

Matter of Forrest

2008 NY Slip Op 32711(U)

September 15, 2008

Surrogate's Court, Nassau County

Docket Number: 349880

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. 349880

WILLIAM A. FORREST,
a/k/a WILLIAM FORREST,

Dec. No. 419

Deceased.

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In this probate proceeding, a decree and a counter-decree have been filed with the court following the court’s direction to settle a decree.

The decedent, William A. Forrest, died on August 25, 2007 leaving a last will and testament dated August 16, 2005. In the will, the decedent nominated his wife, Kathleen L. Forrest, his son, Bruce Forrest, and his attorney, Paul R. Scott, as the co-executors of his estate. On March 21, 2008, Bruce and Paul filed a petition for probate of the will in which they requested that letters testamentary issue to them and to Kathleen. In the petition, Bruce and Paul sought further relief that “Kathleen Forrest qualify as Co-Executor within 15 days of the return date of the citation herein, or, in default of doing so, that she be deemed to have renounced the appointment.” In March 2008, Bryan Forrest, who is another son of the decedent, and Lynn Lazowick, the decedent’s daughter, each filed a waiver of process, consent to probate, both of which contain a request that Kathleen qualify within 15 days of the return date of the citation or be deemed to have renounced her appointment. On April 7, 2008, the court issued a citation returnable on May 7, 2008 to Kathleen. The citation recites the relief sought in the petition. On May 7, 2008, Kathleen appeared by counsel, and the court directed from the bench that a decree be settled.

On June 6, 2008, counsel for Bruce and Paul filed a proposed decree granting probate with notice of settlement. Among other things, the decretal paragraph contains language that Kathleen is deemed to have renounced her appointment as co-executor and that letters testamentary issue to Bruce and Paul.

On June 17, 2008, Kathleen's attorney filed a proposed counter-decree that differs from the proposed decree in that, if the court were to sign it, letters testamentary would issue to Kathleen, Bruce and Paul. Also on June 17, 2008, forty-one days after the return date of the citation, Kathleen's combined verification, oath and designation was filed with the court. The document shows that Kathleen signed it before a notary on May 6, 2008. Kathleen's attorney, John R. Dietz, also filed an affirmation wherein he informs the court that the reason Kathleen's combined verification, oath and designation was filed late was because he, a solo practitioner, had been out of the office for several months recuperating from a broken arm. Mr. Dietz states that he had made only three court appearances since his injury, one being the May 7, 2008 return date of the citation in this proceeding, and he asks the court to sign the proposed counter-decree.

On June 23, 2008, Andrew C. Ellsworth, the attorney for Bruce and Paul filed an affirmation in opposition to the proposed counter-decree. In it, the attorney argues that, in addition to Kathleen's failure to timely file her combined verification, oath and designation, Kathleen was responsible for prior delays that caused the estate to sustain unnecessary costs. Mr. Ellsworth also asserts that Kathleen has a present, disqualifying conflict of interest. Mr. Ellsworth explains that one of the assets that may be in the decedent's probate estate is his interest as a tenant in common in a brokerage account. Kathleen is the other tenant on the account. According to Mr. Ellsworth, Mr. Dietz advised him that Kathleen maintains that the

account was a joint tenancy with right of survivorship and that, according to a forensic document examiner, Kathleen's signature changing the account to a tenancy in common was forged.

Mr. Ellsworth contends that it is "all but certain" that litigation will ensue with respect to this account and that Kathleen will be in opposition to the estate "if this happens."

It is well settled that a testator's choice of executor is entitled to great deference (*Matter of Leland*, 219 NY 387 [1916]). Indeed,

"[t]he right of a testator to direct who shall have the care and management of his estate and the right of a person named in the will as an executor to act as such are both absolute legal rights, and the courts are required to give effect to the provision designating executors the same as any other legal provision of the will" (*id.* at 389 [citations omitted]).

