

Matter of Barclay

2010 NY Slip Op 31755(U)

June 30, 2010

Sur Ct, Nassau County

Docket Number: 356499

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. 356499

EDWARD R. BARCLAY,

Dec. No. 26218
26290

Deceased.
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In this probate proceeding, there are two issues before the court. First, the decedent's spouse, Josephine M. Barclay, opposes the granting of preliminary letters to Peter Hesse and Kathleen Hesse. In addition, Josephine moves to revoke her waiver and consent.

Edward R. Barclay, the decedent, died on April 22, 2009, a resident of Nassau County. He died leaving a purported will dated March 20, 2009. He was survived by his wife from a second marriage, Josephine, and by five children, one of whom, Patricia, is under a disability. A guardian ad litem was appointed for Patricia. The purported will provides that one-third (1/3) of the residuary estate is to be placed in a supplemental needs trust for the decedent's wife. The remainder of the residuary estate is divided into seven equal shares with one share for each of the decedent's children (other than Patricia) and the decedent's three step-children. The purported will nominates the decedent's daughter, Kathleen Hesse, and Kathleen's husband, Peter, as executors. The purported will has been offered for probate by the nominated executors. A waiver and consent was signed by Josephine on May 12, 2009 and filed on June 16, 2009.

The petitioners have filed an application for preliminary letters testamentary. The petition is opposed by Josephine. Josephine has also moved to revoke her waiver and consent. Josephine has filed an affidavit in support of the motions. According to Josephine, she and the decedent were married in 1977. Each had been married previously, their former spouses having passed away. Josephine had three children from her first marriage, and the decedent had five

children from his first marriage. At the time of the marriage, Josephine owned a residence located at 69 Ransom Avenue, Sea Cliff, New York. Prior to the marriage, the decedent sold his residence and moved in with Josephine.

Josephine claims that it was always their intention that upon her death, her residence would be given to her children reserving the right for decedent to reside there. In 2007, at the urging of the decedent's daughter and son-in-law, the decedent and Josephine consulted with an attorney at which time she expressed her desire that the residence pass to her children. The attorney prepared a will for each of them and an Irrevocable Trust. Josephine claims she did not understand the intricacies of the trust agreement but was advised and assured that upon her death her children would get her residence.

In December 2008, Josephine became ill from dehydration and was hospitalized. After a two week stay in the hospital, she entered a nursing home. She alleges that during her stay in the nursing home the petitioners began a process to make her eligible for Medicaid. She was not aware of what needed to be done to achieve this, and claims that at no time was she made aware of the fact that her residence would be transferred in a manner to prevent her from ever leaving it to her children. On April 21, 2009, the day before the decedent died, Josephine re-entered the hospital for an emergency operation. Josephine alleges that it was only after her husband was buried and while she was still in the hospital that she learned for the first time from her sons that "arrangements" had been made so that her residence would not be going to her children. Instead, the residence could be sold and the proceeds shared by them together with the decedent's children. Upon learning this, Josephine asked Katharine Richards, Esq., the attorney who prepared the will, to come see her to discuss the issue. She told Ms. Richards that it was always

her intention to leave the residence only to her children. Josephine claims that it became apparent to her that Ms. Richards was not acting in her interest.

As to her signature on the waiver and consent, Josephine claims that, to her knowledge, she never signed such a document, but that she may have signed other documents represented to her for the purpose of qualifying for Medicaid while she was in the nursing home. Josephine said that no one explained the waiver and consent to her or what executing such a document meant. She also alleges that she never saw her husband's will. Accordingly, Josephine asks for permission to revoke her waiver and consent so that she may file objections based, in part, upon her belief that her husband was not competent to sign a new will. Josephine states that her husband suffered a stroke in early 1986. After surgery, he suffered another stroke in December 1986 which left him unable to speak. His speech returned "somewhat over time but was never fluent." Thereafter, he suffered a number of mini-strokes. Josephine claims that in March 2009, when the purported will was signed, he suffered from dementia to the extent that he would have been "incapable of understanding and appreciating what he was doing or signing." Josephine argues that the decedent would not have purposely and knowingly deprived her of her right to leave her residence to her children or to reside in her home after his death.

