

Matter of Assimakopoulos

Supreme Court of New York, Appellate Division, First Department

March 6, 2018, Decided ; March 6, 2018, Entered

5906, 1154/12

Reporter

159 A.D.3d 453 *; 71 N.Y.S.3d 481 **; 2018 N.Y. App. Div. LEXIS 1465 ***; 2018 NY Slip Op 01440 ****; 2018 WL 1162432

Counsel: [***1] Eva Lana, appellant, Pro se.

[****1] In the Matter of Paula Assimakopoulos, Deceased. Eva Lana, Appellant, v Nicolle Assimakopoulos-Panuthos, Respondent.

Nicolle Assimakopoulos-Panuthos, respondent, Pro se.

Subsequent History: Appeal dismissed by *Matter of Paula Assimakopoulos v Nicolle Assimakopoulos-Panuthos*, 31 NY3d 1070, 2018 N.Y. LEXIS 1358, 78 NYS3d 267, 102 NE3d 1049 (N.Y., June 7, 2018)

Judges: Concur—Friedman, J.P., Tom, Webber, Kern, JJ.

Prior History: *Lana v Estate of Assimakopoulos*, 208 So 3d 1170, 2016 Fla. App. LEXIS 2601 (Fla. Dist. Ct. App. 2d Dist., Jan. 8, 2016)

Opinion

[**482] [*454] Decree, Surrogate's Court, New York County (Rita Mella, S.), entered on or about September 25, 2013, which, among other things, granted limited ancillary letters of administration c.t.a. to cross petitioner Nicolle Assimakopoulos-Panuthos, and bringing up for review an order, same court and Surrogate, entered on or about June 26, 2013, which denied petitioner Eva Lana's motion to renew, unanimously reversed, on the law and the facts, without costs, the decree vacated, the letters revoked, and letters of administration c.t.a. issued to the Public Administrator of New York County.

Headnotes/Summary

Headnotes

Wills—Probate—Court's Independent Inquiry into Decedent's Domicile

Executors and Administrators—Ancillary Administration—Grant of Ancillary Letters Revoked Since Decedent was New York Domiciliary

Based on the evidence presented by petitioner Eva Lana on her motion to renew, the court should have granted renewal, and upon renewal, determined that decedent was a New York domiciliary.

Even if the Florida court had decided that decedent was a domiciliary of that state, "the decree of the State of original probate is not conclusive on the

159 A.D.3d 453, *454; 71 N.Y.S.3d 481, **482; 2018 N.Y. App. Div. LEXIS 1465, ***1; 2018 NY Slip Op 01440, ****1

question of domicile or residence" ([Matter of Cornell](#), 267 NY 456, 462, 196 NE 396 [1935], cert denied 297 US 708, 56 S Ct 500, 80 L Ed 995 [1936]). Accordingly, this Court may make an independent inquiry into domicile (see [Matter of Neumayer](#), 168 Misc 173, 179, 5 NYS2d 331 [Sur Ct, Oneida County 1938], appeal dismissed 256 App Div 1039, 10 NYS2d 887 [4th Dept 1939]).

Assimakopoulos-Panuthos [***2] failed to meet her burden of showing, by clear and convincing evidence, that decedent had changed her domicile from New York to Florida (see [Matter of Ranftle](#), 108 AD3d 437, 441, 969 NYS2d 48 [1st Dept 2013], affd 22 NY3d 1146, 984 NYS2d 287, 7 NE3d 500 [2014], cert denied 135 S Ct 270, 190 L Ed 2d 139 [2014]). The documentation submitted by petitioner in support of her motion to renew, showed that decedent voted in New York, her driver's license was from New York, and her passport application used her New York address (see [Matter of Winkler](#), 171 AD2d 474, 475, 567 NYS2d 53 [1st Dept 1991], lv dismissed 78 NY2d 908, 577 NE2d 1061, 573 NYS2d 469 [1991]). She filed New York State tax returns (see [Ranftle](#), 108 AD3d at 439), and her will and death certificate said she was from New York (see [Matter of Gadway](#), 123 AD2d 83, 86, 510 NYS2d 737 [3d Dept 1987]). Moreover, when decedent left New York for Florida in July 2009, she said she intended to return, but never did because of medical complications (see [Matter of Lockwood](#), 147 NYS2d 106, 107-110 [Sur Ct, Suffolk County 1955]).

