

**Matter of Spalter**

2022 NY Slip Op 32139(U)

June 22, 2022

Surrogate's Court, New York County

Docket Number: Index No. 2014-2879/F

Judge: Rita Mella

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This opinion is uncorrected and not selected for official publication.

SURROGATE'S COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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In the Matter of the First and Final Account of Diane  
Rogers Spalter, as Executor of the Estate of

HAROLD F. SPALTER,

DECISION

Deceased.

File No.: 2014-2879/F

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M E L L A, S.:

The following papers were considered in determining this motion for a protective order:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affirmation of Anne C. Bederka, Esq., in Support of Motion for a Protective Order, dated November 9, 2021, with Exhibits A through D	1,2
Affirmation of Gerard J. Sweeney, Esq., in Opposition to Motion for Protective Order, dated December 3, 2021	3
Reply Affirmation of Anne C. Bederka, Esq. in Further Support of Motion for Protective Order, dated December 20, 2021	4

This is a proceeding to settle the first and final account of Diane Rogers Spalter, as Executor of the estate of Harold F. Spalter, deceased, for the period of July 4, 2014 to May 31, 2020. Petitioner is decedent's surviving spouse and the income beneficiary of a marital trust created under decedent's will to be funded from the residuary estate. Decedent's daughter, from a prior marriage, Elizabeth Iino, is the presumptive remainder beneficiary of the marital trust. It is of note that, according to Petitioner, the aggregate value of the administration expenses of decedent's estate exceeds the value of the assets on hand and that, as a result, the estate is insolvent. Petitioner further alleges that a \$15 million post-death judgment entered against the estate in favor of Iino cannot be satisfied as a result of this insolvency.

In pre-objection discovery, Iino is seeking information from non-party UBS Group AG (UBS) pursuant to a subpoena duces tecum dated October 5, 2021, regarding five accounts titled in decedent's name. Petitioner has moved for a protective order pursuant to CPLR 3103 (a), precluding Iino from seeking discovery relating to financial activity in three of the five accounts which are Individual Retirement Accounts (IRAs), and limiting the requests for all financial documents to the accounting period.

Although the decision by the First Department in *AQ Asset Mgt. LLC v Levine* (111 AD3d 245, 260 [1st Dept 2013]) makes clear that “a depositor has no ownership or other interest in a bank's records of [their] accounts,” and thus no standing to move to quash a subpoena duces tecum served on a non-party bank, it is equally clear that the court may, on its own initiative, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device (*id.*; *see* CPLR 3103 [a]). The court may grant such order “to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts” (CPLR 3103[a]).

In this case, the subpoena lists seven categories of information or documents sought by Respondent concerning the UBS accounts including beneficiary designations, bank statements, deposits, withdrawals slips, transfers into or out of the accounts, documents used to open the accounts, account numbers/titles of accounts, documents related to distributions and withdrawal instruments. According to the subpoena, such records are needed “in light of the fact that . . . the respondent . . . is a judgment creditor and the subpoena seeks information regarding assets that may be subject to levy.”

Petitioner concedes that one of the accounts (86253) was titled in decedent's name and that responsive documents may be produced, though limited to the accounting period. She

contends, however, that the other accounts (42153, 63659, 58371, and 56617) are IRAs and are not subject to disclosure. As to account 56617, Petitioner asserts that it was opened on March 23, 2011, and closed a month later on April 27, 2011, and that a zero balance was reflected on June 30, 2014, that is, prior to the accounting period. Petitioner avers that, for this reason, no production of documents should be directed concerning this account. With respect to the other three IRAs (42153, 63659, 58371), Petitioner proffers that, upon decedent's death, they passed to Petitioner in her capacity as beneficiary and are statutorily exempt from the claims of estate creditors (CPLR 5205 [c]), and that disclosure as to what she posits are now her personal accounts should not be allowed. Because the IRAs passed outside the estate, she argues, they were never administered by the Executor nor are they reflected in the accounting. Petitioner further avers that these IRAs have no identifiable nexus to the administration of the estate and are thus not material and necessary to the prosecution of potential objections. Seeking disclosure of her bank statements, she argues, constitutes harassment.

In response to the motion for a protective order, Iino no longer argues that she is entitled to disclosure based on her status as judgment creditor. Instead, she argues that as a remainder beneficiary of the marital trust created under decedent's will, she is entitled to disclosure concerning whether decedent had the requisite capacity to create or fund these accounts, concerning information related to assets decedent may have diverted out of the estate and into these non-probate accounts as a result of undue influence or coercion, or concerning assets that Petitioner as fiduciary failed to properly identify as belonging to the estate and marshal, thereby reducing the value of the estate.

The court interprets CPLR 3101 liberally when determining what is material and necessary in the prosecution or defense of any action (3101[a]); *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]).

Information regarding the IRAs for the purpose of determining whether these are assets that should be brought back into the estate because the decedent lacked the capacity to make these transfers and/or was coerced or unduly influenced to divert assets to non-probate accounts for the benefit of Petitioner and to avoid potential estate creditors may be relevant (*see Matter of Stanley*, 59 Misc 2d 232, 234 [Sur Ct, NY County 1969] [“Inquiry [pursuant to SCPA 2211] is proper where the executor[ ] received gifts during decedent’s lifetime”]). However, there is no reason for disclosure of activity in these IRAs after decedent’s death. Any inappropriate transfers would have occurred during decedent’s lifetime. A protective order is thus granted to the extent of limiting any request for information or documents related to these three IRAs to the period ending on July 4, 2014, the date of decedent’s death.

In accordance with the discussion above, a new subpoena may be served on non-party UBS that contains the following items listed in the October 5, 2021 subpoena:

- Requests 1 and 4 for beneficiary designation information, and for information used to open all five accounts (42153, 63659, 58371, 86253 and 56617)
- Request 2 for all bank statements and other documents reflecting financial activity in accounts 86253 and 56617
- Request 2 for all bank statements and other documents reflecting financial activity in accounts 42153, 63659 and 58371, but limited to the period of January 1, 2014 to July 4, 2014
- Requests 3, 5, 6 and 7 regarding accounts 86253 and 56617

- Requests 3, 5, 6 and 7 regarding accounts 42153, 63659 and 58371, but such request shall be limited to the period up to July 4, 2014.

Any subpoena, as modified in accordance with this court order, may be served on UBS with directions to produce said documents with the twenty-day statutorily-prescribed period. (CPLR 3120).

This decision constitutes the order of the court.

Dated: June 22, 2022

  
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SURROGATE