

### TRUSTS AND ESTATES LAW

# Continuation of a Business of a Decedent

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It is a general rule of law that death ends any trade or business in which the decedent was the sole owner (see e.g., *Willis v. Sharp*, 113 N.Y. 586, 21 N.E. 705 [1889]; *Matter of Glass' Estate*, 134 Misc. 291, 235 N.Y.S. 299 [1929]; *Matter of Ferrante's Estate*, 190 Misc. 788, 74 N.Y.S.2d 778 [1947]; see also SCPA § 2108). A fiduciary does not have automatic authority under EPTL §11-1.1 to continue a business of a decedent, incur obligations and thus render the estate liable (see EPTL §11-1.1; *Willis v. Sharp*, 113 N.Y. 586, 21 N.E. 705 [1889]).

However, courts have stated that a fiduciary has an inherent authority to temporarily continue a business for the limited exceptions of converting business assets to cash for the benefit of the estate (see *Willis v. Sharp*, 113 N.Y. 586, 21 N.E. 705 [1889]) or "obtaining the best possible sale or disposition of the business" (see *In re Ridosh's Estate*, 5 A.D.2d 67, 169 N.Y.S.2d 54 [3d Dep't 1957], *decree modified on other grounds*, 7 A.D.2d 534, 185 N.Y.S.2d 80 [3d Dep't 1959]).

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In order to grant a fiduciary the power to continue a trade beyond the limited exceptions without triggering the need for court intervention, the decedent must specifically authorize a fiduciary to continue a business in his/her will (see *Willis v. Sharp*, 113 N.Y. 586, 21 N.E. 705 [1889] [stating that "the intention of a testator to confer upon an executor power to continue a trade must be found in the direct, explicit and unequivocal language of the will or else it will not be deemed to have been conferred"]).

In addition, some courts have deemed consent by all interested parties to a fiduciary continuing a business the equivalent of an authorization in the will (see *Philco Radio and Television v. Damsky*, 250 A.D. 485, 294 N.Y.S. 776 [2d Dep't 1937] [stating that "the consent of the beneficiaries, in so far as their interests in the estate are concerned, may be deemed equivalent, at least, to the authorization by a testator in his will for the

purpose of fixing responsibility for debts subsequently incurred”]; see also *In re Saver’s Estate*, 56 N.Y.S.2d 623 [Sur. Ct. 1945] [stating that “the record supports the finding that the decedent’s business was continued with the assent of all the interested parties, all adults and competent”]).

The scope of the power and authority of a fiduciary to continue a business, explicitly granted by a provision in a will or obtained through consent of all interested parties, should be in writing and should also be clear and specific in order to protect a fiduciary from individual liability (see *In re Wolf’s Estate*, 87 N.Y.S.2d 327 [Sur. Ct. 1943]).

Moreover, where a fiduciary is authorized to continue businesses “if in his discretion it (was) for the best interests of (the) estate”, the New York Court of Appeals found that this authorization merely granted the fiduciary power to conduct the businesses with the funds already invested in the businesses at the time of the

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If the court grants the petition, the fiduciary must file a certificate of doing business under an assumed name to protect creditors and persons doing business with the fiduciary

testator’s death, and to subject only these funds, and not the general assets of the estate, to the hazards of the businesses (see *Matter of Muller*, 24 N.Y.2d 336, 300 N.Y.S.2d 341, 248 N.E.2d 164 [1969] [surcharging fiduciary for using other estate assets in business that the fiduciary continued under authorization in will]).