Since decedent was a New York domiciliary, ancillary probate in this state is inappropriate, even though her will has already been probated in Florida ([Matter of Rosenak](#), 184 Misc 2d 807, 809, [*455] 710 NYS2d 813 [Sur Ct, Kings County 2000]; see also [Matter of Beban](#), 135 Misc 25, 34, 237 NYS 701 [Sur Ct, NY County 1929]). Therefore, the grant of ancillary letters to Assimakopoulos-Panuthos is revoked, and nonancillary letters are granted to the Public Administrator.

The choice of the Public Administrator is appropriate given the inability of decedent's

daughters (Lana and Assimakopoulos-Panuthos) to work together; we note that the court [****2] appointed the Public Administrator as the administrator [***3] of the sisters' father's estate (see [Matter of Assimakopoulos](#), 2017 NY Slip Op 32821[U], *1 [Sur Ct, NY County 2017]). Concur—Friedman, J.P., Tom, Webber, Kern, JJ.

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41 N.Y. Jur. 2d DECEDENTS' ESTATES § 1608

New York Jurisprudence, Second Edition June 2021 Update

Decedents' Estates

Tracy Bateman, J.D.; Elizabeth M. Bosek, J.D.; Christine M. G. Davis, J.D., LL.M.; Russell J. Davis, J.D., M.A.; John A. Gebauer, J.D.; Stephanie A. Giggetts, J.D.; Noah J. Gordon, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Michele Hughes, J.D.; Rachel M. Kane, M.A., J.D.; Amy L. Kruse, J.D.; David J. Lanciotti, J.D.; Mary G. Leary, J.D.; Randolph J. Lee, Jr., J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Michele Meyer McCarthy, J.D.; Thomas Muskus, J.D.; Mark T. Roohk, J.D.; Michael Rosenhouse, J.D.; Jeffrey J. Shampo, J.D.; Kimberly C. Simmons, J.D.; Paul Steinberg, J.D.; Mary Ellen Tomazic, J.D., of the staff of the National Legal Research Group, Inc.; Elizabeth Williams, J.D.; Brenda Williamson, J.D.; and Lisa A. Zakolski, J.D.

Part Four. Administration of Estates

XXXIII. Probate Proceedings, Generally


C. Commencement of Probate Proceeding

1. Jurisdiction and Venue

§ 1608. Jurisdiction and venue in probate of domiciliaries' wills

[Topic Summary](#) | [References](#)

West's Key Number Digest

- West's Key Number Digest, [Wills](#)  247 to 249, 253, 258

Forms

- [West's McKinney's Forms, Estates and Surrogate Practice § 2:35](#) (Petition to Determine Domicile of Decedent [Form—SCPA 206])
- [West's McKinney's Forms, Estates and Surrogate Practice §§ 2:35.50, 2:36, 2:37](#) (Decrees Determining Domicile of Decedent [Form—SCPA 206])
- [West's McKinney's Forms, Estates and Surrogate Practice § 2:116](#) (Notice of Motion to Transfer Proceeding to Proper County [Form—SCPA 205, 206, 207])
- [West's McKinney's Forms, Estates and Surrogate Practice § 2:123](#) (Affidavit of Proper County after Executor's Demand [Form—SCPA 205, 206, 207])

While the surrogate's court of any county has jurisdiction over the estate of a decedent who was a domiciliary of the state at the time of his or her death, disappearance, or internment, the proper venue for proceedings relating to such estates is the county of the decedent's domicile at the time of death, disappearance, or internment.¹ A testator's domicile, for venue purposes in a probate action, is the place in which the testator intends to make his or her home indefinitely.² A surrogate must transfer any proceeding to the surrogate's court of the proper county either on its own motion or on the motion of any party.³

