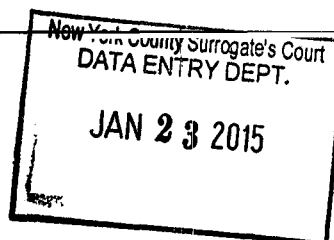


Estate of O'Brien
2015 NY Slip Op 30055(U)
January 23, 2015
Surrogate's Court, New York County
Docket Number: 2013-1174
Judge: Nora S. Anderson
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SURROGATE'S COURT : NEW YORK COUNTY
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Administration Proceeding, Estate of

File No. 2013-1174/B,C

JAMES O'BRIEN,

Decedent.

-----X
A N D E R S O N, S .

In this contested administration proceeding in the estate of James O'Brien, Carol O'Brien, decedent's surviving spouse, and James O'Brien, Jr., one of decedent's sons, have cross-petitioned for letters of administration.

James O'Brien died on April 19, 2012, survived by Carol, James, and another son, Mark. James propounded a lost will in which decedent named him executor, but left his entire estate to Carol (75%) and Mark (25%), explaining that James was "financially secure." Letters of temporary administration issued to James on June 20, 2013. However, the lost will was denied probate (*Matter of O'Brien*, NYLJ, April 21, 2014, at 23, col 2 [Sur Ct, NY County 2014]). Thereafter, Carol petitioned for letters of administration, and James cross-petitioned, seeking his own appointment on the ground that his step-mother is unqualified to serve.

A surviving spouse entitled to share in the estate has priority over all other distributees for the issuance of letters of administration (see SCPA § 1001[1][a]); *Matter of Jordan*, 89 AD3d 1085 [2d Dept 2011]). The issuance of letters to a surviving spouse is mandatory unless such person is ineligible to serve under SCPA § 707 (see e.g. *Matter of Kopko*, 31 AD3d 639

[2d Dept 2006]). James alleges that Carol is ineligible under SCPA § 707(1)(e) as a person "who does not possess the qualifications required of a fiduciary by reason of substance abuse, dishonesty, improvidence, want of understanding, or who is otherwise unfit for the execution of office" (*id.*).

James seeks to paint his step-mother as dishonest and unfit to serve as a fiduciary. However, none of the examples of purported misconduct is sufficient, even if true, to deny Carol her statutory right to letters of administration (*see e.g. Matter of Kopko*, 31 AD3d 639, *supra*; *Matter of Marsh*, 179 AD2d 578 [1st Dept 1992]; *Matter of Cohen*, 14 Misc 3d 1208[A] [Sur Ct, Dutchess County 2006]; *Matter of King*, NYLJ, April 1, 2014, at 23, col 3 [Sur Ct, Bronx County 2014]; *see also Matter of Modell*, 38 Misc 3d 1216[A] [Sur Ct, Nassau County 2012]). For example, the existence of a potential claim for \$200,000 against the estate by decedent's ex-wife is not a basis to fault Carol for seeking to collect on a \$1,000,000 insurance policy for which she was the designated beneficiary. James has failed to explain how the proceeds of the policy could have been subject to the former wife's claim, but, in any event, the current spouse had no obligation to refrain from collecting the proceeds of the policy as its designated beneficiary. As a result, James' unsubstantiated assertion that Carol's efforts to collect the proceeds of the policy caused the estate to incur "significant legal expenses" has no merit.

Nor is there any merit to James' contention that Carol's actions with regard to the estate were "improvident" and have frustrated the proper administration of the estate. There was nothing improper about her conduct in seeking information about payments to decedent from a client of decedent's law practice related to the preparation of joint federal and New York State income tax returns for the year of decedent's death. Moreover, as decedent's spouse, her alleged review of decedent's personal and professional files shortly after his death is a non-event. Significantly, James asserts that "[p]art of [his] duties as [estate fiduciary] **will be** to determine, if possible, if she deleted and/or destroyed certain of [decedent's] personal files and information to determine what, if any, impact that may have had on my father's estate" (emphasis added). However, he concedes that, in the more than 15 months since his appointment as temporary administrator, he has not made this determination. Thus, his allegations are pure conjecture at a point when the potential for actual harm to the estate already should have been determined.

Finally, James' contention that Carol impeded the administration of the estate by failing to respond to his July 2013 request for financial information and documents does not warrant a finding of ineligibility under SCPA § 707(e)(1). Carol insists that she did respond to all requests for information, but, in any event, she had no fiduciary obligation to do so.

Rather, it is James who had a fiduciary obligation to collect it and avail himself of whatever remedies necessary to obtain it. Notably, there is nothing in the record indicating that James pursued his request after July 2013 or sought to compel Carol to provide the information, the lack of which he claims has impeded the estate's administration. If, as James contends, the estate's administration has been negatively affected by Carol's refusal to produce necessary information in her possession, the absence of any demonstrated effort on his part to obtain it speaks only to the efficacy of his tenure as fiduciary.

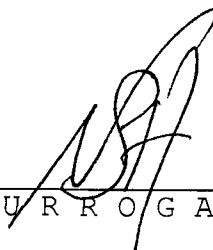
The fact that James believes that he is "more competent" to administer the estate and that decedent "expressed confidence" in him by nominating him executor under the lost will are not factors for the court. Under the circumstances, the estate will be sufficiently protected by the posting of a bond (SCPA § 805). In the event that either brother believes that future events substantiate their concerns that Carol's conduct renders her unfit to serve as fiduciary, they can avail themselves of the remedy of removal under SCPA § 711.

Based upon the foregoing, Carol's petition seeking letters of administration is granted and the cross-petition is dismissed.

Settle decree revoking the letters of temporary

administration issued to James O'Brien and appointing Carol O'Brien as administrator.

Dated: January 23, 2015


SURROGATE