New York Law Journal

Dishonesty as Grounds to Deny Qualification or Remove a Fiduciary

By **Bruce M. DiCicco**

The Surrogate's Court Procedure Act §707 provides that letters may be issued to any "natural person or to a person authorized by law to be a fiduciary." This grant of fiduciary power contains exceptions. Section 707(1)(e) specifically excludes any person who possesses such traits as "substance abuse, dishonesty, improvidence, want of understanding, or who is otherwise unfit for the execution of the office from acting as the fiduciary." Exclusions for improvidence was the subject of my last article.[1]

In terms of the types of petitions being brought, dishonesty has been the subject of numerous court decisions over the years but is greatly misunderstood. This article discusses the standard for showing dishonesty, refinements to the meaning of dishonesty, the standard for proof applicable to such findings and the procedure necessary to make such a finding.

As far back as 1911, the oftencited seminal case *In re Latham*, 145 App. Div. 849, 130 N.Y.S. 535 (1st Dept. 1911) established the meaning of "dishonesty" under the statute. The Latham court limited the meaning to:

> Dishonesty in money matters from which a reasonable apprehension may be entertained that the funds of the estate would not be safe in the hands of the executor.

More recent cases have consistently used the "Latham Standard" as the point of departure in analyzing requests. See for example, *Estate of Blanche Wolther*, New York Law Journal, Nov. 10, 1997, (Nassau Cty., Surr. Radigan); *Estate of May Tannenbaum*, New York Law Journal, Aug. 21, 2007, p. 38, col. 2 (Kings Cty., Surr. Lopez-Torres), *Estate of Mathai*, New York Law Journal Jan. 13, 2015, p. 32, col. 2 (Richmond Cty., Surr. Gigante). It is interesting to note that in *Latham* the Appellate Division, First Department, actually found that the conduct of the nominated executor was not dishonest and suggested that requiring a bond would have alleviated any concerns the lower court had with regard to the appointment rather than denying the choice of fiduciary to the decedent.[2] The bond alternative has been cited subsequently by courts as the appropriate remedy. See *Estate of Lorraine P. Haimes,* New York Law Journal, Oct. 7, 2014 p. 29, col. 1 (Suffolk Cty., Surr. Czygier).

Six years after *Latham*, supra., in *Matter of Haag's Will,* 99 Misc. 164, 165 N.Y.S. 401 (Bronx Cty., Surr. Schulz), aff'd, 178 A.D. 895, (1st Dept. 1917), Surrogate George Schultz further refined the meaning of "dishonesty." There the attorney for Fredericka Haag allegedly commingled her funds while acting as her representative. A committee[3] for Haag (as the result of her intervening incapacity) brought a lawsuit seeking the return of funds wrongfully acquired by the attorney.

> Dishonesty has been the subject of numerous court decisions over the years but is greatly misunderstood.

A referee in the lawsuit had ordered the attorney to account, which he did not do prior to the death of Haag. The attorney countered with the fact that the account was not due as the result of the death and concomitant dismissal of the lawsuit. The surrogate found that the nomination of the attorney should not be set-aside on the ground of "dishonesty" even if the commingling were proven.

The Haag court held that indebtedness to the estate by the proposed executor was insufficient as the sole ground for disqualification based on "dishonesty." The court cited the earlier case *In re Bennett's Will*, 60 Misc. 28, 112 N.Y.S. 592, at 593 (1908), wherein the Surrogate's Court, Kings County, observed that "[o]pportunity to sin is not the basis for a finding of fact that sin is to be expected."[4] The court thus established that conflict of interest alone, i.e., the fiduciary being indebted to the estate he or she serves, does not constitute "dishonesty" as used in the statute justifying denial of letters. See for example, *Estate of Raffaele Lupoli*, New York Law Journal, Sept. 20, 2001, p. 27, col. 5, (Queens Cty., Surr. Nahman), *Matter of Shaw,* 186 A.D. 2d. 809 (2d Dept. 1992), *Matter of Marsh*, 179 A.D. 2d. 578 (1st Dept. 1992), *Matter of Juelich*, 81 A.D. 2d. 919 (2d Dept. 1981), *Matter of Foss*, 282 A.D. 509 (1st Dept. 1953) all holding that it is actual misconduct, not conflict of interest, that justifies removal of the named fiduciary.[5]

