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Filing a Bond by a Preliminary Executor

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Over 50 years ago, the Legislature created the office of preliminary executor, an appointment that allowed for immediate, prompt, ex parte application for preliminary letters testamentary. The preliminary executor has all the powers of a full fiduciary except the power to distribute. If a will directs a nominated executor to post a bond he or she must do so to obtain preliminary letters testamentary. Where a will explicitly dispenses with the filing of a bond, the court has discretion to require the filing of a bond but should not do so unless it determines that there are extraordinary circumstances which warrant the filing of a bond for preliminary letters testamentary.

In 1993, an amendment was made to SCPA Section 1412, the statute governing preliminary letters testamentary.[1] It added the following language to Subsection 5 of SCPA 1412 which relates to the bonding of preliminary executors:

> Where the Will explicitly dispenses with the filing of a bond, the Court *shall* grant such letters without bond, *unless* it determines there are *extraordinary circumstances* in the particular case to warrant the filing of a bond, in which case the Court shall have the discretion to require the person seeking such letters to file a bond in such amount as the Court deems advisable (emphasis added).

This provision was added by the Legislature on the recommendation of the EPTL-SCPA Legislative Advisory Committee with the intention of making the waiver of a bond the normal procedure in the common situation where the will explicitly dispenses with the filing of a bond. It was the intent that the court would exercise its discretion to require a bond only in extraordinary circumstances.[2]

Despite this long 50-year history of dispensing with a bond for preliminary letters, courts continue to require a bond for a variety of reasons. Some courts require a bond in cases where the court merely has a concern about the fitness of the preliminary executor or the validity of the propounded instrument.[3] Where objections to the issuance of preliminary letters or their extension are merely conclusory or there is a failure to demonstrate that the estate will or has suffered harm or that the preliminary executor is unfit, the court should grant or extend the preliminary letters without restriction.[4] Some Surrogate Courts have apparently adopted as a policy the requirement that every preliminary executor post a bond, vitiating the "extraordinary

circumstances" of the statute.

Legislative History

In Chapter 731 of the Laws of 1961 the Legislature created The Temporary Commission on Modernization, Revision and Simplification of the Law of Estates. The commission, known statewide as the "Bennett Commission " in honor of its chair, Surrogate John D. Bennett of Nassau County, had a distinguished panel of Surrogates and estate practitioners. The commission filed many reports with the Legislature and ultimately succeeded in having an entire revision of the law of estates enacted as the Estates, Powers and Trust Law (EPTL) and Surrogates Court Procedure Act (SCPA) as we now know them.

The Legislature created the office of preliminary executor at the recommendation of the Bennett Commission in 1963.[5] The legislative intent was to give the power to a fiduciary to begin the administration of the estate promptly prior to the heirs being notified. That system was more in line with jurisdictions that permit probate in the "common form."[6] New York has since the mid-1800s been a state of probate in "solemn form" where notice is given to heirs in advance of the issuance of a decree admitting a will to probate.

While the Bennett Commission concluded that the solemn form of probate still offered the best protection to heirs and creditors, it adopted recommendations to simplify the process. The abuses of delay and expenses which previously infected the solemn form of probate would be minimized.

Besides delay and expense, the Bennett Commission was influenced by the common practice of objectants with no reasonable basis to object to the will extracting a nuisance value settlement from the estate to avoid further delay and greater expense before ordinary administration could proceed.[7] Another factor was that while temporary administration was available, the powers of a temporary administrator were limited, each action had to be approved by the court, and a bond was required in every instance.[8]

The EPTL-SCPA Advisory Committee pointed out that, while bonding was always in the discretion of the court, clearly, the intent of the Bennett Commission and the original statute was in favor of dispensation of the filing of a bond if the instrument so provided.[9]

Recent Examples

Case law construing the bonding requirement for preliminary executors has emphasized the extraordinary circumstances test where the will dispenses with a bond. In a case where the Appellate Division reversed the Surrogate's determination to appoint a bank as temporary administrator instead of the nominated executor as preliminary executor, the court held that the Surrogate's finding of "…problematic facts underlying the propounded instrument" was not equivalent to "extraordinary circumstances" to require a bond.

