

New York Law Journal



Web address: <http://www.nylj.com>

VOLUME 238—NO. 13

THURSDAY, JULY 19, 2007

ALM

TRUSTS AND ESTATES UPDATE

BY ILENE SHERWYN COOPER

Reasons for Removal of a Fiduciary

A testator's choice of a fiduciary is given great deference by the Surrogate's Court. As such, removal of a named fiduciary is considered a drastic remedy that is ordered sparingly. Significantly, the past months have seen several decisions addressed to the issue of removal, which provide judicial insight into this subject, and guideposts for fiduciary stewardship.

In addition to the foregoing, the spring season has witnessed decisions of interest regarding such matters as document production and res judicata.

Self-Dealing

• *Removal for Self-Dealing and Failure to File an Estate Inventory*

In *In re Estate of Jones*, a petition was filed by the decedent's niece and nephew seeking to have the letters testamentary issued to the executor under the decedent's will revoked, and to have the named executor in the will appointed in his place and stead.

Pursuant to the provisions of his will, the decedent bequeathed specified personal property to his nephew, Robert, and devised and bequeathed the residue of his estate in four equal shares to his sister, his two nephews, of which Robert was one, and his niece. The instrument was admitted to probate on March 15, 2006, and letters testamentary were issued to Robert as the named executor.

The decedent's estate consisted, in part, of a residential parcel of real property. The uncontradicted proof revealed that the executor lived at the premises rent-free since his appointment. In support of their application, the petitioners' alleged that the executor should have leased the premises or attempted to sell it on the open market, and failed to maintain the premises, but for his own use and benefit. In response to the petitioners' claims, the executor contended that he was awaiting the court's approval for a sale of the subject property.

The court found the executor's defense unavailing inasmuch as the provisions of the decedent's will gave him the unfettered right to sell the property on such terms and conditions as he deemed to be in the best interests of the estate.

Ilene Sherwyn Cooper is a partner with *Uniondale's Farrell Fritz*, where she concentrates in the field of trusts and estates. In addition, she is a member-at-large of New York State Bar Association's Trusts and Estates Law Section.



Moreover, the court noted that the executor had failed to adequately address the accusations against him of self-dealing. Further, the court found that the executor had failed to file an inventory in compliance with UCR 207.20, and, as a result, was subject to having his letters revoked.

Accordingly, based upon the foregoing, the court found that the petitioners had met their burden of proof for removal. In view of the record, the court held no hearing was required as a precursor to granting the relief requested, and the letters testamentary previously issued to the executor were revoked.

In re Estate of Jones, New York Law Journal, May 22, 2007, p. 23 (Surrogate's Court, Dutchess County).

• *Allegations of Conflict of Interest Insufficient to Deny Fiduciary Appointment*

In a contested probate proceeding, the preliminary executrix sought, inter alia, admission of the decedent's will to probate and her appointment as the executrix of the decedent's estate. The petition was opposed by the decedent's daughter, who cross-petitioned for the appointment of an independent fiduciary as administrator cta ("with the will annexed") to pursue a wrongful death action against the decedent's spouse and a claim against her for the loss in value of the decedent's real property and additional expenses incurred by the estate.

The decedent's spouse had pleaded guilty to manslaughter in the first degree, a class B felony, for causing the death of the decedent. She was sentenced to a definite term of incarceration of six years plus five years post-release supervision.

The will of the decedent left his entire estate to his spouse, and named his daughter as contingent

beneficiary. In addition, it named his spouse as executrix, and the petitioner in the proceeding as alternate. The decedent's spouse renounced her appointment as executrix, and the petitioner was issued preliminary letters testamentary. While the decedent's daughter alleged that she did not oppose the admission of the decedent's will to probate, she objected to the appointment of the preliminary executrix as executrix on the grounds of a potential conflict of interest with the estate given her friendship with the decedent's convicted spouse.

The court held that a potential conflict of interest between a fiduciary and a party interested in the estate does not warrant the denial of letters to or the removal of a fiduciary. Rather, it is actual misconduct, and not the conflict of interest that justifies removal. The court's authority to remove or refuse to appoint a named fiduciary is limited to the grounds specified in Surrogate's Court Procedure Act (SCPA) 707 and SCPA 711.