In *Estate of Michael J. Stewart*, New York Law Journal, Oct. 1, 2003 p. 28, Col. 4 (Kings Cty., Surr. Harkavy) the nominated fiduciary was the sole beneficiary under the will. Shortly after the collapse of the World Trade Center in which the decedent lost his life, the fiduciary-beneficiary transferred $40,953 from the decedent's savings account into his checking account and then drew a check payable to herself for $45,000 which she then deposited into her own account. The Surrogate's Court, Kings County, held that these circumstances did not constitute "dishonesty."

The court also noted that the actions of the nominated fiduciary occurred after the death of the decedent and thus could not form the basis of a disqualification proceeding but rather should be addressed in a discovery proceeding or in an accounting proceeding.

In *Estate of Shirll Stanley*, New York Law Journal, Oct. 18, 2005, p. 30, col. 2 (Queens Cty., Surr. Nahman), the deposit by the nominated administrator of estate funds into his personal bank account with the knowledge of the objectant was insufficient to » Page 7

BRUCE M. DICICCO *is an attorney in Manhattan.*

Dishonesty

« Continued from page 4

disqualify on the grounds of dishonesty. The court stated that:

> It is settled that to accomplish disqualification on this ground an isolated act of wrongdoing is insufficient and that there must be showing a tendency or habit of mind toward wrongful action. Citing *Emerson v. Bowers,* 14 New York 449 (1856).[6]

In *Stanley*, id., the executor was illiterate and admitted applying $2,000 of the monies of the trust estate to his own account which he had received from his agent or attorney. The executor assigned a lease he owned as security to cover the amount he received improperly from the estate.

The Surrogate's Court, Queens County, drew a distinction between acts of negligence versus abuse in a fiduciary capacity explaining that there must be "a habit of mind and conduct which become a part of the man and that renders him generally and under all ordinary circumstances unfit for the trust of employment in question." The court pointed out that the executor may have misbehaved himself but that does not necessarily mean he lacks the general qualities of mind and conduct as to render him unfit to be entrusted with the office for which the testator selected him. The court noted that the remedy would be for mismanagement of estate property, not removal of the chosen fiduciary.

In *Estate of Michael Walsh*, New York Law Journal, July 26, 2007, p. 29 (Richmond Cty., Surr. Fusco) the nominated executor did not offer a will in his possession for probate but rather sought letters of administration. The absence of a will would have benefited the nominated executor financially so his withholding mattered. The Surrogate's Court, Richmond County, held that the dishonest conduct in financial matters must be so characteristic of the nominee that the estate funds would not be safe. The withholding of the will was insufficient, according to the court, to meet the "characteristic" standard. It would not be incorrect to conclude that the opportunity for sin must ripen into sinfulness in repeated instances in order to reach the "dishonesty" plateau now well established by our common law.

Removal Granted

By way of contrast, acts falling within the realm of statutorily proscribed dishonest behavior were present in *In re Sperrle,* 47 Misc.2d 1084, 264 N.Y.S.2d 93 (Richmond Cty., Surr. Paulo 1965). In *Sperrle*, the nominated co-executor made pencil changes to the decedent's will that while erased, were still visible. The changes would have had the effect of increasing the share of the estate for that co-executor. The court found a breach of the standard of dishonesty set forth by *Latham*, because the change indicated a dishonest intent to divert estate funds even though a single act.

