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Court Decisions
Decisions
Bronx County
First Judicial Department
Surrogate's Court

ESTATE OF PETER **RULLAN**, DECEASED

Surrogate Holzman

ESTATE OF PETER **RULLAN**, Deceased—In this estate, three proceedings are currently pending before the court: (1) a probate proceeding by the decedent's son, the nominated executor and sole residuary beneficiary under the propounded instrument dated March 3, 2005; (2) a cross petition by the decedent's only daughter seeking letters of administration; and, (3) an order to show cause and petition by the son seeking, inter alia, an order revoking the letters of temporary administration that issued to the daughter, enjoining her from disposing of any estate property and compelling her to account, and a decree admitting the propounded instrument to probate and granting him letters testamentary. On consent of the parties, the three applications were restored to the calendar and marked 'submitted.'

The decedent died on April 5, 2008. His only distributees are the son and the daughter. The son commenced the probate proceeding and an initial and supplemental citations issued to the daughter, returnable November 16, 2009 and December 9, 2009, respectively. Thereafter, based on allegations and proof that the daughter could not be served, the son obtained an order, dated February 25, 2010, permitting substituted service on her. Supplemental citations then issued to the daughter, returnable March 22, 2010 and June 28, 2010 respectively; however, to date, no proof of service on the daughter in the probate proceeding has been filed.

By petition filed March 30, 2010, the daughter sought letters of temporary administration asserting, inter alia, that prior to his death, the decedent commenced a medical malpractice cause of action, no amendment or substitution had occurred to date despite assurances by the son and his attorney, and the statute of limitations for the wrongful death cause of action would expire on April 5, 2010. By decree dated April 2, 2010, this court granted the daughter letters of temporary administration, limited by [SCPA 702](#) (1) and, thereafter, the son was served with a citation by the daughter seeking a decree granting her permanent letters of administration.

The son then commenced a proceeding by order to show cause and petition seeking, inter alia, an order revoking the daughter's letters of temporary administration and a decree granting his probate petition. In support he annexed various documents and contends, inter alia, that: (1) the principal asset of the estate is the cause of action commenced by the decedent on February 28, 2008; (2) on March 30, 2010, his attorney wrote to counsel to the daughter noting that they had been unable to serve her in the probate proceeding to date and, if the daughter wanted to assist with the com-

mencement of the wrongful death action, she should provide an address; (3) by complaint filed in the Supreme Court, Bronx County on March 31, 2010, he commenced a personal injury and wrongful death action on behalf of the estate in his capacity as 'proposed executor;' and, (4) in her application for letters of temporary administration, the daughter misrepresented that the statute of limitations was about to expire, she was using fraudulent means to attempt to control the estate, and she should be held accountable for evading process in the probate proceeding and falsely relating facts in her petition for letters of temporary administration.

The daughter opposes the son's order to show cause and petition seeking to vacate her letters of temporary administration, asserting that: (1) the son always knew her address and intentionally failed to serve her with the citation in the probate proceeding; (2) she sought and obtained letters of temporary administration because the son refused to provide information to or cooperate with her when she sought information about the underlying action; (3) since that time, she commenced the underlying action properly, and the son's original and amended complaints, identifying him as 'proposed executor' are a nullity, as the son presently lacks standing to commence or maintain that action; and, (4) based on the son's past actions, which allegedly show he is not qualified to serve as fiduciary, she objects to his appointment as executor. Annexed to the daughter's opposition papers as 'Exhibit A' are her proposed objections to the son's probate petition, which summarily allege fraud, deceit, mistake, undue influence and/or loss of mental capacity of the decedent. To date, the daughter has not appeared, or served and filed those proposed objections, in the son's probate proceeding.

As an initial matter, the branch of the son's application seeking a decree admitting the will to probate and granting him letters testamentary is denied as premature as, to date, jurisdiction has not been acquired over the daughter in the probate proceeding.

Here, each sibling alleges that they have had difficulties with the other. Nonetheless, absent grounds for disqualification, a duly qualified nominated executor is entitled to preliminary letters testamentary to provide for the immediate administration and protection of the assets of the decedent in instances where there may be a delay in probate (see [SCPA 1412](#); [Matter of Haber, 24 Misc 3d 1239 \[A\], 2009 NY Slip Op 51804 \[U\] \[2009\]](#), citing [Matter of Bayley, 72 Misc 2d 312 \[1972\]](#), aff'd [40 AD2d 843 \[1972\]](#), lv denied [31 NY2d 1025 \[1973\]](#); [Matter of Smith, 71 Misc 2d 248 \[1972\]](#)). The clear thrust of [SCPA 1412](#) is to honor the testator's wishes with regard to the appointment of a fiduciary for the estate, even on a temporary basis, and to reduce the possibility of spurious pre-probate contests (see [Matter of Haber, 2009 NY Slip Op 51804 \[U\]](#) supra, citing Turano, Practice Commentaries, McKinney's Cons Laws of NY, Book 58A, [SCPA 1412](#), at 344).

Although the daughter alleges that the son could have properly served her in the probate proceeding as he always knew her address, and that the son failed to provide her with information about the underlying action, she has not demonstrated fraud or undue influence rising to the level of dishonesty which would constitute grounds for the son's disqualification as fiduciary under [SCPA 707](#) (see [Matter of Horton, 255 AD2d 642 \[1998\]](#); [Matter of Haber, 2009 NY Slip Op 51804 \[U\]](#)). Under the circumstances presented, the branch of the son's application to revoke the letters of temporary administration that issued to the daughter is granted. Although the son has not filed a separate application for preliminary letters testamentary, the court hereby deems his pending proceedings to include an application for preliminary letters, limited to pursuing a cause of action for wrongful death and/or personal injury, and grants that limited application. The balance of the son's application, seeking to compel an account from and injunctive relief against the daughter, is denied as the daughter's temporary letters of administration granted her only limited authority pursuant to [SCPA 702](#) (1), and all parties in these three proceedings have alleged that the sole estate asset is the cause of action.

The daughter's cross petition for letters of administration is held in abeyance pending the conclusion of the probate proceeding. In the event that probate is denied, the daughter's cross petition may be restored to the calendar upon two weeks' written notice to the court and the son.

Settle order and proceed accordingly.

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