

STATE OF RHODE ISLAND  
PROVIDENCE, SC

PROBATE COURT OF THE  
CITY OF PROVIDENCE

In Re Estate of: JOHN A. MCALLISTER

No.: 2014- 481

DECISION

SUMMARY OF ISSUES AND PARTIES

The matter is before the Court on a Petition to file and record for probate in Rhode Island a foreign will allowed by the Court of Common Pleas of Allegheny County, Pennsylvania Orphan's Court Division ("PA court") on March 7, 2014 for **John A. McAllister** ("**Decedent**"). The petition is brought by the designated executor thereunder and an heir at law of decedent (a daughter), **Deborah McAllister Johnston** ("Petitioner") of Penn Hills, PA. An objection to its allowance has been submitted by two (2) of the heirs at law of the decedent, both daughters of the decedent, **Moressa Morgan a/k/a JoAnn McAllister** and **Aretta Denise McAllister**, (collectively, "Objectors").

This court requested memos from the parties concerning the following **legal issue**: Does the admission and allowance of a will by a Probate Court from another State (a foreign probate") preclude any hearing and decision on the validity and admissibility of the will in a Rhode Island probate court, thus entitling the foreign will to full faith and credit in Rhode Island and making any issues regarding the will res judicata?

TRAVEL and FACTS OF CASE

Decedent" died February 11, 2014 in Penn Hills, PA.; he had nine (according to Objectors) or ten (per the Petitioner) children, three of them live in Providence, RI (one of whom is an Objector in this matter).

The Petitioner is a resident of Pennsylvania; the circumstances regarding decedent's relocation to and type of residence in Pennsylvania (temporary or permanent) are in dispute, but are **not material** to the **issue** being decided by this court.

Petitioner submitted an exemplified copy of the decedent's will which is dated December 14, 2013 and is **apparently** executed according to the laws of Pennsylvania<sup>1</sup>, along with the

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<sup>1</sup>The required testator signature on the will is incorrect; the notary signed where the testator is supposed to sign. In addition, the name of the notary is written in on the will where the name of the testator belongs, following the signature portion of the document. See **Exhibit B** of Petitioner's memo. However, the PA Court of Common Pleas approved the will because decedent properly executed **the acknowledgement page along** with the three required witnesses and notary public. **NB: the heirs were given notice of this occurrence as well as the probate itself and had the opportunity to object to the will's allowance, even after the court action. Petitioner's Exhibit C and E.respectively.**

other PA court documents. Included is an order dated March 7<sup>th</sup>, 2014 from the PA court allowing the will and court certified copies of the notice of Probate sent to all the heirs at law of the decedent, providing them the opportunity to object to the will's allowance. No interested party objected to the will in the PA court. **NB** neither petitioner nor objector dispute the facts set out in this paragraph.

Petitioner also submitted an exhibit<sup>2</sup> with her memo which contains a Durable Financial and Medical Power of Attorney with Living Will Declaration, executed by the decedent in March 2007 in Pennsylvania, but is not material to the issue being decided by the court.

### **ANALYSIS of MEMOS**

Objector's memo with the court raises the issue of the permanent residency of the decedent at the time the will was executed and at the time of his passing, claiming he was "taken" from RI in August 2013 by the petitioner for what the two children who object to the will believed was only for a visit and not a permanent move, making the argument that he was a resident domicile of RI whose PA probate was not valid because that court lacked jurisdiction; it is also alleged that the decedent did not have testamentary capacity because of mental and physical deficiencies and was being subjected to undue influence by the petitioner herein when he executed his will in December, 2013. These arguments are not germane to the issue at hand that must be decided before proceeding to an examination of the merits of the case. The court will not make any findings of fact concerning these substantive issues or decide the merits of the case at this time.

However, the Objectors do address the question posed by this court concerning the right of interested parties to contest the admission and allowance of a will in RI which was previously allowed by a court in a "foreign" jurisdiction<sup>3</sup>. They cite the RI Supreme court case of *O'Brien v. Costello*, **216 A.2<sup>nd</sup> 694; 100 R.I.422 (1966)** which is suggested constitutes *stare decisis* concerning the issue in this matter. It is proposed that the language in that case supports the proposition that a foreign will is subject to review on all grounds by a RI probate court, thus affording the Objector's the right to a full evidentiary hearing on the issues of decedent's domicile, testamentary capacity, the exertion of undue influence on decedent, and the validity of the will and the PA court proceedings.

Petitioner's memo initially outlines the travel of the case and recitation of the facts from her perspective and repudiates the Objector's position on the merits of the case. Petitioner avers that the decedent was a resident of Pennsylvania and owned real estate there. The memo also recites that notice was sent to all the siblings of the pendency of the PA probate, as well as notice of the allowance of the will. Petitioner agrees that those merits are not relevant to the issue at hand.

