

Matter of Ain

2007 NY Slip Op 31972(U)

June 29, 2007

Surrogate's Court, Nassau County

Docket Number: 0344968/2007

Judge: John B. Riordan

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

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Probate Proceeding, Will of

File No. 344968

STUART L. AIN,

Dec. No. 415

Deceased.

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The decedent, Stuart Ain, died on October 28, 2006 leaving a will dated April 27, 2006. The will nominates Victor Levin and William J. O'Brien, as executors. William J. O'Brien renounced his appointment. The decedent was survived by his two adult children, Michael and Jody.

The will provides that the decedent's entire residuary estate shall be distributed to decedent's companion Donna Brown. The will specifically disinherits the decedent's children. Victor Levin has petitioned for preliminary letters testamentary.

By order to show cause, returnable May 23, 2007, the decedent's daughter Jody seeks an order (i) denying the issuance of preliminary letters testamentary to Victor Levin; (ii) disqualifying Victor Levin from serving as executor of the estate; (iii) removing Victor Levin as the attorney for the estate; (iv) compelling Mr. Levin to comply with discovery demands previously served; (v) compelling Mr. Levin to produce and file with the court an alleged 2004 will of the decedent; (vi) appointing a guardian ad litem to represent the interests of the decedent's two infant grandchildren named as beneficiaries in the prior will; (vii) appointing Jody Ain as executor since she was alleged named as executor in the 2004 will; (viii) staying the issuance of preliminary letters to Mr. Levin pending a hearing on the order to show cause; and (ix)

adjourning the SCPA 1404 examinations. This decision addresses only the issue of whether preliminary letters should issue to Mr. Levin.

SCPA 1412, which governs the issuance of preliminary letters testamentary, was enacted to provide a form of letters to the named executor which would allow for the immediate administration of the estate when there may be a delay in probate. The purpose of SCPA 1412 was to honor the testator's preference regarding the appointment of a fiduciary, even on a temporary basis, and to reduce the possibility of frivolous pre-probate contests (*Matter of Hubbard*, NYLJ, Aug. 25, 1997, at 30, col 2 [Sur Ct, Bronx County]; *Matter of Roth*, NYLJ, Sept. 16, 1999, at 35, col 5 [Sur Ct, Kings County]; McKinney's Cons. Laws of New York, Ann. Vol. 58A, Sec. 1412, Practice Commentaries, p. 344). Preliminary letters allow the estate administration to be expedited and proceed as close to normal as possible and prevent contests within a contest (see, e.g., *Matter of Smith*, 71 Misc 2d 248 [Sur Ct, Erie County 1972]; *Matter of Bayley*, 72 Misc 2d 312 [Sur Ct, Suffolk County 1972], *affd* 40 AD2d 843 [2d Dept 1972], *appeal dismissed*, 31 NY2d 1025 [1973]).

Although a will may be offered for probate by persons other than the nominated executor (SCPA 1402), an application for preliminary letters may only be made by the executor named in the testator's will (SCPA 1412 [1]). A person not named as an executor has no standing to seek preliminary letters (*Timpone v Concorde Enterprises of Staten Island, Inc.*, 93 Misc 2d 691 [Sup Ct, Richmond County 1978]). Moreover, SCPA 1412 provides that where the application is made by one of several nominated executors, notice must be given to all persons who, pursuant to the terms of the will, have a right to letters testamentary equal to that of the petitioner (SCPA 1412 [1], [2][a]). If any person has an equal right to letters, i.e., a named co-executor, such person may join in the application. Where process has issued, the issuance of preliminary letters

under 1412 is mandatory "upon due qualification" (SCPA 1412 [3][a]). If process has not yet issued, preliminary letters may issue in the discretion of the court upon due qualification (SCPA 1412 [3][a]).

