

Matter of Hirschfeld
2015 NY Slip Op 30601(U)
April 10, 2015
Surr Ct, New York County
Docket Number: 2007/0484/A/B
Judge: Nora S. Anderson
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SURROGATE COURT : NEW YORK COUNTY

SEARCHED

New York County Surrogate's Court
MISCELLANEOUS DEPT.
APR 10 2015
FILED
Clerk

----- -x
In the Matter of the Application for
Limited Letters in the Estate of

ZIPORA HIRSCHFELD

Deceased.

File No. 2007/0484

/A/B

----- -x

A N D E R S O N, S.

The motion by the executor, CitiBank,N.A., to dismiss the petition of decedent's daughter for limited letters of administration is denied for the reasons stated below.

Decedent died November 2006. Her will was admitted to probate and CitiBank was appointed executor and testamentary trustee for a residuary trust valued at \$1.2M, of which petitioner is the primary beneficiary.

In 2008, CitiBank informally settled its executor's account and distributed the net assets on hand to the various beneficiaries, including the petitioner's trust. Thereafter, CitiBank resigned as trustee, and Capital One, N.A. was appointed successor trustee.

Petitioner seeks limited letters of administration for the purpose of intervening on behalf of this estate in a pending Supreme Court action in which various *inter vivos* business transfers by decedent's pre-deceased husband are being challenged. Petitioner alleges that if the transfers are invalidated, at least one third of the assets recouped by the husband's estate would benefit this estate in satisfaction of

decedent's spousal election.

CitiBank declines to intervene in the action, contending that it is the Public Administrator's responsibility, as administrator of the husband's estate, to pursue these funds. While not citing authority that would preclude it from joining in the litigation, CitiBank contends that decedent's estate is sufficiently protected by the presence of the administrator of the husband's estate.

Motion to Dismiss

CitiBank alleges the petition is not ripe because petitioner seeks to address a problem that does not actually exist, but instead is based on the purely hypothetical question of what this estate will receive if the Supreme Court litigation results in rescission of the challenged transfers. In support of its theory, CitiBank refers to *Matter of Gardiner*, NYLJ., July 27, 1989, p.1, col.3 (Sur. Ct. N.Y.Co.), where the court dismissed, as unripe, a petition to prevent an adoption proceeding that had not been commenced.

CitiBank also contends that petitioner is not fit to be a fiduciary, because she was denied appointment as guardian for her elderly mother in an MHL Article 81 proceeding, allegedly on the judge's belief that petitioner did not exhibit good judgment regarding her mother's care.

In response to the issue of ripeness, petitioner maintains

that the Supreme Court action in which she seeks to intervene and the estate's interests therein are anything but hypothetical, as the action is currently pending, and its outcome will have a direct and measurable effect on the value of this estate.

In response to the accusation that she is not fit to act as a fiduciary, petitioner, who is a practicing attorney, effectively argues that CitiBank has not shown any direct correlation between her ability to make decisions about decedent's medical care and her ability to participate in litigation on behalf of this estate.

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]).

Citibank declines to take an active role with respect to the Supreme Court action, which involves issues that have bearing on decedent's claims against her husband's assets. Petitioner, as beneficiary of the testamentary trust, is a person interested in protecting the estate's interests. Accordingly, CitiBank's motion is denied, and limited letters shall issue to petitioner upon her qualifying according to law for the purpose of seeking to intervene in the pending action (SCPA 702 [9]).

In issuing letters to petitioner, the court is neither adjudicating the merit of CitiBank's decision not to intervene, nor opining on the *bona fides* of the claims in the Supreme Court action. The court is merely protecting the estate against the prospect of harm from inaction (*Matter of Zwosta*, 2011-364044/B, NYLJ 1202617372717, at*1; *Matter of Leistner*, NYLJ, June 15, 2006).

Furthermore, petitioner is cautioned that "while EPTL 11-1.1(b)(22) entitles a fiduciary to reasonable counsel fees from the estate, if she, in her capacity as fiduciary, uses estate funds 'to the disadvantage of any person interested in the estate' she does so at her own peril" (*Matter of Rosasco*, 19 Misc 3d 1109[A], at*7; *Matter of Stanley*, 240 AD 2d 268, 270,660 NYS2d 107).

This decision constitutes the order of the court.

Dated: *April 10,* 2015

USA

S U R R O G A T E