

Matter of Delaney

2018 NY Slip Op 32755(U)

September 11, 2018

Surrogate's Court, Nassau County

Docket Number: 2013-375855/B

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 Kimberly A. Delaney
as Administrator of the Estate of John S. Frankowski, Sr.
for the Removal, Pursuant to SCPA § 711, of Annmarie
Porter as Successor Executor and for the Disqualification
of Annmarie Porter and Sandra Roman as Beneficiaries
of the Estate of**

DECISION & ORDER

**File No. 2013-375855/B
Dec No. 34742**

HELEN L. FRANKOWSKI,

Deceased.

PRESENT: HON. MARGARET C. REILLY

The following papers were considered in the preparation of this decision:

Order to Show Cause, dated March 27, 2018.....	1
Affirmation in Support and Exhibits.	2
Affidavit in Opposition.....	3
Affirmation in Opposition.	4
Account.....	5
Addendum to Bring Account Current.....	6
Order to Show Cause, dated May 18, 2015.	7
Verified Petition for Removal of Successor Executrix, Disqualification and Disgorgement of Beneficiaries, Temporary Restraining Order and Preliminary Injunction.....	8
Stipulation of Adjournment, dated June 24, 2015.	9
Order, dated June 28, 2016.....	10

In this proceeding for, among other things, revocation of letters testamentary, before the court is a motion brought on by order to show cause by Kimberly Delaney where she seeks the following relief: immediate suspension of Annmarie Porter as successor executor of the estate of Helen L. Frankowski for her repeated violations of orders issued by the court; staying this action and all actions pending in the court where the estate of Helen L.

Frankowski is a party until this application is adjudicated; permanently removing Annmarie Porter as the successor executor of the estate of Helen L. Frankowski for her repeated violations of orders issued by the court; and appointing Kimberly Delaney as the administrator c.t.a. of the estate of Helen L. Frankowski. The motion is opposed by Annmarie Porter.

The decedent died on June 23, 2013. She was survived by three children: John Frankowski, Annmarie Porter, and Sandra Roman; and three grandchildren, Milton Frankowski, Jr., Mark Frankowski and John Frankowski, children of the decedent's predeceased son, Milton D. Frankowski. John Frankowski post deceased and Kimberly Delaney was appointed administrator of his estate. The decedent's last will and testament dated November 9, 2006 was admitted to probate by decree dated September 5, 2013. John Frankowski died on March 7, 2014 and successor letters testamentary issued to Annmarie Porter on March 25, 2014.

By order to show cause and verified petition, dated May 18, 2015 seeking, inter alia, the removal of Annmarie Porter, the court suspended Annmarie Porter as successor executor and restrained from making any distributions of assets of the estate. By so ordered stipulation dated June 24, 2015, the parties agreed "that the letters of Annmarie Porter be fully reinstated as Successor Executor to prepare and file a formal accounting and that she be further authorized to access and pay up to fifty-thousand dollars (\$50,000.00) of administration costs and expenses, which shall be subject to and part of this Court's review of the final accounting."

Annmarie Porter filed a petition for judicial approval of her account on August 3, 2015 for the period June 23, 2013 to July 8, 2015. The account showed principal charges in the sum of \$845,554.58. The charges were reduced by funeral and administration expenses of \$116,900.13, creditor's claims actually paid of \$20,662.84, distributions of principal of \$36,647.82, and unrealized decreases of \$3,582.91 leaving a balance on hand of \$667,760.88. Disbursements for legal fees amounted to \$48,216.61. Objections to the account were filed on August 11, 2017 and an addendum bringing account current was filed on June 20, 2018. The addendum shows disbursements since August of 2015 of \$198,688.31, of which \$184,202.17 represents payment of legal fees. The total amount of legal fees paid to date amounts to \$232,418.78 which represents approximately 27% of the entire estate.

By order of the court dated June 28, 2016, the law firm of Vishnick McGovern Milizio LLP was disqualified as counsel for Annmarie Porter in the removal proceeding. The amended account shows payments to Vishnick McGovern Milizio LLP from August 2016 through January 2018.

Kimberly Delaney now argues that the successor letters testamentary must be revoked because Annmarie Porter violated court orders. Specifically, she argues that Annmarie Porter, despite having been suspended on May 18, 2015, closed on the sale of real property owned by the estate on May 22, 2015 and paid administration costs and expenses of more than \$198,688.31.

Annmarie Porter, in turn, argues that she was not served with a certified copy of the order to show cause which suspended her and that the administration expenses that she paid

over the \$50,000.00 represented legal fees that her attorneys advised her to pay. She further argues that the administration of the estate is close to being completed and that she will not make any further disbursements.

SCPA § 719 provides that the court may make a decree revoking letters issued to a fiduciary where any of the facts provided in SCPA § 711 are brought to the attention of the court (SCPA § 719 [10]). SCPA § 711, in turn, provides that any interested person can present to the court a petition praying for a decree revoking letters where the fiduciary has “wilfully 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 duty” (SCPA § 711 [3]).

The removal of a fiduciary without a hearing is a drastic remedy. The testator enjoys the right to determine who is the most qualified and his or her “solemn selection is not lightly to be disregarded” (*Matter of Leland*, 219 NY 387, 393 [1916]; accord *Matter of Venezia*, 71 AD3d 905 [2d Dept 2010]). The Surrogate may only remove the fiduciary “where the misconduct is established by undisputed facts or concessions, where the fiduciary’s in court conduct causes such facts to be within the court’s knowledge or where facts warranting the amendment of letters are presented to the court during a related evidentiary hearing” (*Matter of Duke*, 87 NY2d 465, 472 [1996] [internal citations omitted]). Removal will be exercised sparingly and only upon a clear showing of serious misconduct that endangers the safety of the estate (*Id.*).

In the instant proceeding, it is undisputed that the suspended fiduciary was reinstated only to the extent of being allowed to file an account and pay up to \$50,000.00 in

administration expenses. There is also no question that legal fees are considered estate administration expenses (*see Matter of Karl*, 266 AD2d 392 [2d Dept 1999]). Finally, in clear violation of the so ordered stipulation, the fiduciary paid out approximately \$148,000.00 more than she was allowed to pay in administration expenses. This is an unequivocal showing of serious misconduct that endangers the estate, as well as a willful refusal to obey the lawful direction of the court contained in the “so ordered” stipulation of June 24, 2015 (SCPA § 711 [3]).

Accordingly, the motion is **GRANTED**, to the extent that the successor letters testamentary that issued to Annmarie Porter are revoked.

The application to appoint Kimberly A. Delaney as administrator c.t.a. of the estate of Helen Frankowski is **DENIED** without prejudice to commence the appropriate proceeding to be appointed. The remaining relief sought is **DENIED**, as moot.

This constitutes the decision and order of the court.

Dated: September 11, 2018
Mineola, New York

E N T E R:

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

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