In *In re Pullman,* 89 A.D. 2d 608, 452 N.Y.S.2d 456 (2d Dept. 1982), an applicant for preliminary letters testamentary was found to be ineligible due to finding (1) that he exercised undue influence over the decedent in the execution of three deeds which were signed the same day as the will, (2) in a prior action it was determined that he commingled trust funds, (3) there were no less than 13 unsatisfied judgments against the nominated executor in the state of New Jersey. The fourth factor mentioned was that the nominated preliminary executor was in debt to the estate in the amount of $65,137 which seems to confuse the issue but the case can be read for the accumulation of factors as constituting dishonesty and could be useful in using indebtedness as a factor, but not the only factor, in seeking removal based on dishonesty.[7]

In *In re Cullen,* 163 Misc. 410, 297 N.Y.S. 280 (N.Y. Cty., Surr. Delehanty 1937), one of the co-executors had exerted what was found in a prior proceeding at trial to have unduly influenced the decedent to leave the estate to himself in a will executed within hours prior to death. The presence of proven undue influence was found to be enough to disqualify him on grounds of dishonesty. The court stated:

> Dishonesty, unlike embezzlement or larceny, is not a term of art. Even so, the measure of its meaning is not a standard of perfection, but an infirmity of purpose so opprobrious or furtive as to be fairly characterized as dishonest in the common speech of men.

In *Matter of Cohen,* 164 Misc. 98 (Kings Cty., Surr. Wingate 1937) aff'd. 254 A.D. 571 (2d Dept. 1938) one of three nominated co-executors (i) falsely represented to a customer of his employer that he was authorized to collect a debt of $25, (ii) received the sum, (iii) forged his former employer's name to a receipt, (iv) as a result of which he was convicted of the crime of petty larceny that was a misdemeanor but not a felony, (v) committed perjury in that he alleged under oath before a duly authorized clerk of the court that he was a person competent to act as surety upon an undertaking filed in the matter and (vi) was referred by the court to the district attorney following which he was indicted for the crime of perjury and was awaiting trial at the time of the application for letters. The court did not appoint him based on "dishonesty" being a habit of mind and a tendency toward such behavior in this person.

The court noted that if acquitted of the perjury he would, however, then be appointed. Surrogate George Wingate in *In re Canter*, 146 Misc. 123, 261 N.Y.S. 872 (Kings Cty., Surr. Wingate 1933) held that a single act of dishonesty resulting in a felony conviction (in this case defrauding the U.S. government) would not constitute "dishonesty" since isolated behavior did not indicate "dishonest habits of mind." In the case the criminal conviction occurred long before the drafting of the will in which he was nominated to act so this may be an important fact to consider as well. The cases perhaps draw fine lines but they are helpful points from which to depart in evaluating whether or not one should seek disqualification.

Acts Independent of Estate

The courts have similarly addressed the issue of whether acts not directly affecting the decedent's estate should be a basis for disqualification for "dishonesty" because they nonetheless would imperil the funds of the estate. The court in *In re Linder*, New York Law Journal, Dec. 4, 1987, p. 13, col. 3 (Bronx Cty., Surr. Ostrau) denied the petitioner letters of administration. The petitioner was the wife of the decedent, but had little to do with him after the first year of marriage. The petitioner was found to have concealed her marital status in connection with her application for public assistance as well as her failing to inform the Department of Social Services of address changes. Moreover, she submitted a false Social Security number on both her employment record and health insurance applications. The court held such actions showed a "pattern of dishonesty and deceit" sufficient to disqualify her.

In *In re Ventricelli*, New York Law Journal Aug. 16, 1988 p. 19, col. 4 (Bronx Cty., Surr. Holzman) a surviving spouse who petitioned for letters was disqualified due to a $25,000 discrepancy in the books of a nursery school partially owned by the decedent and operated by the petitioner. The court took further displeasure with the use of funds and a checking account of the corporate employer for personal purchases. The petitioner, moreover, provided her sister with

Far too many unsuccessful cases have been brought challenging the appointment of a fiduciary due to a failure to appreciate the Latham Rule of deference to the nomination made by a decedent and undervaluing the steep hurdle that it presents to objectants.

a salaried position requiring little work and paid another employee of the corporation "off the books" all of which showed dishonesty in money matters that would imperil the estate according to the surrogate.

