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ODDITIES AND CHALLENGES IN PROBATE LAW

TACKLE PERSONAL REPRESENTATIVE CHALLENGES GRACEFULLY

A. Pitfalls in Appointment and Authority of a Personal Representative

In New York State the "personal representative" of an estate refers to the Executor (or Executrix) nominated in the decedent's Last Will and Testament or, if the decedent died without a Will, then to the Administrator (or Administratrix) of the Estate, as appointed by the Surrogate's Court from among the decedent's distributees (closest legal heirs). For purposes of this discussion, the Executor or Administrator will be referred to as "the fiduciary".

In either case, the fiduciary may have many shortcomings in terms of the multiple roles that a fiduciary can and must play in the settlement of a decedent's estate. Among these many roles are the following:

1. Business decision-making: The fiduciary must collect and safeguard the assets of the estate. This can involve dealing with bankers, stockbrokers, insurance companies and, in more complicated estates with varied assets, also dealing with real estate brokers, art dealers, auction houses, and valuation experts. There is also the need to deal with creditors of the estate, and to determine whether estate debts are valid, and whether they can be negotiated, settled or disputed. It is very important to note that even though much of the correspondence with these various individuals and entities is facilitated by the estate's attorney, the actual decision-making rests squarely on the shoulders of the fiduciary who, as a matter of law, is responsible for completing these tasks in a timely and diligent manner.

Practice Tip: The estate's attorney should always be cognizant of the fact that poor decision-making by the fiduciary could reflect poorly on, and be blamed on the estate's attorney by the beneficiaries of the Will, or the distributees of the estate. Therefore, if the attorney has serious reservations about business decisions being made

by the fiduciary, such as the timely sale of estate assets, or the maintenance and repair of estate property, he or she would be well advised to send the fiduciary a written statement of such reservations and disagreement, with the recommendation of a different course of action. If these reservations and disagreements are of a continuous and substantial nature, the estate attorney might be well advised to resign as the estate's attorney, lest the fiduciary's improvidence and/or incompetence. cast its long shadow over the attorney's professional status.

2. Dealing with the beneficiaries/distributees of the Estate: In most cases involving the settlement of an estate (except for insolvent estates), there is the tantalizing prospect among the beneficiaries of the Will or the distributees of the intestate (no Will) estate, of receiving money. Once these beneficiaries or distributees are informed of the fiduciary's identity, that individual is likely to be incessantly barraged with telephone calls, letters, and (in these modern times) with e-mails advising the fiduciary of personal emergencies, impending disasters, and the dire need for orthodontia and prom dresses, all of which apparently occurred the day after the decedent passed away. The fiduciary must have strong moral fiber and a stiff backbone to deal with all of these impatient beneficiaries during the pendency of the estate settlement. Adding to the complexity of the situation is that usually the beneficiaries or distributees are family members, so that all of the dynamics of family relationships come into play. In summary, in many cases the fiduciary is not emotionally equipped to deal with impatient beneficiaries of the estate, and it falls upon the estate attorney to deal with these matters.

B. Problems the Removal of a Personal Representative Can Trigger

The removal of the estate's fiduciary is tantamount to a train being derailed, or a general being relieved of duty on the battlefield. The estate's settlement comes to a halt while the successor fiduciary appointed by the Surrogate's Court familiarizes himself or herself with the progress made up to that point, problems that must be addressed, and the proper course to follow towards completion of the estate's settlement.

In the case of the removal or resignation of an Executor named in the decedent's Will, the successor or alternate Executor named in the Will has the first

priority to be the new Executor appointed by the Surrogate's Court. This is due to the fact that the Court gives the highest priority to the successor or alternate Executor chosen by the decedent himself or herself. In the event that there is no successor or alternate Executor named in the Will, or such named individual is unable or unwilling to serve as Executor then the Surrogate's Court, in accordance with Section 1418 of the Surrogate's Court Procedure Act (SCPA) will appoint an "administrator c.t.a." in the following order of priority:

1. The sole beneficiary or, if he or she is dead, then his or her fiduciary;

2. One or more of the residuary beneficiaries or, if any are dead, then his or her fiduciary;

3. If there is no eligible person entitled to letters under subparagraphs (1) and (2) above who will accept, then the Court may issue letters to one or more of the persons interested in the estate or, if any are dead, to his or her fiduciary.

4. If there is no eligible person entitled to letters under the foregoing provisions who will accept, or an appointment of a third party is not made by consent of all the beneficiaries, then letters shall issue to the Public Administrator or, if there is none for the county, then to the Treasurer of the county.