Within this context, the court found that the decedent's daughter had failed to provide any probative facts to declare the preliminary executrix ineligible to serve, and her objections were, therefore dismissed. The court concluded that any issues relative to the wrongful death action or claims against the decedent's spouse could be revisited at the time the fiduciary filed her account.

In re Estate of Guldbrandsen, NYLJ, May 15, 2007, p. 23 (Surrogate's Court, Dutchess County) (Surr. Pagones).

Hostility With Beneficiaries

• *Removal of Preliminary Executrix Sustained on Appeal based on Conflict of Interest and Hostility With Beneficiaries*

In *Matter of Palma*, the Appellate Division, Third Department, affirmed an order and decree of the Surrogate's Court, Schenectady County, which revoked the preliminary letters testamentary that had been issued to the decedent's daughter, without a hearing, and issued temporary letters of administration to a third party.

The decedent died survived by her four children. Her husband had predeceased her. The propounded instrument devised and bequeathed the decedent's estate in four equal shares to her children, and named one of them as alternate executor to her spouse. Shortly after the appointment of the decedent's daughter

as preliminary executrix, the estate of the decedent's predeceased husband, together with one of the decedent's children, petitioned the court to have her letters revoked. Based upon the authority found in SCPA 711 and SCPA 719, the Surrogate's Court, without holding a hearing, revoked the preliminary letters, and, thereafter, by decree, issued temporary letters of administration to an independent individual who had served as the decedent's Article 81 guardian prior to her death.

The Appellate Division affirmed the Surrogate's order and decree. In doing so, the court first addressed the issue of standing. The court found that inasmuch as the estate of the decedent's predeceased husband was an acknowledged creditor of the estate of the decedent, it had standing to challenge the fitness of the fiduciary.

As to the issue of revocation, the court said that great weight is to be given to the testator's choice of executor, and that, as such, a party seeking to disqualify a fiduciary bears the burden of doing so by establishing one or more of the statutory grounds set forth in SCPA 707 and SCPA 711.

The court held that a potential conflict of interest or the mere fact that an executor owes a debt to the estate, will not, in itself, be sufficient to disqualify the fiduciary. Rather, actual misconduct must be demonstrated. Moreover, hostility or friction between the named executor and beneficiaries will not suffice to remove or disqualify a fiduciary, unless such enmity threatens to interfere with the administration of the estate.

Based on the foregoing, the court determined that the Surrogate's Court was correct in removing the preliminary executrix without a hearing. The court noted that the principal assets of the decedent's estate were interests in two companies, which had, together with the decedent and her husband, during their lifetime, conveyed five commercial properties to a third entity in exchange for promissory notes guaranteed by the preliminary executrix individually. This entity was owned in equal shares by the decedent's four children, and was in the process of being judicially dissolved at the behest of one of the children.

The court further noted that the preliminary executrix and two of her siblings were contesting the will of their predeceased father, and that the entity to which the commercial properties had been conveyed had recently disposed of these properties, thus placing the preliminary executrix in the untenable position of having to collect, as executor, on the promissory notes from herself, as the personal guarantor of such notes. The record revealed that the preliminary executor had disavowed any personal liability on the notes, claiming that they were never intended to be paid.

The court found that the foregoing circumstances warranted the fiduciary's removal on the grounds that her alleged conflicts with the estate were real and presently existed. Moreover, the court held that while a hearing is normally required in advance of removal, there was sufficient uncontested information in the record, to wit, the open hostility between the fiduciary and her sibling, alleged financial improprieties in the fiduciary's dealings with the corporate entity that was the subject of dissolution, and the guaranteed loans, to justify revocation of the fiduciary's letters without a hearing.

Matter of Palma, __NYS2d__, 2007 WL 1285825 (3d Dept.)

Statutory Grounds

• Removal of a Fiduciary Denied Where Grounds Fail to Satisfy Statute

In a contested proceeding to revoke letters testamentary, the court concluded, after an evidentiary hearing, that the petitioners had failed to establish grounds for removal and denied the relief.

In support of their application, the petitioners alleged, *inter alia*, that a waiver and consent to probate was forged by the executor, that the estate property had been mismanaged, that an estate account had never been opened, that an estate tax return and fiduciary returns for the estate had never been filed, that an estate inventory had not been filed, and that no steps had been taken to complete the administration of the estate.