The court stated that "…Under SCPA 1415(5) the Court may order a bond solely upon a finding of extraordinary circumstances." The court was also influenced by the expense to the estate of the bond. The court stated that the Surrogate's concern was not enough to deny the petitioner's application for preliminary letters or require a bond where the will did not; the Surrogate could

have appointed the bank as a second temporary administrator.[10]

In the present economic climate, surety companies are reluctant to write bonds for certain fiduciaries without proof that the fiduciaries are high net worth individuals. Preliminary executors whose bonding requirements are waived by the testator are thus unable to qualify. A whole class of nominated executors are excluded by the practical consequences of requiring a bond that cannot be obtained by the nominated fiduciary. The intention for 50 years to allow a preliminary executor to administer the estate as nearly as normal as possible in order to expedite probate proceedings and control costs is effectively defeated by a policy of bonding in every instance.

As the EPTL-SCPA Advisory Committee has stated, "…the one major philosophy of the Bennett Commission was to revise existing and create new statutes to ensure the speedy, economical and just disposition of all questions arising in connection with the affairs of decedents. One of the basic [tenets] of the Bennett Commission was to make recommendations for the 999 honest persons out of 1,000 and not recommendations that would penalize time wise and expense wise the vast majority of the citizens of the State of New York in order to stop the one dishonest person."[11]

Policies and rulings by Surrogates that limit the statutory command to dispense with bonding except in extraordinary circumstances, tend to penalize the estate and eliminate the normal procedure in the common situation. It delays the proceeding, can cause paralysis and damage the estate administration and can be costly. It simply undermines the legislative intent of the 1993 Amendment to SCPA 1412(5).

Surrogates can deal with the small percentage of cases where a nominated fiduciary may cause damage to an estate while respecting the designation of a testator who, in most instances, gave due consideration to the trustworthiness of the nominated fiduciary.

Surrogates who are rightfully concerned with protecting estates have other remedies such as further restrictions or limitations on letters, appointments of co-temporary administrators and barring certain transactions without court approval. In any of these cases, there must be genuine evidence to support bonding in opposition to the statute and the expressed intent of the testator. The danger of making a rule or policy for the one dishonest person defeats 50 years of carefully thought out legislation to achieve efficiency in estate administration.

Endnotes:

1. See, Laws of 1993 ch. 514, §35.

2. *Matter of Katz*, 14 Misc3d 1204(A), 831 NYS2d 360 (Sur Ct Nassau Co. 2006).

3. *Matter of Gallagher*, NYLJ 10-6-2006 at 34 (Sur Ct Kings Co.).

4. *Matter of Hernesh*. 37 Misc3d 1213(A) (Sur Ct. Bronx Co 2012).

5. See, SCA §153-a; Laws of 1963 ch. 405.

6. Second Report of Commission on the Law of the Estates [1963] at p. 90 (The so-called "Bennett Commission").

Probate in the "Common Form," inherited from England in early colonial days is generally understood to permit the will to be proven and the fiduciary appointed by the clerk or the court before notice is given to the heirs. New York has since the mid-1800s been a state of probate in "solemn form" where notice is given to heirs in advance of the issuance of a decree admitting a will to probate. See, EPTL-SCPA Advisory Committee to the Legislature, Fourth Report, Warren's Heaton on Surrogate's Court Practice (7th ed); Appendix 4 at App 4-5.

7. Bennett Commission, supra at 94-95.

8. Id.

9. EPTL-SCPA Advisory Committee, Second Report Warren's Heaton (7th ed) Appendix 2 at App 1-19.

10. *Matter of Lurie*, 58 AD3d 575 (1st Dept 2009); See also, *Matter of Mestman*, 44 Misc3d 1219A (Sur Ct Dutchess Co. 2014).

11. Warren's Heaton, supra, Appendix 1, at App 1-18.
