

Matter of Neumann
2019 NY Slip Op 32363(U)
August 7, 2019
Surrogate's Court, New York County
Docket Number: 2016-4105/C
Judge: Rita M. Mella
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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

New York County Surrogate's Court

Date: AUGUST 7, 2019

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In the Matter of the Petition of Belinda Neumann Donnelly
Pursuant to SCPA 2102(5) for Advance Payment on Account
of Her Interest in the Estate of

DECISION and ORDER

DOLORES ORMANDY NEUMANN,

File No. 2016-4105/C

Deceased.

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M E L L A, S.:

The following papers were considered in determining this motion to dismiss:

<u>Papers Considered</u>	<u>Numbered</u>
Notice of Motion, dated March 26, 2019, by Respondent Melissa Neumann, To Dismiss the SCPA 2102(5) Proceeding, together with Affidavit, dated March 26, 2019, of Donald Novick, Esq., Attaching Exhibit A	1, 2
Affidavit, dated April 18, 2019, of Gary B. Freidman, Esq., in Opposition To Motion to Dismiss, Attaching Exhibits 1 through 7	3
Affidavit, dated April 19, 2019, of John R. Morken, Esq., In Support of Motion to Dismiss, Attaching Exhibits A through Q	4
Affidavit, dated April 18, 2019, of Lori A. Sullivan, Esq., in Support of Motion to Dismiss	5
Reply Affidavit, dated April 26, 2019, of Donald Novick, Esq.	6
Affidavit, dated April 29, 2019, of Gary B. Freidman, Esq., in Further Opposition to Motion to Dismiss, Attaching Exhibits 1 through 10	7

Melissa Neumann moves to dismiss, for failure to state a claim (CPLR 3211[a][7]), the petition of her sister, Belinda Neumann Donnelly, which seeks a \$750,000 advance distribution from the estate of their mother, decedent Dolores Neumann.¹ Melissa, joined by her father, Hubert Neumann, and her sister, Kristina Neumann, argue that Belinda has failed to state the elements of a claim for an advance distribution set forth in SCPA 2102(5).

That statute authorizes the court to "advance to any beneficiary of an estate all or part of any beneficial interest to which [s]he is entitled when the property of the estate applicable to the

¹Petitioner also currently serves as the preliminary executor of their mother's estate.

payment of debts, legacies and expenses exceeds by at least one-third the amount of all known claims, legacies having priority and beneficial interests of the same class and the beneficiary needs such payment for h[er] support or education or of h[er] family” (SCPA 2102[5]).

Movant asserts that the facts as alleged in the petition would not satisfy the arithmetic requirement of the statute nor establish the required financial need (*see generally Matter of Zaharopoulos*, 38 Misc 3d 1227[A]; 969 NYS2d 807 [Table]; 2013 NY Slip Op 50304[U][Sur Ct, Queens County 2013]). Movant, however, misreads the statute’s requirements.

Before determining those issues, however, the court must identify the interests – whether those under a possible will or those in intestacy– that should be used to make the calculation prescribed by the statute. Here, the estate has two pending proceedings. One is a probate contest involving an instrument under which, if probated, petitioner is to receive 8 shares out of the 10 shares of the residuary (which is subject to only relatively minor specific bequests). The other proceeding was commenced by Belinda, seeking to disqualify Hubert as surviving spouse and as a distributee of decedent’s estate. Both proceedings could have a significant impact on the value of the relative interests of the parties here.

Movant takes the position that it is the intestate interests that in this case should factor into the calculation under the statute. The court agrees, in view of the statute’s dual objective. On the one hand, section 2102(5) aims to allow a beneficiary (as defined in SCPA 103[8]) to receive a distribution for which she can show an immediate need that cannot await the completion of estate administration. On the other hand, the statute also aims to avoid an advance distribution that would ultimately prove to leave too little to cover the administration expenses, any unpaid known claims, and beneficial entitlements of beneficiaries over whom the recipient of

the advance does not have priority. In the present case – where the size of petitioner’s beneficial interest will ultimately depend upon whether the estate passes under a will or in intestacy – the statute’s purpose is best served if the court minimizes the possibility of an excessive distribution to petitioner by projecting the value of her interest conservatively. Here, the conservative projection is based upon the premise of intestacy, since petitioner’s beneficial interest would be smaller in intestacy than under the will. There having been no disqualification of Hubert to date, for purposes of the SCPA 2102(5) calculation, his intestate share here is deemed to be (roughly) half of the net estate, with petitioner and her two sisters sharing the balance of the estate equally.² Thus, petitioner has for present purposes a one-sixth intestate interest in the net estate.

