

Estate of Pepe

2020 NY Slip Op 34476(U)

December 23, 2020

Surrogate's Court, Bronx County

Docket Number: 2016-2139

Judge: Nelida Malave-Gonzalez

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SURROGATE'S COURT, BRONX COUNTY

December 23, 2020

ESTATE OF MARIE PEPE, Deceased
File No.: 2016-2139 and 2016-2139/A - B

In this contested estate in which the only issue is the selection of a fiduciary, currently pending are cross petitions filed by two sons of the decedent: Steven, the nominated alternate executor under the decedent's will dated May 5, 1993, and Thomas, who seeks the appointment of the Public Administrator as administrator c.t.a. The court previously denied Steven's summary judgment motion seeking to dismiss Michael's objections to his cross petition (see Matter of Pepe, NYLJ, Jan. 2, 2019 at 22, col 1 [Sur Ct, Bronx County 2019]). The decedent's distributees are his four children. Distribution under the propounded instrument is the same as in intestacy. Michael, a third son who is the nominated executor under the instrument, was previously disqualified to serve as the fiduciary (see Matter of Pepe, NYLJ, Mar. 5, 2018 at 19, col 3 [Sur Ct, Bronx County 2018]). A daughter Linda, previously consented to Steven's application and now consents to the appointment of the Public Administrator. The parties refuse to engage in

mediation.

After Michael filed objections to Thomas' application, the court directed a conference pursuant to SCPA 1411, at which Thomas and Michael appeared with counsel, Steven and Linda appeared pro se, and counsel for the Public Administrator also participated. At that time, the four children indicated that Michael continues to reside at a two-family home owned by the decedent which is the only estate asset, there is a tenant who may or may not be paying rent, there are ongoing expenses to maintain the realty and the estate is illiquid. All of the children except Michael agreed that the realty should be sold as expeditiously as possible so that they may receive their bequests. At a subsequent conference held with a Court Attorney-Referee attended by the parties and counsel, although Michael's attorney stated that he was going to file a motion seeking to reargue the court's decision and order disqualifying his client, no such motion has been filed to date. Thereafter, the Public Administrator consented to serve as temporary administrator or receive full letters and market the realty. Although the court issued a scheduling order directing, inter alia, that all documents in further support of or in opposition to the cross petitions filed by Steven and Thomas were to be served and filed on or before September 25, 2020 and both proceedings were to be marked "fully submitted for determination", no additional documents have been filed to date other than a document submitted by Steven which states that he consents to the appointment of the Public Administrator which is not notarized or in the

proper format. Although it appears that Steven no longer wants to serve, his cross petition seeking to be appointed executor will be addressed below.

Generally, a testator's wishes regarding the appointment of a fiduciary will be honored unless there are serious and bona fide allegations of misconduct or wrongdoing (see *Matter of Alfano*, NYLJ, May 29, 2001 at 9, col 6 [Sur ct, Nassau County 2001]; *Matter of Fruchtman*, NYLJ, Nov. 28, 1997, at 35, col 1 [Sur Ct, Kings County 1997]). Where there is a clear showing of misconduct or wrongdoing, the court can decline to appoint the nominated fiduciary on the ground that the dishonesty renders him ineligible (see SCPA 707 [1] [e]; *Matter of Duke*, 87 NY2d 465, 473 [1996]; *Matter of Gottlieb*, 75 AD3d 99 [1st Dept. 2011], lv denied 16 NY3d 706 [2011]).

The disharmony and hostility among the four children is palpable. Michael remains entrenched at the premises, to the exclusion of the other three children, does not pay use and occupancy or have the means to purchase the property from the estate. He also collected rents from the tenant without authority and failed to account for the same. Steven admits to resorting to "self-help" to offset Michael's occupancy and rent collections by collecting \$43,000 in rents, also without authority, and distributing them to himself, Linda and Thomas. The court finds that the disharmony rises to the level such that it jeopardizes the interests of all of the beneficiaries and the proper administration of the estate (see *Matter of Beharrie*, 84 AD3d 1227, 1229 [2d Dept 2011]; *Matter of King*, NYLJ, Jan. 11, 2013 at 23, col 2 [Sur Ct, Bronx County 2013], *Matter of Rad*, 162 Misc 2d 229 [Sur Ct, New

York County 1994]). Accordingly, on this state of the record, including that the court has already disqualified Michael and that the document submitted by Steven which attempts to consent to the appointment of the Public Administrator, that it appears that he no longer wants to serve as executor, the application to appoint the Public Administrator as administrator c.t.a. is granted, and Michael's petition and Steven's cross petition are dismissed.

The court is satisfied that the testator executed the will dated May 5, 1993 in its present form in compliance with the statutory requirements and that, at the time of its execution, the testator was competent to make a will and was free from restraint. Accordingly, the will dated May 5, 1993 is entitled to be admitted to probate and the court finds that it is in the best interest of the estate and the beneficiaries to appoint a fiduciary other than the nominated executors with authority to not only take appropriate steps to marshal and sell the realty but also to administer the estate and grants Thomas' cross petition (File No. 2016-2139/B), to the extent that letters of administration c.t.a. shall issue to the Public Administrator upon duly qualifying therefor (see Matter of Kaufman, 137 AD3d 1034, 1035 [2nd Dept 2016], lv denied 28 NY3d 908 [2016]; Matter of Mandelbaum, 7 Misc 3d 539 [Sur Ct, Nassau County 2005]; Matter of Cavallo, NYLJ, Dec. 21, 2001 at 25, col 2 [Sur Ct, Richmond County 2001]). Although the Public Administrator has the authority to market and sell the realty in whatever manner she deems advisable (see SCPA 1123 [1]; EPTL 11-11.1 [b] [5] [B]), she may thereafter serve and file an appropriate application seeking the appointment

of an independent appraiser and broker for the realty.

This decision constitutes the order of the court dismissing Michael's petition (File No. 2016-2139) and Steven's cross petition (File No. 2016-2139/A) respectively seeking to be appointed executor. Michael and Steven are directed to turn over all records pertaining to the estate and any assets in their possession or control including, inter alia, all rents and security deposits to the administrator c.t.a, within thirty days of the date of the decree to be entered hereon as well as grant access to the premises as directed by the fiduciary to effectuate its marketing and sale.

Settle decree and proceed accordingly.


HON. NELIDA MALAVE-GONZALEZ
SURROGATE