



Witnesses to SCPA 2307-A Disclosures

By Robert M. Harper

SCPA 2307-a requires that an attorney-draftsperson make certain disclosures to a testator before the testator executes a will nominating the draftsperson, an attorney affiliated with the draftsperson, or an employee of the draftsperson or the affiliated attorney as executor. The failure to comply with SCPA 2307-a, which mandates, inter alia, that the disclosures be acknowledged in writing signed by the testator in the presence of at least one witness other than the nominated fiduciary, generally will result in the reduction of the fiduciary's commissions by one-half. Recently, in *Matter of Beybom*, Suffolk County Surrogate John M. Czygier, Jr. addressed whether "a witness to [an SCPA] 2307-a disclosure form may be affiliated with the nominated attorney/fiduciary" without resulting in a reduction of the executor's commissions. This article discusses the issue in detail.

SCPA 2307-a

SCPA 2307-a was enacted to "reduce the potential for overreaching when an attorney drafts a will in which [the draftsperson, an attorney affiliated with the draftsperson, or an employee of the draftsperson or the affiliated attorney] is named as executor." Toward that end, and to ensure that a testator's nomination of a fiduciary is "based upon an informed decision," SCPA 2307-a requires that certain disclosures be made to the testator before the testator executes a will nominating the attorney-draftsperson, an attorney affiliated with the draftsperson, or an employee of either the draftsperson or the affiliated attorney as executor.

In order to comply with SCPA 2307-a, the following disclosures must be made: "subject to limited statutory exceptions, any per-

son, including the testator's spouse, child, friend or associate, or an attorney, is eligible to serve as executor;" "absent an agreement to the contrary, any person, including an attorney, who serves as an executor is entitled to receive an executor's statutory commissions;" "absent execution of a disclosure acknowledgment, the attorney who prepared the will, a then affiliated attorney, or an employee of such attorney or a then affiliated attorney, who serves as an executor shall be entitled to one-half the commissions he or she would otherwise be entitled to receive;" and "if such attorney or an affiliated attorney renders legal services in connection with the executor's official duties, such attorney or a then affiliated attorney is entitled to receive just and reasonable compensation for such legal services, in addition to the executor's statutory commissions." Absent a writing, separate and apart from the will, that is signed by the testator and acknowledges, in the presence of a witness other than the nominated fiduciary, that the SCPA 2307-a disclosures were made to the testator, the nominated executor's commissions generally will be reduced by one-half.

As virtually all fiduciaries wish to receive their full commissions, attorneys and other executors affected by SCPA 2307-a should be careful to ensure that the testator has executed an SCPA 2307-a-compliant disclosure form. The failure to do so likely will result in the executor receiving commissions that have been reduced by one-half.

Matter of Beybom

Although SCPA 2307-a requires that at least one person other than the nominated executor witness the testator's signature on a disclosure form, the statute does not address whether the witness may be affiliated with the nominated fiduciary.

However, Surrogate Czygier recently

addressed the issue in *Matter of Beybom*.

There, the decedent died, leaving a last will and testament in which he nominated the petitioner, the instrument's attorney-draftsperson, to serve as executor. After the decedent's death, the petitioner sought to have the will admitted to probate. The petitioner also presented to the court an SCPA 2307-a disclosure form, which was signed by the decedent and witnessed by an attorney affiliated with the petitioner's law firm.

Surrogate Czygier addressed the issue of whether the witness to the disclosure form could be affiliated with the nominated fiduciary without tainting the disclosures memorialized in the form. Opining that the "better course of action may have dictated using someone other than an attorney affiliated with the nominated executor" to witness the SCPA 2307-a disclosure form, the Surrogate, nonetheless, concluded that the witness's affiliation with the petitioner did not, in and of itself, taint the disclosure form with "the self-interest of the witness" and the petitioner. As a result, the petitioner was entitled to full executor's commissions.

In reaching that conclusion, Surrogate Czygier noted that SCPA 2307-a was devoid of a "standard of relationship or affiliation" which would disqualify anyone other than the nominated fiduciary from witnessing the signing of a disclosure form. The Surrogate's decision also was premised, at least in part, on the notion that a bright-line prohibition against having anyone affiliated with the nominated fiduciary serve as a witness would force law firms to use strangers as witnesses whenever the statute applied. Surrogate Czygier recognized that such a bright-line prohibition could prove impractical and was not mandated by SCPA 2307-a.

Against the backdrop of *Beybom*, there



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are a few additional practical considerations of which attorneys should be aware. Most notably, a court might find that SCPA 2307-a disqualifies an individual who is not merely affiliated with or employed by the attorney-fiduciary from serving as a witness to a disclosure form. Indeed, a court might conclude that an attorney-fiduciary's law partner is precluded from witnessing the disclosure form when the law firm's partnership agreement calls for the attorney-fiduciary to split commissions with his or her partners. Such a result would be consistent with former New York

County Surrogate Renee R. Roth's decision in *Matter of Moss*, wherein Surrogate Roth found that SCPA 2307-a prohibited the attorney-fiduciary's law partner from witnessing the disclosure form.

The lesson to take away is that SCPA 2307-a does not necessarily prohibit someone affiliated with or even employed by an attorney-fiduciary from witnessing an SCPA 2307-a disclosure form. When the witness is merely affiliated with or employed by the attorney-fiduciary, but does not have a personal financial interest in the fiduciary's commissions, the witness

likely will suffice for the purposes of SCPA 2307-a.

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