initial petition for pre-action disclosure was filed, and a new affirmation from a Lebanese lawyer experienced in inheritance matters. In light of the foregoing, and in the interest of justice, the branch of the petitioner's motion which is for renewal of the petition is granted.

The new evidence submitted by the petitioner includes two photographs of the petitioner and the decedent, purporting to show resemblance, an affirmation of the petitioner's mother, Hanaa Faek El Mghayzel, and three affirmations from Lebanese

attorneys averring, *inter alia*, that DNA evidence is acceptable proof in cases of lineage confirmation.

In her affirmation, the petitioner's mother, asserts that she was married to the decedent, Sultan bin Abdul-Aziz Al Saud, who was known as "Prince Sultan", and gave birth to the petitioner as a result of that relationship. She explains that she is a Syrian national born in 1961 who moved to Saudi Arabia with her family when she was two years old. She first met Prince Sultan, a Saudi national, when she was fourteen years old and a classmate of his daughter. She states that in or about December 1982, she married Prince Sultan at one of his palaces - "Al Seteen Street Palace" - and that the ceremony was performed by a sheikh. Faek El Mghayzel asserts that she moved to that palace. She became pregnant with the petitioner in 1983 and returned to her mother's home during the early stages of the pregnancy. She gave birth to the petitioner on February 10, 1984, at the Al Mubarek Hospital in Riyadh. She further asserts that she called her husband who was happy to hear the news of the birth and requested that she name his son Talal. She returned to Syria in 1996 and the petitioner joined her there nine months later. She asserts that the petitioner maintained contact with his father while in Syria and the father sent financial assistance "on occasion." She opined that the physical resemblance of the petitioner to his father was striking from an early age.

Since the petitioner now informs the court that he has actually commenced the Lebanese filiation action he averred that he was planning to bring in his original application, he may not obtain pre-action disclosure under CPLR 3102(c). As the Appellate Division, First Department, has expressly held, CPLR 3102(c) is only available as a vehicle for disclosure *before* a contemplated action is commenced. See Johnson v Union Bank of Switzerland, AG, 150 AD3d 436 (1st Dept. 2017); see also Teamsters Local 404 Health Services & Insurance Plan v King Pharmaceuticals, Inc., 906 F3d 260 (2nd Cir. 2018). Thus, the petitioner's application for pre-action disclosure pursuant to CPLR 3102(c) must be denied in light of the petitioner's commencement of the Lebanese action.

However, CPLR 3102(e) authorizes the court to order disclosure related to an "[a]ction pending in another jurisdiction." Specifically, it provides that discovery may be ordered by a New York court where "any mandate, writ or commission issued out of any court of record in any other state, territory, district or foreign jurisdiction" or "whenever upon notice or agreement, it is required to take the testimony of a witness in the state." CPLR 3102(e). Although its specific language is somewhat limiting, courts have implicitly found that CPLR 3102(e) authorizes all Article 31 disclosure devices, including the production of documents or things. See, e.g.,

Matter of Dier, 297 AD2d 577 (1st Dept. 2002); Matter of Wolf Popper Ross Wolf & Jones, 179 AD2d 389 (1st Dept. 1992); see also Siegel, NY Prac § 352 (6th ed 2019).

A review of the case law reveals that there are differing views at the trial court level as to whether an application under CPLR 3102(e) must be preceded by an order in the foreign action allowing the discovery sought in New York. See, e.g., Matter of Welch, 183 Misc 2d 890 (Sup Ct, NY County 2000); Matter of Deloitte, Haskins & Sells, 146 Misc 2d 884 (Sup Ct, NY County 1990). However, by its terms, the use of CPLR 3102(e) is not limited to use in instances where the foreign court has issued an order or mandate requesting the New York court's aid; an agreement or notice will suffice. Moreover, the Appellate Division, First Department, has implicitly indicated that an attorney may seek discovery in New York by issuing a subpoena out of a New York court, without first seeking an order in the foreign action allowing it. See Matter of Ayliffe and Companies, 166 AD2d 233 (1st Dept. 1990).

