

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

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In the Matter of the Application of Michael Boyle,
as Administrator, c.t.a. of the Estate of

File No. 2015-384972/A

JAMES F. BOYLE,
a/k/a JAMES F. BOYLE,

Dec. No. 31348

for an Order Pursuant to SCPA 2013 Directing
the Return of Property Belonging to the Estate.
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Before the court is a petition filed on September 10, 2015, by Michael Boyle, as the administrator, c.t.a. of the estate of his brother, James F. Boyle, seeking an order directing Patrick Donoghue and Patricia Donoghue to return property belonging to the estate of James F. Boyle to the petitioner.

James F. Boyle (the decedent) died on April 13, 2015. On August 4, 2015, the decedent's will was admitted to probate and the court issued letters of administration, c.t.a. to Michael Boyle, the decedent's sole distributee and sole legatee (Michael or the petitioner).

Shortly after the death of the decedent, property belonging to the estate, an AKC registered Irish Terrier dog named Darby was removed without permission from the decedent's home and placed in the possession of Patrick Donoghue and Patricia Donoghue (the respondents), who continue to have possession of the dog. Although Michael has made repeated demands for the return of the dog, respondents have refused to return the dog to Michael.

Counsel for the respondents filed a verified answer and an affirmation in opposition on November 19, 2015, arguing that Michael requires assistance with his own personal needs, property and financial affairs. The affirmation recites that the dog had been purchased by the decedent shortly before his death. On the day of decedent's funeral a cousin found the dog barricaded into the kitchen of the apartment that had been shared by the decedent and Michael.

The dog was allegedly alone and covered in urine and feces. The cousin removed the dog and shortly thereafter the respondents offered to care for the dog. Respondents claim that they spent approximately \$3,310.00 for the dog's medical care, food and equipment, in addition to training and rehabilitating the dog. Counsel for the respondents asserts that only four months after taking possession of the dog did they learn that Michael claimed the dog.

Counsel for the respondents argues that Michael's relinquishment of the dog to his cousin should be considered a gift to the respondents, who took the dog from Michael's cousin. She further argues the court must consider the best interests of the dog as well as the best interests of Michael. Counsel asserts that directing the return of the dog to Michael would unjustly enrich Michael and would also return the dog to a potentially unsafe environment. Finally, counsel suggests that the court may wish to determine whether it would be appropriate to appoint a court evaluator to determine whether Michael can manage his affairs and act as administrator.

Under current New York law a court can not predicate a decision on what is best for a dog (*Gellenbeck v Whitton*, NYLJ, Nov. 12, 2015 at 27 [Sup Ct, New York County]). "The correct law is the law of property and this court will determine and award possession of [a dog] according to that law and no other" (*id.*). Further, contrary to the arguments made by respondents' counsel, the elements of a gift are not present, and there has been no unjust enrichment of Michael, whose counsel asserts that he sought the return of the dog almost immediately after his cousin removed the dog from his home.

Even if the court could consider the welfare of the dog in deciding this case, the November 2, 2015 written report of Marianne Kehoe, Chairperson of the Rescue Committee of the Irish Terrier Club of New York, regarding the advisability of returning the dog to Michael,

provides overwhelming assurance that Michael has the means and inclination to give the dog a proper, safe and loving home. The report is based upon the visit of Marianne Kehoe to Michael's home and her meeting with Michael, his attorney, his attorney-in-fact, two friends, Michael's housekeeper and the dog walker employed by Michael to walk the dog two to three times daily, once the dog is returned to Michael.

The motion is granted in its entirety. Patrick Donoghue and Patricia Donoghue are directed to return the dog, belonging to the estate of James F. Boyle, to the petitioner, within 15 days of service of a copy of this order on their attorney.

This constitutes the decision and order of the court.

Dated: December 23, 2015

EDWARD W. McCARTY III
Judge of the
Surrogate's Court

/s