Observation:

The surrogate's court of any county has jurisdiction over, and is a proper venue for, the proceedings of any decedent who was a domiciliary of the state at the time of his or her death and who died as a result of wounds or injury incurred as a result of the terrorist attacks on September 11, 2001.⁴

An allegation of the jurisdictional fact of domicile of the decedent in the county at the time of death included in the petition for probate establishes jurisdiction, in the absence of collusion or fraud.⁵ Since domicile is a waivable and nonjurisdictional concept, if a court mistakenly, without objection, exercises jurisdiction over the estate of a domiciliary of another county, its decree is not vulnerable to direct or collateral attack for lack of subject matter jurisdiction.⁶ However, in a case where the executor does not attack the jurisdiction of the court rendering the decree and where the fact of the decedent's residence within the territorial jurisdiction of the court is not essential to confer jurisdiction upon the court even though it is the only jurisdictional fact recited in the petition for probate, the parties to the probate proceeding are not estopped from thereafter disputing the allegations of the petition for probate as to the testator's domicile.⁷

It may be necessary for the surrogate's court to decide whether the decedent effected a change of domicile prior to his or her death in order to determine the proper venue for the probate of the will.⁸

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Footnotes

- 1 [SCPA § 205\(1\)](#).
A domiciliary is a person whose domicile is within the State of New York. [SCPA § 103\(16\)](#).
- 2 [In re Will of Andros, 3 Misc. 3d 216, 775 N.Y.S.2d 799 \(Sur. Ct. 2004\)](#).
- 3 [SCPA § 205\(2\)](#).
In a proceeding to probate a will, appellant was not entitled to a transfer from Kings County to Bronx County where the decedent had resided in Brooklyn during her marriage, there was no evidence that the decedent intended to change her domicile when she entered a nursing home in the Bronx, and although the decedent's residence in Brooklyn had been sold and therefore she could not return there, she was not precluded, health permitting, from returning to her community in Brooklyn. [Matter of Urdang, 194 A.D.2d 615, 599 N.Y.S.2d 60 \(2d Dep't 1993\)](#).
[SCPA § 205\(2\)](#) provides that the surrogate, on the motion of any party, must transfer a proceeding to the proper county, if it belongs in another county, and the surrogate's court may make a determination as

to whether a proceeding should be transferred at any time prior to the decree since, under [SCPA § 102](#), the time limitations found under [CPLR 511](#) within which to raise a venue question are not applicable; accordingly, a motion to dismiss a probate proceeding on the ground that the decedent died domiciled in another county would be denied and a hearing ordered to determine whether the court should retain jurisdiction of the proceedings or transfer them. [Will of Harrigan](#), 126 Misc. 2d 298, 482 N.Y.S.2d 219 (Sur. Ct. 1984).

4 [SCPA § 205\(3\)](#).

5 [In re O'Daniels' Estate](#), 67 Misc. 2d 571, 323 N.Y.S.2d 345 (Sur. Ct. 1971).

6 [In re Bonora](#), 123 A.D.3d 699, 998 N.Y.S.2d 400 (2d Dep't 2014) (involving a controversy over proper venue as between Kings and Richmond Counties).

7 [In re Mulhern's Estate](#), 31 A.D.2d 317, 297 N.Y.S.2d 485 (4th Dep't 1969) (involving a choice-of-law issue as between New York and the Province of Ontario in the probate of the will of a decedent who died in ~~Erie County~~ and left personal property there).

8 [In re Assimakopoulos](#), 159 A.D.3d 453, 71 N.Y.S.3d 481 (1st Dep't 2018), appeal dismissed, 31 N.Y.3d 1070, 78 N.Y.S.3d 267, 102 N.E.3d 1049 (2018) (holding that the decree of the state of original probate is not conclusive on the question of domicile, the court found that the Florida estate representative, who had obtained ancillary letters, c.t.a. from the New York County surrogate, had failed to meet her burden of showing by clear and convincing evidence that the decedent had changed her domicile from New York to Florida; the court further held that even if the Florida court had made a determination of domicile, the courts of New York could revisit that determination, and, as the evidence showed that the decedent voted in New York, her driver's license was from New York, her passport application used her New York address, she filed New York State tax returns, her will and death certificate both said she was from New York, and that when she left New York for Florida, she said that she intended to return, but never did because of medical complications, the court revoked the ancillary letters, c.t.a. and issued nonancillary letters to the New York Public Administrator due to the inability of the parties to work together).