At the hearing of the matter, the executor testified that he collected rents on estate property, and paid the expenses attendant thereto, but had deposited and expended the monies from an account he held individually with one of his brothers. Moreover, he admitted that he failed to file an estate inventory or fiduciary report, and failed to file fiduciary income tax returns. However, he stated that he had attempted to keep the estate property rented, and to repair the property to bring it up to code, although this latter effort had not been possible due to insufficient funds in the estate to do so. The testimony of the petitioners revealed that this insufficiency in funds was, in part, attributable to their refusal to pay rent on the property on the grounds that the executor's appointment had been fraudulently procured. Nevertheless, the executor testified that he was prepared to wind up the estate once the subject property was sold.

Based on the foregoing, the court held that the petitioners had failed to satisfy the statutory grounds for removal of the fiduciary. In addition, it opined that it was loathe to remove an executor where the administration of an estate is close to being completed.

Accordingly, the petition was denied.

In re Estate of McHayle, NYLJ, 5/21/07, p. 44 (Surrogate's Court, Kings County) (Surr. Seddio)

Matrimonial Records

• Production of Matrimonial Records Ordered

In a contested discovery proceeding, the petitioner moved, *inter alia*, for an order compelling the respondent to produce net worth statements she executed in her pending matrimonial action. Respondent claimed that the documents were irrelevant to the Surrogate's Court proceeding and therefore were not subject to disclosure.

The subject matter of the discovery proceeding were numerous items of personal property, including jewelry, silver, china, furnishings and crystal, that petitioner claimed belonged to the decedent's estate. The respondent answered the petition by alleging that she was unaware of the existence or whereabouts of a number of items,

and that other numerous items were given to her as gifts. The movant maintained that respondent's net worth statement would possibly demonstrate the provenance of the disputed property or constitute inconsistent statements.

The court noted that limited disclosure of matrimonial documents has been allowed as long as the material sought was relevant to the proceeding at issue. In view of the subject matter of the discovery proceeding, the court concluded that the demand for production was relevant, but allowed the respondent to redact any items in the net worth statement that she deemed not relevant or were otherwise not claimed by her to be a gift, with the understanding that she would be precluded at trial from claiming gift as to any items so redacted.

In re Estate of Shepard, NYLJ, 4/23/07, p. 41 (Surrogate's Court, Suffolk County) (Surr. Czygier).

Res Judicata

• Res Judicata Bars Objections to Accounting

In *re Winston*, NYLJ, April 23, 2007, p. 33 (A.D. 1st Dept.), the Appellate Division, Second Department, affirmed a decree of the Surrogate's Court, Westchester County, which dismissed the objections to the co-trustee's accounting.

The principal asset of the subject trust was stock in Harry Winston Inc. By decree, dated in 1982, the co-executor of the decedent's estate settled its account. The objectant to the trustee's account was a party to the co-executor's accounting and consented to the entry of the accounting decree, without objection.

On appeal of the trust accounting decree, the objectant claimed that the co-trustee of the trust breached its fiduciary duties in the administration of the trust, and failed to properly determine the trust's inception value. With regard to the issue of the fiduciary's stewardship, the court said that where the Surrogate's Court was called upon to assess the credibility and weight to be accorded to conflicting opinions offered by several expert witnesses who appeared at trial, its factual determination should not lightly be cast aside. The court held that the determination of a fiduciary's prudence and care is a question of fact to be found by the trial court, and the Surrogate's opinion in this regard was amply supported by the record.

In addition, the court held that the co-trustee had established that its account was complete and accurate, and that the objectant had failed to come forward with any evidence to the contrary. Most particularly in this regard, the court held that the claims by the objectant as to the inception value of the trust assets were barred by principles of *res judicata*, as it was a matter lodged in the executor's accounting and decree to which he had consented.

In re Winston, 39 AD3d 765 (A.D., 2d Dept. 2007).

Reprinted with permission from the July 19, 2007 edition of The New York Law Journal © 2007 ALM Properties, Inc. All rights reserved. Further duplication without permission is prohibited. For information, contact 212-545-6111 or visit www.almreprints.com. # 070-07-07-0030