Josephine's counsel has also submitted an affirmation in support of the motion. Josephine's counsel stated that, as a result of the consultation with Ms. Richards in 2007, the residence at 69 Ransom Avenue was transferred into a joint irrevocable trust naming Kathleen Hesse and Peter Hesse as trustees. In early 2009, Peter and Kathleen, as trustees, transferred the residence out of the trust and into Kathleen's individual name. Thereafter, Kathleen transferred the residence into the decedent's name. Counsel claims this was done without Josephine's

consent or awareness. Ten days later, the decedent executed a new will which provided that the home would be divided equally among decedent's children and Josephine's children.

Josephine's counsel also raises an issue with respect to the notary acknowledgment on the waiver and consent purportedly exercised by Josephine. Josephine claims that the notary whose signature and stamp appears on the waiver did not visit Josephine at the nursing home on the date the waiver was purportedly signed or on any other date. According to Josephine's counsel, the nursing home records indicate that the only visitor on that date was Katharine Richards. Moreover, Josephine asserts that the notary is "the friend neighbor and/or co-worker of Respondent Peter Hesse."

As to the application for preliminary letters, Josephine argues that she will be prejudiced if letters are issued because then the Ransom Avenue home can be sold.

The petitioners have filed an answer wherein they assert that Josephine had a complete understanding of each and every transfer, document, trust or other legal matter relating to her and husband's affairs. Respondents claim that Josephine received verbal and written communications from Katharine Richards and met with Ms. Richards alone on more than one occasion. Moreover, Ms. Richards never represented the petitioners. Petitioners also claim that the decedent sold his house and paid for all the bills while they lived as husband and wife. While the decedent was doing this, Josephine made gifts of approximately \$150,000.00 to her children. Petitioners allege that they had no input or advice in the estate planning process and that the decedent and Josephine relied upon expert legal advice. In addition, they contend that the decedent always had mental capacity.

Request for Preliminary Letters

SCPA 1412¹, 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 (*Estate 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]).

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, col 1 [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

¹ The legislature created a new form of letters known as preliminary letters in 1963 [SCA §153-a]. SCA §153-a was reenacted without substantial change as SCPA 1412.

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 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, col 4 [Sur Ct, Richmond County]; *Matter of Smith*, 71 Misc 2d 248 [Sur Ct, Erie County 1972]).

Josephine’s allegation that petitioners are not qualified to act as fiduciaries (SCPA 707 and SCPA 708) fails to go beyond conclusory allegations which are clearly insufficient to provide a basis for the denial of preliminary letters testamentary. She has failed to demonstrate “good cause” or serious wrongdoing which would permit the court to nullify the testator’s choice of fiduciaries. Accordingly, petitioners’ application for preliminary letters testamentary is granted. Nevertheless, Josephine has raised an issue regarding the petitioners’ actions regarding the transfer of the Ransom Avenue house out of the trust and into Kathleen’s individual name. Accordingly, the preliminary letters testamentary shall restrict the preliminary executors from

selling the Ransom Avenue house without prior court approval.

Revocation of Waiver and Consent

In general, courts are reluctant to allow the withdrawal of a waiver and consent since “such actions disrupt the orderly process of administration and create a continuous aura of uncertainty.” (*Matter of Stern*, NYLJ, July 20, 1994, at 28, col 3 [Sur Ct, New York County]). The burden of proof is on the party attempting to revoke the waiver (*Matter of Anderson*, 22 Misc 2d 662 [Sur Ct, Suffolk County 1960]). The test for withdrawal of a waiver and consent differs depending upon whether a probate decree has issued. If a decree has issued, it is more difficult to revoke the waiver because vacatur is also required (*Matter of Frutiger*, 29 NY2d 143 [1971]). Whether the withdrawal is sought pre-decree or post-decree, the party seeking to revoke the waiver must show that the waiver was obtained by fraud or overreaching, or was the product of misrepresentation or misconduct, or that newly discovered evidence, clerical error or other sufficient cause warrants revocation (*Matter of Frutiger*, 29 NY2d 143 [1971]; *Matter of Titus*, 39 AD3d 1203 [4th Dept 2007]; *Matter of Westberg*, 254 AD 320 [1st Dept 1938]; *Matter of Henderson*, 4 Misc 2d 599 [Sur Ct, New York County 1956]). If withdrawal is sought pre-decree, such a showing is sufficient absent prejudice to the other side (*Matter of Culley*, NYLJ, Feb 14, 1996, at 31, col 3 [Sur Ct, New York County]).

