

Matter of Knee
2015 NY Slip Op 32864(U)
July 1, 2015
Surrogate's Court, Richmond County
Docket Number: 2014-106
Judge: Robert J. Gigante
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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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In the Matter of the Estate of

MARIE STARACE KNEE

**File Nos. 2014-106
2014-106/A**

Deceased.

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In this pending probate proceeding, the decedent died on October 6, 2013, a resident of Richmond County. At her death, decedent was survived by her spouse, and five children from a prior marriage. Although no one contests probate of decedent's Last Will and Testament dated October 14, 2004, the battle herein relates solely to who shall administer decedent's estate.

The Will nominates decedent's surviving spouse, Alan Knee, as the executor and her son, Robert Starace, as successor. In his petition, Alan Knee seeks to be appointed executor. In the cross petition, the decedent's son, Robert Starace, seeks to disqualify Alan Knee and have himself appointed executor in his place. The respondent children claim that the nominated fiduciary is unfit due to his dishonest and improvident handling of decedent's assets since Marie Starace Knee's death, including taking a large sum of money from her safe deposit box and failing to pay required expenses on real estate.

Under §707(1)(e) of the SCPA, a person may be ruled ineligible to receive letters if he "does not possess the qualifications required of a fiduciary by reason of substance abuse, dishonesty, improvidence, want of understanding, or ... is otherwise unfit for the execution of the office." The provision for denial of letters to one who is "otherwise unfit

for execution of the office" was added with the intention "to clarify the standard to be employed by the Surrogate... and to expand the possible bases on which denial of letters might be grounded." Matter of Rad, 162 Misc 2d 229, 231; 616 NYS 2d 684 (New York Cty Surr Ct 1994). The burden of proving ineligibility rests with the objectants. Matter of Krom, 86 AD 2d 689, 690; 446 NYS 2d 522 (NY App Div 1982); In re Mecko's Will, 70 NYS 2d 41,47 (Broome Cty Surr Ct 1947).

Relative to the issue of eligibility, the Court is mindful that the weight of authority is to the effect that the showing against a nominated executor must be relatively strong in order to disqualify him on the ground of dishonesty. Indeed, the choice of the decedent should not be set aside lightly (Matter of Murphy, 136 Misc2d 618; In re Mecko's Will, 70 NYS2d 41).

The Court is likewise mindful of the standard set for dishonest conduct which would render one incompetent to execute the duties of a fiduciary. This standard is set forth in Matter of Latham's Will, (145 App Div 849) and its progeny. In Latham, the Court stated "the dishonesty contemplated by the statute must be taken to mean dishonesty in money matters from which a reasonable apprehension may be entertained that the funds of the estate would not be safe in the hands of the executor." A mere isolated act of wrongdoing is not enough to disqualify a fiduciary for dishonesty. Matter of Cohen, 164 Misc 98, 100; 298 NYS 368 (Kings Cty Surr Ct 1937).

Marietta Stapleton, the decedent's daughter, testified at an eligibility hearing held on March 9, 2015, that Alan Knee took between "four hundred to five hundred thousand dollars" in cash from a safe deposit box held in her and her mother's name. However, in an affidavit duly sworn to on February 12, 2014, Ms. Stapleton stated "... I saw trays of jewelry, multiple envelopes of cash including three envelopes labeled

"\$20,000" and one labeled "\$15,000 ..." The affidavit does not contain any information regarding the total amount of cash claimed to have been in the box. Mr. Knee denies there was any money in the safe deposit box. These mere allegations of wrongdoing fall far short of the level of proof required to demonstrate that Alan Knee is ineligible to serve, due to dishonesty.

However, dishonesty and improvidence are two separate and distinct grounds for disqualification. Improvidence requires a lesser burden of proof than dishonesty because "the quality of being improvident does not necessarily involve moral turpitude," Mecko, 70 NYS 2d at 47. Improvidence has been defined only as actions that "would be likely to render the estate unsafe and liable to be lost or diminished," Matter of Ferguson, 41 Misc 465; 84 NYS 1102 (Kings Cty Surr Ct 1903); Matter of Badore, 73 Misc 2d 471, 477; 341 NYS 2d 970 (Franklin Cty Surr Ct 1973). In addition, a finding of improvidence may also be based on the applicant's misappropriation or mishandling of decedent's property, Matter of DeBelardino, 77 Misc 2d 253, 255; 352 NYS 2d 858 (Monroe Cty Surr Ct 1974).

Respondents contend, and Alan Knee acknowledges, that he has not paid any of the carrying charges, including mortgage payments and real estate taxes, on 457 Brighton Street, Staten Island, New York 10307, the former marital home in which he still resides, since his wife's death. Further he acknowledged, this has led to a foreclosure action being commenced against the property, an estate asset. Mr. Knee's testimony at his eligibility hearing became more difficult since, although knowing his testimony was to continue, he left his eye glasses at home and was unable to identify exhibits in evidence or respond to questions posed by respondents' counsel. When asked by the Court, "(M)ay I ask where your glasses are, sir?" and "(Y)ou knew you

were coming here?" Mr. Knee responded, "It didn't seem like an important thing to me." At times, Mr. Knee also appeared confused, and gave vague and non-responsive answers to questions. Indeed, the Court found his testimony to be incredible.

The Court after carefully noting and assessing the demeanor, candor and credibility of Alan Knee, including his want of understanding regarding the duties and responsibilities of a fiduciary, finds him ineligible to perform the duties of executor of his late wife's estate due to improvidence and want of understanding and, therefore, respondents' application to disqualify him as executor of this estate is granted, and his petition seeking letters testamentary is hereby denied.

Accordingly the matter is restored to the Court calendar on **August 12, 2015 at 10:30 a.m.**, for a conference with the Court's Law Department.

The Clerk of the Court is directed to mail a copy of this Order to all attorneys who have appeared in this matter.

This Decision shall constitute the Order of this Court.

Dated: July 1, 2015.



ROBERT J. GIGANTE, Surrogate