

SCANNED

DEC 16 2020



**SCHENECTADY COUNTY  
SURROGATE'S COURT**  
JUDICIAL BUILDING  
612 State Street  
Schenectady, New York 12305-2113  
(518) 285-8455 or 453-5590  
Fax: (518) 451-8732

Amy C. Stone  
Chief Clerk

Diane D. Enzinna  
Principal Court Attorney

Jennifer L. Signore  
Secretary to Surrogate

**Vincent W. Versaci**  
Surrogate

December 16, 2020

**Via E-Mail & U.S. Mail:**

Frank T. Mahady, Esq.  
P.O. Box 1223  
120 Broadway  
Albany, NY 12201

**Via E-Mail & U.S. Mail:**

Gerard F. Parisi, Esq.  
Parisi, Coan & Saccocio, PLLC  
376 Broadway, 2<sup>nd</sup> Floor  
Schenectady, NY 12305

Re: **Estate of Mary Ann Diacetis**

Surrogate's File No.: **2019-389**

Dear Counselors:

In connection with the above-referenced matter, enclosed please find a copy of the Decision/Order signed by Hon. Vincent W. Versaci on December 16, 2020.

As set forth in the enclosed Decision/Order, the Court has assigned a control date of **January 15, 2021** for Petitioner to serve complete discovery responses upon Objectants. Upon Objectants receipt of Petitioner's complete responses, Objectants' counsel shall contact the Court for the purpose of scheduling the SCPA §1404 Examination.

Thank you for your attention to this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read "Amy C. Stone".

Amy C. Stone  
Chief Clerk

Enclosure

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Schenectady County  
Surrogate's Court

STATE OF NEW YORK  
SURROGATE'S COURT COUNTY OF SCHENECTADY

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In the Matter of the Probate of the Last Will and  
Testament of,

MARY ANN DIACETIS,

a/k/a

MARY DIACETIS,

Deceased.

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**DECISION/ORDER**

File No. 2019-389

**APPEARANCES:**

Attorneys for the Petitioner, John Flower:

Frank T. Mahady, Esq.  
120 Broadway  
P.O. Box 1223  
Albany, New York 12201

Attorneys for Objectants, Antoinette

Engel and Albert T. Diacetis, Jr.:  
Parisi, Coan & Saccocio, PLLC  
Gerard F. Parisi, Esq., CPA, Of Counsel  
376 Broadway, 2<sup>nd</sup> Floor  
Schenectady, New York 12305

**VINCENT W. VERSACI, S.**

In this contested probate proceeding, Objectants, Antoinette Engel and Albert T. Diacetis, Jr., filed a Motion to Compel Discovery pursuant to CPLR Rule 3124, seeking to compel the Petitioner, John Flower, to produce materials that the Petitioner has failed to provide in response to discovery demands, including materials that the Petitioner has asserted are privileged. In the alternative, Objectants request that the Court conduct an *in camera* review of the materials claimed to be privileged. The Petitioner has opposed the Motion.

On or about December 4, 2019, Objectants served a Notice for Discovery and Inspection and Demand for Names and Addresses of Witnesses, among other discovery demands (hereinafter referred to collectively as the "Discovery Demands"). The Petitioner served a Response to the Notice for Discovery and Inspection only (hereinafter referred to as the "Petitioner's Response"). He did not respond to any of the other demands. Finding the Petitioner's Response to be inadequate, Attorney Parisi sent correspondence dated June 26, 2020, to Attorney Mahady in a good faith effort to resolve the discovery dispute as required by 22 NYCRR §202.7(a). Having received no reply from Attorney Mahady, Objectants filed the instant Motion.

Specifically, Objectants argue that the Petitioner's Response is inadequate because the Petitioner improperly objected to the Discovery Demands as being, *inter alia*, "convoluted and imprecise"; "garbled"; "inappropriate"; "overly broad"; and "without justification or basis in fact". The Petitioner also objected to various demands on the basis of attorney-client privilege and work product. Objectants contend that their Discovery Demands are clear and straightforward, and appropriately seek documentary evidence that is material and relevant to their claims that the Decedent lacked testamentary capacity and was unduly influenced by the Petitioner. Objectants further argue that the Discovery Demands are not overly broad because the documents sought are properly "confined to a three-year period prior to the date of the propounded instrument and two years thereafter, or to the date of decedent's death, whichever is the shorter period", as required by 22 NYCRR §207.27. In addition, Objectants allege that the attorney-client privilege does not apply to the materials sought based on the exception to this privilege that is carved out by CPLR §4503(b).