[In re Ranftle](#), 108 A.D.3d 437, 969 N.Y.S.2d 48 (1st Dep't 2013), order aff'd, 22 N.Y.3d 1146, 984 N.Y.S.2d 287, 7 N.E.3d 500 (2014) (holding that the testator's surviving same-sex spouse, who was appointed executor of testator's will, met his burden of proof in showing that the testator had changed his domicile from Florida to New York in the months prior to his death in opposing a petition by the testator's brother seeking leave to submit objections to the probate of the will; scattered evidence that the testator remained a Florida domiciliary was overwhelmed by a large and consistent body of evidence showing that the testator, prior to his death, had moved back into the New York apartment that he had shared with his husband with the intent of permanently remaining there, and that his change of domicile was motivated both by his grave illness and by New York's recognition of same-sex marriages).

[Matter of Estate of Gadway](#), 123 A.D.2d 83, 510 N.Y.S.2d 737 (3d Dep't 1987) (holding that the surrogate's court erred in summarily deciding that the decedent was a domiciliary of Florida, and in declining to exercise its discretion under [SCPA § 1605](#) to probate a will, where the evidence that the decedent had changed her longstanding domicile in New York to that of Florida shortly before her death showed only that she had acquired a Florida driver's license while keeping New York license, registered to vote in Florida, filed a tax return as a Florida resident, and led her New York attorney to believe she may have changed her domicile to Florida while the evidence of New York domicile consisted of her concentration of financial operations, bank accounts, and business dealings; declaration in her will that she was a New York resident and that the distribution of estate should be defined by New York law; her naming of her New York attorney as an executor; her choice of burial site near her longtime New York home; and leading her brother to believe she was a New York resident, the court stating that since the challengers to New York domicile had not shown, by clear and convincing evidence, that the decedent had indeed changed her domicile to Florida, the surrogate's court should not have summarily decided the issue); [In re Will of Andros](#), 3 Misc. 3d 216, 775 N.Y.S.2d 799 (Sur. Ct. 2004) (the domicile of a 63-year-old inmate, for purposes of venue for probate of his will, was the county in which he was imprisoned; in view of the inmate's state and federal prison terms, it was reasonable to conclude that had he lived to his life expectancy, the inmate would still have died in prison); [Estate of Grushovetz](#), 84 Misc. 2d 356, 375 N.Y.S.2d 518 (Sur. Ct. 1975) (holding that the surrogate's court had jurisdiction to probate the decedent's will and to consider such issues as domicile even though the decedent died in Pennsylvania after moving there three months before his death and even though a Pennsylvania probate court had issued letters of administration to the decedent's former guardian, the surrogate's court noting that the Pennsylvania court

SILVER created new categories of relevant domiciliary facts through copious evidence she collected as a law student-- and which evidence (and comity) was ignored by Florida where she is routinely retaliated against via weaponized sanction motions filed by Local counsel & upheld without basis in fact or law by local jurists. SILVER actually authored the entry in this chapter

had no knowledge of the decedent's purported will and had not litigated or determined the issue of the decedent's domicile).

