

Estate Litigation Tidbits

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In Order To Receive A Full Executor's Commission, An Attorney/Executor Must Provide The Court With An Acknowledgment Even If The Will Predates SCPA §2307-a Enactment In 1995.

In an uncontested probate proceeding, the attorney draftsman, who was also the executor of the estate, was denied his full commissions under SCPA §2307-a for failing to provide the Court with an affidavit in accordance with SCPA §2307-a even though the Will was executed in 1972, before SCPA §2307-a was enacted.

The Court stated that although the Will was executed prior to the enactment of SCPA §2307-a, the Court still required the attorney draftsman/executor to provide an acknowledgement of his disclosure to the Decedent regarding commissions of the attorney/executor or to establish "good cause" for failing to comply with the statute. The Court reasoned that the Decedent died after SCPA §2307-a was enacted; therefore, the attorney/executor should have executed the appropriate acknowledgement. The attorney/executor failed to show evidence of either, therefore, his commissions were reduced by one-half. *In re Oxendine*, N.Y.L.J., Sept. 10, 2007, at 27, col. 6 (Sur. Ct. New York County).

In Order To Remove A Nominated Fiduciary, The Objectant Must Illustrate A "Clear Showing Of Serious Misconduct".

In a contested probate proceeding, the petitioner moved to dismiss objections to her appointment as executrix of the estate by the objectant. The petitioner, one of the Decedent's children, was accused of dishonesty, imprudence and unfitness to serve as executrix of her mother's estate.

The objectant claimed that the petitioner was ineligible to serve in accordance with SCPA §707, based upon the following four events:

- 1) the petitioner's purchase of real property from the Decedent;
- 2) items of value missing from the Decedent's home without explanation;
- 3) the petitioner's placement of the Decedent in a nursing home against her will and at substantial cost; and

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- 4) the petitioner's sale of the Decedent's home which regarded in negative tax consequences for the estate that could have been avoided.

The petitioner countered these claims by the objectant by stating:

- 1) that the petitioner's purchase of the real property from the Decedent took place almost eight years prior to the Decedent's death and that there was no evidence showing that this agreement was anything but at arms length;
- 2) that several items which the objectant claims were missing were sold at auction and that the objectant received notice prior to the sale;
- 3) that the placement of the Decedent in the nursing home was for her benefit and that the objectant was merely concerned about how the cost of the nursing home on his inheritance; and
- 4) that any capital gains taxes from the sale of the Decedent's home were minimized as much as possible.

The Court noted that the Testator had a right to determine whom she wanted to serve as executor and that in order to deny the issuance of letters, there must be a clear showing of serious misconduct on the part of the nominated fiduciary. Consequently, the burden of proof to disqualify an individual from becoming a fiduciary rests upon the individual challenging the appointment. The Court found, after reviewing the evidence presented, that the accusations put forth did not rise to the level of precluding letters to the petitioner. *In re Ellis*, N.Y.L.J., Sept. 24, 2007, at 47, col. 2, (Sur. Ct. Suffolk County).

Although Made By The Testator, Handwritten Changes To A Will Without Abiding By The Testamentary Formalities Of EPTL §3-2.1 Are Disregarded.

In an uncontested probate proceeding, the petitioners offer a Will for probate that has handwritten changes on the document. These changes were in the testator's handwriting and were initialed by the Testator. It was revealed that the Testator had decided to make changes to his Will and, rather than go to his attorney to have these changes made, he decided to make the changes himself. However, he did so without abiding by the testamentary formalities of EPTL §3-2.1. Since the subscribing witnesses to the Will stated that the written markings on the Will were not present at the time of the Will execution, the changes made by the Testator, even though they were his wishes, were disregarded and his Will as admitted to probate as originally drafted. *In re Gold*, N.Y.L.J., Sept. 5, 2007, at 34, col. 4, 2007 (Sur. Ct. Bronx County).

With Two Witnesses, A Will Can Be Probated Even Where One Witness Is Interested So Long As The Interested Witness Receives Less Than His/Her Intestacy Share.

In an uncontested probate proceeding, two of the three attesting witnesses to a Will were beneficiaries under that same Will. The Court stated that the testamentary formalities of EPTL §3-2.1 state that there must be two disinterested witness. The Court further noted that, under EPTL §3-3.2, when there are not at least two uninterested attesting witnesses to a Will, the disposition to the interested witness would be void, thus said beneficiary/witness would receive the lesser of his or her intestate share or bequest under the Will.