In the case of the removal or resignation of an Administrator appointed by the Surrogate's Court from among the decedent's distributees (closest legal heirs) in accordance with Section 1001 of the SCPA, the Court may grant "letters of administration d.b.n." in accordance with SCPA Section 1007 "to one or more eligible persons and the proceedings to procure such letter shall be the same as upon an application for original letters of administration." (SCPA Section 1007(1)).

SCPA Section 711 governs the removal of a fiduciary by the Surrogate's Court. Among the grounds for removal of a fiduciary are the following:

1. Where by reason of the fiduciary having wasted or improperly applied the assets of the estate, or made investments unauthorized by law or otherwise improvidently managed or injured the property committed to his or her charge or by reason of other misconduct in the execution of his office or dishonesty, drunkenness,

improvidence or want of understanding, he or she is unfit for the execution of his or her office.

2. Where the fiduciary has willfully refused or without good cause neglected to obey any lawful direction of the court contained in any decree or order or any provision of law relating to the discharge of his or her duty.

3. Where the grant of the fiduciary's letters was obtained by a false suggestion of a material fact.

4. Where by the terms of a will, deed or order, the fiduciary's office was to cease upon a contingency which has happened.

5. Where the fiduciary has failed without sufficient reason to notify the court of his or her change of address within 30 days after such change.

6. Where the fiduciary has removed property of the estate without the state without prior approval of the court.

7. Where the fiduciary does not possess the qualifications required by reason of substance abuse, dishonesty, improvidence, want of understanding, or who is otherwise unfit for the execution of the office.

It is important to note that a fiduciary cannot simply resign because he or she wishes to. Pursuant to SCPA Sections 715 and 716, a petition must be presented to the Court for permission to resign, in which the fiduciary enumerates the reasons for seeking resignation. The court order permitting the fiduciary to resign will also specify the appointment of the new fiduciary, as well as a direction for the exiting fiduciary to file a judicial accounting. This is done to ensure that there is a smooth transition of fiduciary authority, and that there is always a fiduciary authorized to act on behalf of the estate.

C. Your First Step after a Personal Representative Resigns

As mentioned in the preceding paragraph, the Surrogate's Court seeks to ensure that there is never a void in fiduciary authority over an estate. If a fiduciary has been permitted to resign, than a successor fiduciary has most likely been appointed by the Court in the same order.

If this is the case, then your first step is to see if you will maintain your employment as the estate attorney. Remember, your client is not the estate; your client is (was) the fiduciary. This is an important distinction, which is treated in greater detail in the section of this seminar dealing with the ethical question of identifying the client.

If there is a new fiduciary, you must see whether he or she or it (in the case of a financial institution) will be retaining your services as the estate's attorney. If so, then a new retainer agreement should be negotiated and executed. If not, then a final bill for services rendered (plus disbursements) should be rendered. If it seems that there will be difficulty in collecting your final fees in this matter, then an application for legal fees should be made to the Court.

Assuming that you will continue as the estate's attorney, then you will be performing invaluable service to the new fiduciary by bringing him or her or it "up to speed" on the progress of the estate, since you are probably the only knowledgeable liaison between the previous work done, and the work still to be done.

If you suspect that there may have been a misuse of estate funds, or negligence in the handling of estate assets, or any other irregularity in the estate's partial settlement by the resigning or removed fiduciary, you as the estate's attorney should advise the successor fiduciary to carefully peruse the required judicial accounting of the outgoing fiduciary (SCPA Section 716). This advice serves and protects the new fiduciary in two ways: (1) to uncover and identify any irregularities in the prior fiduciary's conduct, so that the successor fiduciary cannot be held liable for such conduct; and (2) to serve as a benchmark for assets and their value when collected; income, estate, and fiduciary (estate income) taxes paid; debts and claims paid, resolved, or as yet unresolved; uncollected assets which still need to be collected; and any distributions to beneficiaries or distributees already made.

Another very important aspect of your continuing role as the estate's attorney is to advise the new fiduciary of personal, estate, and fiduciary tax deadlines which may be approaching, insurance coverage (home, business, vacation home, professional liability, "key man" life insurance) deadlines approaching, and repairs

and/or maintenance scheduled or needed on real estate properties, business equipment, or other estate assets.

D. Minimize the Adverse Effects of Disability or Death of a Personal Representative

If you are representing a fiduciary, and it becomes apparent to you that the fiduciary is confronting a serious physical and/or mental disability, or advises you that he or she is facing imminent death, then you must act quickly. You must advise your client, the fiduciary, to petition the Surrogate's Court for permission to resign, so that a successor fiduciary may be appointed in a timely manner, thus ensuring a smooth transition of authority to the successor fiduciary.