Further, while it may be “better practice for the [fiduciary] to obtain court authorization” to pay a fiduciary a salary, who is also acting as an employee in the decedent’s business (see

*Matter of Tuttle’s Estate*, 4 N.Y.2d 159, 167, 173 N.Y.S.2d 279, 286 [1958]), “there is no rule which says that an executor, who is an employee in decedent’s business, may not be paid a salary for working in the business” (see *In re Ridosh’s Estate*, 5 A.D.2d 67, 169 N.Y.S.2d 54 [3d Dep’t 1957], *decree modified on other grounds*, 7 A.D.2d 534, 185 N.Y.S.2d 80 [3d Dep’t 1959]; see also *In re Saver’s Estate*, 56 N.Y.S.2d 623 [Sur. Ct. 1945] [stating that “the services performed by the administrator c.t.a were entirely separate and apart from the duties imposed upon him as administrator c.t.a” and finding that the fiduciary’s receipt of a salary from continuing the decedent’s business did not preclude him from being awarded statutory commissions]).

Whether authority is already granted to a fiduciary to continue the decedent’s business by the decedent’s will and/or by the consent of all interested parties of the estate or not, a fiduciary may petition the court having jurisdiction to continue a business, of which the decedent was the sole owner, and it is in the best interests of the estate (see SCPA §2108; see also EPTL §11-1.1 [22][c] stating that “[t]he court having jurisdiction of the estate or trust may authorize the fiduciary to exercise any other power which in the judgment of the court is necessary for the proper administration of the estate or trust”). Before August 26, 1997, this statute excluded all professions. By Laws of 1997 Chapter 475, the legislature made an exception for dental practices (see SCPA §2108).

Currently, SCPA §2108 permits the court to allow a New York-licensed dentist to continue the decedent’s dental practice for up to eight months, to ensure that its value does not plummet during a period considered reasonable

for the settlement of the estate. SCPA §2108 does not give the court the authority to extend the time period beyond eight months for the decedent's dental practice (see *Matter of Grasso*, 196 Misc.2d 916, 768 N.Y.S.2d 109 [Sur. Ct. 2003]).

Additionally, Real Property Law, §441-a(8) provides for the continued use of a real estate broker's license following the decedent's death by his/her fiduciary for a period of not more than 120 days provided authority to do so is given by the Surrogate pursuant to SCPA §2108 (see *Estate of Nelson*, 122 Misc. 2d 889, 472 N.Y.S.2d 73 [Sur. Ct. 1984]).

In *Estate of Nelson*, Surrogate C. Raymond Radigan stated that the "initial period of time may be extended by permission of the Secretary of State upon good cause shown for an additional 120 days." Even if a fiduciary already was granted explicit authority by the decedent's will or by consent of the interested parties of the estate, obtaining a court decree for continuation of a decedent's business may also be instrumental to (1) protect a fiduciary from individual liability, (2) establish clear guidelines of what the fiduciary can and cannot do regarding operating the business and (3) as result of more established guidelines by court decree, it can prevent against future estate or trust litigation between interested parties.

In order to commence this proceeding, the fiduciary must (1) file a petition with the court having jurisdiction, and (2) submit waivers and consents from all interested parties or if waivers

and consents cannot be obtained, a fiduciary must cite all interested parties. For expediency, before waivers and consents can be obtained or before the interested parties are cited, "the court may make an intermediate order...authorizing the continuance of the business pending the return of process and final decree" (see SCPA §2108 [1]).

If the court grants the petition, the fiduciary must file a certificate of doing business under an assumed name to protect creditors and persons doing business with the fiduciary (see SCPA §2108 [5]; General Business Law §130). The certificate must state "the extent to which the debts and other liabilities incurred in the continuance are to be chargeable to the assets of the estate as provided in the decree" (see SCPA §2108 [5]). Filing the certificate relieves the fiduciary of personal liability but does not absolve the fiduciary of liability in his or her fiduciary capacity, and persons with a claim can satisfy the claim only out of the assets listed in the decree as available. The fiduciary must keep all business assets isolated from other estate funds (see SCPA §2108 [6]).

Lastly, the court can at any time entertain a petition by a person interested or by a creditor for an order directing the fiduciary to wind up the business if it is no longer in the best interests of the estate (see SCPA 2108 [7]).

Needless to say, all of the foregoing deals with a business solely owned by a decedent. Partnership and corporate entities have their own rules concerning continuation.