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| <b>Matter of Gnatzy</b>                                                                                                                                                                                                        |
| 2017 NY Slip Op 32679(U)                                                                                                                                                                                                       |
| December 21, 2017                                                                                                                                                                                                              |
| Surrogate's Court, New York County                                                                                                                                                                                             |
| Docket Number: 2017-3013/C                                                                                                                                                                                                     |
| Judge: Nora S. Anderson                                                                                                                                                                                                        |
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New York County Surrogate's Court  
DATA ENTRY DEPT.

DEC 21 2017

SURROGATE'S COURT : NEW YORK COUNTY

-----X  
Probate Proceeding, Estate of

MYRNA GNATZY,

File No. 2017-3013/C

Deceased.

-----X  
Petition to Revoke Certificates of  
Voluntary Administration and Appoint  
Temporary Administrator in the Estate  
of

MYRNA GNATZY,

File No. 2017-3013/A,B

Deceased.

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

In these contested applications for temporary letters of administration and preliminary letters testamentary in the estate of Myrna Gnatzy, each of decedent's grandsons seek appointment as fiduciary, claiming the other is unfit to serve.

Myrna Gnatzy died on August 3, 2017, survived by a son, Joseph Aviles, and the two petitioners here, decedent's grandsons, Rene and Adam Aviles. Under a will and codicil, dated March 21, 2012 and December 12, 2012, respectively, decedent made a \$5,000 pre-residuary bequest to Joseph and provided for her residuary estate to be distributed as it would be in intestacy, i.e., 50% to Joseph, 25% to Adam, and 25% to Rene. Shortly after decedent's death, Adam, the nominated executor, sought to administer the estate under SCPA Article 13, which authorizes the appointment of a "voluntary administrator" in estates with personal property valued at \$30,000 or less [SCPA § 1301(1)].

Certificates of voluntary administration issued to Adam on August 14, 2017. Six weeks later, Rene commenced a proceeding to remove Adam and to succeed him as temporary administrator "until such time as Joseph [the nominated successor executor under the will] makes an application for appointment as fiduciary of Decedent's estate." Shortly thereafter, Adam commenced a probate proceeding and brought the instant application for preliminary letters testamentary.

The basis for Rene's removal proceeding was that decedent at her death owned a corporation, which in turn owned a \$3 million property in Brooklyn, a fact Adam did not dispute. What Adam did dispute was Rene's contention that 1) he had purposely failed to disclose to the court that decedent's estate included the corporation and possibly other assets that rendered it too large to be administered as a "small estate" under SCPA Article 13, and 2) he was also unfit to serve because he had "a history of alcohol abuse and has expressed hostility towards petitioner...." According to Adam, he had prepared the application for voluntary administration without the aid of counsel and had incorrectly believed that only the contents of decedent's apartment, with a total value of less than \$30,000, counted for purposes of Article 13. As for the balance of Rene's allegations, Adam unequivocally denied them. In an October 30, 2017 decision and order, the court revoked the certificates of voluntary administration issued to

Adam because the value of the estate undisputable exceeded \$30,000, but did not at that point decide whether Rene or Adam was to be appointed fiduciary pending the outcome of the probate proceeding (see *Matter of Gnatzy*, NYLJ, Nov. 3, 2017, at 22, col 5 [Sur Ct, NY County 2017]).

Based upon the parties' submissions on the instant applications, the only issue in the probate proceeding appears to be Adam's fitness to serve, not the validity of the propounded will and codicil. Since the determination of the fitness issue will occasion a delay, a fiduciary will be required to administer the income-producing real property pending the ultimate determination of whether Adam should be appointed executor. Under these circumstances, the court first must give consideration to Adam's application for preliminary letters testamentary under SCPA § 1412, rather than to Rene's application for letters of temporary administration under SCPA Article 9. The reason is simple. SCPA § 1412 honors the testator's choice of fiduciary, even if only on a temporary basis (see Margaret Turano, *Practice Commentaries*, McKinney's Cons Laws of New York, Book 58A, SCPA 1412 at 427 [2011 ed]; see also *Matter of Haber*, 24 Misc 3d 1239[A] [Sur Ct, Bronx County 2009]).

The court has considered Rene's disputed allegations concerning whether Adam is qualified to serve and does not find them sufficient to require either denial of Adam's application

for preliminary letters, or an initial hearing on Adam's fitness prior to the issuance of preliminary letters (*see Matter of Vermilye*, 101 AD2d 965 [2d Dept 1984]). Joseph, the nominated successor executor who is entitled to half the estate, has consented to Adam's appointment. Rene has not offered any basis upon which to conclude that, pending the outcome of the fitness dispute, his 25% share of the estate would not be protected by Adam's posting of a bond in the amount of that interest, i.e., \$809,000 (SCPA § 1412[5]; *see Matter of Orwasher*, NYLJ, Apr. 16, 2014, at 22, col 3 [Sur Ct, NY County 2014]).

None of the cases cited by Rene, the only beneficiary not named by decedent to occupy a fiduciary role, support his appointment as temporary administrator under the circumstances here. This is so without regard to the serious issues that Adam has raised concerning Rene's fitness to serve. Based on the foregoing, Rene's application for letters of temporary administration is denied and Adam's application for preliminary letters testamentary is granted upon the filing of a bond in the amount of \$809,000. A hearing on the issue of Adam's fitness to serve as executor will be scheduled in due course.

Order signed.

Dated: December 21, 2017

  
S U R R O G A T E