In this case, one of the attesting witnesses to the Will was the Decedent's surviving spouse. The Court found that the surviving spouse did not forfeit his legacy under the Will because as a distributee, he was permitted to receive the lesser amount of his share under intestacy or his legacy under the Will. In this instance, if the surviving spouse receiving his share under the laws of intestacy, EPTL §4-1.1, he would receive a larger distribution than he received under the current Will offered for probate. Therefore, he would be counted as a disinterested witness, thus satisfying the provisions of EPTL §3-2.1, thereby allowing for this Will to be admitted to probate. *In re Roberts*, N.Y.L.J., Aug 6, 2007, at 28, (Sur. Ct. Kings County).

A Professional Corporation Cannot Receive Letters Testamentary, Only Individuals And Select Entities "Authorized By Law."

In an uncontested probate proceeding, the nominated executor was a professional corporation. The Court stated that it would not issue letters to a professional corporation, citing SCPA §707, which states, in part that letters testamentary will be issued to "a natural person or a person authorized by law to be a fiduciary." The Court noted that "natural person" meant individuals only, and "person authorized by law" was limited to banks and trust companies, which were specifically authorized under Banking Law, to serve as fiduciaries. Since the professional corporation did not fit into the definition of either "natural person" or "a person authorized by law", the Court held that the professional corporation was ineligible to receive letters, thus letters could only be issued to the successor or alternate executor nominated under the Will. *In re Huntington*, Unreported Decision, File No., 07-975 (Sur. Ct. Onondaga County 2007).

Mere Allegations Are Not Sufficient To Remove A Nominated Fiduciary Under SCPA §707 For Dishonesty.

In a contested probate proceeding, the Decedent's daughter waived her rights to be the executrix of the estate, but objected to the appointment of her brother as administrator c.t.a. for the purpose of bringing a discovery proceeding against her. In her objections, she requested the Public Administrator be appointed. She stated in her objections that her brother should be disqualified for dishonesty in accordance with SCPA §707(1)(e). She offered evidence showing that he originally failed to offer the Will for probate, even though the Will was in his possession.

The Court interpreted SCPA §707(1)(e) to mean "dishonesty" regarding financial matters. Since the petitioner did not put forward evidence showing that the estate would not be financially safe and secure with her brother, and since mere allegations are not sufficient to remove an individual in accordance with SCPA §707, the Court denied her petition to have her brother removed as administrator c.t.a. *In re Walsh*, 16 Misc. 3d 1109A (Sur. Ct. Richmond County 2007).

Nominated Fiduciaries Who Are Removed By A Subsequent Will Can File Objections To The Latter Will.

The Decedent had executed a Will and lifetime trust in 1990, naming his wife's niece and her husband as successor trustees, who are the objectants in the case at bar. Said petitioners alleged that another niece, hereinafter "the respondent", became involved in the Decedent's affairs and unduly influenced him to execute a new Will and trust agreement naming her as trustee and primary beneficiary as well as executing a power of attorney, naming said niece as the Decedent's attorney-in-fact. Objectants commenced an action requesting the removal of the niece as trustee and the return of the Decedent's property. The respondent moved to dismiss the action asserting that the objectants, as they are not distributees of the Decedent, beneficiaries of the estate or beneficiaries of the trust and are no longer fiduciaries to either instrument, are not "interested persons" in accordance with SCPA §103(39) and thus fail to have standing to bring their action.

The Court compared the instant proceeding with that of a probate proceeding, holding that SCPA §1410 allows a nominated executor, who has been removed by a subsequent writing, to file objections to the latter writing, as "all fiduciaries named by a testator are duty bound to prevent the frustration of his wishes as well as to effectuate to the best of their ability his expressed intentions." Therefore, any adversely affected parties have standing to object. Since the objectants were adversely affected by the later in time Will and Trust agreement, they had standing to commence their action. *In re Ciricleo*, N.Y.L.J., June 27, 2007, at 39 (Sur. Ct. Westchester County).

Court Grants Leniency To Surviving Spouse Regarding Her Untimely Filing Of Her Statutory Right Of Election.

The Decedent's surviving spouse requested that the Court grant her untimely application for right of election. The Decedent died on August 25, 2005, and letters of administration were issued on May 9, 2006. The surviving spouse failed to file her right of election within 6 months as in accordance with EPTL §5-1.1A(d)(1). She eventually filed her application for a right of election on April 30, 2007. She claimed that her application was untimely due to her difficulty determining the amount she was to receive if she chose to file her right of election and her inability to locate certain assets, including testamentary substitutes.