Here, the court has not been apprised of any mandate of the Lebanese court relating to the discovery sought by the petitioner, and the parties have not entered into any agreement to exchange disclosure. However, the court deems service of the notice of petition upon the respondent to be notice of the petitioner's demand for disclosure within the meaning of CPLR

3102(e). Based on a plain reading of that provision, the court further determines that the petitioner's application falls within the scope of discovery authorized by CPLR 3102(e).

In Matter of Ayliffe and Companies, the Appellate Division, First Department, stated that "[t]he court's inquiry with respect to objections raised by persons required to testify pursuant to CPLR 3102(e) is limited to determining (1) whether the witnesses' fundamental rights are preserved; (2) whether the scope of inquiry falls within the issues of the pending out-of-state action; and (3) whether the examination is fair." Matter of Ayliffe and Companies, supra at 224; see Matter of Brandes v Harris, 78 AD2d 638 (2nd Dept. 1980). No showing of special circumstances is required. Id. The test prescribed by the First Department has also been applied where a party seeks New York disclosure pursuant to another article 31 device. See Matter of Dier, supra. Thus, its application is not limited to out-of-state depositions.

It cannot be disputed that the disclosure sought by the petitioner in New York falls within the scope of the issues raised in the pending Lebanese action, in which the petitioner seeks confirmation of his filiation with the decedent. Furthermore, although the petitioner is not required to demonstrate that the discovery sought would be admissible in the Lebanese court, the petitioner's submissions, which include

affirmations from Lebanese attorneys, establish that the results of a reliable DNA test are admissible as absolute proof of paternity in Lebanese filiation actions.

As to whether the fundamental rights of the respondent and decedent are preserved, the court considers the respondent's contention that Section 79-1 of the New York Civil Rights Law (Section 79-1) prohibits the disclosure sought by the petitioner under the present circumstances. See NY Civil Rights Law § 79-1. Section 79-1(2)(a) states in relevant part that "[n]o person shall perform a genetic test on a biological sample taken from an individual without the prior written informed consent of such individual," or in the case of a deceased individual, without the consent of the individual's next-of-kin, except where the court orders such a test (NY Civil Rights Law § 79-1[11]). Section 79-1(4)(d) further provides that in authorizing a genetic test or disclosure of genetic test results to specified individuals, the court shall consider "the privacy interests of the individual subject of the genetic test and of close relatives of such individual, the public interest, and, in the case of medical or anthropological research, the ethical appropriateness of the research." A "genetic test" is defined by the statute as "any laboratory test of human DNA, chromosomes, genes, or gene products to diagnose the presence of a genetic variation linked to a predisposition to a genetic disease or disability in the

individual or the individuals offspring; such term shall also include DNA profile analysis."

The court rejects the petitioner's contention that Section 79-1 solely protects individuals against "broad-based genomic testing for predisposition to disease." The legislature's definition of "genetic test" is broad, and its inclusion of "DNA profile analysis" implicates testing performed for the purpose of determining biological parenthood. Contrary to the petitioner's assertion, there is no indication in the statute that DNA profile analysis should be interpreted to exclude paternity testing. Indeed, while a number of states have expressly excluded paternity testing from statutes regarding genetic testing (see, e.g., Alaska Stat. § 18.13.010; La. Rev. Stat. Ann. § 22:1023[D][2]; N.J. Stat. Ann. § 10:5-45[a][2]), the exemptions provided in Section 79-1 are limited to "any test of blood or other medically prescribed test in routine use that has been or may be hereafter found to be associated with a genetic variation, unless conducted purposely to identify such genetic variation."