The grounds for disqualification are those set forth in SCPA 707 and 711 (*Matter of Marsh*, 179 AD2d 578 [1st Dept 1992]); the party alleging ineligibility bears the burden of proof on that issue (*Matter of Palma*, 40 AD3d 1157 [3d Dept 2007]; *Matter of Rad*, 162 Misc 2d 229 [Sur Ct, New York County 1994]). The court should not interfere with the testator's nomination unless there is a clear showing of serious misconduct that endangers the estate (*Matter of Vermilye*, 101 AD2d 865 [2d Dept 1984]; *see also Matter of Venezia*, 25 AD3d 717 [2d Dept 2006]). SCPA 1416 directs that

"[u]pon the application of a fiduciary, a person interested or a creditor, the court shall direct an executor named in a will to qualify within a time specified by the court or in default of so doing to be deemed to have renounced the appointment in any case where a person named as executor in a will does not qualify or renounce within 15 days after probate . . ." (SCPA 1406 [1] [a]).

Although the citation stated as further relief sought that Kathleen qualify within 15 days of the return date or be deemed to have renounced, the court is not inclined to nullify the decedent's choice of his wife as a co-executor of his estate merely because Kathleen filed her combined verification, oath and designation approximately three weeks after the time period set forth, particularly where there is no showing of misconduct by Kathleen or prejudice to the estate. In any event, SCPA 1416 affords the relief sought by the petitioners only where at least 15 days have elapsed since the will's admission to probate.

In support of their argument that Kathleen has an actual conflict of interest which disqualifies her from serving as a co-executor, Bruce and Paul cite *Matter of Badore* (73 Misc 2d 471 [Sur Ct, Franklin County 1973]) where, after a hearing, the court found the sole nominated executor ineligible to serve based on a finding of improvidence as set forth in SCPA 707 [1[[e] (*id.* at 477)]. In *Badore*, the determining factor on which the court relied was the nominated fiduciary's admission to the decedent's daughters, who were the decedent's sole distributees, that the nominated fiduciary had signed and delivered to the decedent more than \$400,000 in promissory notes, but now claimed that he was not legally obligated at the time of the decedent's death for the money (*id.* at 471). The court thus found that the nominated executor had an actual conflict of interest that rendered him ineligible to serve (*id.* at 476).

In *Matter of Palma* (40 AD3d 1157 [3d Dept 2007]), another case cited by Bruce and Paul, the Third Department affirmed the order of Surrogate's Court, Schenectady County, which, among other things, revoked, without a hearing, the preliminary letters it had issued to the petitioner, who was one of the decedent's daughters. While noting that "the mere fact that a fiduciary owes a monetary debt to an estate, without evidence of misconduct, is not sufficient to

disqualify that fiduciary” the appellate court agreed with the Surrogate’s Court’s finding that the petitioner’s “conflict, divided loyalty, self interest and hostility” rendered her unfit under SCPA 711[8] to serve as fiduciary “[b]ased on the papers submitted [to the Surrogate’s Court] and its unique familiarity with the parties and the multiple lawsuits among them over which it has presided” (*id.* at 1158).

In the proceeding before this court, Bruce and Paul have failed to meet their burden of proving that Kathleen is ineligible to serve as a co-executor. They have failed to show sufficient evidence with respect to Kathleen’s alleged conflict, nor have they shown any evidence of misconduct by Kathleen or peril to the estate. Further, they have not informed the court whether they learned of Kathleen’s alleged conflict before or after they petitioned for her appointment as a co-executor and they have not provided any information of the dollar value of the account in question. In the event that the matter is litigated and Kathleen is shown to have an actual conflict with the estate, Bruce and Paul can then seek relief from the court.

Accordingly, since the proposed counter-decree more closely follows the court’s direction from the bench, it will be signed.

This constitutes the decision and order of the court.

Dated: September 15, 2008

JOHN B. RIORDAN
Judge of the
Surrogate's Court