

**SURROGATES COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER**

Probate Proceeding, Will of

ELINOR J. HAIGHT,

Deceased.

DECISION and ORDER

File Nos. 2019-148/C

SALL - S.

This is an application for preliminary letters testamentary by petitioner Diane C. Angst in connection with a contested probate proceeding. Diane is the nominated executor in a Codicil, dated March 10, 2015, offered for probate ("the Codicil") along with the decedent's will dated February 13, 2002 ("the Will"). Insofar as is relevant here, the Codicil names Diane as sole executor, whereas the Will nominates her as co-executor with her brothers, respondents Andrew C. Haight and Douglas B. Haight.

Andrew and Douglas oppose Diane's application, requesting that the court deny her application in its entirety, or alternatively, issue preliminary letters to one or both of them to serve as preliminary executor(s) with her. In sum, they allege: (1) that Diane, who was the decedent's attorney-in-fact, "repeatedly misused the Power of Attorney to divert the Decedent's assets to herself"; (2) "abused her position of trust by securing" the Codicil at issue; (3) Diane's nomination as sole executor was procured "when the Decedent lacked testamentary capacity to execute a testamentary instrument and was procured by undue influence fraud and duress"; and (4) that Diane procured a Transfer on Death ("TOD") Beneficiary Designation Form, which gave her a greater share of the subject account on the decedent's death, through fraud, duress and undue influence, and when the decedent

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was incapacitated. They further allege that Diane's conduct demonstrates that she does not possess the qualifications required of a fiduciary by reason of dishonesty and improvidence, and she is otherwise unfit for the execution of the office under SCPA 707 (1)(e).

Pursuant to SCPA 1412, the court may issue preliminary letters testamentary to the nominated executor in an instrument offered for probate so that an estate can be immediately administered when there may be a delay in probate. "The purpose of SCPA 1412 was to honor the testator's preference regarding the appointment of a fiduciary, even on a temporary basis, and to reduce the possibility of frivolous pre-probate contests" (*Matter of Mandelbaum*, 7 Misc3d 539, 541 [citations omitted]; *Matter of Graziano*, NYLJ, June 20, 1991 at 27, col. 3). "A testator's wishes regarding the appointment of a fiduciary even on a temporary basis will be honored unless there are serious and bona fide allegations of misconduct or wrongdoing" (*Matter of Mandelbaum*, *supra* [citations omitted]).

The party who challenges the appointment of the nominated fiduciary bears the burden of proof (*Matter of Krom*, 86 AD2d 689, *appeal dismissed* 56 NY2d 505; *Matter of Pollack*, NYLJ, May 10, 1999 at 30, col. 5), and conclusory allegations that a nominated executor is unfit to serve as fiduciary are insufficient to deny an application for preliminary letters (*Matter of Vermilye*, 101 AD2d 865; *Matter of Farber*, 98 AD2d 720; *Matter of Mandelbaum*, *supra*). Although the court may refuse to issue preliminary letters to a nominated executor and issue temporary letters of administration to the Public

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Administrator if it is in the best interest and protection of the estate and its beneficiaries (see *Matter of La Valle*, NYLJ Dec. 1, 2005, at 30, col. 6; *Matter of Weiss*, NYLJ, Dec. 19, 1997, at 32, col. 3), the court should avoid a contest within a contest when the estate can be protected by the posting of a bond or other safeguards (see *Matter of Roth*, NYLJ, Aug. 12, 2005, at 30, col. 3; *Matter of Pollack*, *supra*; *Matter of Rella*, NYLJ, March 16, 1999, at 28, col. 5).

Applying the foregoing to the instant case, the court grants Diane's application. Douglas and Andrew's conclusory allegations that Diane's nomination as executor was procured by duress, undue influence and/or fraud are insufficient to deny the application for preliminary letters testamentary (see *Matter of Vermilye*, *supra*). Moreover, because the issues raised in this proceeding are the same as those that will be litigated in the underlying contested probate proceeding, the court concludes that it is in the best interests of all concerned to have the nominated fiduciary appointed preliminary executrix, conditioned upon the filing of a bond in the amount of \$800,000.00 (see *Matter of Roth*, *supra*; *Matter of Pollack*, *supra*).

Accordingly, it is hereby

ORDERED that preliminary letters issue to Diance C. Angst upon her duly qualifying according to law (see SCPA 708) and upon her filing a surety bond in the amount of \$800,000.00; and it is further,

ORDERED that said preliminary letters testamentary will expire six months from the date of issuance unless further extended by order of the court.

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THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

The following papers were considered on this application:

1. The petitioner's application for preliminary letters testamentary dated January 17, 2019, and all exhibits submitted therewith; and

2. The Respondents' Verified Objections to the petitioner's application for preliminary letters testamentary, dated February 9, 2019.

Dated: White Plains, N.Y.
February 28, 2019



HON. BRANDON R. SALL
Westchester County Surrogate

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