A testator's wishes regarding the appointment of a fiduciary even on a temporary basis will be honored unless there are serious and bona fide allegations of misconduct or wrongdoing (*Matter of Alfano*, NYLJ, May 29, 2001, at 32, col 6 [Sur Ct, Nassau County]; *Matter of Schill*, NYLJ, Mar. 15, 2000, at 30, col 2 [Sur Ct, Nassau County]; *Matter of Fordham*, NYLJ, Dec. 16, 1998, at 22, col 6 [Sur Ct, Bronx County]; *Matter of Fruchtmann*, NYLJ, Nov. 28, 1997, at 35 [Sur Ct, Kings County]). Preliminary letters may be denied, however, where the nominated executor's eligibility is at issue (*Matter of Bayley*, 72 Misc 2d 312 [Sur Ct, Suffolk County 1972], *affd* 40 AD2d 843 [2d Dept 1972], *appeal dismissed*, 31 NY2d 1025 [1973]). Where there is a clear showing of undue influence or other serious misconduct or wrongdoing, the court can decline to appoint the nominated fiduciary as preliminary executor on the grounds that the dishonesty makes him ineligible under SCPA 707 (*Matter of Roth*, NYLJ, Sept. 16, 1999, at 35, col 5 [Sur Ct, Kings County]; *Matter of Kunicki*, NYLJ, Aug. 30, 1999, at 30, col 6 [Sur Ct, Kings County]; *Matter of Scamardella*, NYLJ, June 3, 1996, at 32, col 4 [Sur Ct, Richmond County]). Generally, however, mere conclusory allegations that a nominated fiduciary is unfit are insufficient to deny preliminary letters (*Matter of Vermilye*, 101 AD2d 865 [2d Dept 1984]; *Matter of Piterniak*, NYLJ, Sept. 20, 2002, at 23, col 3 [Sur Ct, Suffolk County]; *Matter of Rella*, NYLJ, Mar. 16, 1999, at 28, col 5 [Sur Ct, Westchester County]; *Matter of Nigro*, NYLJ, Feb. 3, 2003, at 23, col 3 [Sur Ct, Kings County]). Further, if it is in the best interest and protection of the estate and its beneficiaries to appoint a fiduciary other than the nominated executor, temporary letters may issue to the Public Administrator (*Matter of Cavallo*, NYLJ, Dec. 21,

2001, at 26 [Sur Ct, Richmond County]; *Matter of Smith*, 71 Misc 2d 248 [Sur Ct, Erie County 1972]).

SCPA 1412 [2][a] affords an executor named in a later will a priority over an executor named in an earlier will. Where competing wills are offered, the court may, however, issue preliminary letters to the executor of the earlier will for "good cause shown" (SCPA 1412 [2][a]). Good cause shown has been found to exist where the circumstances surrounding the execution of the later will are so suspect that issuance of letters to the executor of the earlier will will better protect the parties (*Matter of Lazarus*, 84 Misc 2d 957 [Sur Ct, New York County 1975]).

Here, Jody Ain has requested that preliminary letters issue to her as executor under the alleged 2004 will. The petitioner's counsel states that the petitioner did not draw a will for the decedent in 2004 and has no knowledge of a 2004 will. Even if there is an earlier will naming Ms. Ain as executor, Mr. Levin, as an executor named in the purported later will, has a prior right to letters pursuant to the provisions of SCPA 1412(2)(a). Under SCPA 1412, preliminary letters must issue to Mr. Levin in the absence of good cause shown or serious misconduct which renders him unqualified (*Matter of Roth*, NYLJ, Sept. 16, 1999, at 35, col 5 [Sur Ct, Kings County]).

Jody Ain argues that preliminary letters should not issue to Mr. Levin for the following reasons. First, she claims Mr. Levin has failed to produce the 2004 will. Second, she claims that Mr. Levin has failed to comply with discovery demands. Third, she claims that Mr. Levin is unfit to serve because of alleged misstatements by the process server upon which the order for substituted service was based and the fact that the letter enclosing the waiver and consent were sent to the wrong address. Fourth, she questions the valuation of the assets set forth by Mr. Levin in the application for preliminary letters. Lastly, she claims that Mr. Levin acted in

collusion with the residuary legatee. All of these allegation fail to demonstrate "good cause" or serious wrongdoing which would permit the court to nullify the decedent's choice of a fiduciary.

The 2006 will dispenses with the filing of a bond. Pursuant to SCPA 1412(5), even if the will dispenses with the filing of a bond, the court may require a bond if "extraordinary circumstances" exist. There are no such extraordinary circumstances here (see, *Matter of Alfano*, NYLJ, May 29, 2001, at 32, col 6 [Sur Ct, Nassau County]). Preliminary letters testamentary shall issue to Victor Levin upon his duly qualifying under the law, to serve without bond.

This constitutes the decision of the court.

Settle order.

Dated: June 29, 2007

JOHN B. RIORDAN
Judge of the
Surrogate's Court