

**Matter of Block**

2023 NY Slip Op 30028(U)

January 9, 2023

Surrogate's Court, New York County

Docket Number: File No. 2017-4425/D

Judge: Rita Mella

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This opinion is uncorrected and not selected for official publication.

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

-----X  
Petition to Compel an Accounting by David Barrett,  
Co-Executor of the Will of

LOIS BLOCK,

Deceased.

DECISION and ORDER  
File No.: 2017-4425/D

-----X  
M E L L A, S.:

Zenovia Qualliotine, in her capacity as sole beneficiary under the will of Lois Block, has petitioned for an order directing her co-executor, David Barrett — who happens to be the attorney who drafted decedent's will — to account (*see* SCPA 2205 [2] [b]). Decedent died on September 27, 2017, at age 71, leaving a \$900,000 estate, the primary asset of which is unsold real property on Fire Island, New York. Petitioner alleges: "Fiduciary Barrett has exclusive custody and control over the money of the estate[,] . . . claims a right to commissions based on the value of the unsold real property," and "refuses to sign the transfer documents to the house to the Petitioner."

Citation, addressed to Barrett, was issued with a June 3, 2022 return day; however, for the reasons explained below, the petition was not submitted for decision until October 7, 2022, four months thereafter.

First Barrett appeared to evade personal service of citation, allegedly instructing the doorman of the building in which he lived and worked to deny the process server access, thus forcing Petitioner to seek, on July 8, 2022, an order authorizing substituted service upon Barrett (*see* SCPA 307 [3] [c] and CPLR 308 [4]). Meanwhile, Barrett demonstrated his awareness of the proceeding in emails to the court and to Petitioner's counsel.

The court authorized substituted service upon Barrett, and a supplemental citation was issued, returnable August 10, 2022. The citation served upon Barrett was accompanied by a “Notice to Cited Parties,” by which he was informed that any intent to object to the petition, any request for oral argument, or any request for an adjournment for the purpose of consulting with counsel must be conveyed to the court, by means of an email, at least three business days before the return day.

Next, Barrett sought a further adjournment. On August 4, 2022, Barrett sent an email to the court, with a copy to Petitioner’s counsel, in which he described various physical ailments, and wrote: “Accordingly, I am requesting a three month [sic] adjournment.”

The court responded with an August 8, 2022 email directed Barrett, which read: “Are you seeking an adjournment to obtain counsel? Do you intend to file any objection to the petition? Please answer these questions, with a ‘Yes’ or a ‘No,’ by responsive e-mail, by 5:00 PM tomorrow, Tuesday, August 9, 2022.” Barrett failed to respond.

Nevertheless, as a courtesy to Barrett, the court issued a scheduling order on August 9, 2022, in which the court adjourned the return day to October 7, 2022, set a September 22, 2022 deadline for the filing of any objection, set a September 23, 2022 deadline for any request for oral argument, and stated that, in the absence of a timely request, the petition would be marked for submission on October 7, 2022. The September deadlines passed without any objection filed or any request for oral argument made.

Nonetheless, after business hours on October 6, 2022, at 6:49 PM, Barrett sent an email to the court, with a copy to Petitioner’s counsel, in which he requested the opportunity to appear at a “virtual” oral argument on the following day in order to oppose the petition. He also called the Miscellaneous Department of this court on October 6, 2022, and, on October 7, 2022, he left

a message at the Law Department of this court, requesting a return call regarding his “appearance” later that afternoon.

Pursuant to the August 9, 2022 order, the petition was marked “submitted” on October 7, 2022. Nevertheless, as a further courtesy to Barrett, the court conducted a conference call that day. During the conference call, Barrett posited that he was entitled to commissions on the unsold real property and to legal fees of \$22,700 in addition to what he has already been paid. He also acknowledged that Petitioner never had access to the liquid assets of the estate.

That Petitioner has not accounted as co-executor does not bar her from petitioning, as she has here, in her capacity as a person interested in the estate (*see Matter of Gangitano*, 1989 NY Misc LEXIS 916 [Sur Ct, Westchester County]). Indeed, to compel her to account as co-executor would serve no purpose: she is the sole beneficiary of the estate, there is no creditor of the estate, and she has assumed no active role in administering estate assets. Therefore, any requirement that she account as co-fiduciary pursuant to SCPA 2205 (2)(h) is waived (*see id.*).

By contrast, to compel Barrett to account as co-executor is “for the best interests of the estate” (SCPA 2205 [1]). The estate funds are within Barrett’s sole control, and he has not distributed the primary asset of the estate.

Accordingly, the petition is granted. David Barrett is directed to account for his acts as co-executor of the will of Lois Block. Given his awareness of the instant petition over the last six months, Barrett shall file his account as co-executor, together with a petition for its settlement, and any other submissions required to obtain the issuance of a citation in the accounting proceeding within 45 days of service upon him of a copy of this Decision and Order with notice of entry. Barrett shall then cause citation to be issued and complete service to be

made without undue delay, on all persons interested in the accounting proceeding pursuant to SCPA 2210.

This decision constitutes the order of the court.

The Clerk is directed to email this Decision and Order to the parties listed below.

Dated: January 9, 2023

  
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SURROGATE

To:

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