

Matter of Pessoni
2005 NY Slip Op 30643(U)
November 15, 2005
Surrogate's Court, Cortland County
Docket Number: File No. 13963
Judge: Julie A. Campbell
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STATE OF NEW YORK
SURROGATE'S COURT : COUNTY OF CORTLAND

In the Matter of the Petition
for Letters of Administration
by John Pessoni,
of
THE ESTATE OF
JASON PESSONI

File No. 13963
DECISION AND ORDER

JULIE A. CAMPBELL, Surrogate

This is a contested proceeding for the appointment of an administrator for the estate of Jason Pessoni, who died intestate on May 20, 2005, survived by his parents, John Pessoni and Mary Ann Loehmann, and his brother, Eric Pessoni. The estate consists of personal property having a value of approximately \$10,000 and a cause of action for conscious pain and suffering and wrongful death. On June 15, 2005, decedent's father, John Pessoni, filed a petition for letters of administration. On July 15, 2005, decedent's mother, Mary Ann Loehmann, filed a petition for letters of administration. On July 27th and August 22nd Ms. Loehmann and Mr. Pessoni, respectively, filed objections to each others' petitions.

By Decision and Order of this Court dated November 10, 2005, Mr. Pessoni's petition was dismissed. Therefore, the Court finds that he lacks standing to object to the grant of letters to petitioner. SCPA 709 provides that a "person interested" in the estate may file objections under one of the grounds in section 707. Based on this Court's determination under EPTL 4-1.4 that Mr. Pessoni is disqualified as a distributee, he has failed to demonstrate any interest in the estate.

Nevertheless, the Court held a hearing on November 10, 2005, and even if he had standing, his objections would be dismissed on the merits. Under the governing statute, SCPA 1001, petitioner, as parent of the decedent and distributee under his estate, has standing to serve as administrator. A distributee's eligibility to receive letters of administration is, in turn, governed by SCPA 707. Objectant here has asserted that petitioner is unfit to receive letters of administration within the meaning of SCPA 707 (1) (e), which permits the denial of letters to one who "does not possess the qualifications required of a fiduciary by reason of substance abuse, dishonesty, improvidence, want of understanding, or who is otherwise unfit for the execution of the office." Specifically, objectant alleges that Ms. Loehmann has "a long history of alcohol abuse," a "pathological tendency toward dishonesty and improvidence" and a lack of discretion in her personal affairs.

The burden of proof is on the objectant [SCPA 709]. Mr. Pessoni has not submitted credible evidence that Mrs. Loehmann is ineligible within the meaning of SPCA 707. He offered the testimony of Mary Ann Loehmann and himself. They testified at length about the (largely irrelevant)¹ strained relationship between the parties and Mr. Pessoni's lack of a relationship with Jason. The only relevant evidence was addressed to Mrs. Loehmanan's fitness as a parent and her alleged alcohol consumption.

¹ Objectant argues that evidence that petitioner did not foster a positive relationship between himself and his sons translates into evidence that she is unfit to administer the estate. In light of this Court's November 10, 2005, decision and order and the findings therein, that argument is unconvincing.

With respect to the latter, the evidence was limited to the fact that a couple of years ago Ms. Loehmann had a DWI conviction. The evidence must be sufficient to raise the risk that the substance abuse will affect the petitioner's performance [*Will of Duke*, 220 AD2d 241 (First Dept., 1995)]. Objectant has not offered evidence sufficient to establish habitual substance abuse, or that the substance abuse affects petitioner's ability to handle estate affairs so as to disqualify her from appointment as fiduciary [*Mtr of Estate of Rad*, 162 misc2d 229 (NY Sur, 1994), citing *In re Reichert's Estate*, 34 Misc 288 (1901)].

Relative to the issue of ineligibility pursuant to SCPA 707(1)(e), the weight of authority is to the effect that the showing must be relatively strong in order to disqualify on the ground of dishonesty. The Court is likewise mindful of the standard set for dishonest conduct which would render one incompetent to execute the duties of a fiduciary, as found in *Matter of Latham's Will*, 145 App.Div. 849, and its progeny. In *Latham* the Court stated "the dishonesty contemplated by the statute must be taken to mean dishonesty in money matters from which a reasonable apprehension may be entertained that the funds of the estate would not be safe in the hands of the executor" [*Ibid.* @ 854; see, also, 40 NY Jur2d, *Decedents Estates* section 1335)]. The showing must be relatively strong, without reliance on presumption or suspicion [*Ibid.*]. In applying the *Latham* standard, the Court finds that Mary Ann Loehmann is not ineligible to receive letters of administration on that ground.

Improvidence as a ground for objection to the issuance of letters refers to habits of mind and conduct which become a part of the person and render her generally, and under all ordinary circumstances, unfit for the trust or employment in question [*Mtr of Estate of Britton*, 173

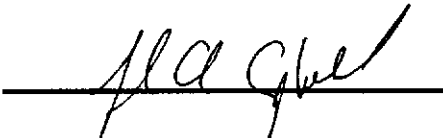
Misc2d 300 (NY Sur, 1997)]. Objectant argues that he has demonstrated petitioner's unfitness on this ground by evidence that she had other children out of wedlock. Once again, his proof falls far short of the nature and quality of improvidence required to disqualify her as administratrix.

Objectant has failed to establish grounds to deny petitioner letters.

His objections will be dismissed and Mary Ann Loehmann will be granted letters of administration.

The foregoing constitutes the opinion, decision and order of the Court.

DATED: *November 15, 2005*


HON. JULIE A. CAMPBELL