Revocation of a waiver has been denied where the applicant claims that he did not understand the effect or significance of the waiver, yet his education and general experience belies such claim. In *Matter of Titus* (39 AD3d 1203 [4th Dept 2007]), the petitioner sought to revoke a waiver and consent on the basis that she executed the document, but did not understand its significance. The court denied the application pointing out that the applicant was a certified

public accountant with a master's degree in business administration (*see also Matter of Martin*, 14 Misc 2d 266 [Sur Ct, New York County 1944] [petitioner's application was denied on the basis that petitioner was a woman of mature years, education and culture]; *Matter of Coccia* (59 AD3d 716 [2d Dept 2009] [denied party's attempt to withdraw waiver finding his allegation that he didn't understand the impact of it conclusory])).

Moreover, necessary parties are deemed to have read and understood the contents and consequences of signing a waiver and consent (*Matter of Anderson*, 22 Misc 2d 662 [Sur Ct, Suffolk County 1960]). In *Matter of Anderson*, the court deemed a necessary party "chargeable with knowledge of the contents and the legal effect of such waiver - whether or not he availed himself of the advice of counsel at the time of the execution thereof" (*Matter of Anderson*, 22 Misc 2d 662, 663 [Sur Ct, Suffolk County 1960], *citing Matter of Stone*, 272 NY 121 [1936]).

There are, however, certain situations where a necessary party will be permitted to withdraw a waiver and consent. For example, a withdrawal will sometimes be allowed if evidence is brought to the court's attention that may alter the outcome of the probate proceeding (*In re American Comm. for Weizmann Inst. of Science v Dunn*, 10 NY3d 82 [2008]). Thus, in *Matter of Culley* (NYLJ, Feb. 14, 1996, at 31, col 3 [Sur Ct, New York County]), the court allowed the withdrawal where the distributees raised factual issues surrounding the decedent's testamentary capacity. They also were unaware at the time they signed the waivers that the decedent had been residing in a nursing home operated by a religious group named as a legatee in a codicil submitted for probate. The distributees also were not represented by an attorney and were incorrectly told by the nominated fiduciary that the waivers could be withdrawn at any time. Similarly, the court permitted a waiver in *Matter of Gallas* (NYLJ, Feb. 4, 2000, at 37, col 4 [Sur

Ct, Westchester County]) where the petitioners showed that the proponent of the purported will, also the draftsman, misled them into signing the waivers.

In addition, withdrawal of a waiver has been permitted in the interest of justice and where a withdrawal would not result in prejudice (*Matter of Carrion*, NYLJ, Jan. 25, 1989, at 26, col 3 [Sur Ct, Bronx County]; *Matter of Hertz*, NYLJ, Dec. 4, 1992 at 25, col 2 [Sur Ct, Bronx County]; *Matter of Engelberg*, NYLJ, Oct. 1, 1991, at 25, col 6 [Sur Ct, Westchester County]; *Matter of Stupel*, NYLJ, Jan. 3, 1996, at 28, col. 6 [Sur Ct, Suffolk County]).

Here, allegations have been raised concerning the acknowledgment by the notary on Josephine's waiver. Pursuant to SCPA 401(4), the waiver must be acknowledged. Moreover, Josephine has raised an issue concerning the actions of the proponents in securing her waiver. The court is mindful of the fact that withdrawal is being sought prior to the issuance of a decree. Accordingly, a conference is scheduled for July 15, 2010 at 9:30 a.m. to schedule an evidentiary hearing to determine the validity of Josephine's waiver and consent and set down a discovery schedule if necessary.

This constitutes the decision and order of the court.

Dated: June 30, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court