

## TRUSTS AND ESTATES UPDATE

## Expert Analysis

# The Selection of the Right Fiduciary

**T**he testator's selection of a fiduciary is given great deference by the Surrogate's Court. Indeed, such respect is accorded to a testator's, or, in the case of a trustee, a grantor's selection, that removal will only be granted upon a showing that an estate and its administration would otherwise be jeopardized. Recent opinions addressed to the issues surrounding the appointment and removal of a fiduciary are examined in this month's column.

### Executor Removed for Want of Understanding

In *In re Sullivan*, N.Y.L.J., Dec. 26, 2019, at 26 (Sur. Ct., Kings County), the Surrogate's Court was confronted with a petition by the co-executor of the estate, to remove his co-executor/sibling on the grounds that she (1) had moved out of state without timely

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notifying the court of her change of address, (2) had interfered with his efforts to administer the estate, (3) had failed to fulfill her fiduciary duties to the beneficiaries of the estate, and (4) was no longer mentally and physically capable of serving as fiduciary. The decedent's will was admitted to probate on June 25, 2015, and his siblings, the petitioner and respondent, who were the principal beneficiaries of his estate, were appointed co-executors on that date.

In support of his application, the petitioner alleged that his sister had abdicated her fiduciary duties and hindered his ability to administer the estate by, inter alia, compelling him to file a petition to sell a parcel of real property, and

thereafter, delaying the sale due to her failure to maintain organized records regarding the parcel and to share information about the property and its tenants. Additionally, the petitioner claimed that his sister had thwarted his efforts to sell two other parcels of realty by refusing to engage in certain discussions regarding the repair and renovation of the properties in order to maximize profits. Attempts by petitioner's counsel to contact the respondent and to reach an agreement with her at a court conference resulted in no progress being made.

Further, the petitioner maintained that his sister had relocated to Virginia without informing the court within 30 days of doing so, pursuant to SCPA 711(6), and that she was rarely in New York, despite the fact that substantial work remained in administering the estate. Finally, the petitioner alleged that he wanted to finalize the estate administration and make distributions to the beneficiaries,

and that it would not be possible if the respondent continued as his co-fiduciary.

Although respondent objected to the petition, she failed to submit an affidavit in support of the objections. The court found the affidavit submitted by her counsel unavailing.

The court opined that a fiduciary could be removed without a hearing where the misconduct alleged is established by undisputed facts or concessions. Nevertheless, a fiduciary's letters may be revoked for the sole reason of failure without sufficient reason to notify the court of a change of address within 30 days. Accordingly, the court concluded that removal of the respondent was warranted on that basis alone.

Moreover, the court noted that while a testator's selection of a fiduciary must be accorded deference, where the lack of cooperation between fiduciaries interferes with the proper administration of an estate or future cooperation seems improbable, a co-fiduciary may be removed. To this extent, the court found that the continuation of the respondent in office would only result in further intractable delay in administering the estate and wasting of the estate's assets. Finally, the court observed that since the respondent did not refute allegations of her physical or mental inability to serve, the

court held that the removal was required due to the respondent's "want of understanding" of her fiduciary duties, and her unfitness to fulfill the execution of her office. See SCPA 711(8).

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In *In re Aoki*, the court suspended the letters of trusteeship issued to the decedent's surviving spouse with respect to a trust created under his last will and testament, and scheduled a full evidentiary hearing on the issue of her revocation.

### **Suspension Of Letters Ordered**

In *In re Aoki*, N.Y.L.J., March 16, 2020, at 23 (Sur. Ct. New York County), the court suspended the letters of trusteeship issued to the decedent's surviving spouse with respect to a trust created under his last will and testament, and scheduled a full evidentiary hearing on the issue of her revocation. The court found that the petitioners, the decedent's two children and residuary beneficiaries of the trust, provided substantial evidence of waste and mismanagement of trust assets by the trustee. This evidence included, inter alia, proof that the trustee caused a wholly owned corporate asset of the trust to engage in litigation and eventually lose its license to operate a restaurant in Hawaii. The concededly valuable license was for the running of the only restaurant in

a franchise that the trust retained in the United States.

