

Matter of Hendricks
2022 NY Slip Op 32794(U)
August 9, 2022
Surrogate's Court, Bronx County
Docket Number: File No. 2011-2577
Judge: Nelida Malave-Gonzalez
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SURROGATE'S COURT, BRONX COUNTY

August 9, 2022

ESTATE OF ALLON HENDRICKS, Deceased
File No.: 2011-2577

In this contested estate, a granddaughter of the decedent who is the nominated executor in an instrument dated December 7, 2009 ("the petitioner"), filed a petition seeking its probate on October 19, 2011. One of the decedent's daughters ("the objectant"), who is not a beneficiary under the instrument and filed objections, now moves pursuant to SCPA 1001(9) to dismiss the probate proceeding and to be appointed administrator of this estate based on, inter alia, the petitioner's failure to move this proceeding forward in a timely manner.

The decedent died on September 17, 2011 survived by two children, the objectant and another daughter who consents to probate ("the other daughter"). The propounded instrument was attorney drafted and supervised and contains an attestation clause and self-proving affidavit. It devises real property, the only known asset of the estate, to the petitioner and the other daughter in equal shares. The residuary beneficiaries are the petitioner, the other daughter, and three great-grandchildren who are children of the petitioner in equal shares. After objections were filed, SCPA

1404 examinations were held, and a decision issued in 2012 directing a conference pursuant to SCPA 1411. Thereupon, petitioner's original counsel moved to be relieved and new counsel for the petitioner filed a notice of appearance with the court, obtained jurisdiction over the beneficiaries on the 1411 citation and moved to be relieved as counsel in 2014.

On the original date for counsel's motion to be relieved, the court adjourned the matter to afford petitioner time to obtain new counsel and directed her to do so by that date. On the scheduled adjourned date, as the petitioner had not retained new counsel, the objectant's attorney made an oral application for temporary letters, noting that the probate proceeding was not moving forward and an administrator needed to be appointed to marshal and protect the assets of the estate. At that time, the court indicated that it would entertain such an application if the petitioner did not, in fact, move the probate proceeding forward in a timely manner.

In December 2014, objectant filed a petition to be appointed temporary administrator noting that the probate proceeding had been pending for over three years, the petitioner was not moving the proceeding forward, and that there were assets that needed to be administered requiring the appointment of a fiduciary. On that state of the record, the court signed an order dated July 2, 2015 granting temporary letters of administration to the objectant. Thereafter, a citation issued, returnable August 20, 2015, seeking dismissal of the probate petition and awarding full letters of administration to the objectant. That proceeding was marked "supplemental

citation.” The objectant failed to complete jurisdiction on that application or move the proceeding forward until she filed the current motion in May of 2021.

Meanwhile, in December of 2014 petitioner’s current counsel filed a notice of appearance in the probate proceeding and five years later, in December of 2019, requested that the matter be set down for a conference. From December 2019, after several adjournments, multiple conferences were held beginning in June of 2020, and the matter was referred to mediation in August of 2020 but could not be resolved. Additional conferences were held with the court in 2020 and 2021 to address outstanding discovery to allow the matter to proceed to trial. It was only after several conferences and court appearances between 2020 and 2021 that objectant made the within motion seeking to dismiss the probate petition and requested that she be granted permanent letters of administration.

In support of her motion the objectant cites the above-referenced procedural history and argues, inter alia, that the petitioner has delayed this matter and has not moved to finalize the probate proceeding for almost ten years. She notes that pursuant to SCPA 1001(9) the court may grant letters of administration despite a pending probate proceeding if that proceeding has not been diligently prosecuted. She also alleges that decedent’s medical records, which her counsel subpoenaed and were delivered directly to the Chief Clerk, indicate that the decedent was suffering from cognitive dementia and other impairments at the time the propounded

instrument was signed which supports a finding that decedent was not competent to make a will when he signed the propounded instrument. Accordingly, objectant concludes that petitioner's lack of prosecution in the probate proceeding, coupled with the medical records establishing that the decedent was not competent to make a will, support dismissal of the probate proceeding and her appointment as administrator of the estate.

In opposition, the petitioner cites the same procedural history, insists that she has not caused any delays and avers that she has actively participated in all of the scheduled court conferences and the recent court directed mediation in an attempt to resolve this matter. She opines that the reason the matter has not proceeded to trial is because of the numerous attempts made by the court to resolve the issues, and that the objectant never complained of any delays and only did so after the petitioner did not acquiesce to the objectant's settlement demands. Petitioner urges that granting the objectant's application pursuant to SCPA 1001(9) is inappropriate under these circumstances and cites supporting case law recognizing the court's duty to uphold a testator's intent. She concludes that, as the instrument was signed more than two years prior to decedent's death, was attorney drafted and supervised and clearly expresses the testator's intent, the court should deny the relief sought by the objectant in all respects.

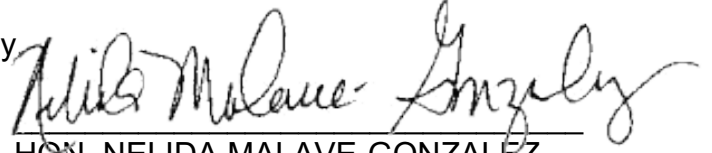
SCPA 1001(9) provides that "[l]etters of administration may be granted by the court in any case in which a paper writing purporting to be a will has been filed in the court and proceedings for its probate have not been

instituted within a reasonable time or have not been diligently prosecuted.” Courts have granted these applications in limited circumstances where “the validity of the propounded instrument is doubtful because of apparent non-compliance with the requisite formalities and either distribution will be the same as in intestacy or all legatees have consented” (see SCPA 1009 [9]; Matter of Lig Shing Zee, 240 NYLJ 28 [NY County 2008] citing Matter of Von Ripper, 95 Misc 2d 952 [NY County 1978]). Although the objectant alleges that the decedent was not competent to make a will, the instrument was, in fact, attorney drafted and supervised making it presumptively valid. A finding as to the decedent’s competency to make a will would involve additional issues of fact that should be determined during a trial, and not on this motion.

Although this estate has been pending for more than a decade, and the petitioner may be faulted for not diligently prosecuting the matter for several years, the objectant also failed to advance her own application seeking to dismiss the probate proceeding and finalize the administration of the estate after being appointed temporary administrator in July, 2015. On this state of the record and given the fact that there remain significant issues of fact concerning testamentary capacity, the objectant’s motion is denied. The parties are directed to file a note of issue, certificate of readiness and an order framing issues on or before September 15, 2022 in accordance with the Uniform Rules for the Surrogate’s Court (22 NYCRR) §§ 207.29 and 207.31, and shall appear at 9:30 a.m. on the court’s virtual platform on

September 29, 2022 for a pre-trial conference to discuss outstanding issues and set a date for trial in the probate proceeding.

Proceed accordingly

A handwritten signature in black ink, appearing to read "Nelida Malave-Gonzalez", written over a horizontal line.

HON. NELIDA MALAVE-GONZALEZ
SURROGATE