

## TRUSTS AND ESTATES UPDATE

## Expert Analysis

# The Removal Of a Fiduciary

**G**iven the judicial deference accorded to a testator's selection of a fiduciary, the removal of an executor or trustee is not a step that a court is inclined to take. However, when circumstances demonstrate that the administration of an estate or trust is in jeopardy as the result of a fiduciary's misconduct, removal, or at the very least, suspension of the fiduciary's authority, may be warranted. This month's column reports on recent Surrogate's Court decisions addressing this issue.

### Removal Denied

Hostility between the named fiduciary in a will or trust and a beneficiary has often served as fodder for a petition for revocation of the fiduciary's appointment. However, as set forth in *In re Smithers*, NYLJ, Aug. 17, 2000, at 21 (Sup. Ct. New York County), and *In re Brody*, 21 Misc.3d 1108A, 872 N.Y.S.2d 689 (Sur. Ct. Nassau County 2008), unless the hostility interferes with the proper administration of the estate, it cannot, in itself, serve as a basis for removal.

In *In re Antin*, the Surrogate's Court, New York County (Anderson, S.) again visited the issue of hostility as a basis for the removal of a fiduciary, when it granted the executor's motion for sum-

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mary judgment dismissing a petition for revocation of letters testamentary. The record revealed that the decedent was survived by two children, a son, who was the executor of his estate, and his daughter, who was the petitioner in the proceeding, both of whom were sole beneficiaries under his will.

The court noted that since the inception of the estate the parties had demonstrated an unusually high level of animosity toward each other, and an inability to resolve even the simplest of issues without judicial intervention. The application for removal was but one of three proceedings reflective of their acrimony.

In support of her application, the petitioner alleged that the executor removed personal property from a home once owned by the decedent, but which had been deeded by the executor to himself and the petitioner, as tenants in common. The petitioner maintained that her use of the property over the years was sufficient to constitute a distribution of one-half the contents to her, and accordingly, the executor's removal of the property, albeit for safekeeping, constituted a conversion.

In opposition, the executor argued that given the hostility between the parties he sought to safeguard the property from becoming a casualty of the animosity he had with his sister. The court agreed with the executor, finding that he had a duty to preserve the assets of the estate, and that the petitioner had failed to create an issue of fact on this issue requiring his removal. Additionally, petitioner claimed that the executor had liquidated estate jewelry and an IRA which she had requested be distributed to her in kind. However, the record reflected that the proceeds of the sale of these assets were utilized to pay the debts and administration expenses of the estate, and accordingly, the court found no basis for the executor's removal on this ground.

In response to the petitioner's claim that the executor's conduct was the result of vindictiveness toward her, the court opined that the friction between the parties was not in itself a sufficient basis for replacing the testator's appointee, particularly where there was no allegation of self-dealing or other clear misconduct, and the bulk of the administration has been completed. Thus, although the apparent animus between the parties was a cause for concern, the court noted that it had not resulted in a loss to the estate, other than the cost of litigation engendered by both parties, and accordingly denied removal on the grounds of hostility.

Finally, the petitioner alleged that the executor had failed to report a Swiss

bank account as an asset of the estate on the federal estate tax return. While the executor had indeed omitted the asset, the record revealed that he subsequently reported the account on the return, and the IRS had determined not to proceed against the estate as a result of the initial omission. The court accordingly held that while the executor had, to this extent, failed to fulfill his fiduciary obligations, not every breach of misconduct justified a fiduciary's removal. In view of the fact that no damage to the estate resulted from the executor's conduct, and the estate was near conclusion, removal was not warranted.

*In re Antin*, NYLJ, Feb. 1, 2013, at p. 38 (Sur. Ct. New York County).

#### Trustee Authority Suspended

Before the Surrogate's Court, Nassau County, in *In re Harvey*, was an application instituted by the decedent's daughter to hold the respondent, her brother, in contempt of court for failing to file an account of his proceedings as trustee of two revocable trusts that had been created by their parents, and to have the respondent's letters of trusteeship revoked.

The record revealed that the court had directed the respondent to account in November 2010, and that the order had been personally served on him.

Although the respondent opposed the application for contempt with a commitment to file his account within 60 days, the court noted that said date had long passed without accountings being filed. Moreover, while the respondent argued that the provisions of the trust instruments required application of Florida law to the controversy, the court discredited respondent's claims, concluding that it had jurisdiction over the subject matter of the proceeding, and that the law of the forum state, New York, governed the procedural issues raised by respondent regarding the notice provided by the order to show cause seeking to hold him in contempt.

In this regard, the court held that despite typographical errors in the document, the requisite language for contempt required by the judiciary law was apparent on the face of the order, and any attempt by the respondent to avoid his obligations to account on this basis was nothing but posturing.

With regard to the choice of law governing the request to remove the respondent, the court also concluded that New York law, rather than Florida law, applied. The court found that New York had the most contacts with the trusts inasmuch as the trustee and beneficiary resided in New York, the trust assets allegedly were in New York, the estate of one of the grantors was administered in New York, and the terms of the trusts required that the supplemental needs trust created thereunder for the benefit of the petitioner conform to New York law.

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The court in 'Antin' noted that the apparent animus between the parties had not resulted in a loss to the estate (other than costs of litigation) and accordingly denied removal on the grounds of hostility.

Moreover, the court opined that New York had a vested interest in overseeing the administration of its estates, ensuring the protection of trust assets within its borders, and safeguarding the interests of innocent beneficiaries, by requiring fiduciaries to comply with court orders.