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<sup>2</sup> **Exhibit A** of Petitioner's filing;

<sup>3</sup> "Foreign" meaning another state or country **RIGL, § 33-7-25;**

Petitioner argues that because the heirs at law were given actual notice of the PA court action via US mail, with ample opportunity to object to its allowance in court there, they are barred from objecting to the Petition for Probate in this court based on the established doctrines of re judicata, full-faith and credit and comity. Petitioner believes this case is distinguished from **Costello** supra, relying on the discussion by our Supreme Court at **Costello page 699** that a court in one jurisdiction cannot, by constructive notice, acquire in personam jurisdiction over a non-resident. Petitioner avers that because Objectors had actual mail notice of the PA proceedings, though not through actual service of notice by a court officer so authorized, and **not** constructive notice, they cannot claim the PA court lacked jurisdiction over them and are not bound by its decision.

### **DECISION and CONCLUSION OF LAW**

**R.I. GEN. LAWS §33-7-18** provides that a person interested in any will which was finally proved and allowed in a probate court in a different state, territory or district in the USA or a foreign country shall file a writing with an authenticated copy of the will and probate so acted upon by the out of state probate court, in any probate court in RI where the decedent had real or personal property requesting that the will be filed and recorded in the office of the clerk of that probate court. The RI probate shall **assign a time and place for a hearing** (emphasis added). **§33-7-19** provides that the RI probate court causes notice to be given as if it were a RI probate, so that “any person may appear and show cause why the copy so filed should not be filed and recorded” (probated in RI). **§33-7-20 and §33-7-22** address other issues concerning the probate of a will of a person who is a foreign domiciliary and whose will is not required to be probated in his/her domicile, shall be probated as if it is a will for a resident of this state. These statutes, taken together clearly and unambiguously afford the Objectors herein the right to raise questions in the court regarding the validity of the will, the capacity of the decedent, his domicile as well as the issue of undue influence.

**NB** These statutes use language indicative that the RI probate courts merely files and records the will after its filing and a show cause hearing; from a probate practice point, this is not the case: the foreign will, after hearing, follows the same course as an original probate of a decedent in RI, similar to the mandates in **RI GEN LAWS §33-7-25**.

Two **1858 cases**, decided by the RI Supreme Court, *Bowen v Johnson* **5 RI 112** and *Olney v Angell* **5 RI 198** refer to the proceedings in the probate courts as “in rem” proceedings and as such not requiring actual service on the interested parties by a duly authorized process provider. The **Bowen case** supra, states that the allowance of a will by a court in a jurisdiction other than RI is “only **prima facie** evidence of its validity in this state....” (**at page112**). Further, the court holds that the probate of a will is “**not like a judgment between parties** (in personam) but a decree in rem...and confined in its operation to matters within the state which takes the probate” (**page 118**). The court further distinguishes the difference between in personam and in rem jurisdiction, opining that the former requires actual, personal service (in the legal sense)

while the latter does not. The justices further state that the **US Constitution** does not extend the jurisdiction of local courts, or to extend beyond its just limits, the operation of a local decree; leaving the probate of a will where it finds it, a decree local in its nature and operation.

A review of the **Costello case** supra clearly supports this court's analysis of the pertinent Rhode Island sections of the **RI General Laws**, supra; it makes the same conclusion as this court.

The issue of res judicata is not applicable since the **MA probate court** did not affect the title of assets in RI. In our case, neither did the **PA court**.

In **Costello**, the argument of notice by mail and failure to object in the Massachusetts court does not satisfy the requirement of actual service upon a non-resident or a non-resident who enters an appearance, thus Appellant (O'Brien) is not in party in the MA Proceedings. Again, the court has stated that probate is an in rem proceeding and so far as it affects personalty beyond the state, it acts in personam and binds only parties or their privies.

In this matter, the fact that objectors received mailed notice of the PA court's actions does not make them a party to the case, in the legal sense, since they are not residents of PA and were not served notice of the proceedings by a authorized court officer.

The argument of privy and findings thereto in the **Costello case** are not relevant to the facts herein.

The **Costello court** also finds that the MA probate court did not have jurisdiction over the RI assets, thus making the full faith and credit argument granted by the US Constitution without merit.

Likewise, this court has found that both the RI statutes and relevant case law support the premise that PA court has no jurisdiction over the RI assets.

**Costello** defines comity as not a positive rule of law but one of practicality based on a proper regard of law of a foreign state. The court found that it would not invoke any rule of comity in the case since the MA court did not have jurisdiction over the RI assets; this court finds accordingly in this case.

## **ORDER**

Based on the above, the court finds that the will allowed in the Pennsylvania court is subject to review in this court at a hearing and grants to the Objectors limited discovery concerning the validity of the will, the domicile of the decedent, his capacity to execute a will, whether undue influence or fraud was perpetrated upon him, with a full hearing to follow.

Appropriate scheduling will be established by this court at the hearing when this decision is entered.

**ENTER:** \_\_\_\_\_  
**Probate Judge**

**DATE:** \_\_\_\_\_

**BY ORDER:** \_\_\_\_\_  
**Probate Clerk**

**DATE:** \_\_\_\_\_