

TRUSTS AND ESTATES LAW

Hostility as a Basis for Removal Of a Fiduciary Without a Hearing

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Courts show great deference to a testator's choice of fiduciary. While a court may remove a fiduciary for cause, the Court of Appeals has made clear that this power should be exercised "sparingly" and that a fiduciary is usually entitled to a hearing first. See *Matter of Duke*, 87 N.Y.2d 465, 473 (1996). Nonetheless, the court has also recognized that, under SCPA Section 719, "the Surrogate is clearly granted the exceptional authority to summarily remove executors ... [where misconduct] is established by undisputed facts or concessions, or where the fiduciary's in-court conduct causes such facts to be within the court's knowledge ..." Where a fiduciary's behavior clearly demonstrates entrenched hostility toward beneficiaries or a co-fiduciary, summary removal has been held appropriate.

SCPA Section 719 describes circumstances in which the Surrogate may remove a fiduciary without a pleading or the issuance of process. The grounds include, among other things, a fiduciary's felony conviction, commingling of estate assets with his or her own funds, or failure to account pursuant to a court order. The statute also permits removal where "any of the facts provided in Section 711 are brought to the attention of the court." In turn, SCPA Section 711 permits service of process and a



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petition upon a fiduciary seeking their removal for any of 12 specified reasons. These include, for example, a fiduciary's dishonesty, waste, improvidence, want of understanding, failure to comply with a court order, failure to inform the court of a change in address, substance abuse or removal of property from the state without court permission.

Hostility and conflict between a fiduciary and beneficiaries, or between co-fiduciaries, can serve as a basis for summary removal where it "interferes with the expeditious administration of the estate." See *Matter of Steward*, 193 A.D.3d 940, 943 (2d Dep't 2021). Such conduct is often evidenced by substantial delay in winding up the estate or "pending related litigation [that demonstrates] misconduct or insurmountable hostility between parties." (citing *Matter of Jurzykowski*, 36 A.D.2d 488, 491 (1st Dep't 1971) aff'd 30 N.Y.2d 510 (1972)). Several decisions serve as examples. See, e.g., *Matter of Kaufman*, 137 A.D.3d 1034 (2d Dep't 2016), (affirming summary revocation of letters testamentary based on conflict between

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co-fiduciaries); *Matter of Paladino*, 135 A.D.2d 541 (2d Dep't 1987) (removing executor in light of "obstructionist conduct" in other litigations against beneficiaries).

For example, in *Matter of Steward*, the Appellate Division reversed the Surrogate's order denying the immediate suspension of an estate's co-administrators. The court found that the record contained undisputed evidence of animosity between the fiduciaries which resulted in the estate being unresolved nearly two decades after the decedent's death. The court also noted that there was related litigation among the parties in Georgia in which one of the administrators admitted to mismanagement of estate assets. As such, it was untenable for these co-administrators to continue serving in a fiduciary capacity.

Likewise, in *Matter of Berlin*, 135 A.D.3d 746 (2d Dep't 2016), two co-executors had long been antagonistic toward one another in proceedings before the Surrogate. Each cross-petitioned to remove the other and the Surrogate granted both petitions without a hearing. The court found that the acrimony between the co-fiduciaries delayed the administration of the estate and that it was unlikely they would ever cooperate in the future. The Appellate Division affirmed, noting that the estate "had been pending for a decade and had, in the brief period of co-executorship, generated substantial litigation."

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In *Matter of Palma*, 40 A.D.3d 1157 (3d Dep't 2007), one of decedent's four children was appointed the preliminary executor of her estate (petitioner). Another of decedent's children later sought the petitioner's removal. The Surrogate granted the application without a hearing based on its knowledge of other litigation among the parties. On appeal, the Appellate Division affirmed, noting that the decedent's children were engaged in a probate contest concerning their father's estate and a judicial dissolution proceeding concerning a family business. Additionally,

the petitioner was the personal guarantor of more than \$1 million in promissory notes payable to entities owned by the decedent's estate. As there had been a default on those notes, the petitioner was left in the "untenable position" of having to take steps as preliminary executor to collect the debt from herself. Worse, she had already declared that she would not attempt to collect the notes and would instead debit them from each the beneficiary's share. Such "open hostility" justified the petitioner's summary removal.

Similarly, upon dueling motions and without a hearing, the Bronx Surrogate's Court issued an order in 2019 that summarily removed a preliminary executor based on the hostility the parties exhibited in proceedings before the court. See *Estate of Harris*, File No. 2017-1035. In so holding, the court stated: to put it mildly and succinctly, the preliminary executor and the objectants have been engaged in disputes and litigation over every conceivable matter related to the decedent's person and his property, and there appears to be no end in sight to the litigation. There does not seem to be much the preliminary executor and objectants can agree on except they do not 'like or trust each other,' and the disdain and animosity was manifest throughout the parties' arguments.

The court concluded that, under the circumstances, the testator's selection of a fiduciary was required to yield because "there was no scenario of which the court could conceive that would allow this estate to move forward should the preliminary executor remain in place."

In sum, when there are multiple pending proceedings concerning an estate, courts gain unique knowledge and insight into a fiduciary's attitude toward beneficiaries and co-fiduciaries. Where a fiduciary uses litigation as a means of drawing beneficiaries or co-fiduciaries into conflict, or prolongs those proceedings to the detriment of the estate's administration, the court may remove or suspend the fiduciary without a hearing based on what has transpired in its view. In these situations, summary removal not only serves to promote the expeditious administration of an estate, but to protect the beneficiaries' interests from being diminished by the fiduciary's penchant for protracted litigation on the estate's dime.