

**Matter of Smidt**

2019 NY Slip Op 33677(U)

December 19, 2019

Surrogate's Court, New York County

Docket Number: 2018-4193

Judge: Nora S. Anderson

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This opinion is uncorrected and not selected for official publication.

SURROGATE'S COURT : NEW YORK COUNTY  
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Probate Proceeding, Will of

New York County Surrogate's Court  
DATA ENTRY DEPT.  
Date: December 19, 2019

DONNA C. SMIDT, File No. 2018-4193+  
Deceased.

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A N D E R S O N , S .

In the pre-objection stage of the above probate proceeding, decedent's son Clark moved pursuant to CPLR 2221 for leave to reargue the court's prior decision granting preliminary letters testamentary to decedent's son Bart. The proponent of decedent's will opposes the motion. The court grants leave to reargue, and for the reasons stated herein, adheres to its prior ruling.

Decedent died in Connecticut on August 17, 2018, at the age of 95, survived by her two sons, Bart and Clark. In her will, dated November 14, 2011, she left her entire estate to Bart to the exclusion of Clark. Bart, the nominated executor, filed a petition seeking preliminary letters alleging that decedent was a domiciliary of New York at the time of her death. On November 20, 2018, the court issued an order granting preliminary letters to Bart. The next day, Clark filed an affidavit opposing the issuance of such

letters to Bart on two grounds: (1) that decedent was a domiciliary of Connecticut and therefore the court had no jurisdiction over her estate, and (2) that Bart was unqualified to act as a fiduciary. On December 6, 2018, the court issued an order directing Bart to submit an affidavit addressing Clark's allegations, in effect staying the issuance of the preliminary letters. The parties filed briefs on the jurisdictional issue and the court in its decision, dated April 18, 2019, ruled that decedent's estate was indeed within this court's jurisdiction and thus directed the issuance of preliminary letters to Bart.

A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (CPLR 2221[d][2]). Clark argued that the prior decision addressed only his challenge to this court's jurisdiction and that it was silent as to his theory that because Bart had unduly influenced decedent to give him benefits during her lifetime and under the propounded instrument, that he be denied letters based on his unfitness for office, or in the alternative, that the court require

Bart to post a bond. To the extent that the decision's silence may suggest that the court overlooked this aspect of Clark's prior submissions, leave to reargue is appropriate. However, upon reargument, the court adheres to its original decision granting preliminary letters to Bart, without bond. Clark's theory as to Bart's unfitness, based on bare conclusory assertions as to undue influence, does not provide the court with a basis for entertaining a "contest within a contest" at this threshold stage of the probate proceeding (see *Matter of Vermilye*, 101 AD2d 865 [2d Dept 1984]; *Matter of Hernesh*, NYLJ, Nov. 16, 2012, at 23, col 2 Sur Ct, Bronx County]). Nor does it warrant depriving the estate of the nominated fiduciary who presumptively reflects decedent's choice (see, e.g., *Matter of Lurie*, 58 AD3d 575 [1<sup>st</sup> Dept 2009]; *Matter of Gottlieb*, 75 AD3d 99 [1<sup>st</sup> Dept 2010]). Any issue of undue influence, if and when timely raised in a formal objection by Clark, is best considered on a fully developed record in relation to the validity of the will as well as to the fitness of the nominated fiduciary (see *Matter of Bolen*, 166 AD3rd 1367 [3d Dept 2018]). As for Clark's request that Bart be required to file a bond, the court looks to the propounded instrument which specifically

dispenses with such a requirement. Absent some  
"extraordinary circumstance" not presented here, a bond  
requirement is unwarranted (*Matter of Lurie, supra; Matter  
of Curran*, 45 Misc 3d 1209[A][Sur Ct, Nassau County 2014]).  
This constitutes the decision and order of the court.

Dated: December 19, 2019

NSA  
S U R R O G A T E