

<b>Matter of Estate of Scott</b>
2022 NY Slip Op 30730(U)
March 24, 2022
Surrogate's Court, Bronx County
Docket Number: File No. 2020-506/B
Judge: Nelida Malave-Gonzalez
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## SURROGATE'S COURT, BRONX COUNTY

March 24 , 2022

ESTATE OF ROBERT SCOTT, Deceased  
File No.: 2020-506/B

This is a contested probate estate where jurisdiction is not yet complete. Kim Wade (the "petitioner"), the decedent's step-daughter, is the nominated executor in the written instrument dated December 21, 2019 (the "will") being offered for probate. Before the court is the petitioner's application to extend her expired preliminary letters testamentary, which is opposed by Lorrie Scott (the "objectant"), one of the decedent's daughters.

The decedent died at the age of 85 on January 30, 2020. His distributees are the objectant, two other daughters and two granddaughters. On June 23, 2020, the petitioner filed her petition to probate the will, along with an application for preliminary letters testamentary. On January 5, 2021, Robin Scott, one of the decedent's other daughters, filed objections to probate alleging, inter alia, lack of testamentary capacity, undue influence and fraud.

The will, which leaves the decedent's entire estate in equal shares to the petitioner and his step-son, Errol Holloway, has an attestation clause and appears to have been drafted by an attorney who supervised its execution. Affidavits pursuant to SCPA 1406 have been filed for the two attesting witnesses.

The estate's primary asset is real property located at 942 East 220<sup>th</sup> Street, Bronx, New York (the realty) with an appraised value of \$550,000. According to the petitioner, the realty's most recent deed, dated September 18, 1997, shows it being acquired by the decedent and his spouse, Rosavelt Scott, as tenants by the entirety. Mrs. Scott, who is the petitioner's mother, predeceased the decedent on August 14, 2016.

On July 31, 2020, the court issued an order granting preliminary letters testamentary to the petitioner. Those letters, which impose SCPA 805(3) restrictions on the realty, expired on January 31, 2021. On July 15, 2021, the objectant filed a cross petition seeking letters of temporary administration. Thereafter, on October 27, 2021 the petitioner filed her "Report of the Preliminary Executrix" with an application to extend her preliminary letters. The objectant filed opposition to this application on November 12, 2021. In response, the petitioner submitted a verified reply, dated March 14, 2022, denying the objections to her appointment as a fiduciary.

In opposition to the extension request, the objectant alleges misstatements and omissions in the preliminary executor's report that understate the estate's debts and fail to account for certain estate assets, including the proceeds of a life insurance policy, an alleged annuity payment, rental income received from a tenant at the realty and real property located in another state. The objectant also raises an issue with the petitioner failing to report that a "fraud action" was brought by the objectant and her sisters

against the petitioner in the Supreme Court

Additionally, the objectant alleges that the petitioner: (i) forged the decedent's signature on a check for \$1,638; (ii) disposed of the decedent's household possessions and family heirlooms without consulting the distributees; and (iii) directed his remains to be cremated, even though it was the family's desire for a burial. Finally, the objectant notes that the petitioner's son improperly accumulated nearly eight thousand dollars in unpaid parking tickets and toll fees while operating the decedent's motor vehicle, which is not listed as an estate asset.

The petitioner replies that she did not exclude any estate assets from her report. Addressing the life insurance policy issue, the petitioner states it was paid to her as the designated beneficiary. The petitioner denies receiving any annuity payment. She continues that no "valuable antiques and family heirlooms" were disposed of, and the basement of the realty was cleaned due to a rodent infestation. Although there is a tenant at the realty, rental income is in arrears, and the ConEdison account for the property for unpaid gas and electric charges is currently \$9,233.12.

