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Improvidence as a Ground to Challenge Qualifications or Remove a Fiduciary

By **Bruce M. DiCicco**

Based on the regularity of cases published in this newspaper it appears the desire to remove a fiduciary and/or challenge the qualifications of a fiduciary is one of the most, if not the most, common subjects of litigation in the Surrogate's Court. The vast majority of the cases result in the petitioners being denied their request for removal or appointment. Of course the problem is not with the skill and acumen of the members of the New York bar; rather, the problem lies in the necessarily vague terms of the statute governing removal and eligibility to receive letters. This article will address "improvidence" as a ground for denial of letters or removing a fiduciary.

The Surrogate's Court Procedure Act §711 (8) (SCPA) provides for removal as follows:

> Where he or she does not possess the qualifications required of a fiduciary by reason of substance abuse, dishonesty, *improvidence*, want of understanding, or who is otherwise unfit for the execution of the office. (emphasis supplied).

SCPA 707-1.(e) also provides for ineligibility for appointment as follows:

> One who does not possess the qualifications required of a fiduciary by reason of substance abuse, dishonesty, *improvidence*, want of understanding, or who is otherwise unfit for the execution of the office. (emphasis supplied).

Choice of Fiduciary

At the outset we must be aware of the well-settled legal principle that a testator's choice of a fiduciary is not to be lightly disregarded as this presents a high hurdle in removal or disqualification cases and is routinely set forth as a point of departure by the courts. See *Matter of Duke*, 87 N.Y.2d 465, 473 (1996); *Matter of Leland*, 219 N.Y. 387, 393 (1916).

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

It has also been well established in the law that the choice of the testator will not be nullified unless there is a clear showing of misconduct which endangers the safety of the estate. *Matter of Vermilye*, 101 A.D.2d 865 (1984); *Matter of Israel*, 64 Misc.2d 1035, 1043, 315 N.Y.S.2d 453 (Surrogate's Court Nassau Cty., Surr. Bennett 1970); *Estate of Gloria S. Fordham*, NYLJ, Dec. 16, 1998, (Bronx Cty. Surr. Holzman) citing *Matter of Israel*, 64 Misc.2d 1035, 1043, 315 N.Y.S.2d 453 (Nassau Cty., Surr. Bennett); *Matter of Duke*, 87 N.Y.2d 465 (1996); *Matter of Farber*, 98 A.D.2d 720, 469 N.Y.S.2d 126 (2d Dept. 1983).

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A person alleging improvidence also has the burden to prove it by a fair preponderance of the evidence. *Estate of Michael J. Stewart*, NYLJ, Oct. 1, 2003, p. 28, col. 4 (Kings Cty., Surr. Harkavy); *Matter of Krom*, 86 A.D.2d 689, 690, 446 N.Y.S.2d 522, (App. Div. 1982); *In Re Mecko's Will*, 70 N.Y.S.2d 41, 47 (Broome Cty. Surr. Ct. 1947).

According to the Kings County Surrogate's Court in *Estate of Concetta Randazzo*, improvidence is much more than mere inexperience or ignorance of the law, particularly where the assistance of competent counsel is at hand. It is, rather, a fundamental inability to discharge the duties of the office, whether by reason or mental defect or disability, or lifelong inability to deal effectively with business matters or otherwise. Improvidence, said the Randazzo court, refers to habits of mind and conduct which became a part of the man, and render him generally, and under all ordinary circumstances, unfit for the trust or employment in question. *Estate of Concetta Randazzo*, NYLJ, Sept. 29, 1994, p. 31 (Kings Cty., Surr. Bloom), citing *Matter of Leland*, 219 N.Y. 387 (1916); *Matter of Flood*, 236 N.Y. 408, 411 (1923), citing *Emmerson v. Bowers*, 14 N.Y. 449, 454 (1856); *In re Stege's Estate*, 164 Misc. 95, 299 N.Y.S. 115 (Broome Cty., Surr. Cooke).