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41 N.Y. Jur. 2d DECEDENTS' ESTATES § 1609

New York Jurisprudence, Second Edition | June 2021 Update

Decedents' Estates

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Part Four. Administration of Estates

XXXIII. Probate Proceedings, Generally

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§ 1609. Jurisdiction and venue in probate of nondomiciliaries' wills

[Topic Summary](#) | [References](#)

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- West's Key Number Digest, [Wills](#)  247 to 249, 253, 258

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- [West's McKinney's Forms, Estates and Surrogate Practice § 2:116](#) (Notice of Motion to Transfer Proceeding to Proper County [Form—SCPA 205, 206, 207])
- [West's McKinney's Forms, Estates and Surrogate Practice § 2:123](#) (Affidavit of Proper County after Executor's Demand [Form—SCPA 205, 206, 207])

National Background:

While there are decisions in some jurisdictions which recognize affirmatively that jurisdiction to admit to probate the will of a nonresident who has left assets within the state exists independently of special statutory authorization,¹ New York is among the states which, by statute, confer jurisdiction on their courts to probate wills of nonresident decedents who leave property in the state.

The surrogate's court of any county has jurisdiction over the estate of any nondomiciliary decedent who leaves property in the state or a cause of action for wrongful death against a domiciliary of the state.²

The proper venue for proceedings relating to such estates is the county (a) where the nondomiciliary decedent left property; (b) where personal property belonging to the nondomiciliary decedent has, since his or death, disappearance, or internment, come into and remains unadministered; or (c) of the domicile of the person against whom a nondomiciliary left a cause of action for wrongful death.³

Where venue may lie in more than one county under the foregoing provisions, the court where a proceeding is first commenced with proper venue retains jurisdiction, and matters relating to the estate of the nondomiciliary decedent pending in the surrogate's court of other counties will be transferred to it.⁴

A surrogate may transfer any proceeding to the surrogate's court of the proper county either on its own motion or the motion of any party.⁵

In determining whether to accept an application for original probate of a will of a nondomiciliary which has not yet been admitted to probate in the decedent's domicile, a court should examine the nature of New York's contacts with the decedent and the estate, including (1) the location of decedent's assets; (2) the residence of the nominated fiduciaries and beneficiaries; (3) the expense of proving the will in the decedent's domicile; (4) the decedent's request, if any, for New York probate; and (5) the good faith of the proponents.⁶ Moreover, the court should consider what weight should be given to the fact that the decedent's domicile has already assumed jurisdiction over the decedent's estate.⁷ Jurisdiction over the estate of a nondomiciliary should not be transferred from the testator's domicile to New York unless it is required by some imperative rule of law.⁸

Prominent Placement
of Landmark Case in
ALL Treatises

Caution:

Even though a court in another state may have found a decedent to have been a domiciliary of that state and probated the decedent's will, a New York court may revisit the issue of domicile. In the course of such review, if the decedent is in fact found to have been a domiciliary of New York at the time of death, the issuance of ancillary letters by the New York court is inappropriate.⁹

Observation:

The jurisdiction of the surrogate's court is concurrent with that of the Seneca Nation of Indians for purposes of the probate of the will of a member of the Seneca Nation, and where the nominated executor has chosen the surrogate's court as the forum, such jurisdiction will be retained by the court.¹⁰

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Footnotes

1 [Am. Jur. 2d, Wills § 736.](#)

2 [SCPA § 206\(1\).](#)

The surrogate's court has jurisdiction to probate the will of a nondomiciliary on the basis of personal property in the form of stock certificates having come into New York after the decedent's death; although discretionary, jurisdiction should not be declined merely because property was brought into the state for the purpose of conferring jurisdiction if there was no wrongful intention. Accordingly, preliminary letters would issue where the probate in New York was contemplated by the decedent, there was litigation relating to the estate pending in New York, one of the two nominated executors and three of the four attesting witnesses lived in New York, all interested persons other than the decedent's estranged wife had consented to the probate in New York, and the undetermined rights of the decedent's estranged wife would be equally protected under the laws of New York. [Will of Nelson, 125 Misc. 2d 451, 475 N.Y.S.2d 194 \(Sur. Ct. 1984\).](#)

3 [SCPA § 206\(1\).](#)

4 [SCPA § 206\(2\).](#)

5 [SCPA § 206\(3\).](#)

6 [In re Estate of Baer, 46 A.D.3d 1368, 849 N.Y.S.2d 143 \(4th Dep't 2007\).](#)

