

Matter of Giurdanella
2025 NY Slip Op 32666(U)
July 14, 2025
Surrogate's Court, New York County
Docket Number: File No. 2022-642/B
Judge: Hilary Gingold
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ENTERED

JUL 14 2025

DATA ENTRY DEPT
New York County Surrogate's Court

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

-----X
In the Matter of the Estate of

ROBERT J. GIURDANELLA,

Deceased.

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G I N G O L D , S .

DECISION & ORDER

File No. 2022-642/B

The following papers were read in determining these motions:

Papers Numbered

Notice of Motion dated April 25, 2025 – Memorandum of Law dated April 25, 2025 – Affirmation of Frank T. Santoro dated April 25, 2025 and exhibits

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Notice of Cross-Motion dated June 3, 2025 – Affirmation of Carlo Giurdanella dated June 2, 2025 – Memorandum of Law dated June 3, 2025 – Affirmation of Brian DeLaurentis dated June 2, 2025 and exhibits – Affirmation of Ann Giurdanella dated June 2, 2025

4-9

Reply Memorandum of Law dated June 20, 2025 – Reply Affirmation of Frank T. Santoro dated June 20, 2025

10-11

Decedent died on December 6, 2021, survived by his spouse Ann Giurdanella, and their two children, Christine Renzi and Carlo Giurdanella. Pursuant to his will dated September 16, 2020, decedent's assets poured over into the Robert J. Giurdanella Revocable Trust, which provides for the creation of two further trusts of which Ann is an income beneficiary. After her death, the remainder of these trusts is to be split equally between Christine and Carlo.

On March 22, 2022, decedent's will was admitted to probate by this Court and letters testamentary were issued to Christine, as the nominated executor. On November 14, 2024, Ann served and filed a notice of election which Christine rejected as untimely. Ann then commenced this proceeding seeking to determine the validity of her spousal election against decedent's estate

under SCPA 1421. Christine, as respondent-executor, now moves pursuant to CPLR 3211 to dismiss the petition as untimely. Petitioner opposes the motion and cross-moves for leave to amend, conduct discovery, or, alternatively, to cancel the notice of election under EPTL 5-1.1.

“On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(5) as barred by the applicable statute of limitations, a [movant] must establish, prima facie, that the time within which to sue has expired. Once that showing has been made, the burden shifts to the [non-moving party] to raise a question of fact as to whether the statute of limitations has been tolled, an exception to the limitations period is applicable, or the plaintiff actually commenced the action within the applicable limitations period” (*Flintlock Constr Servs, LLC v Rubin, Fiorella & Friedman, LLP*, 188 AD3d 530, 531 [1st Dep’t 2020]).

In her motion, Christine argues that Ann’s spousal election is time-barred because she filed and served her notice of election and commenced this proceeding two years and eight months after this Court issued letters testamentary. Under EPTL 5-1.1-A(d)(1), an election against a decedent’s estate must be made within 6 months from the date of the issuance of letters testamentary, and no later than 2 years after the date of decedent’s death. Where the spouse defaults in making a timely election, the court may extend the time to make an election and relieve the default provided that “no decree settling the account of the personal representative has been made and that twelve months have not elapsed since the issuance of the letters” (EPTL 5-1.1-A[d][2]). Although EPTL 5-1.1-A(d)(2) allows a court to relieve a spouse’s default upon good cause shown where “two years have not elapsed since the decedent’s date of death”, the court lacks the power to exercise such discretion where more than one year has elapsed since the issuance of letters (*Matter of Hornby*, 139 AD3d 1153 [3d Dep’t 2016]).

Here, Ann filed her notice of election and commenced this proceeding in November 2024, almost three years after decedent's death and, critically, two years and eight months since the issuance of letters testamentary. Thus, under the plain terms of EPTL 5-1.1-A, her request for relief is time-barred. Further, since more than twelve-months have elapsed since the issuance of letters testamentary, this Court is without discretion to relieve Ann of her default (*Matter of Hornby*, 139 AD3d at 1154 [Surrogate's Court did not have statutory power to relieve surviving spouse of his default in waiting over one year following issuance of letters testamentary before petitioning for right of election]; *Matter of Nieczaj*, 67 Misc 3d 1213(A) [Sur Ct, Orange Cty 2020] [holding that petition to vacate default and extend the time to exercise the right of election must be denied because petition was filed more than twelve months after letters of administration were issued]).

In opposition to Christine's showing that the petition is time-barred, Ann seeks to invoke, for the first time, the extraordinary remedy of equitable estoppel. She argues that even if her claim is deemed time-barred under EPTL 5-1.1, Christine is estopped from asserting the statute of limitations as a defense because it was her and her attorney's own actions which caused the delay.