CPLR §3101(a) requires “full disclosure of all matter material and necessary in the prosecution or defense of an action . . .” The words “material and necessary” have been liberally interpreted by the Courts “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”. Allen v. Crowell-Collier Publ. Co., 21 N.Y.2d 403, 406. See also, Foster v. Herbert Slepoy Corp., 74 A.D.3d 1139, 1140; Friel v. Papa, 56 A.D.3d 607, 608. “It is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims.” Crazytown Furniture v. Brooklyn Union Gas Co., 150 A.D.2d 420, 421. See also, Foster v. Herbert Slepoy Corp., supra; Vyas v. Campbell, 4 A.D.3d 417, 418.

“The Supreme Court has broad discretion in the supervision of discovery”. Casabona v. Huntington Union Free School Dist., 29 A.D.3d 723. See also, Andon v. 302-304 Mott St. Assoc., 94 N.Y.2d 740, 746. After reviewing the Discovery Demands, the Petitioner’s Response and the arguments of counsel, the Court finds that Objectants’ Discovery Demands are coherent and sufficiently specific in identifying the documents sought. They do not read like a set of interrogatories as suggested by the Petitioner. Nor are they “garbled” or “imprecise”. Rather, each demand is clearly worded and narrowly tailored to seek material and relevant evidence or is reasonably calculated to lead to the discovery of material and relevant evidence that relates to Objectants’ claims of lack of testamentary capacity and undue influence.

Given the nature of these claims, Objectants are not limited to discovery

regarding the execution of the Decedent's Will only. The Discovery Demands appropriately seek documents pertaining to all transactions involving the Decedent and/or her assets that occurred between November 20, 2015, three (3) years prior to the date on which the Decedent's Will was executed, and February 18, 2019, the date of the Decedent's death. Since the Discovery Demands are reasonably related to Objectants' claims and comply with the 3-year/2-year rule as defined in 22 NYCRR §207.27, they are not overly broad or unduly burdensome.

Furthermore, the Court agrees with Objectants that Attorney Mahady's office file and records relating to the preparation and execution of the Decedent's Will are not protected under the attorney-client privilege or the work product doctrine. CPLR §4503(b) provides an exception to the general rule that attorneys are prohibited from disclosing confidential communications with their clients. This statute mandates as follows:

[i]n any action involving the probate, validity or construction of a will or, after the grantor's death, a revocable trust, an attorney or his employee shall be required to disclose information as to the preparation, execution or revocation of any will, revocable trust, or other relevant instrument, but he shall not be allowed to disclose any communication privileged under subdivision (a) which would tend to disgrace the memory of the decedent.

Since this proceeding involves the probate of the Decedent's Will and since the Petitioner has not alleged that the disclosure of Attorney Mahady's office file "would tend to disgrace the memory of the decedent", the exception to the general attorney-client privilege rule applies here. In fact, Attorney Mahady admits in his papers that his office notes and records pertaining to the drafting of the Decedent's Will have already been produced in response to the demands numbered 14 and 15. Thus, it appears that

an *in camera* review by the Court of the documents claimed to be privileged is unnecessary.

Objectants need not prove the facts supporting their claims as this early stage of the proceeding. Objectants are rightfully seeking preliminary discovery prior to the filing of their formal Objections and are entitled to complete responses to their Discovery Demands. Accordingly, Objectants' Motion to Compel Discovery is hereby granted. To the extent the Petitioner has not fully responded to all of Objectants' Discovery Demands, the Petitioner is hereby ordered to serve complete responses within thirty (30) days of the date of this Decision and Order. Attorney Parisi is directed to contact the Court upon receipt of the Petitioner's complete responses, for the purpose of scheduling an examination of the attesting witnesses to the Will pursuant to SCPA §1404.

The parties' remaining arguments, to the extent not specifically addressed herein, have been considered and found to be unavailing.

The foregoing shall constitute the Decision and Order of this Court.

Signed at Schenectady, New York, this 16<sup>th</sup> day of December, 2020.



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Hon. VINCENT W. VERSACI  
Surrogate

ENTER: *December 16, 2020*  
*Amy C. Stone, Chief Clerk*