7 [In re Estate of Baer, 46 A.D.3d 1368, 849 N.Y.S.2d 143 \(4th Dep't 2007\).](#)

8 [In re Estate of Baer, 46 A.D.3d 1368, 849 N.Y.S.2d 143 \(4th Dep't 2007\).](#)

9 [In re Assimakopoulos, 159 A.D.3d 453, 71 N.Y.S.3d 481 \(1st Dep't 2018\), appeal dismissed, 31 N.Y.3d 1070, 78 N.Y.S.3d 267, 102 N.E.3d 1049 \(2018\).](#)

As to ancillary letters, generally, see [§ 1726.](#)

10 [In re Jameson's Will, 68 Misc. 2d 945, 328 N.Y.S.2d 466 \(Sur. Ct. 1972\).](#)

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41 N.Y. Jur. 2d DECEDEENTS' ESTATES § 1726

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Part Four. Administration of Estates

XXXIV. Foreign Estates

A. Overview of Ancillary Administration

§ 1726. Purpose of, and necessity for, ancillary letters

[Topic Summary](#) | [References](#)

West's Key Number Digest

- West's Key Number Digest, [Executors and Administrators](#) 🔑 518(1) to 518(6), 524(.5) to 524(3)

When counsel desires to reduce to possession assets of a nondomiciliary which are located here, to satisfy debts of New York creditors out of assets located here, and to transmit the balance to the place of domiciliary administration—in short, to administer the assets located here of a nondomiciliary—then he or she must obtain ancillary administration.¹ The essential, underlying function of ancillary estate administration proceedings is to obtain control and possession of the New York assets of a nondomiciliary, to satisfy New York creditors, and to transfer the remaining assets to the domiciliary administrator.² Thus, ancillary probate in New York is inappropriate where the decedent was in fact a domiciliary of this state at the time of death, and this is so even where the decedent's will has already been probated in another state.³




An ancillary fiduciary is one who is subordinate or auxiliary to the principal or domiciliary fiduciary.⁴

The entire theory of ancillary administration is based upon the principle that the ancillary representative acts in an auxiliary capacity, as an aid to the chief administration which is to be conducted in the principal jurisdiction,⁵ and an ancillary fiduciary must be appointed since a domiciliary fiduciary will not be recognized for this purpose outside the state of the decedent's domicil.⁶

FELOS set in motion the ancillary enterprise which enabled him to be the sole de facto beneficiary of SILVER's parents' life savings

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Footnotes

- 1  Wedemann v. U.S. Trust Co. of New York, 258 N.Y. 315, 179 N.E. 712, 79 A.L.R. 1320 (1932); Gordon v. Gordon, 110 A.D.2d 623, 487 N.Y.S.2d 574 (2d Dep't 1985); In re Edwards' Estate, 87 Misc. 2d 337, 385 N.Y.S.2d 253 (Sur. Ct. 1976).
- 2  Matter of Stern, 91 N.Y.2d 591, 673 N.Y.S.2d 972, 696 N.E.2d 984 (1998).
- 3  In re Assimakopoulos, 159 A.D.3d 453, 71 N.Y.S.3d 481 (2018), appeal dismissed, 31 N.Y.3d 1070, 78 N.Y.S.3d 267, 102 N.E.3d 1049 (2018).
- 4 In re Lanari's Estate, 40 Misc. 2d 572, 243 N.Y.S.2d 535 (Sur. Ct. 1963).
- 5 In re Lanari's Estate, 40 Misc. 2d 572, 243 N.Y.S.2d 535 (Sur. Ct. 1963); In re Zietz' Estate, 198 Misc. 77, 96 N.Y.S.2d 442 (Sur. Ct. 1950).
- 6 Steele v. Connecticut General Life Ins. Co., 31 A.D. 389, 52 N.Y.S. 373 (4th Dep't 1898), aff'd, 160 N.Y. 703, 57 N.E. 1125 (1899).
As to the power of a foreign fiduciary to bring an action without first obtaining ancillary letters, see § 1465.

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