

TRUSTS AND ESTATES LAW

Surrogate's Court: Seeking Advice for Construction or Direction

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A subtitle from a recent NYLJ case digest summary reads: "Petitioner Not Allowed to Seek Court's Advice For Purposes of Trust Construction" (NYLJ, Oct. 2, 2023, Case Digest: Application of Lazar Follman). In this matter, the petitioner initially brought the matter as a construction proceeding and respondent argued that petitioner actually sought advice and direction from the court without showing extraordinary circumstances.

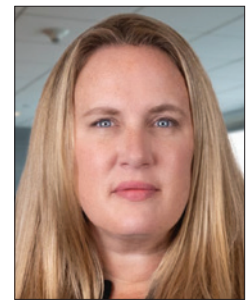
While there were other factors at play, the court ultimately determined that neither a construction proceeding nor a proceeding for advice and direction were what was actually being sought here and the petition was dismissed. *Application of Follman*, 2023 WL 6303560, 2023 N.Y. Slip Op. 23292.

"A fiduciary or a person interested in obtaining a determination as to the validity, construction or effect of any provision of a will" may bring a construction proceeding. SCPA §1420 (1). In other words, ambiguous language in a will is deciphered as to its meaning or intent by the court.

In *Follman*, the court found the in terrorem language unambiguous and further declined to opine



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due to Petitioner essentially requesting non-specific advice. If the petitioner sought guidance on whether a distinct event would trigger an in terrorem clause, perhaps the court may have deemed a construction proceeding proper.

More specific than a construction proceeding, "under SCPA §2107, the fiduciary may seek advice and direction from the court regarding investment decisions, the sale of property, tax issues and the distribution of estate assets." 2 Harris N.Y. Estates: Probate Admin. & Litigation §28:207 (6th ed.).

This also includes application to the court to advise and direct "in other extraordinary circumstances" or "where there is conflict among interested parties" and further makes it clear that this application is not there for the court to substitute its judgment for that of the fiduciary and may decline the application if same is sought. SCPA §2107(2). This further supports the determination of the court in *Follman* to dismiss the petition requesting just that.

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What one must keep in mind is that a fiduciary is paid a commission to make decisions and should not impose on the court to make such decisions unless there is a true need.

Lastly, and perhaps most important, the fiduciary protects himself from any objection that the estate suffered a loss so long as the fiduciary substantially followed the court's advice and direction. SCPA §2107(3). Further, a fiduciary who successfully obtains advice and direction from the court has assuaged his or her doubts in their administration of the estate with regard to the uncertainty now resolved by the court. If the resulting direction is sufficiently followed by the fiduciary, they may remain confident in their related action should there be a related loss by the estate.

While the facts of the *Follman* case do not support the use of either construction or an advice and direction proceeding, fiduciaries and the estate administration attorneys that represent them, are often faced with ambiguity for which such proceedings should be considered. If not for any other reason but for the fortification it provides the fiduciary by following the courts advice for construction and or direction.

Despite the added cost and time, bringing such a proceeding precludes reasonable litigation with regard to the matter at hand. It also provides the fiduciary with a clear path how to administer the estate with regard to the ambiguous language or unclear intent. The issue is correctly recognizing those situations where an application for the court's construction for ambiguity, and/or the court's advice and direction is needed in an extraordinary circumstance, that otherwise is unable to be deciphered objectively.

Even if the court declines such an application, the fiduciary's ultimate interpretation and or actions are bolstered by the fact that they followed the appropriate channels when faced with doubt in how to act before using their own judgment to the best of their ability. In the event the court later finds against the fiduciary, their application for assistance could very well preclude penalties or surcharge.

The best-case scenario for any fiduciary is to have a clear unambiguous will or trust from which to follow the wishes of the decedent. Unfortunately, the fiduciary often finds themselves trying to interpret their loved ones wishes through a badly written will or trust, which often the attorney did not prepare. The will or trust containing language that is unclear or provides uncertain direction may have been written by the decedent themselves, a friend or other lay person, done online for a small fee from a suspect source, or even drafted by an attorney (qualified, well-meaning, or otherwise).

Needless to say, many wills and trusts that end up in court were written by individuals that should not be drafting wills or trusts in the first place. Without getting into the statutory requirements each document must contain, the language should be clear as there are many matters that can go wrong in the administration of an estate that have nothing to do with ambiguous language or uncertainty with regard to the direction the fiduciary should take.

However, more often than not, it is the fiduciary that is looking for the court to tell them what to do or otherwise agree with what they want to do. In this article, we highlight the ambiguity in intent and uncertainty in the direction for the fiduciary to follow. The court is then tasked with determining whether this ambiguity and uncertainty exists and or warrants the court to impart its own judgment in the matter.

While the hurdle to receive advice and direction from the court is high due to the extraordinary circumstance requirement, properly filed construction proceedings have had more success and are more common. There the court is not imparting judgment on what the fiduciary should do, the court determines the validity, construction or effect of a provision of a will, SCPA §1420 (1), leaving the fiduciary to follow same.

In conclusion, the use of these proceedings benefit the fiduciaries who properly seek them, all while accomplishing the ultimate theme of the Surrogate's Court, to follow the intent of the decedent for them as they are not here to advise us of same.