

**Matter of Benedek**

2023 NY Slip Op 31431(U)

April 25, 2023

Surrogate's Court, Bronx County

Docket Number: File No. 2019-1371

Judge: Nelida Malave-Gonzalez

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SURROGATE'S COURT, BRONX COUNTY

April 25, 2023

ESTATE OF ZOLTAN M. BENEDEK, Deceased  
File No.: 2019-1371

The decedent died on May 21, 2019, survived by a son, John Benedek (“John”) and a daughter, Catherine Benedek (“Catherine”) as his only distributees. In this proceeding, John petitioned to probate the decedent’s purported last will and testament, dated November 20, 2008 (the “will”). Catherine objected to the application on the sole ground that John is unqualified to serve as the estate’s fiduciary. John then moved for summary judgment seeking, inter alia, to dismiss the objections and Catherine opposed the motion. The matter having been fully briefed, it is now before the court for a decision.

BACKGROUND

**The propounded will**

The will, dated November 20, 2008, is attorney drafted and supervised, and contains an attestation clause signed by two witnesses who also executed an annexed self-proving affidavit. Under the will, the decedent’s predeceased spouse is the named executor. John is the nominated successor executor and Catherine the nominated alternate successor executor.

With the wife’s passing, the will bequeaths the decedent’s entire estate in equal shares to John and Catherine as its contingent beneficiaries. The estate consisted of several financial accounts, a cooperative apartment located in Bronx County and real property in Connecticut which required administration. On August 12, 2019, John obtained

preliminary letters testamentary upon posting a bond for one million three hundred thousand dollars (\$1,300,000). Those letters were thereafter extended on July 22, 2021 and have since expired. According to John's moving papers, the cooperative apartment and the real property in Connecticut have been sold and very little remains to be done administratively to wind up the estate.

### **The Article 81 proceeding**

Prior to his death, the decedent was the subject of a Mental Hygiene Law Article 81 proceeding in Bronx County Supreme Court (the "guardianship proceeding"), wherein John was appointed his property guardian pursuant to an order of Supreme Court Justice Robert T. Johnson, dated June 18, 2018. After the decedent's death John filed a final guardianship accounting and Catherine objected to same. Ultimately, Supreme Court Justice Howard J. Sherman approved the accounting pursuant to a decision, dated September 8, 2020 ("September 2020 decision"), and an order, dated December 14, 2020 ("December 2020 order"), which, inter alia, dismissed Catherine's objections to the account and settled John's account as guardian.

### **Catherine's objections**

In her objections, Catherine contends that John should not be appointed executor because, inter alia, he is ineligible to serve as a fiduciary pursuant to SCPA 707(1)(e) as a result of his dishonesty and want of understanding; his prior history of non-compliance with court orders; and there are alleged conflicts of interest between John and the estate. Catherine's affidavit submitted in support of her objections alleges that during the guardianship proceeding John failed to provide her with initial and annual

reports, and that not only did he file a late, inaccurate and incomplete final report, but he neglected to give her notice of that report's filing. Catherine also claims that John incorrectly stated the decedent had no assets when the guardianship proceeding commenced and omitted at least four known accounts from the final report, thereby misstating the amount of assets held in the guardianship account.

Catherine also references several Charles Schwab accounts held by the decedent with an approximate value of \$1.4 million that she alleges were to be distributed to her and John upon decedent's death, outside of the estate. She asserts that John inappropriately transferred those funds into accounts that require estate administration in an attempt to collect greater commissions. Catherine further contends that John made inappropriate transactions while he held a Power of Attorney for the decedent which included the purchase of an Apple Computer for John's child, thousands of dollars in monthly credit card payments, and significant cash withdrawals from the decedent's accounts. Catherine urges that John will similarly mismanage estate funds and should not be appointed the estate's fiduciary. Catherine's objections request that the court grant the will to probate and disqualify John as a fiduciary and issue her letters testamentary.

**John's motion for summary judgment**

John moves for summary judgment dismissing the objections, admitting the will to probate and appointing him the estate's executor. In his affidavit submitted in support of the motion, John contends that the majority of the daughter's objections and allegations against his qualification to serve as executor relate to the guardianship proceeding. He argues that these allegations were already addressed in prior Supreme Court decisions in the guardianship proceeding, and he points out that Judge Johnson

found him qualified to act as the decedent's Article 81 guardian, notwithstanding Catherine's initial objection to his appointment.

To further his argument, John attaches to his affidavit a copy of the September 2020 decision in the guardianship proceeding. In that decision, Judge Sherman dismissed Catherine's objections to John's final account, finding John's actions as guardian were reasonable and appropriate. John notes that the decision was very detailed, and it directly addressed and dismissed allegations in the guardianship proceeding which, he avers Catherine raises again in this probate proceeding.