According to the petitioner, at present there is no fiduciary to collect rent or commence an eviction proceeding and, in any event, the estate has no liquid assets to pay the utility bills or retain counsel for an eviction proceeding. The petitioner points out that any out-of-state real property is not subject to the administration of this New York estate. As to the petitioner's alleged secrecy regarding the Supreme Court action, she

annexes a copy of the order (Guzman, J.) transferring the matter to this court. Finally, with respect to the decedent's vehicle, the petitioner claims it was a gift from the decedent to the petitioner's son (and has been impounded by New York City). As such, the son's tickets are his own debts, not an estate liability to be reported in the preliminary executor's report.

It is well settled that a testator's selection of a fiduciary is presumptively entitled to great deference (see *Matter of Leland*, 219 NY 387 [1916]; *Matter of Singer*, 2 Misc 3d 665 [Sur Ct, NY County 2003]). It must be implemented absent a statutory ground for disqualification (see *Matter of Simon*, 44 AD2d 570 [2d Dept. 1974], *appl den'd* 34 NY2d 516 [1975]; *Matter of Duke*, 87 NY2d 465 [1996]). This is the case even if the instrument nominating the fiduciary has yet to be probated (see *Matter of Rattner*, 107 AD3d 600 [1st Dept 2013]).

SCPA 1412 allows a nominated executor to obtain preliminary letters testamentary to immediately administer and protect estate assets when the probate of a will may be delayed (see *Matter of Mandelbaum*, 7 Misc3d 531 [Sur Ct, Nassau County 2005]). The purpose of SCPA 1412 is to honor the testator's wishes with regard to the appointment of a fiduciary for his estate, even on a temporary basis, and to reduce the possibility of frivolous pre-probate contests ( (*Estate of Hubbard*, NYLJ, Aug. 25, 1997, at page 30, col 2 [Sur Ct, Bronx County 1997]). Whenever feasible, the court should appoint a preliminary executor rather than a temporary administrator (see *Matter of Graziano*, NYLJ, June 20, 1991 at Pg. 30, col. 6 [Surr Ct,

Bronx County]).

The party alleging that the fiduciary is ineligible to serve bears the burden of proof in this regard (see *Matter of Marriott*, NYLJ, October 10, 2017 at page 32 [Sur Ct, Albany County]) Preliminary letters should be denied to a nominated fiduciary sparingly, and only where there is a clear and strong showing of serious misconduct or wrongdoing that endangers the safety of the estate (see *Matter of Israel*, 64 Misc.2d 1035 [Sur Ct, Nassau County 1970]). Mere speculative or conclusory allegations that a nominated fiduciary is unfit to serve are an insufficient basis to deny preliminary letters (see *Matter of Farber*, 98 AD2d 720 [2d Dept 1983]).

Here, the objections are based on “information and belief” and conclusory. On this state of the record, the objectant has not met her substantial burden of proving, with competent evidence, that the petitioner is unfit to receive preliminary letters testamentary under any of the grounds specified in SCPA 707 or SCPA 711. Moreover, the objectant’s claims do not justify further delaying the issuance of preliminary letters pending a time consuming and costly hearing of issues which would normally be raised and determined in an accounting proceeding (see *Matter of Vermilye*, 101 AD2d 865 [2d Dept. 1984]).

In the absence of a strong showing that there is likelihood of harm to the estate’s assets, the court will not allow the objectant’s opposition to the issuance of preliminary letters testamentary to generate a contest within a contest (see *Matter of Fordham*, NYLJ, Dec. 16, 1998 at page 23,

col. 3 [Sur Ct, Bronx County]). Accordingly, the petitioner's application for an extension of preliminary letters is granted.

This decision constitutes the order of the court directing the immediate extension of preliminary letters testamentary previously issued to the petitioner for a period of six months. The SCPA 805 (3) restrictions imposed upon the realty are to continue. No further extensions will be permitted absent proof that the petitioner has taken all necessary steps to obtain jurisdiction over all necessary parties.

Order signed.

  
HON. NELIDA MALAVE-GONZALEZ  
SURROGATE