The term improvidence wants of precise meaning and has been defined as that which would be likely to render the estate unsafe and liable to be lost or diminished. *Estate of Elizabeth Pond a/k/a Elizabeth B. Pond*, NYLJ, May 2, 2002, p. 27, col. 6 (Suffolk Cty., Surr. Czygier) citing I*n Re DeBelardino's Estate*, 77 Misc.2d 253, 352 N.Y.S.2d 858 (1974), aff'd 47 A.D.2d 589, 363 N.Y.S.2d 974 (1975); *Estate of Ellen Piterniak*, NYLJ, Oct. 10, 2003, p. 26, col. 4 (Suffolk Cty. Surr. Czgier).

Type of Conduct

In *Randazzo*, the primary grounds for denial of preliminary letters to the nominated executor who was a school teacher, were failure to timely file estate tax returns, failure to timely apply for preliminary letters, and failure to timely collect $275,000 of bonds. With regard to the estate tax returns, the petitioner was unaware of the requirement to file the returns but did file the income tax returns for the decedent with which she was familiar. With regard to the bonds, the decedent died April 9, 1991 and attempts at stop orders on payment of the bonds still were not obtained in November 1993 due to the fact that the fiduciary was acting de facto rather than obtaining preliminary or full letters.

The fiduciary then changed lawyers and obtained preliminary letters but not before some of the bonds had been purloined. Upon discovery of the apparent theft, new counsel for the nominated fiduciary sought and » Page 8

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obtained a restraining order to protect the remainder of the bonds.

The conduct of the petitioner seems rather poor, yet it did not result in removal. The court noted that this was not a case where the proposed fiduciary is a legatee unrelated to the decedent who receives the bulk of the estate to the exclusion of the spouse and child of the decedent or a case where the testator has given fair indication of a belief that the proposed fiduciary lacks the required requisite qualifications by leaving his entire legacy in trust.

Both comments highlight the weight given to the choice of fiduciary and the circumstances of the appointment. They signal that fiduciary choices will not be undone even by choosing less than optimal legal counsel that could result in a loss to the beneficiaries. The poor or erroneous counsel given to the fiduciary by the attorney excused what might have otherwise been improvidence had there been no lawyer involved.

Moral Failings?

In *Estate of Michael J. Stewart,* NYLJ, Oct. 1, 2013, p. 28, Col. 4, Kings Cty. (Surr. Harkavy) the nominated executor lived with the decedent who died in the World Trade Center disaster. The decedent had left pre-signed checks with instructions that the person (also nominated as the executor) use them in case of emergency. The executor did so immediately after the tragedy and removed $45,000 of the funds belonging to the decedent in his own name and deposited them to her own account. Objections to her nomination as executor included improvidence.

The court stated, "Improvidence wants of precise meaning, and has been defined by cases as that which would be likely to render the estate unsafe and liable to be lost or diminished." Citing *Matter of Badore*, 73 Misc.2d 471, 341 N.Y.S.2d 970 (Franklin Cty., Surr. Lawrence 1970); *Matter of Ferguson*, 41 Misc. 465, 84 N.Y.S. 1102 (Kings Cty., Surr. Church 1903). "Improvidence exists when it pervades one's moral fiber and renders one generally, under all ordinary circumstances, unfit to act as a fiduciary," said the court citing *In Re Murdoch*, 22 Misc.2d 168, 196 N.Y.S.2d 891 (Richmond Cty., Surr. Boylan 1969).

The court held that improvidence had not been established since the issue of whether the funds belonged to the estate or were embezzled by the nominated executor would be one properly raised only in a discovery proceeding and not in a challenge to the appointment. So one parameter emerges in evaluating improvidence, namely, that disputes as to ownership of funds would not lead to a finding of improvidence. But where the nominated co-executor attorney transferred funds pursuant to a power of attorney to joint accounts in his name after having obtained the original power of attorney document under false pretenses from the attorney draftsman who was holding it for the principal, the court refused his appointment as a co-executor for improvidence.[1] *Estate of Henry Isaacson*, NYLJ, June 23, 2008, p. 35, col. 2 (Kings Cty., Surr. Lopez-Torres).

Improvidence requires a lesser burden of proof than dishonesty because the quality of being improvident does not necessarily involve moral turpitude. *Estate of Edwin R. Wallace*, NYLJ, Aug. 8, 2011, p. 29, Col. 1 (Rich. Cty, Surr. Gigante). Improvidence may also be based on the applicant's misappropriation or mishandling of the property of the decedent. *Wallace*, supra.; *Matter of DeBelardino*, supra.

