

## TRUSTS AND ESTATES UPDATE

## Expert Analysis

# The Eligibility Of a Fiduciary

While deference is accorded to the testator's selection of a fiduciary, there are circumstances when judicial intervention is required in order to safeguard the interests of the estate and satisfy statutory dictates. Recently, Surrogate's Courts have had the opportunity to consider this issue, as evidenced by the decisions that follow.

### Administrator cta Eligibility

Before the Surrogate's Court, Kings County, in *In re Waxman*, was an application, pursuant to the provisions of SCPA 1418, for letters of administration cta by the decedent's sole distributee, who had been specifically disinherited under the propounded will. Seven of the eight residuary beneficiaries under the instrument renounced their right to serve and consented to the relief requested by the petitioner.

Objections to the application were filed by the public administrator, who had previously been appointed temporary administrator of the estate, alleging that the petitioner was ineligible to serve since (1) she was not a beneficiary under the propounded will, and there-

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fore, was not a person interested in the estate, as required by the provisions of SCPA 1418 (1)(c); and (2) she had failed to obtain the consent of all those beneficially interested in the estate, pursuant to SCPA 1418(6). The petitioner moved to dismiss the objections, which motion was converted to one for summary judgment.

In support of her application, the petitioner maintained that despite her disinheritance, she was a "person interested" in the estate, and, thus, qualified to serve pursuant to SCPA 1418, since she would be entitled to a share of the decedent's estate if the propounded will was denied probate. In addition, she claimed that the interest in the estate of the beneficiary whose consent she had not obtained was de minimis, and in any event, that beneficiary had defaulted in the proceeding. In opposition, the objectant contended, inter alia, that the petitioner was not a "person interested" in the estate, as defined in SCPA 103(39), and that the provisions of SCPA 1418 expressly required the consent of all beneficiaries of the estate in order for the petitioner to be appointed.

The court agreed with the objectant, finding that the petitioner was not a "person interested" in the estate "entitled or allegedly entitled to share as a beneficiary" thereof, and thus, was not entitled to letters of administration cta, pursuant to the provisions of SCPA 1418(1)(c). The court rejected the petitioner's argument that as an intestate distributee she was a "person interested," concluding that while her status would entitle her to object

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to probate, it would not qualify her as a "person interested" for purposes of SCPA 1418, which required the fiduciary to have an interest in the property to be administered.

Moreover, the court noted that although petitioner could, in its discretion, be appointed administrator cta, the exercise of that discretion was

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dependent upon her filing acknowledged consents of all the beneficiaries. The court found that the absence of one such consent was fatal to the petitioner's application.

Accordingly, letters of administration cta were issued to the public administrator, pursuant to the provisions of SCPA 1418(2).

***In re Waxman*, NYLJ, Dec. 9, 2016, at p. 35 (Sur. Ct. Kings County).**

### Hearing on Eligibility Ordered

In *In re Srybnik*, the petitioner, the decedent's spouse and preliminary executor of the estate, sought admission of the decedent's will to probate, but objected to letters testamentary issuing to the respondent, the co-executor nominated under the instrument, on the grounds of "want of understanding," pursuant to SCPA 707(1) (e). Alternatively, the petitioner sought an order directing an independent medical evaluation of the co-executor or an immediate hearing on his eligibility. The respondent was the decedent's brother and lifetime business partner.

Following the filing of the probate petition, the petitioner, individually and ex parte, requested the issuance to her of preliminary letters testamentary. In support of that application, the petitioner's counsel alleged, upon information and belief, that the respondent was ineligible to serve as fiduciary, on the grounds that he was 99 years of age, infirm, and lacked the requisite understanding to fulfill his duties. Although the respondent subsequently sought the revocation of the petitioner's preliminary letters, that application was later withdrawn.

Depositions of both the petitioner and respondent were directed, and thereafter, petitioner moved for summary judgment.

The court noted that the phrase "want of understanding" has been defined as a lack of intelligence sufficient to understand the nature and extent of fiduciary duties, rather than a lack of information,

business experience or legal knowledge. That is, disqualification on this contemplates that the fiduciary is likely to jeopardize estate assets and put the interests of the beneficiaries at risk.

Because the testator's selection of a fiduciary is entitled to great deference, the burden of proving ineligibility rests with the party asserting the claim. To that extent, the court found that the petitioner had satisfied, prima facie, her entitlement to summary judgment, based upon the respondent's videotaped deposition, together with the affidavit of a physician who reviewed the tape and transcript. Nevertheless, the court concluded that the respondent had raised an issue of fact as to his eligibility to serve, based upon the affidavit of a physician and counsel's affirmation, both of which called into question the medical opinion of the physician retained by petitioner.

Accordingly, the court denied petitioner's motion for summary judgment, and scheduled a hearing in order to fully

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In '*In re Jacobs*,' the court found that the objectant had failed to demonstrate any misconduct on the part of the proposed successor trustees that would endanger the trust, and opined that alleged hostility is not grounds for disqualifying an otherwise eligible fiduciary.

develop the record before it determined whether the respondent was capable of understanding and performing his duties as fiduciary.

***In re Srybnik*, NYLJ, Jan. 23, 2017, at p. 29 (Sur. Ct. New York County) (Mella, S.).**

### Successor Trustees

Before the Surrogate's Court, New York County, in *In re Jacobs*, was a

contested proceeding in which the petitioners sought permission to resign as co-trustees of the trust created under the decedent's will, and to appoint the principal beneficiary's siblings in their place and stead. One of the proposed successors was nominated in the instrument, and the second was designated by the co-trustees pursuant to their authority under the instrument.

Objections to the application were interposed by the beneficiary, who appeared pro se, and who alleged that her family had been abusive towards her, and that she had had no contact with one of her siblings for at least 15 years. The remaining beneficiaries of the trust, including the guardian ad litem appointed for the infant beneficiaries, consented to the application.

The court acknowledged the general rule that accorded respect for the testator's choice of fiduciary, noting, as well, that the principle extended to the selection made by a person authorized by the testator to select a successor. With this in mind, the petitioner's application was granted.

Specifically, the court found that the objectant had failed to demonstrate any misconduct on the part of the proposed successor trustees that would endanger the trust, and opined that alleged hostility is not grounds for disqualifying an otherwise eligible fiduciary. Moreover, the court found it significant that the proposed successors were family members who were familiar with the needs of the beneficiaries, and who agreed to serve without compensation.

***In re Jacobs*, NYLJ, April 5, 2016, at p. 22 (Sur. Ct. New York County) (Mella, S.).**