

<b>Matter of Zaldivar (Winter)</b>
2022 NY Slip Op 33210(U)
September 20, 2022
Surrogate's Court, New York County
Docket Number: File No. 2020-547/A
Judge: Nora S. Anderson
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SURROGATE'S COURT : NEW YORK COUNTY

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Application of Grace Zaldivar and Esther  
Odorisio for Limited Letters of  
Administration in the Estate of

File No. 2020-547/A

ANTONIA WINTER,

Deceased.

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A N D E R S O N, S.

This is a contested petition for limited letters of administration in the estate of Antonia Winter (SCPA 702). Petitioners Esther Odorisio and Grace Zaldivar ("Petitioners"), decedent's sisters and sole distributees, seek letters in order to investigate and pursue possible claims the estate may have against the estate of decedent's post-deceased companion, Jack Desmond Kramer ("Kramer"). The petition is opposed by Judah Schwartz, Esq., ("Respondent"), the executor of Kramer's estate and the petitioner in a pending proceeding in this court to probate decedent's will dated February 27, 2019. The parties have consented to summary disposition of this petition on the pleadings.

The relevant facts are as follows. Decedent died on December 13, 2019, at the age of 90. In the propounded will, decedent made bequests of \$50,000 to each of the Petitioners and left her residuary estate to Kramer. Decedent nominated Kramer as executor, and her niece, Andrea Zaldivar ("Andrea"), as

successor executor.

In two previous wills, dated July 17, 2008, and July 16, 1999, on file with the court, Petitioners were named as residuary beneficiaries. In the 2008 will, the residuary estate is divided equally among Petitioners and Kramer. In the 1999 will, it is divided equally between the Petitioners, with Kramer named only as a co-fiduciary.

Kramer initiated proceedings to probate the will dated February 27, 2019, but he died on May 3, 2020, before completing jurisdiction. Although nominated as successor executor, Andrea declined to proceed with the probate proceeding because she believes the instrument is invalid due to decedent's lack of testamentary capacity. Accordingly, Respondent, who is the fiduciary of Kramer's estate, has amended the probate petition, asking that letters of administration c.t.a. issue to himself. The probate proceeding is in pre-objection discovery, and Petitioners are expected to contest the will's validity.

Prior to decedent's death, Andrea had commenced an Article 81 proceeding in New York Supreme Court seeking appointment of a guardian for decedent's personal needs and property management, alleging that decedent was unable to care for herself and that Kramer, with whom she lived, was unable to properly care for her and was exploiting her financially. Kramer cross-petitioned, opposing the appointment of a guardian. After a hearing, the

Article 81 court appointed an independent guardian for decedent's personal and property needs, with specific authority to discover and seek turnover of any property rightfully belonging to her. Decedent died before the guardian could fully investigate the allegations of financial abuse. However, the guardian advised the Article 81 court in her final report that decedent had dementia, had been unable to manage her finances for some time prior to February, 2019, and that although Kramer had hindered the guardian's efforts to identify or marshal her ward's financial assets, she had learned from the limited records available to her that Kramer had withdrawn significant funds from decedent's accounts in the year before she died.

Petitioners here seek limited letters of administration in order to initiate litigation to recover assets from Kramer's estate or his distributees which they believe he wrongfully took from decedent. They point out that Respondent, if and when he is appointed as fiduciary of decedent's estate, could not be expected to pursue claims against himself as fiduciary of Kramer's estate.

Respondent opposes the petition on the ground that it is premature. He asserts that the estate has a value of \$650,000. Thus the estate's assets are more than sufficient to pay the \$50,000 bequests to Petitioners under the February 29, 2019, will. He further notes that Petitioners would have an interest

in the outcome of a turnover proceeding only if they were to succeed in their challenge to that will.

Although Respondent alleges that decedent's assets will be sufficient to pay the \$50,000 bequests to Petitioners in the February 27, 2019, will, nothing in the record identifies decedent's assets or liabilities in full. Moreover, if the February 27, 2019, will is denied probate, Petitioners would be entitled to most or all of decedent's estate under the two earlier wills or in intestacy. The record here raises serious concerns about the validity of the propounded will and the possibility that there may be property belonging to the estate which Respondent, as the executor of Kramer's estate, has no incentive to collect.

In view of the time which has already passed since decedent's death and the further delays inherent in a contested probate proceeding, there is a serious possibility that the pursuit of assets belonging to the estate would be barred by statutes of limitations before any inquiry could be made. In circumstances such as this, it is appropriate to appoint a limited fiduciary with the power to pursue claims in favor of the estate rather than risk the extinguishment of such claims (*Matter of Rosasco*, 19 Misc 3d 1109[A], 2008 NY Slip Op 50627[U][Sur Ct, NY County 2008]; see also, *Matter of Davidson*, 177 Misc 2d 928 [1998]). In view of the uncertainty of whether Petitioners will

in fact benefit from this exercise, however, the court does not authorize them to use estate assets in their efforts to recover assets for decedent's estate. If Petitioners are ultimately successful, they can later seek reimbursement from the estate (*Matter of Leach*, 27 Misc 3d 1232[A], 2010 NY Slip Op 51015[U]).

Accordingly, the petition is granted. Letters of limited administration shall issue to Esther Odorisio and Grace Zaldivar, upon their duly qualifying, which authorize them to investigate and pursue litigation to recover assets belonging to decedent's estate.

Settle decree.

A handwritten signature in black ink, consisting of the letters 'WSA' in a stylized, cursive font, positioned above a solid horizontal line.

S U R R O G A T E

Dated: September 20 , 2022