It is important to note that in New York State, an executor or administrative cannot delegate responsibility to a third party by executing a power of attorney. The powers granted by the Surrogate's Court to an executor or administrator are considered personal to that individual or entity, and cannot be transferred to anyone else without a court order.

To minimize the adverse effects upon the estate of the disability or impending death of the personal representative, the estate's attorney should urge the fiduciary to turn over copies of the estate checkbook ledger, bank statements, and cancelled checks to the attorney, pending the appointment of a successor fiduciary. Any other "secrets" of the decedent which were divulged only to the fiduciary, such as safe deposit boxes, "hiding places" for assets, or assets without a paper trail (such as foreign bank accounts), should also be divulged either to the attorney, or to someone within the confidence of the impaired fiduciary.

E. Handle the Logistics of Dealing with Out-of-State Personal Representatives

In this age of fax, e-mail and Federal Express, there is simply no difficulty in dealing with fiduciaries who reside outside of New York State. Court documents can be executed and notarized anywhere in the United States, as well as in Canada and Mexico, and will be accepted by the Surrogate's Court. Documents executed in other foreign countries must be signed in the United States Consulate of that country, and witnessed by a consular official with the consulate seal affixed to the document.

An American citizen, or a "green card" holder, may serve as an executor or administrator, regardless of where in the world they reside. A citizen of another country may only serve as an executor or administrator if an American citizen or "green card" holder serves as a co-fiduciary with them.

Documents for the collection of stocks, bonds, or other estate securities which require a "medallion signature guarantee" may be signed and guaranteed anywhere in the United States or abroad by a major bank or brokerage firm that is a member of the "medallion signature guarantee" program.

It is important to remember that regardless of where the fiduciary resides, the estate bank account must be maintained within the State of New York, so that the Surrogate's Court continues to have jurisdiction over the estate monies until final distribution. A violation of this requirement is grounds for removal of the fiduciary (SCPA Section 711(7)).

As a practical matter, the fiduciary may keep the estate checkbook in the location where he or she resides, and send completed and signed checks to the estate attorney as needed. In the alternative, the estate attorney may keep the estate checkbook, complete the estate checks as needed, and send them to the fiduciary for signature and return to the attorney for mailing to creditors, beneficiaries and other parties.

F. How to Control the Wayward Personal Representative

The experienced estate practitioner finds that there are two different situations that may arise in dealing with the "wayward" behavior of a fiduciary. For want of better terms, I will call them "minor" problems and "major" problems.

"Minor" problems usually involve emotional issues that the fiduciary confronts upon becoming a fiduciary. Very often, the fiduciary is handling the estate of a close relative. He or she is in a state of mourning, and finds it very difficult to confront the financial and business challenges of settling a loved one's estate. This often leads to delays in the settlement of the estate, which in turn often leads to arguments with other family members or other beneficiaries who are waiting for their inheritance. The estate's attorney can help the estate proceed to a timely conclusion by taking on many of the fiduciary's ministerial tasks himself or herself.

"Major" problems are another matter. These involve such problems as mismanagement of the estate's assets; the wasting of estate assets due to neglect, lack of repair or lack of insurance; or the missing of tax filing deadlines and payments. Such problems also include conversion of estate assets, self-dealing to the detriment of the estate, and other conflicts of interest with the estate and its beneficiaries. The estate's attorney must carefully and diligently put the fiduciary on notice that he or she does not and cannot condone such illegal behavior, and urge the fiduciary to set things right. In my opinion, the estate's attorney must then seek to resign from representation of the fiduciary. It is very important to note that in the event that the fiduciary is engaged in litigation or other matters where the attorney's abrupt resignation would impair the legal rights and standing of the client and the estate, then the attorney must seek permission from the Surrogate's Court to resign.

I direct your attention to Disciplinary Rule 2-110 "Withdrawal from Employment" which is found in Canon 2 of the Model Code of Professional Responsibility, as promulgated by the American Bar Association. This Disciplinary Rule states that an attorney shall not withdraw from employment until the attorney has taken "reasonable steps" to avoid foreseeable prejudice to the rights of the client, including giving due notice to the client, permitting time for retention of other counsel, delivering to the client all documents and property to which the client is entitled, and complying with any applicable laws and regulations. (DR 2-110 (A)(2)).

Please also note that DR 2-110(C)(1)(b) and (c) state that an attorney shall not request permission to withdraw in matters pending before the Court unless such

request or such withdrawal is because (among other stated reasons) the client "personally seeks to pursue an illegal course of conduct" and/or "insists that the lawyer pursue a course of conduct that is illegal or that is prohibited under the Disciplinary Rules."