The question before the court is whether, by requesting an advance of \$750,000, petitioner has stated a claim under SCPA 2102(5). Assuming, for the purpose of answering this question, that the advance sought by her is the maximum amount to which she would ultimately be entitled, and given that her intestate share is one-sixth of the total net estate, the total of beneficial interests of the same class would be roughly six times that amount, or \$4,550,000.³ The total assets on hand subject to the payment of claims and legacies amount to \$29,284,145.46.⁴ Unpaid debts and expenses by movant’s own reckoning are \$4,050,000⁵ in

²In an intestate distribution, Hubert, if not disqualified, would be entitled to the first \$50,000, plus one-half of the residue (EPTL 4-1.1[a][1]).

³ To give meaning to the statute’s purpose of protecting those interested in the estate from being disadvantaged by an advance to a beneficiary, “beneficial interests of the same class” should include petitioner’s interest. The above figure also includes the additional \$50,000 to which Hubert would be entitled in intestacy.

⁴Although the petition itself used a figure of \$21.5 million for the estate value, the court is entitled to examine the affidavits on a motion to dismiss to determine if petitioner has a possible claim (*Leon v Martinez*, 84 NY2d 83 [1994]; *Biondi v Beekman Hill House Apt. Corp.*, 257

possible unpaid income taxes on capital gains. Applying the statutory formula to these figures, petitioner has stated a claim for relief if \$29,284,145.46 (amount on hand) exceeds by at least one-third the total of known claims (\$4,050,000) and beneficial interests of the same class (\$4,550,000). The total of claims and beneficial interests being \$8,600,000, it is clear that the amount on hand surpasses the excess one-third required.⁶ Therefore, petitioner has met the requirements for stating a claim under SCPA 2102(5).

As to financial need, petitioner's allegations that her father has removed her and her family from her long-term residence⁷ and that the education expenses of her three children are no longer being paid from family trusts for which her father Hubert is trustee, together with allegations of substantial costs of other litigations among family members in which petitioner is involved, are sufficient to allege need under *Matter of Goldman*, 150 AD2d 267 (1st Dept 1989). *Goldman* held that a beneficiary's need for an advance payment must be made with reference to the lifestyle the beneficiary previously enjoyed, and such an application does not require the

AD2d 76 [1st Dept 1999]; *Sheridan v Carter*, 48 AD3d 444 [2d Dept 2008]). The amount of liquid and illiquid property of the estate, after the sale of certain artwork, as used in this decision, was provided in an affidavit in opposition to this motion.

⁵ According to Belinda, movant's claim that \$4,050,000 is owed in estate taxes ignores the fact that if Hubert receives an intestate share, the amount the estate would owe in taxes would decrease significantly. For purposes of the analysis here only, movant's figure is accepted.

⁶ This is so whether using the \$29,284,145.46 figure presented by petitioner, or the lesser figure of \$24,963,625.46, represented by petitioner as the liquid assets on hand, which movant adopts as the proper figure.

⁷ Petitioner alleges that she and her family had resided rent-free for a number of years in a building owned by a trust benefiting family members, whose trustee is her father, Hubert. According to Hubert's submissions on this motion, the litigation seeking to oust petitioner's family from this building was settled, with petitioner agreeing to vacate the premises by a date certain.

beneficiary to have liquidated all her own assets before she can claim need within the meaning of the statute August 7, 2019(150 AD2d at 268). Movant's submissions are inadequate to demonstrate that petitioner has not stated a claim of need under SCPA 2102(5) (*see Matter of Dinger*, 150 AD3d 1108 [2d Dept 2017]).

Accordingly, the motion to dismiss this SCPA 2102(5) proceeding is denied.

Respondents shall file and serve verified answers within ten days of the date of this decision.

The parties are directed to appear at the courthouse to argue the merits of the application as to the issue of petitioner's need at **11:00 a.m. on August 30, 2019.**

This decision constitutes the order of the court.

Clerk to notify.

Dated: August 7, 2019



SURROGATE