The Court noted that the Decedent died less than two years prior to her application, which is the upper limit as provided by EPTL §5-1.1A(d)(1) and that no decree settling the estate had been entered. She filed her right of election within one year of the issuance of letters of administration, and, even though the statutory limitation was six months after the issuance of letters, as there was no prejudice to any other party involved, the Court granted her untimely application. *In re Dedona*, N.Y.L.J., July 11, 2007, at 29 (Sur. Ct. Westchester County).

An Attorney/Executor Can Receive A Full Commission Under SCPA §2307 Even If The SCPA §2307-a Affidavit Does Not Conform With The Most Recent Amendment Of The Statute.

In an uncontested probate proceeding, the petitioner/nominated executor was the law partner of the attorney draftsman of the Decedent's Will. When the Will was executed, in 2002, the Testator signed an acknowledgment of disclosure in compliance with SCPA §2307-a at that time. However, in 2004, SCPA §2307-a was amended to say "(iii) absent execution of this disclosure acknowledgment, an attorney who serves as executor shall be entitled to one-half the commissions he or she would otherwise be entitled to receive." With this language absent, the acknowledgement, as executed in 2002, no longer complied with the current law.

The issue before the Surrogate's Court was whether the 2002 acknowledgment, which was in full compliance with the law as it stood in 2002, should be given full effect, regardless of the 2004 change in the law.

The Court noted that the 2004 addition was only to the model forms and not to section one of the statute. Further, the Court noted that, when originally executed, the acknowledgment conformed to the law at that time. Expressing that the statute should not be given retroactive effect as it was signed in full compliance with the law as it stood in 2002; the Court permitted the attorney/executor to receive his full commission. *In re Griffin*, 16 Misc. 3d 295 (Sur. Ct. Nassau County 2007).

Revocation Of A Signed Waiver & Consent Is Difficult.

In an uncontested probate proceeding, a Will was offered and admitted to probate after the petitioner/nominated executor received all of the required Waivers and Consents back from the distributees. One distributee, however, sought to have the fully executed Waiver and Consent that she had submitted to the petitioner revoked and have the decree admitting the Will to probate, set aside. The distributee argued that she did not understand that by signing the Waiver and Consent, she gave up her right to challenge the Will.

The Court rejected the distributee's attempt to revoke his Waiver and Consent to the probate of the Decedent's Will stating that unless her consent was achieved by means of fraud, overreaching, misrepresentation, misconduct, newly-discovered evidence or a clerical error, his consent could not be revoked. *In re Titus*, 39 A.D. 1203 (4th Dep't 2007).

At The Direction Of The Court, The Late Filing Of Objections To Probate Was Allowed.

In this contested probate proceeding, petitioner filed a motion to dismiss the objections of the objectant due to his delinquent filing of objections.

The Court noted that SCPA §1410 sets forth the time period by which objections must be filed. That period is 10 days after the completion of the SCPA §1404 examinations or within such time as fixed by stipulation or the Court. The Court noted that in this case, the court referee advised the objectant that objections were due 10 days after the transcript of said SCPA §1404 examination was filed with the Court. The Court stated that the direction by the Court effectively superseded the statutory 10-day deadline. The Court further added that the delay was only a few days and that the objectant, upon learning he was delinquent in filing his objections, immediately filed them. Furthermore, the Court confirmed that it has an interest in ensuring that only valid Wills are admitted to probate. Due to the minor delay, the Court allowed the late objections to be filed. *In re Kryk*, 15 Misc. 3d 1133(A) (Sur. Ct. Monroe County 2007).

The Court Has The Ability To Convert An Application For Preliminary Letters Into An Application For Limited Letters Of Administration

In this matter, the alternate executor filed a cross-application for preliminary letters testamentary. In said application, the alternate executor alleged that the nominated executor was duplicitous, lax and dishonest and that the nominated executor executed undue influence over the Decedent prior to his death. She offered evidence showing that the nominated executor's brother was the attorney-in-

fact for the Decedent and in that capacity, transferred the Decedent's home to the nominated executor shortly before the Decedent's death.

Despite the above evidence, the Court stated it was the intent of the Testator to have the nominated executor serve as his estate's fiduciary and that only upon the clear showing of misconduct or wrongdoing would letters not be granted to the nominated executor in accordance with SCPA §707. The evidence presented in this case, did not meet such a threshold. However, based on the allegations presented in her cross-application, the Court converted and granted her application for preliminary letters testamentary to an application for limited letters of administration, pursuant to SCPA §702(9), in order to carry out a discovery proceeding pursuant to SCPA §2102 and SCPA §2103. *In re Hoelzer*, 15 Misc. 3d 1138(A) (Sur. Ct. Nassau County).

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