

Matter of Cherny

2019 NY Slip Op 33150(U)

September 16, 2019

Surrogate's Court, Bronx County

Docket Number: 2016-2855/A

Judge: Nelida Malave-Gonzalez

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SURROGATE'S COURT, BRONX COUNTY

September 16, 2019

ESTATE OF ILONA CHERNY, Deceased
File No.: 2016-2855/A

FILED
SEP 16 2019

CLERK OF THE COURT
COUNTY OF BRONX

In this SCPA 2103 proceeding, petitioner, an attorney and co-executor of the estate, moves seeking, inter alia, to restore this matter to the calendar, to compel certain outstanding discovery responses pursuant to CPLR 3124 from Tamas Terjeki, the decedent's caretaker, (hereinafter referred to as "the respondent"), and to deny respondent's request that the petitioner bear the cost of the interpreter for respondent's deposition. The respondent cross-moves for a protective order precluding the petitioner from obtaining the subject discovery sought herein.

After the return date of the SCPA 2103 citation, the parties consented to an order dated September 18, 2018 marking the matter "off calendar" in order to conduct discovery and attempt to resolve the matter. If such efforts proved unsuccessful, the matter was to be restored to the calendar upon two weeks written notice to the court and all parties. The resolution efforts were fruitless thereby triggering this application, as stipulated by the parties.

The underlying proceeding alleges that \$800,000.00 was obtained by the respondent caretaker, and deposited into custodial accounts in near equal amounts for the benefit of respondent's children. Respondent contends that the decedent gifted the monies to his two minor children for their education prior to her death. Thereafter, respondent absconded with funds in an amount of at least \$400,000.00 from the accounts collectively.

It is undisputed that two days after the establishment of the known custodial accounts, the respondent returned to the bank and withdrew \$200,000.00 from each account, however the respondent has not disclosed what he did with those funds, or their present location. Petitioner now seeks outstanding discovery pertaining only to the funds removed by the respondent after the date of the original gift. Petitioner contends that these specific bank records are material and necessary to discovering and investigating the decedent's intent to make a gift.

In opposition, respondent contends that the subject bank records are not reasonably calculated to lead to the discovery of admissible evidence and therefore are not material or necessary to the underlying action. Further, counsel for the respondent, who was previously appointed by the court as guardian ad litem for the infant children, contends that the previously provided records and statements are complete through the commencement of this proceeding and any additional records violate his wards financial privacy.

Petitioner also moves to compel the respondent to submit himself for a deposition and rejects respondent's demand the estate must pay for a Hungarian translator. Petitioner alleges the respondent regularly does business, communicates, reads, writes, and sufficiently understands the English language and therefore the right to a translator under CPLR 3114 should not be afforded at the expense of the estate.

The respondent admits that he can speak, read, and understand the English language. However, he expresses concerns that he may not understand the complexities of the legal concepts in this proceeding, and may suffer additional stress from being deposed. Although he conducts business and day-to-day conversations in English, the nature of a legal proceeding requires that respondent fully understand the questions being posed to him. Counsel for the respondent represents that he has employed a Hungarian translator for his client in their own meetings in order to be sure he fully understands the concepts and consequences of the instant proceeding. Included in his pleadings is an affidavit of that translator supporting respondent's request.

In opposition to the respondent's cross motion for a protective order, petitioner notes that a decision of the court to compel the requested discovery, or in the contrary, does not additionally require a protective order to bar the petitioner from further pursuing the subject discovery.

The cornerstone of discovery in New York is full disclosure of all matter material and necessary in the prosecution or defense of an action regardless of the burden of proof (see CPLR 3101 [a]). The words 'material and necessary' are... to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason (see *Allen v. Crowell-Collier Publishing Co.*, 21 NY2d 403, 406 [1968]).

The court finds that the request for details as to where the subject funds have been deposited since the time of the original alleged gift is material and relevant to the instant proceeding. The basis of petitioner's application is the allegation that the respondent orchestrated the gifts in order to obtain the funds for himself using his minor children as a conduit to do so. The respondent's withdrawal of \$200,000.00 from each of the infant's custodial accounts and his refusal to disclose the whereabouts of those funds or furnish any proof as to their being used for educational purposes is directly related to the estate's interest in the funds. Failure to disclose this information impedes the petitioner from ascertaining whether separate accounts were established, or if those monies were used for the education of the minor children as the respondent claims was the decedent's donative intent of the gift. Moreover, the requested discovery is material and necessary both to the instant case and to the interests of the infant children. The court does not

find merit in the respondent's claim that the production of such information would violate any financial security or privacy of the minor children as the request is limited to information involving the subject funds in which they may have an interest, and as such, the request for a protective order is denied.

With regard to the use and necessity of interpreters and translation, the first sentence of CPLR 3114 provides that "if the witness to be examined does not understand the English language, the examining party must, at his own expense, provide a translation of all questions and answers". However, this provision, as all disclosure provisions of CPLR article 31, must be viewed in light of the court's broad discretion under CPLR 3103(a) to regulate the "use of any disclosure device" (see *Ozen v Yilmaz*, 181 AD2d 666 [2d dept 1992]).

The court does not find a sufficient basis to shift the burden of payment for an interpreter for respondent's deposition to the respondent. While the respondent admits to "understanding the English language", it is clear the use of the word "understanding" is to include complex legal concepts, procedure, and vernacular outside a lay persons conversations. Based on the respondent's counsel having employed an interpreter in explaining these concepts to his client as they relate to the underlying proceeding, the use of an interpreter is within the terms of the statute. It is in the court's discretion to broadly interpret the use of disclosure devices and to protect the integrity of the respondent's

testimony. Therefore, a translator shall be provided at the expense of the petitioner.

As for infant children, the surrogate's court is vested with broad authority in controlling the affairs of incompetents, and such affairs will be closely supervised by the court on behalf of its ward (SCPA 1761; see 4-49 Warren's Heaton, Surrogate's Court Practice § 49.02 [2][a] [2010]; Matter of Title Guar. & Trust Co., 242 App Div 80, 273 N.Y.S. 158 [1934], affd 271 NY 537, 2 N.E.2d 683 [1936]). In making its determination the court is motivated by what is in the best interests of the ward (see *Latterman v Guardian Life Ins. Co.*, 280 NY 102, [1939]).

The broad authority of this court in protecting the interest of its wards imparts a duty by which it must be determined if there is a conflict between the interests of the infant children and the respondent, and if there is, to address the necessity of separate counsel. Although counsel for the respondent was initially appointed as guardian ad litem for the infants based upon the representations that there was no divergence of interest, the issues raised at this juncture clearly establish they are in fact in conflict. Accordingly, the court, sua sponte, shall appoint a separate guardian ad litem for the minor children.

This decision constitutes the order of the court directing the respondent to produce all outstanding discovery within thirty (30) days of its receipt of the decision and order. Moreover, the parties are directed to

appear for conference in this proceeding on November 7, 2019 at 9:30am in courtroom 406.

The Acting Chief Clerk shall mail a copy of this decision and order upon all parties.

Proceed accordingly.


HON. NELIDA MALAVE-GONZALEZ
SURROGATE