Case law shows that improvidence can be a ground to disqualify or remove a fiduciary but only where there is clear and convincing evidence proximately related to the time of service as the fiduciary.

The court in *Estate of Wallace* stated that the concealment of estate assets, the intentional undervaluation of assets, the refusal to allow inspection of business records of the decedent and the refusal to account to the public administrator all would be grounds to find improvidence if proven. The objectants failed, however, to prove those allegations in the case. But Surrogate Robert Gigante held in *Wallace* and in *Estate of Mathai*, NYLJ, Jan. 23, 2015, p. 32, col. 2 (Richmond Cty.) that merely understating the value of estate assets where no representation was made that the values were based on fair market value appraisals was insufficient to establish improvidence.

In *Wallace*, the nominated executor also failed to inform the court that the only surviving witness to a will she sought to probate in that court had died thus preventing the very relief she was requesting. The nominated fiduciary also had appointed herself the secretary of a corporation owned by the decedent without authority to do so. Both of these actions were likely to render the estate unsafe for the other beneficiaries and thus constituted improvidence according to the court.

In *Estate of Maiken Rand*, NYLJ, July 6, 2012, p. 18, col. 4 (Bronx Cty., Surr. Holzman) the nominated executor was a disbarred attorney who was found guilty of professional misconduct involving dishonesty, fraud, deceit or misrepresentation. Following a three-year suspension imposed upon the attorney for such misconduct, the attorney was found guilty of practicing law without a license within just eight months of his suspension.

The court cited the rules set forth above regarding improvidence and held that such facts were sufficient to support a finding of improvidence sufficient to preclude the appointment of the attorney as the fiduciary. But in *Matter of Estate of Burack*, NYLJ, Sept. 21, 2015, Dec, #1202737555290 the disbarment of the co-trustee in 1995 for commingling funds 20 years prior to the removal proceeding did not justify removal where

he was only one of three trustees and thus could not act alone.

Relevant Proof

Estate of Catherine D. Field, NYLJ, Feb. 23, 2015, p. 22, col. 5 (N.Y. Cty., Surr. Anderson) is a warning to petitioners regarding removal of nominated executors without sufficient relevant proof. In this case, decided on a motion for summary judgment challenging the appointment of petitioner as the nominated executor, it was alleged that the nominated executor had received a reprimand from his former employer (the Department of Sanitation) for not appearing for a drug test in 2007 and for testing positive for drugs twice in 2003. There was also an allegation in 2010 of a telephone call to 911 claiming that the nominated executor was drunk. It was alleged in objections to the petition seeking the appointment as executor that the nominated executor had introduced the objectant to drugs at a young age and that the nominated executor had bloodshot eyes, slurred speech and a strong scent of marijuana two years prior to the request to be appointed the fiduciary.

There were affidavits submitted in the case to the effect that the executor had raped and sexually molested the affiant and that for the last five years of the decedent's life it seemed apparent that decedent was intimidated by the nominated executor. An affidavit of a part-time companion and health-care worker described the nominated executor as an unreliable son who did not often visit his mother.

Another affidavit from a friend of the decedent for 50 years and whose parents lived next door to the decedent, stated that she smelled marijuana emanating from the decedent's apartment in September 2013. There was, however, an affidavit submitted in rebuttal by another person who lived in the apartment below the decedent in the same building in which he stated that he regularly smelled marijuana in the hallways and it is impossible to determine the source of the odor.

The court noted that the nominated executor had received preliminary letters and promptly complied with the court's order to obtain a bond, had opened an estate bank account and had paid overdue maintenance on the decedent's apartment. Under these facts the court held that the allegations of the character of the nominated executor involved incidents that were remote in time and not pertinent to his fitness to perform the tasks required of an executor so that no improvidence was shown to exist.

Conclusion

The case law discussed above shows that improvidence can be a ground to disqualify or remove a fiduciary but only where there is clear and convincing evidence proximately related to the time of service as the fiduciary and that it is more likely to succeed as a ground where the failure involves financial matters that will affect the estate immediately.

1. The attorney was also found to likely have been sharing fees with a non-attorney in exchange for referral of legal cases.