Catherine's objections herein specifically assert that John inappropriately used the decedent's funds prior to his appointment as guardian to make purchases for his own son, pay credit card bills and made withdrawals from decedent's accounts. While John reiterates that the decedent made the purchases and the withdrawals and payments for decedent's benefit, he points out that the same allegations were made by Catherine in the guardianship proceeding to challenge his appointment as the decedent's guardian. John contends that the claims were addressed by the court evaluator in her report and found to be no basis for barring John from serving as the decedent's guardian.

Likewise, John also argues that in the guardianship proceeding Catherine asserted her claim that the Charles Schwab accounts were inappropriately transferred. Again, according to John, the court evaluator's report confirmed that these accounts were transferred by the decedent and not by John, and there was no finding that John acted improperly with respect to any of the decedent's funds.

#### **Catherine's opposition to the motion**

In opposition, Catherine submits an affirmation from her counsel as well as

her own supporting affidavit. The attorney affirmation raises additional objections to John's appointment as executor, citing improprieties that he allegedly committed as preliminary executor. Specifically, the affirmation alleges that John inexcusably delayed selling the cooperative apartment, resulting in accrued maintenance and late fees for untimely payments which lead to threatened legal action by the cooperative board of directors. The affirmation further alleges that the decedent had been receiving Holocaust survivor benefits as a form of pension and John failed to notify the provider of decedent's passing and inappropriately collected eighteen months of benefits, totaling approximately \$12,000, which were paid to accounts that John controlled as fiduciary.

Catherine's affidavit in opposition, similar to her objections, primarily addresses issues relating to the guardianship proceeding and alleged inappropriate actions taken by John prior to his appointment as decedent's guardian. Notably, Catherine's affidavit contains approximately 25 paragraphs, with only the last paragraph addressing John's actions as preliminary executor as a reason for his disqualification.

Catherine's affidavit essentially repeats her objections that John committed financial improprieties against the decedent, and it also includes details that she claims only came to her attention after the decedent's death which, she suggests, might have changed the findings of the court evaluator in the guardianship proceeding if they had been considered. Moreover, Catherine's affidavit asserts that John breached his fiduciary duties as a preliminary executor, by (i) paying unnecessary brokerage fees in the sale of the decedent's cottage in Connecticut, and (ii) using estate funds to purchase a speculative stock company where he was employed and this investment subsequently lost over \$35,000. Catherine, however, fails to support any of the affidavit's "new" details or its

allegations regarding improper commission payments or investments with admissible evidence.

**John's reply affidavit**

In reply, John reasserts that the daughter's opposition is almost entirely focused on alleged improprieties that he committed as the decedent's guardian, and those claims were addressed by the prior decisions in the guardianship proceeding. As to the specific allegations regarding his actions as preliminary executor, John first offers that the delay in selling the cooperative apartment resulted from his preliminary letters expiring in February, 2020 and the delays in extending those letters due to the COVID-19 pandemic. John further explains that the maintenance fees for the apartment were initially on "auto-pay" but when his letters expired the account was depleted and he could not cancel the auto-pay or make payments as he no longer had authority. John notes that when the letters were finally extended in July, 2021, he was able to expeditiously sell the cooperative apartment. With respect to Catherine's claims regarding the decedent's reparations checks from the Holocaust fund, John avers that he sent a death certificate to notify the fund of decedent's death, but the checks continued to be paid. He explains that he could not repay the fund with his preliminary letters but will do so once he is issued full letters.

John's reply does not address the allegations as to unnecessary brokerage expenses incurred with the sale of the property in Connecticut or the alleged inappropriate stock purchase. He concludes by urging that he acted appropriately as the decedent's guardian and his actions were approved by the Supreme Court. Moreover, he states that the decedent's real property has been sold and all that remains to administer the estate is for some bills to be paid and the assets to be distributed to himself and Catherine,

equally. He asks the court to dismiss Catherine's objections and appoint him the estate's executor.

### ANALYSIS

Summary judgment cannot be granted unless it clearly appears that no material issues of fact exist (see *Phillips v Joseph Kantor & Co.*, 31 NY2d 307 [1972]; *Glick & Dolleck, Inc. V Tri-Pac Export Corp.*, 22 NY2d 439 [1968]). The movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form to demonstrate the absence of any material issue of fact (see *Alvarez v Propect Hosp.*, 68 NY2d 320 [1986]; *Friends of Animals, Inc. v Associated Fur Mfrs. Inc.*, 46 NY2d 1065 [1979]). When the movant makes out a prima facie case, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (see *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Summary judgment is a drastic remedy which requires that the party opposing the motion be accorded every favorable inference, and issues of credibility may not be determined on the motion but must await the trial (see *F. Garofalo Elec. Co. v New York Univ.*, 300 AD2d 186 [1st Dept 2002]).

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]). 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]). In the same way that courts are

required to exercise the power of removal of a fiduciary sparingly, courts should nullify a testator's choice of executor "only upon a clear showing of serious misconduct that endangers the safety of the estate" (see *Matter of Duke*, 87 NY2d at 473; *Matter of Gottlieb*, 75 AD3d 99 [1st Dept 2010], lv denied 16 NY3d 706 [2011]). Accordingly, a testator's choice of fiduciary is generally respected by courts unless the appointment of the nominated person would put the estate at risk.

