

**Matter of Johansen**

2007 NY Slip Op 32121(U)

June 6, 2007

Surrogate's Court, Nassau County

Docket Number: 0340617/2007

Judge: John B. Riordan

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SURROGATE’S COURT: STATE OF NEW YORK  
COUNTY OF NASSAU

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Probate Proceeding, Will of

File No. 340617

EDITH A. JOHANSEN a/k/a  
EDITH JOHANSEN,

Decision No. 222

Deceased.

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This is an application for preliminary letters testamentary.

The decedent, Edith A. Johansen, died on December 14, 2005 leaving a will dated September 13, 2005 (the “2005 Will”) and a prior will dated January 24, 2003 (the “2003 Will”). The 2003 will nominates the decedent’s daughter, Karen Colossale, as executor and the decedent’s daughter, Maureen Erickson, as successor executor. The 2005 will also nominates Karen as executor. The decedent was also survived by her other daughter, Linda Johansen.

The 2003 will bequeaths all shares that the decedent had in any companies or corporations to the decedent’s grandchildren, Daniel Erickson and Christina Colossale, equally and the decedent’s bank accounts to her daughters, Karen and Linda, equally. The 2003 will further provides for bequests of tangible personal property. The 2003 will gives the decedent’s cooperative apartment in equal shares to Christina and Daniel. The remainder of the estate is bequeathed in one-third (1/3) shares to each of the decedent’s daughters, Maureen, Karen and Linda.

The 2005 will gives all of the decedent’s jewelry to Christina, and the balance of the decedent’s tangible personal property located in her home to Karen and Karen’s husband, Theodore. The 2005 will further provides for a bequest of the decedent’s joint bank account located at Washington Savings Bank to Karen, or if Karen does not survive, to Christina. Under Article FOURTH of the 2005 will, the residuary estate is bequeathed to Christina.

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 Fruchtman*, 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, Maureen has requested that preliminary letters issue to her as a substitute executor under the 2003 will. Thus, Karen, as an executor named in the 2005 will, has a prior right to letters pursuant to the provisions of SCPA 1412(2)(a). Under SCPA 1412, preliminary letters must issue to Karen in the absence of good cause shown or serious misconduct which renders her unqualified (*Matter of Roth*, NYLJ, Sept. 16, 1999, at 35, col 5 [Sur Ct, Kings County]).

Maureen argues that preliminary letters should issue to her because she intends to commence a discovery proceeding against Karen, as well as Christina, Theodore and other persons who have knowledge of the decedent’s assets and the events and circumstances leading to \$36,000 of credit card debt on the decedent’s charge card. Maureen’s allegations fail to demonstrate “good cause” or serious wrongdoing which would permit the court to nullify the decedent’s choice of fiduciary. Accordingly, Maureen’s application for preliminary letters testamentary predicated on her nomination as substitute executor under the 2003 will is denied, and Karen’s application for preliminary letters testamentary as executor under the 2005 will is granted. The court, based upon its “broad equitable powers, however, including the power to convert or fashion a remedy based upon the facts alleged, without strict adherence to the title of the proceeding given by the petitioner” (*Matter of Nickolas*, NYLJ, Apr. 27, 2005, at 27 [Sur Ct, Suffolk County]) deems that portion of the instant proceeding which seeks authority to commence a discovery proceeding, as an application for the issuance of limited letters of administration to Maureen. Accordingly, limited letters of administration shall issue to Maureen upon duly qualifying according to law, without bond.

The 2005 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 Karen Colossale upon her duly qualifying under the law to serve without bond.

This constitutes the decision of the court.

Settle decree.

Dated: June 6, 2007

JOHN B. RIORDAN  
Judge of the  
Surrogate’s Court