Nonetheless, Section 79-1 permits courts to authorize genetic testing in the absence of written consent, provided that the court consider factors including the privacy interests of the individual subject of the genetic test and of close relatives of such individual and the public interest. See NY Civil Rights Law § 79-1(4)(b)-(d). Moreover, as the petitioner correctly

contends, courts have authorized posthumous genetic marker paternity testing without the consent of close relatives in proceedings brought to establish inheritance rights in New York. See Matter of Poldrugavaz, 50 AD3d 117 (2nd Dept. 2008); Matter of Estate of Betz, 74 AD3d 1459 (3rd Dept. 2010).

For example, in Matter of Poldrugavaz, the Appellate Division, Second Department, addressed the issue of pretrial genetic marker testing in the context of a nonmarital child's proceeding to establish inheritance rights under EPTL 4-1.2(a), which requires such child to establish by clear and convincing evidence that he or she is an heir to an applicable decedent. The court in Matter of Poldrugavaz held that the standard of proof on a pretrial motion for posthumous genetic marker testing is "some evidence" that the decedent openly and notoriously acknowledged the nonmarital child as his own. The court also set forth certain factors to be considered in determining whether it is reasonable and practicable to order DNA testing, including "(1) whether evidence presented demonstrates a reasonable possibility that the genetic testing will establish a match; (2) the practicability of obtaining the tissue sample for the purpose of conducting the genetic testing, including whether the sample is readily available; (3) whether there is a need to exhume the decedent's body or obtain the sample from a nonparty; (4) whether appropriate safeguards were, or will be, taken to insure the

reliability of the genetic material to be tested; and (5) the privacy and religious concerns of the decedent and or his family members." Matter of Poldrugavaz, supra at 129.

The Appellate Division, Third Department, adopted the standard set by the Second Department in Matter of Poldrugavaz in Matter of Estate of Betz, supra. The Appellate Division, Fourth Department, has instead held that pretrial DNA testing for the purpose of establishing paternity pursuant to EPTL 4-1.2(a)(2)(C) may proceed without the party seeking such testing making any showing that the decedent openly and notoriously acknowledged such party as the decedent's child., See Matter of Estate of Morningstar, 17 AD3d 1060 (4th Dept. 2005). The Appellate Division, First Department, has not addressed the issue of posthumous pretrial DNA testing pursuant to EPTL 4-1.2(a)(2)(C), which the court notes was modified by the legislature following each of the foregoing decisions. However, it has held that a request for exhumation for the purpose of taking tissue samples from the decedent upon which a blood genetic marker test could be administered was correctly denied on the ground that EPTL 4-1.2(a)(2)(D) did not authorize posthumous DNA testing, where the decedent chose neither to acknowledge nor designate the movant as heir and there was no incompetence, fraud or undue influence on the decedent alleged. See Matter of Estate of Janis, 210 AD2d 101 (1st Dept. 1994). EPTL 4-1.2(a)(2)(D) was subsequently

repealed by the legislature in 2010. The court notes that both Matter of Estate of Morningstar and Matter of Estate of Janis were each decided prior to the enactment of Section 79-1.

As the court has observed, unlike Matter of Poldrugavaz and the related cases cited above, this matter does not involve a proceeding to establish inheritance rights pursuant to New York law, i.e., EPTL 4-1.2(a). Instead, the petitioner seeks discovery pursuant to CPLR 3102(e) in aid of an action to establish his filiation in Lebanon. In addition, none of the foregoing cases address Section 79-1. Indeed, it does not appear that Section 79-1 has ever been addressed in the context of a civil proceeding in which posthumous genetic testing is sought. Nonetheless, Matter of Poldrugavaz is instructive insofar as it establishes a framework for assessing an application for an order directing posthumous genetic testing. Read in conjunction with Matter of Ayliffe and Companies, Matter of Poldrugavaz suggests that the issues of fairness and the fundamental rights of a party subject to a demand for genetic marker paternity testing pursuant to CPLR 3102(e) may be adequately addressed by considering such factors as the likelihood that such testing would reveal paternity, the practicability of obtaining a tissue sample upon which to conduct testing, and the privacy interests of the decedent and his relatives.