Standard of Proof

In *Estate of Jesse G. Silverman*, New York Law Journal, Jan. 19, 1995, p. 31, col. 3 (Richmond Cty., Surr. D'Arrigo) and in *Estate of Elizabeth Pond, a/k/a Elizabeth B. Pond*, New York Law Journal, May 2, 2002, p. 27, Col. 6 (Suff. Cty. Surr. Czygier) the court stated that the proof required to set aside the nomination of a fiduciary must be "relatively strong." Grounds for ineligibility must be proved and will not be inferred. *Estate of Michael Walsh*, supra., citing *Matter of Reide,* 138 A.D. 83 (1910).

In *Matter of Tannenbaum*, supra., the court rejected an objection to appointment on the grounds of dishonesty that were set forth in a letter the court treated as a verified answer without further proof being offered. The objectant acting pro se had not requested a hearing subsequent to the filing of the answer so the court denied the request for disqualification because there was no proof submitted. There is, furthermore, no right to a jury trial. *Matter of Krom's Estate* 86 A.D. 2d 689 (App. Div. 3d. Dept. 1982).

Conclusion

In *Matter of Latham*, the court laid down the rule "To refuse to grant letters to an executor named in a will is no light matter and can be justified only upon the grounds stated in the Code. Unless the case can be brought within the letter and spirit of the statute the Surrogate has no discretion to refuse letters." In the author's view, far too many unsuccessful cases have been brought challenging the appointment of a fiduciary due to a failure to appreciate the Latham Rule of deference to the nomination made by a decedent and undervaluing the steep hurdle that it presents to objectants.

Conflicts of interest, while potential, are not a basis for a finding dishonesty. The dishonesty must also be in money matters that affect the estate or will likely affect the estate, and a single act of dishonesty may not even be enough to remove the chosen person, it must rise to the level of being a characteristic or habit of the nominated individual. It should also be remembered that allegations with regard to dishonesty must be substantiated so a hearing should always be requested if there are issues of fact.

Pending criminal charges involving dishonesty, until proven, will furthermore not be enough without other acts showing a history of such bad conduct to deny the appointment. The standard of proof in removal proceedings is the "relatively high" or "relatively strong" standard and should be practically evaluated before bringing questionable cases to court. Many of the grievances thought to exist in acquiescing to the appointment of a nominated fiduciary often can be addressed by bonds or in the accounting proceeding.

1. New York Law Journal Oct. 23, 2015.

2. In *Latham* the nominated fiduciary requested customer lists from the business of the decedent at which he was employed and used the lists to solicit customers for his subsequent employer company. He later contacted all the customers of the company of the decedent and clarified that he did not intend for any of them to leave the company of the decedent if they were not so inclined. The court found that these actions were not dishonest in that they were all accomplished above board and with knowledge of the company owned by the decedent.

3. Currently known as guardians.

4. In that case the nominated executors held the estate for the benefit of their children as remainder beneficiaries to which the next of kin of the decedent objected on the apparent grounds of a temptation to be dishonest.

5. The rationale in these cases is that the aggrieved party has a remedy in the accounting proceeding if the conflict of interest operates to their disadvantage and all petitions should be evaluated with this question in mind—Is there a remedy in the accounting proceeding?

6. Interestingly, *Emerson v. Bowers* involved a reversal of a finding of improvidence but whether the grounds be improvidence or dishonesty the concept expressed in the case appears to be equally applied.

7. The nominated preliminary executor had been convicted of a felony but received a "Certificate of Relief from Disabilities" causing the surrogate to conclude that Letters were prohibited. The Appellate Division ruled that there was no cause to deny letters where a certificate was obtained.