The trustee's conduct in this regard became the subject of fact-finding on the record by the U.S. District Court in several of its decisions, and by members of arbitration panels involved in the litigation that eventuated in the loss of the subject license. The court held that its decision to suspend the trustee's authority was made in view of those findings, which the court found described conduct that jeopardized the trust estate.

### **Summary Judgment Granted Removing Trustee**

In *In re Gadsden*, N.Y.L.J., March 25, 2019, at 29 (Sur. Ct. Kings County), the court granted the petitioner's motion for summary judgment and removed the trustee of the subject inter vivos trust. In support of her request for removal, the petitioner alleged, inter alia, that the respondent had failed to comply with court orders, failed to distribute trust assets in a timely manner, neglected to pay real estate taxes since 2012 on the trust real estate, and converted trust funds to his own personal use.

The application was opposed by the respondent who indicated, inter alia, that he was ready to transfer title to each of the trust beneficiaries in compliance with a prior court order. Further, respondent alleged that the

rental income he was collecting on the trust property was being utilized by him to pay the living expenses of four out of the six trust beneficiaries.

Noting that the removal of a fiduciary is to be exercised sparingly and only upon a clear showing of serious misconduct, the court found, upon the record presented, that the petitioner had established a prima facie case for removal, and that respondent had failed to raise the existence of any material issues of fact to preclude summary relief. In pertinent part, the court found that the respondent had failed to distribute the assets of the trust in accordance with the express provisions of the trust instrument, and, by his own admission, had been distributing trust assets to some but not all of the beneficiaries, including the petitioner. Further, the court observed that the respondent had failed to comply with court orders. As a result of the foregoing, the court held that the respondent's conduct evidenced a want of understanding of his fiduciary duties, as well as a willful refusal to obey or neglect of court orders, without good cause, and endangered the trust estate.

### **Preliminary Letters Issue to Nominated Executor Absent Proof of Unfitness To Serve**

Before the Surrogate's Court, New York County, in *In re Smidt*,

N.Y.L.J., Dec. 30, 2019, at 17 (Sur. Ct., New York County), was a motion by the decedent's son to reargue a prior decision of the court granting his brother, who was the nominated executor and sole beneficiary of the estate, preliminary letters testamentary. Despite claims by the movant that the court lacked jurisdiction over the estate, and that his brother was unfit to serve as fiduciary, the court found that

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Noting that the removal of a fiduciary is to be exercised sparingly and only upon a clear showing of serious misconduct, the court in '*In re Gadsden*' found, upon the record presented, that the petitioner had established a prima facie case for removal, and that respondent had failed to raise the existence of any material issues of fact to preclude summary relief.

the estate was within its jurisdiction, and directed that preliminary letters issue.

In support of his application, the movant argued that the court's prior decision addressed only his challenge to the court's jurisdiction, but not to his claims regarding his brother's unfitness to serve on the grounds that he unduly influenced the decedent to execute the propounded will, or in the alternative, that he be directed to post bond. The court observed that pursuant to the

provisions of CPLR 2221(d)(2), a motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion ..."

Within this context, the court found that to the extent that its silence on the issue of the nominated executor's fitness to serve could be interpreted as overlooking that aspect of the movant's prior submissions, reargument was appropriate. However, upon reargument, the court adhered to its original decision, finding that the movant's allegations as to unfitness, based upon bare conclusory assertions as to undue influence, did not provide the court with grounds for entertaining a "contest within a contest" at the present threshold stage of the probate proceeding. Rather, the court noted that any issue of undue influence, if and when raised in a timely objection to probate, was best considered on a fully developed record. Moreover, as to movant's request that a bond be posted, the court found that the will dispensed with the filing of a bond, and no extraordinary circumstance requiring a bond was otherwise presented.