Here, the petitioner's submissions, which include, *inter*

alia, an affirmation of his mother and photographs of the decedent and the petitioner purporting to show resemblance, demonstrate a reasonable possibility that the genetic testing he seeks will establish that he is the decedent's son.

In addition, the tissue sample sought by the petitioner is within the respondent's possession and readily available; unlike the movant in Matter of Estate of Janis, supra, the petitioner does not assert that there is a need to exhume the decedent's body. While the privacy and religious concerns of the decedent and his next-of-kin remain relevant, such concerns are mitigated by the absence of a need for exhumation. See Matter of Poldrugavaz, supra; Matter of Estate of Betz, supra. Moreover, aside from the fact that other family members might be surprised by the appearance of an alleged child whose existence was formerly unknown to them, DNA testing will not impose any undue hardship on other members of the decedent's family. Mindful of "the steadily consistent trend [in New York courts] to enhance the ability of nonmarital children to assert rights of inheritance such that they should be treated in pari materia with marital children" (Matter of Poldrugavaz, supra at 123-24 [citing cases]), and in light of the extremely limited scope of genetic marker paternity testing, the court deems the petitioner's interest in obtaining the decedent's DNA to outweigh the privacy interests of the decedent and his relatives under the

circumstances presented.

Finally, in order to satisfy the court that appropriate safeguards will be taken to ensure the reliability of the genetic material to be tested, the petitioner shall submit an affidavit from an individual with authority at a testing laboratory designated by the petitioner, stating that the laboratory will accept the DNA sample of the decedent, submitted by the respondent, solely for the purpose of comparison with a DNA sample provided by the petitioner, and will follow routine chain-of-custody and confidentiality protocols. Testing shall be performed at an accredited laboratory under strictly controlled laboratory conditions and the chain of custody clearly documented. Furthermore, the petitioner shall pay for the cost of the paternity testing.

In light of the foregoing, provided that the petitioner complies with the conditions specified by the court, the petitioner shall be entitled to an order directing a genetic marker test using the decedent's tissue and/or blood samples in the respondent's possession and a DNA sample from the petitioner, in order to determine the petitioner's paternity.

B. REARGUMENT

Since the branch of the petitioner's motion seeking renewal of his petition has been granted, and upon renewal, the ultimate

relief sought in the petition awarded, the court does not address the branch of the petitioner's motion which is for reargument.

IV. CONCLUSION

In light of the foregoing, it is

ORDERED AND ADJUDGED that the petitioner's motion to renew or reargue his petitioner, which was denied without prejudice to renewal upon proper papers by order dated June 15, 2018, is granted to the extent that leave to renew is granted, and upon renewal, the petition is granted to the extent that genetic marker testing with regard to the petitioner's paternity shall proceed as set forth herein; and it is further,

ORDERED that, within 30 days of entry of this order, the petitioner shall submit an affidavit from an individual with authority at an accredited testing laboratory designated by the petitioner stating that the laboratory (1) will accept the blood and/or tissue samples of the decedent Sultan bin Abdul-Aziz Al Saud, submitted by the respondent, solely for the purpose of comparison with a DNA sample provided by the petitioner, and (2) will follow routine chain-of-custody and confidentiality protocols; and it is further,

ORDERED that, within 30 days of entry of this order, the petitioner shall submit a proposed order (1) directing production by the respondent of the blood and/or tissue samples of the

decedent to the accredited testing laboratory, and (2) directing such laboratory to conduct a test using those samples and a sample to be properly submitted by the petitioner, and to serve the results of any such test on the parties to this proceeding, will issue; and it is further,

ORDERED that all costs associated with the genetic testing that is the subject of this order will be borne by the petitioner.

This constitutes the Decision, Order, and Judgment of the court.

Dated: July 15, 2019

ENTER: _____
J.S.C.

HON. NANCY M. BANNON