

Matter of Reilly

2017 NY Slip Op 31131(U)

May 5, 2017

Surrogate's Court, Nassau County

Docket Number: 2015-385067/A,B

Judge: Margaret C. Reilly

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**SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

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**Petition of Brian John Reilly to Resign and Amend
Letters Testamentary in the Estate of**

**DECISION
File No. 2015-385067/A,B
Dec. No. 32810**

**JOYCE REILLY,
a/k/a JOYCE F. REILLY ,
a/k/a JOYCE FLORENCE REILLY,**

Deceased.

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PRESENT: HON. MARGARET C. REILLY

The following papers were considered in the preparation of this decision:

Petition with Exhibits.....	1
Affirmations (2) to Amend.	2
Emergency Affirmation.	3
Report of the Guardian ad Litem and Affirmation of Services.	4
Letter of Co-Executors dated April 17, 2017.	5
Letter of Guardian ad Litem dated April 26, 2017.	6
Supplemental Report of the Guardian ad Litem dated May 3, 2017.	7

A petition was filed by Brian John Reilly (the petitioner) on June 9, 2016, seeking permission to resign as co-executor and for letters testamentary to be amended to allow Maureen Dye and Janice Ann Reilly to continue serving as co-executors. The basis for the relief sought is the petitioner's ineligibility to serve as a fiduciary under New York law. The petitioner, Maureen Dye and Janice Ann Reilly are represented by the same attorney in this proceeding.

The matter appeared on the court's calendar on July 13, 2016, and a guardian ad litem was appointed on July 25, 2016 to represent the interests of Patricia Reilly, a sister of the three co-executors. The guardian ad litem consented to serve on August 11, 2016, and he

filed his report on February 14, 2017. In his report, the guardian ad litem expressed concern for the protection of Patricia Reilly's interest in the estate. He recommended that the court grant the relief sought by the petitioner, direct the settlement of a decree amending letters testamentary to name Maureen Dye and Janice Anne Reilly as sole co-executors of the decedent's estate, and direct that judicial accounting proceedings consistent with SCPA §§ 715 and 716 be taken to protect his ward's interest, which is to be distributed to the trust created on September 7, 2004 by the decedent and her husband for the benefit of Patricia Reilly (the Reilly Discretionary Trust). Only after the petitioner has accounted should a decree be issued discharging the petitioner as a co-executor.

The petition was submitted for decision on March 2, 2017. More than six weeks later, co-executors Maureen Dye and Janice Reilly sent an ex parte letter to the court.¹ The letter was not served on the guardian ad litem or on the petitioner and, therefore, the contents of the letter could not be considered by the court. Neither attorneys nor parties may initiate ex parte (one-sided) communications with the court. Pursuant to the Code of Judicial Conduct, to uphold the independence and integrity of the judiciary, a judge shall not initiate, permit or consider ex parte communications, or consider other communications made outside the presence of the parties concerning a pending or impending proceeding except for permitted limited purposes (see Code of Judicial Conduct Canons 1, 3 [B][7]; *Matter of Levine*, 74 NY2d 294 [1989]). Letters or faxes sent to the court will not be considered unless there is

¹The letter does not indicate whether it was sent with the knowledge of the co-executors' attorney.

an indication that a copy has been sent to all parties.

On April 28, 2017, the court received a letter from the guardian ad litem, advising the court that he had learned of the ex parte letter and would file a response. One week later, the guardian ad litem filed a supplemental report, dated May 3, 2017, in which he reiterates his earlier conclusions, including the recommendation that the petitioner not be discharged until his account as co-executor has been approved by the court. These conclusions are based upon the ward's disability along with the petitioner's withdrawals from the decedent's convenience bank account after her death, the petitioner's reported attempt to remove funds from the Reilly Discretionary Trust, and the decision of the other two co-executors to distribute \$8,000.00 to the petitioner when he moved out of the decedent's home.

Irrespective of the recommendation of the guardian ad litem and his specific concerns for the protection of his ward's interest, a formal judicial accounting is required when a necessary party in an estate is under a disability (Margaret Vaentine Turano and C. Raymond Radigan, *New York Estate Administration*, ¶ 6.02 [b] at 234 (2017 ed)). Moreover, under SCPA § 715, a fiduciary petitioning the court for permission to resign will be directed to proceed to the judicial settlement of the fiduciary's account by a date to be determined by the court. Pursuant to SCPA § 716:

“If it shall be determined that the petition [to resign] shall be granted, an intermediate order may be entered forthwith or at any time during the pendency of the proceeding, permitting the petitioner to resign . . . and directing the resigning fiduciary to turn over all assets in his hands to his successor and file his account and a petition for the judicial settlement thereof and proceed to have it judicially settled. . . . Upon the resigning fiduciary fully accounting and paying over all money which is found to be due from him and

delivering over all books, papers and other property in his hands to his successor, or in such manner as the court directs, a decree may be made discharging him accordingly.”

When letters are granted to a party who was ineligible to receive them, the letters will be revoked, and the court will direct the party to whom letters were issued to file a judicial account (*see, Matter of Flannagan*, 51 NYS2d 369, 370 [Sur Ct, New York County 1944]).

Accordingly, the petition is **GRANTED**. Permission is given to Brian John Reilly to resign as a co-executor of the estate of Joyce Reilly, and his letters are revoked effective immediately. Letters testamentary previously issued in the estate will be amended to allow Maureen Dye and Janice Ann Reilly to continue serving as co-executors.

The petitioner is directed to file a formal account as a resigning co-executor of the estate no later than August 31, 2017.² After the account has been judicially settled, a decree may issue discharging Brian John Reilly.

Settle decree.

Dated: May 5, 2017
Mineola, New York

E N T E R:

HON. MARGARET C. REILLY
Judge of the Surrogate's Court

²If the initial three co-executors wish, they may, but are not required to, file one joint account for all of them, covering the period of time in which the resigning co-executor served. The joint account would be the first intermediate account of Maureen Dye and Janice Anne Reilly and the final account of Brian John Reilly.

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