Accordingly, based on the foregoing record, the trustee was found to be in contempt of court, and his letters were suspended. The trustee was granted leave to purge himself of contempt by filing petitions for the judicial settlement of his account, together with accountings for the subject trusts, within 30 days from the date of personal

service upon him of a certified copy of the order, or risk having his authority permanently revoked.

*In re Harvey*, NYLJ, Jan. 14, 2013, at p. 33 (Sur. Ct. Nassau County).

#### Hearing Directed

In *In re Hammerschlag*, the Surrogate's Court, New York County (Anderson, S.) was confronted with a petition by the beneficiary of a testamentary trust to compel distributions from the trust and for removal of the trustee. The trustee moved for summary judgment dismissing the application.

The record revealed that the terms of the trust granted the trustee broad discretion to pay so much of the income and/or principal of the trust to the petitioner, after due regard of her other available resources, as the trustee deemed necessary or proper for her education, health, maintenance or support. The trust required mandated distributions of principal to the beneficiary at ages 30 and 35, when the trust terminates.

In support of her application, the petitioner, who was then 26, alleged that she had no assets, no means of support, was homeless, and was living on the generosity of third parties. She requested monthly rental payments for an apartment for herself and her son and monthly expenses for a period of two years, as well as a lump sum payment from the trust of \$15,000. The petitioner further alleged that the trustee had made no independent investigation of her needs and had acted in bad faith in rejecting her requests for funds by relying on information supplied to him about her from her mother from whom she was estranged.

The trustee opposed the application, alleging that the petitioner had engaged in various acts of fraud and criminal behavior against her mother and father, that the petitioner had failed to document her request for funds, and that he, as trustee, had exercised his discretion in good faith based on his desire to preserve the trust funds until

petitioner was more fiscally responsible.

Based on the record, the court denied the trustee's motion for summary relief. The court concluded that although the trustee's discretion was extremely broad, it was not unbounded, and was subject to judicial review in order to prevent any abuse in the exercise of such authority. To this extent, viewing the record in a light most favorable to the petitioner, the court found that the record was unclear as to whether the trustee had failed to exercise his independent judgment or adequately evaluate the beneficiary's needs before refusing to make distributions to her from the trust, and thus whether he had acted in good faith. Accordingly, the court directed that a hearing be held on the allegations contained in the petition.

*In re Hammerschlag*, NYLJ, April 24, 2013, at 22 (Sur. Ct. New York County).

#### Standing

Before the Surrogate's Court, Queens County, in *In re Buchwald*, was an application by the guardian of the person and property of the decedent to revoke the letters of administration issued to the public administrator.

The record revealed what the court described as a recurrent scenario when an individual appointed as a guardian pursuant to Mental Hygiene Law Article 81 does not perform her statutorily mandated duties upon the death of her ward. It appeared that the decedent died soon after the commission had issued to the petitioner, an attorney, to serve as guardian, and prior to her collection of the assets of her ward's estate, which included a claim against her ward's former attorney-in-fact.

The court noted that death of an incapacitated person, as a general matter, terminates a guardianship, extinguishes the guardian's powers, but for the duty to pay certain expenses of the ward's estate, and requires the guardian to notify others of the incapacitated person's death.

Nevertheless, in the case sub judice, the petitioner failed to recognize that her guardianship had ended with the death of her ward and continued to act as if she had the power to do so. As such, four months after the decedent's death, the petitioner instituted a proceeding in Supreme Court seeking a turnover of \$1.2 million from her ward's attorney-in-fact. Soon thereafter, the petitioner negotiated a settlement of the action, and a stipulation of settlement was entered and "so ordered" by the Supreme Court, despite the fact that she was without power to enter such a settlement.

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The court concluded in '*Hammerschlag*' that although the trustee's discretion was extremely broad, it was not unbounded, and was subject to judicial review in order to prevent any abuse in the exercise of such authority.

In the interim, the public administrator was appointed administrator of the decedent's estate. Thereafter, and regardless of the court's appointment of a fiduciary, the petitioner marshaled over \$3.1 million of the decedent's assets, and contacted the decedent's surviving relatives in Israel in an attempt to persuade them to nominate her as co-fiduciary to serve with the public administrator. Indeed, the court noted that petitioner's conduct since the decedent's death was reflective of her intent to seek commissions as both a guardian and co-administrator totaling in the sum of \$106,500. Additionally, the court noted that if the petitioner acted as her own attorney in connection with the estate, she would have sought legal fees.

Subsequent thereto, the petitioner corresponded with the public administrator, and copied the Surrogate's

Court and the Supreme Court, indicating that she was in possession of the decedent's original will, and had been retained by the beneficiaries to seek its probate. The public administrator then commenced a turnover proceeding against the petitioner, and simultaneously therewith, the petitioner commenced a proceeding to revoke the letters of administration issued to the public administrator. Inasmuch as the petitioner was not a beneficiary of the decedent's estate, or a nominated executor in any testamentary instrument, and did not otherwise appear to be a person interested with standing to seek revocation, the court scheduled a hearing on the issue of whether the petition should be entertained.

Based on the papers submitted at the hearing and the oral argument on the record, the court rejected the petition, finding that the petitioner lacked standing to institute the proceeding. Moreover, the court found that even if petitioner had standing, she had failed to assert valid grounds for the revocation of letters. The court held that although a purported will of the decedent had been located, this did not mandate that the letters of administration issued to the public administrator be revoked. Rather, the court opined that the validity of the instrument could be determined in an accounting, or by way of a separate probate proceeding.

*In re Buchwald*, NYLJ, March 1, 2013, at p. 40 (Sur. Ct. Queens County).