

Matter of Shapiro

2007 NY Slip Op 30946(U)

April 24, 2007

Surrogate's Court, Nassau County

Docket Number: 0342597/2007

Judge: John B. Riordan

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SURROGATE'S COURT OF THE STATE OF NEW YORK
 COUNTY OF NASSAU

-----X
 Proceeding by ROBIN SHAPIRO, surviving spouse of

GLENN H. SHAPIRO,

Deceased.

File No. 342597

Decision No. 147

-----X

This is a proceeding by petitioner, Robin Shapiro, for an order pursuant to SCPA 711: (1) suspending the limited letters of administration of respondents, Daria Shapiro and Peter B. Shapiro; (2) removing Daria and Peter as co-administrators; and (3) appointing Robin or another person as administrator d.b.n. Daria and Peter oppose the relief sought in the petition.

The decedent, Glenn H. Shapiro, died intestate on June 10, 2006, a resident of Nassau County. He was survived by two adult children, Daria and Peter. Robin is their mother. It appears that Robin and her children were estranged at the time of decedent's death.

At the time of his death, the decedent was involved in a divorce action in Supreme Court, Nassau County, with Robin. He and Robin had entered into a stipulation dated May 4, 2006 setting forth the parties' rights and obligations in the divorce action, as well as in a constructive trust action, also pending in Supreme Court, Nassau County. Findings of fact and conclusions of law and the judgment of divorce had been submitted to the Supreme Court and the judgment of divorce was noticed for settlement for June 8, 2006. The judgment of divorce had not been signed when the decedent died and, according to Robin, has not been signed or entered to date.

On June 23, 2006, Daria and Peter filed a petition for letters of administration and limited administration. In paragraph 6 of the petition, they alleged that decedent did not have a spouse at the time of his death. Robin was not cited and did not appear in that proceeding. Limited letters

of administration were granted to Daria and Peter on June 27, 2006. Robin filed a notice of election on December 22, 2006 and a notice of claim against the estate on January 2, 2007.

In support of her petition, Robin alleges that Daria and Peter willfully and materially misrepresented to the court that the decedent did not have a spouse, since she and the decedent were not divorced. She also alleges that Daria and Peter, as co-administrators of the decedent's estate, have not complied with various provisions of the aforementioned stipulation, including distribution of personalty to Robin, payment to Robin of one-half of decedent's pension plan, and payment of Robin's health insurance for one year from the signing of the judgment of divorce. Robin also alleges that she has been contacted by creditors of the estate, despite a provision in the stipulation that the decedent would hold Robin harmless and be responsible for all the debts of his business. Finally, Robin alleges that Daria and Peter have failed to prosecute the constructive trust action, despite the obligation undertaken in the stipulation by the decedent to do so.

Daria and Peter assert that they did not mislead the court by alleging that decedent did not have a spouse when he died because "if all that remained to be done in a divorce action is the mere act of signing the judgment, the action does not abate on the death of one of the parties." They also argue that Robin is estopped from objecting to the "granting of Limited Letters of Administration to [Daria and Peter] by her own actions." They claim that Robin failed to assert a superior right to petition for letters of administration, that she has ratified their actions, and that she explicitly waived her right to serve as administrator in Article VI of the stipulation, which states, in relevant part, "Each party hereby releases, waives, and relinquishes any and all

rights . . . to act as executor or administrator of the other party's estate." In her reply papers, Robin admits the waiver. Daria and Peter also counter that the estate has substantially complied with the terms of the stipulation, asserting instead that Robin is the party at fault.

There is no doubt that a fiduciary has the duty of undivided loyalty and good faith (*see generally Meinhard v Salmon*, 249 NY 458, 464 [1928]). The decision to suspend or remove a fiduciary lies in the discretion of the Surrogate (SCPA 713; *Matter of Simon*, 44 AD2d 570, 570 [2d Dept 1974]). The power is used sparingly (*Matter of Israel*, 64 Misc 2d 1035, 1043 [Sur Ct, Nassau County 1970]), since the decision to do so is a serious one (*see Matter of Braloff*, 3 AD2d 912 [2d Dept 1957], *aff'd* 4 NY2d 847 [1958]; *Matter of Kaufman*, NYLJ, July 28, 1989, at 23, col 6 [Sur Ct, Nassau County] [(removal not warranted where actions of fiduciary do not imperil the estate)]. The burden is on the party seeking to remove the fiduciary (*see Matter of Krom*, 86 AD2d 689, 690 [3d Dept 1982]).

Although the court does not take lightly any misrepresentations made to it, Robin has failed to convince the court that it should summarily suspend the limited letters of administration of Daria and Peter. The judgment of divorce was noticed for settlement two days prior to the decedent's death. Daria and Peter were estranged from Robin. Although Robin appears to have been the decedent's spouse at the time of his death, the court does not conclude, based on the record before it, that Daria and Peter made the misrepresentation willfully when they alleged that the decedent died without a spouse. Moreover, since Robin waived her right in the stipulation to serve as administrator, she would not have qualified as such, despite a spouse's statutory priority over that of a child (SCPA 1001[1][a]).

Robin's other allegations against Daria and Peter are controverted by them, and a hearing will be necessary on the issue of revocation of their limited letters of administration. The matter will appear on the court's calendar on Wednesday, May 9, 2007, to set a discovery schedule, if one is necessary, and a date for the hearing.

This constitutes the decision and order of the court. No further order need be submitted.

Dated: April 24, 2007

JOHN B. RIORDAN
Judge of the
Surrogate's Court