A court may apply the doctrine of equitable estoppel "where it would be unjust to allow a [respondent] to assert a statute of limitations defense" (*Zumpano v Quinn*, 6 NY3d 666, 673 [2006]; *Harbinger Capital Partners II, LP v Apollo Global Mgt, LLC*, 236 AD3d 514, 515 [1st Dep't 2025]). To invoke the doctrine, petitioner must establish, by "clear and convincing" evidence, that she failed to commence her petition "in a timely fashion due to a fraud, deception or misrepresentation perpetrated by [respondent]" (*Bayuk v Gilbert*, 57 AD3d 227, 227-28 [1st Dep't 2008]). Even when an intentional misrepresentation is established, petitioner must show reasonable reliance upon the misrepresentations and due diligence in bringing the claim (*Zumpano*,

6 NY3d at 674; *Brean Murray, Carret & Co. v Morrison & Foerster LLP*, 165 AD3d 582, 582-83 [1st Dep't 2018]).

In support of her argument, Ann alleges that in February 2022, she executed documents waiving and consenting to the probate of decedent's will and executed her own will and trust (which were subsequently revoked). The documents were prepared by Gregg Weiss, Esq., allegedly at Christine's behest, and Ann now claims that she did not understand what she was signing. However, even if the Court accepts these allegations as true, they are irrelevant. The documents Ann executed in February 2022 bear no connection to her right to timely elect against the estate and she fails to show how any of these documents impeded her ability to do so.

Ann also argues that Christine and her attorney, Mr. Weiss, had a duty to inform her about her right of election and their failure to do so resulted in the delay. Regarding Christine, Ann argues that Christine owed her a fiduciary duty because she was acting as her agent pursuant to a January 7, 2022, power of attorney. Unsurprisingly, Ann fails to cite a single authority to show that the power of attorney obligated Christine to inform Ann about her right of election. Once again, there is simply no connection between the power of attorney and Ann's failure to assert her claim. In any event, Ann revoked the power of attorney on June 13, 2023, almost eighteen months before she commenced this proceeding, and she has failed to demonstrate any diligence in investigating the facts and asserting her right of election (*see MBI Int'l Holdings Inc v Barclays Bank PLC*, 151 AD3d 108, 117 [1st Dep't 2017] [holding that plaintiff failed to demonstrate due diligence in ascertaining the facts and commencing the action in order to invoke equitable estoppel]).

Regarding Mr. Weiss, Ann argues that he was acting as her attorney concerning this estate and her own estate planning, and thus had a fiduciary obligation to advise her of her right of election. She also asserts that Mr. Weiss deceived her by misrepresenting the value of the estate in

the probate petition, claiming that it was worth approximately \$2 million, when in fact the federal and state tax return shows a value of \$45 million.

Ann's allegations regarding the value of the estate are misplaced. She fails to account for approximately \$40 million in real estate business interests owned by decedent, a non-probate asset which was disclosed in the estate's tax returns in February 2023. Moreover, Ann fails to show that Mr. Weiss had any duty to affirmatively inform her of her right of election, particularly since this would have upended decedent's entire estate plan, triggering approximately \$11 million in federal and state taxes and requiring the liquidation of decedent's real property interests. In any event, Ann's relationship to Mr. Weiss terminated in April 2023, nineteen months before she attempted to elect against the estate by commencing this proceeding and she has failed to make any showing of due diligence in bringing her claim (*Simcuski v Saeli*, 44 NY2d 442, 450-51 [1978] ["Due diligence on the part of the plaintiff in bringing an action is an essential element for the applicability of the doctrine of equitable estoppel...[and] the burden is on the plaintiff to establish that the action was brought within a reasonable time after the facts giving rise to the estoppel have ceased to be operational"]; see also *Twersky v Yeshiva Univ*, 993 FSupp2d 429, 443 [SDNY 2014] [holding that the outer limit for exercising due diligence is generally the length of the statute of limitations measured from the time the estoppel ended]).

Ann's remaining contentions are likewise without merit. For instance, Ann argues that the one-year statute of limitations under EPTL 5-1.1-A is inapplicable because Christine's letters were fraudulently obtained and must be revoked *nunc pro tunc*. Yet she has failed to bring a proceeding for this relief, as required by SCPA 711, nor is there any basis for doing so. Ann's argument that a six-year statute of limitations period is applicable also fails as it misconstrues the nature of this proceeding, which is to vacate Ann's default in failing to timely elect against the estate. Finally,

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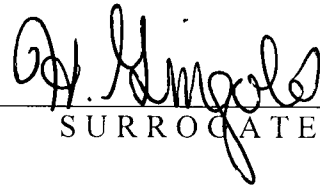
Ann's cross-motion to amend the petition to add allegations regarding equitable estoppel must be denied because the proposed amendment is meritless and cannot survive a motion to dismiss (*see Durst Pyramid LLC v Silver Cinemas Acquisition Co*, 222 AD3d 431, 432 [1st Dep't 2023]).

Accordingly, it is

ORDERED that the motion to dismiss is granted and the petition is dismissed; and it is further

ORDERED that the cross-motion is granted to the extent that the notice of spousal election is cancelled and is otherwise denied.

Dated: July 14th, 2025



SURROGATE