Here, the majority of Catherine's objections relate to John's actions when serving as decedent's guardian or before his appointment to this position. Her opposition to John's motion includes additional alleged actions taken by John as preliminary executor. A review of Judge Sherman's September 2020 decision and December 2020 order settling John's account as guardian confirm that the objections filed by Catherine in this proceeding were previously addressed and decided therein. The September 2020 decision specifically addresses the daughter's objections as to John's failure to file accounts, the inaccuracy of his final account as well her allegations that he misappropriated funds. In his decision, Judge Sherman concludes

"[w]ith respect to the guardian's conduct in the discharge of his duties as guardian, including his accounting for all assets marshaled, expended retained in that capacity, such is found to have been appropriate, reasonable, within the scope of his powers granted to him . . . and in the best interest of the [decedent]."

The objections directed at John's actions prior to his appointment and while he was decedent's guardian were raised by Catherine as material issues for the Supreme

Court to consider in the guardianship proceeding. Catherine had a full and fair opportunity to litigate those issues in the guardianship proceeding. Ultimately, the Supreme Court did not decide those issues in Catherine's favor. John was appointed the decedent's guardian and his account was settled. On this state of the record, the court finds that Catherine is collaterally estopped from relitigating those issues in this proceeding(see *Ryan v. New York Telephone Co.*, 62 NY2d 494-501[1984]; *Sun Mei, Inc. v. Chen*, 21 AD3d 265 [1<sup>st</sup> Dept 2005]). Accordingly, her objections are dismissed (see *Matter of Cox*, NYLJ May 6, 2019 [Sur Ct, Kings County 2019] [dismissing objections to appointment of executor finding that allegations as to disqualification had already been adjudicated in guardianship proceeding]).

As for the specific allegations regarding John's conduct as preliminary executor, which were raised for the first time in the daughter's opposition to John's motion, the court finds that Catherine has not met her burden of proof to establish John's ineligibility to serve, as his alleged actions do not rise to the level of disqualification. Initially, the court finds that John provided an adequate explanation, supported by sufficient evidence, for his delay in selling the decedent's cooperative apartment; his late and nonpayment of maintenance fees; and his collection of pension funds that should not have been paid to the estate. Moreover, as the cooperative apartment was promptly sold after John's preliminary letters were extended after delays caused by the COVID-19 pandemic, the court finds his actions related to the apartment are not a basis to disqualify him as a fiduciary.

The allegations that John incurred unnecessary brokerage expenses in selling the Connecticut property and used estate funds to purchase a speculative stock that

lost the estate money are not supported by any admissible evidence and therefore create no triable issues of fact to defeat summary judgment (see *SRM Card Shop, Inc. v 1740 Broadway Assocs., L.P.*, 2 AD3d 136 [1<sup>st</sup> Dept 2003]). Further, as noted above, in deciding whether to nullify a testator's choice of an executor, courts should do so only sparingly and only if the conduct alleged is serious enough that the court believes an estate would be at risk as a result of the appointment (see *Matter of Duke*, 87 NY2d at 473; *Matter of Gottlieb*, 75 AD3d 99 [1<sup>st</sup> Dept 2010], lv denied 16 NY3d 706 [2011]). While the court finds these particular allegations concerning, they are not enough to disqualify John on this record given that the daughter has not provided admissible evidence in support of these allegations and considering that the estate is essentially fully administered and there is a surety bond in place. To be clear, the court is not passing upon whether these alleged actions damaged the estate, as that question should be addressed in an accounting proceeding, where a surcharge may be imposed if actual damages to the estate are established.

### CONCLUSION


The court finds that Catherine has not raised any triable issues of fact as to John's disqualification and no basis is presented for John's disqualification (see SCPA 707). Therefore, John's motion for summary judgment is granted. Catherine's objections are denied and dismissed, and the matter shall proceed as an uncontested probate.

The genuineness of the will and the validity of its execution has been shown to the satisfaction of the Court. Therefore, the will is admitted to probate pursuant to SCPA §1408 and EPTL §3-2.1. Petitioner's counsel is directed to settle a decree on notice consistent with this decision within ten (10) days from the date hereof.

Finally, in light of the unanswered allegations regarding John incurring unnecessary brokerage expenses in selling the Connecticut property and using estate funds to purchase a speculative stock, John is hereby directed to file his account, a petition for its judicial settlement and all of the papers required to obtain the issuance of a citation in the accounting proceeding within sixty days (60) days from the date hereof (see SCPA 2205 [1]). John shall then, without delay, obtain jurisdiction over all of the necessary parties in the accounting proceeding pursuant to SCPA 2210, and shall appear before the court from time to time as required for the purpose of the settlement of his account. No estate distributions shall be made until John's account is settled by the court.

This decision constitutes the order of the court.

Settle decree and proceed accordingly.

  
HON. NELIDA MALAVE-GONZALEZ  
SURROGATE