

**Matter of Hirschfeld**

2014 NY Slip Op 33228(U)

October 28, 2014

Surrogate's Court, New York County

Docket Number: 2005/3139

Judge: Nora S. Anderson

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This opinion is uncorrected and not selected for official publication.

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New York County Surrogate's Court  
DATA ENTRY DEPT.  
OCT 28 2014

SURROGATE'S COURT : NEW YORK COUNTY  
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Probate Proceeding, Will of

ABRAHAM HIRSCHFELD,

File No. 2005/3139/A

Deceased

-----x

A N D E R S O N, S.

Incident to this probate proceeding, decedent's daughter seeks limited letters of administration to enforce claims on behalf of her father's estate. The Public Administrator and decedent's son ("respondents") move to dismiss the petition.

Background

Decedent died on August 9, 2005, survived by his post-deceased wife and two children. Under the propounded will, decedent left \$500,000 in trust for his daughter; \$500,000 in trust to the Abe and Zipora Hirschfeld Park; and the residue in trust for his grandchildren.

Although the will nominates decedent's son as executor, the court granted the daughter's application (with the son's consent) in 2006 to appoint the Public Administrator as temporary administrator to investigate the daughter's claim that the son procured various partnership interests from decedent by the commission of undue influence and forgery.

The Public Administrator conducted an investigation and reported in her 2008 interim account that the daughter's allegations did not rest on sufficiently colorable grounds to

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justify the expense of prosecuting the claims.

Now, after the passage of six years, the daughter asks the court to issue limited letters alleging that the Public Administrator neither appeared in pending Supreme Court litigation brought by decedent's partners to challenge the validity of the transfers to the son, nor independently pursued the son for his alleged wrongdoing, stating that the Public Administrator "seems determined to accept, without any oversight, documentation provided to her counsel by [the son]" in support of the transfers; and accusing her of relying completely or too heavily on the guardian's report that he found no grounds to set aside the transfers.

Respondents move to dismiss the daughter's application based on her failure to allege any of the grounds set forth in SCPA 702 upon which the court may grant limited letters, and her failure to allege any misconduct or a conflict of interest on the part of the Public Administrator. They also argue that the daughter has offered no support for her conclusion that the Public Administrator's decision not to prosecute was unreasonable, or that the Public Administrator is not adequately representing the estate's interests in the pending Supreme Court litigation.

Respondents counter that a fiduciary's judgment is conclusive as to whether or not to commence litigation on behalf of an estate absent a showing of a conflict of interest, self dealing, or other misconduct by the fiduciary. They note that the daughter, who is

herself an attorney with expertise in trusts and estates law, waited ten years from the date of the transfers and seven years after the Public Administrator was appointed to pursue perfunctory, unsubstantiated allegations, which are controverted by two disinterested fiduciaries.

Further, respondents point out that even though the daughter says the Public Administrator ignored her claims regarding the validity of the transfers, she does an about-face in her reply affidavit by conceding that the Public Administrator did, indeed, conduct her own investigation. Similarly, the daughter's claim that the Public Administrator is not participating in the Supreme Court action is belied by the Public Administrator's submission of pleadings showing that her office is a party to the litigation and that it is in fact actively participating on behalf of the estate.

Finally, respondents cite the daughter's default in filing objections to the interim account as indicative of her lack of seriousness underlying her current allegations, as well as her lack of understanding of the importance of timely action required of a fiduciary.

#### Discussion

The court in its discretion may award limited letters to "commence and maintain any action or proceeding against the fiduciary in his or her individual capacity, or against anyone else against whom the fiduciary fails or refuses to bring such a

proceeding (SCPA 702[9]). The statute is typically used to protect an estate from self-dealing by the fiduciary (*Matter of Menitskiy*, No 351064, NY Misc, LEXIS 6500 at \*16; *Matter of Goldman*, 196 Misc 2d 965).

The mere fact that a beneficiary of an estate and its fiduciary disagree as to whether a lawsuit on the estate's behalf is warranted is not reason enough to require the fiduciary to expend estate assets on litigation, since fiduciaries have an overriding duty to obey the dictates of good sense (*McQuaide v Perot*, 223 NY 75, 79-80). As the Court of Appeals has observed, "The winning of a lawsuit may be a Pyrrhic victory and the possibility of defeat is always present" (*McQuaide v Perot*, 223 NY 75, 79-80). Accordingly, unless there is a substantial basis for a beneficiary's bid for authority to begin a litigation that the already appointed fiduciary has declined to bring, a court should not empower the beneficiary to take the administration of the estate out of the current fiduciary's hands (*McQuaide v Perot*, 223 NY 75).

Rather, the court should award limited letters "in the event the primary fiduciary has a conflict" that precludes her from exercising independent judgment on behalf of the estate, or where it can be demonstrated that the fiduciary has otherwise been unreasonable in declining to pursue litigation (*McQuaide v Perot*, 223 NY 75, 79-80; *Matter of Bennett*, 84 AD3d at 1366-67; see

*Lefkowitz v Li Ka-Shing*, 30 AD3d 334 (affirming dismissal where plaintiff failed to establish that the refusal of her parents' estate to pursue her claims was unreasonable).

In the present case, the daughter fails to proffer any evidence of unreasonableness by the Public Administrator in determining if and to what extent estate assets should be used to pursue her claims against her brother. Nor has the daughter alleged that the Public Administrator's determinations were tainted by misconduct or a conflict of interest.

Based on the foregoing, the court determines that the daughter has failed to establish sufficient grounds authorizing the court to appoint an additional fiduciary and to remove the Public Administrator from administering decedent's estate. Accordingly, her application is denied.

This decision constitutes the order of the court.

Dated: *OCT 28*, 2014

  
S U B R O G A T E