

Matter of Kopet

2016 NY Slip Op 32052(U)

September 12, 2016

Surrogate's Court, Nassau County

Docket Number: 2014-378779/F

Judge: Margaret C. Reilly

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**SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

**In the Matter of the Application of Ellen Werther, as
Attorney-in-Fact for Sandra Kopet to Remove David
Gerstein as Executor Under the Last Will and
Testament of**

DECISION & ORDER

**File No. 2014-378779/F
Dec. No. 31610**

HOWARD KOPET,

Deceased,

and to Disqualify Nominated Executors.

PRESENT: HON. MARGARET C. REILLY

The following papers have been considered in the preparation of this decision:

Amended Notice of Motion for Summary Judgment.	1
Affirmation in Support of Motion with Exhibits.	2
Affirmation in Opposition to Motion with Exhibits.	3
Memorandum of Law in Opposition to Motion	4

In this proceeding to remove David Gerstein as the executor of the estate of Howard Kopet and to disqualify the nominated successor executors¹, the petitioner moves the court for an order granting summary judgment; the motion is opposed.

Respondent, David Gerstein, was the decedent’s friend for over 70 years and his attorney for over 40 years. The will nominated both Gerstein and Sandra Kopet, the decedent’s wife, as co-executors. However, Sandra Kopet is now disabled and letters testamentary issued solely to David Gerstein on September 15, 2014. The proceeding to

¹ A proceeding was also commenced to remove David Gerstein as trustee and to disqualify the nominated successor trustees. The parallel motion for summary judgment in that proceeding is being decided simultaneously with this decision.

remove Gerstein and the nominated successor fiduciaries was commenced by Ellen Werther, Sandra Kopet's daughter, in her capacity as Sandra's attorney-in-fact.

By decision and order, dated December 28, 2015, this court granted Ellen Werther's motion to disqualify Gerstein's law firm, Eaton & Van Winkle LLP, from representing David Gerstein in the underlying proceedings seeking his removal as executor.² The summary judgment motion now before the court emanates directly from the court's decision and order disqualifying David Gerstein's law firm from representing him in these proceedings. The affirmation in support of the motion posits that the disqualification of Gerstein's law firm mandates his removal as executor, as a matter of law. The movant asserts that Gerstein's former representation of both the decedent and Sandra Kopet, and the subsequent disqualification of his law firm from representing him, creates an "intolerable" conflict of interest that requires David Gerstein's removal as executor. The court disagrees.

"It is well settled that the testator enjoys the right to determine who is most suitable among those legally qualified to settle his affairs and execute his will and a potential conflict of interest does not warrant the replacement of the fiduciary" (*Matter of Hunter*, 6 AD3d 117, 127 [2d Dept 2004], *affd*, 4 NY3d 260 [2005][internal quotation and citations omitted]). The grounds for removal are those set forth in SCPA §§ 711, 719. "A potential conflict of interest on the part of the fiduciary, without actual misconduct, is not sufficient to render the fiduciary unfit to serve" (*Matter of Palma*, 40 AD3d 1157, 1158 [3d Dept 2007]). Even an

²By decision dated July 28, 2016, the court denied Gerstein's motion to reargue.

actual conflict of interest does not justify the removal of a fiduciary “except where [the] conflict of interest motivates the fiduciary to seek personal advantage and gain at the expense [of] and to the detriment of the estate” (*Matter of Israel*, 64 Misc2d 1035, 1043 [Sur Ct, Nassau County 1970]). Thus, even where a conflict of interest is shown, the testator’s choice of fiduciary may be negated only upon a showing of serious misconduct that endangers the safety of the estate (*see Matter of Duke*, 87 NY2d 465, 473 [1996]) or where the friction between the fiduciary and the beneficiaries is so severe as to interfere with the proper administration of the estate (*see Matter of Rudin*, 15 AD3d 199, 200 [1st Dept 2005]), unless it is the beneficiary who is primarily responsible for the friction (*See Matter of Venezia*, 71 AD3d 905, 906 [2d Dept 2010]).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Even assuming that the movant has established that a conflict of interest exists between David Gerstein (and his legal associates) and Sandra Kopet, the papers do not establish nor even argue that the administration of the estate or its assets are at peril while

Gerstein serves as executor or that any friction for which Gerstein is to blame is preventing the efficient administration of the estate. The movant having failed to make a prima facie showing of entitlement to summary judgment as a matter of law, the court need not even consider the adequacy of the opposing papers (*see Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]).

Accordingly, the motion for summary judgment removing David Gerstein as executor and disqualifying the successor executors nominated in the will is denied.

This constitutes the decision and order of the court.

Dated: September 12, 2016
Mineola, New York

E N T E R:

HON. MARGARET C. REILLY
Judge of the Surrogate's Court

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