

7/26/2010 N.Y.L.J. 26, (col. 6)

New York Law Journal
Volume 244
Copyright 2010 ALM Media Properties, LLC

Monday, July 26, 2010

Court Decisions
Decisions
Bronx County
First Judicial Department
Surrogate's Court

ESTATE OF WINIFRED BROWN **BRISSETT**, ALSO KNOWN AS WINIFRED ELIZABETH BROWN **BRISSETT**, DECEASED

Surrogate Holzman

ESTATE OF WINIFRED BROWN **BRISSETT**, also known as WINIFRED ELIZABETH BROWN **BRISSETT**, Deceased —The executrix, the decedent's niece who was previously directed to account and held in contempt of court for failing to follow that direction, moves by order to show cause to extend her time to file her account. The respondents on the order to show cause oppose the application asserting that, at this time, they are entitled to various other relief. The decedent died testate on February 21, 2004 at the age of 77. Her sole distributee is a post-deceased spouse. Her will dated September 18, 2000 was admitted to probate and letters testamentary issued to the decedent's niece. Pursuant to her will, the decedent made various bequests to the executrix, the post-deceased spouse and others and, pursuant to paragraph ELEVENTH, gave to the post-deceased spouse:

‘that share of my estate to which he would be entitled by virtue of his right, pursuant to the laws of the State of New York, to elect to take against the provisions of my will . . . less the aggregate value of any other property passing to my said husband that will be taken on account of such elective share, without regard to whether or not such property passes to my husband by my Will or otherwise.’

The decedent also gave the postdeceased spouse a life estate in income-producing Bronx realty and, upon his death, paragraphs TWELFTH and THIRTEENTH of the will devised the Bronx realty to the executrix, the sole residuary beneficiary. The underlying probate petition indicates that the major asset of the estate is the incomeproducing Bronx realty.

Following the issuance of letters testamentary, the co-administrators of the estate of the post-deceased spouse petitioned for a compulsory accounting and, by order filed April 7, 2008, the executrix was directed to file an account within 30 days after personal service upon her of a certified copy of the order with notice of entry (see *Matter of Brissett*, NYLJ, Mar. 17, 2008, at 29, col 2). When no account was forthcoming, the coadministrators of the estate of the post-deceased spouse moved by order to show cause to punish the executrix for contempt of the order filed April 7, 2008. The executrix failed to appear or file objections in response to that application and, by order filed February 2, 2009, this court granted the application, determined that the executrix was in contempt of this court for wilfully dis-

obeying the provisions of the April 7, 2008 order, and authorized the issuance of a warrant of commitment without further notice should she fail to purge herself of contempt within 30 days of service upon her of a copy of that order with notice of entry (see *Matter of Brown-Brissett*, NYLJ, Dec. 24, 2008, at 35, col 3).

On April 8, 2009, a warrant of commitment issued and, subsequently, on April 22, 2009, the executrix was brought before the court by the Sheriff of the City of New York. During that proceeding, counsel to the executrix stated on the record that the executrix' failure to account was due more to his law office failure than to any disregard of the court's order, and promised that an account would be filed and served by May 22, 2009. Based upon the state of the record at that time, the warrant of commitment was temporarily vacated; however, in the event that the executrix failed to file and serve her account by May 22, 2009, the court indicated it would issue another warrant of commitment upon the filing of an affidavit to that effect by the attorney for the coadministrators of the estate of the post-deceased spouse. Upon the filing of such an affidavit, another warrant of commitment issued, dated June 30, 2009.

The executrix then moved to stay the warrant and, after hearing arguments from both sides, the court stayed the warrant of commitment until September 8, 2009; however, this court also ruled that in the event that the executrix failed to, inter alia, file her account together with a petition for its judicial settlement by September 8, 2009, the warrant of commitment dated June 30, 2009 could be executed.

By order to show cause dated September 25, 2009, the executrix sought an extension of time to file her account and petition for judicial settlement asserting, inter alia, that: (1) she contacted several attorneys for assistance in rendering her account, but was unable to afford a retainer and then agreed to a payment plan with a different attorney to perform that work; (2) that attorney asked for funeral bills, cancelled checks and bank statements to complete the accounting and, because she did not keep those records, she would have to request them from the bank; and, (3) now that she had an estate attorney to assist her, she would be able to account. Although the executrix sought to temporarily stay execution of the warrant of commitment during the pendency of her instant application for an extension, the court declined to grant that temporary relief.

In response to the application, the co-administrators of the estate of the post-deceased spouse review the foregoing history and assert, upon information and belief that, inter alia, the executrix transferred to herself all estate assets consisting of Bronx realty as well as bank accounts in excess of \$60,000. They urge the court to direct that any excessive distributions be repaid to the estate (citing [SCPA 2215](#) [3]) and, in the 'Wherefore' clause of their response, they seek an order: (1) directing the executrix or the sheriff to deed the Bronx realty back to the estate; (2) directing that process issue revoking the letters testamentary that issued to the executrix; (3) appointing one of the co-administrators of the estate of the post-deceased spouse as successor fiduciary of this estate; and, (4) imposing sanctions on the executrix for her dilatory and frivolous tactics.

[SCPA 2205](#) gives the court, on its own initiative or on petition, the authority to grant various relief in connection with a compulsory accounting proceeding. Notwithstanding that a warrant of commitment remains outstanding, the relief permitted by [SCPA 2205](#) is likely to prove more fruitful than the imprisonment of the executrix. Given the numerous extensions already granted to the executrix, and the fact that she has failed to file her account to date, her application for yet another extension is denied. Furthermore, the relief sought in the 'Wherefore' clause of the response to the executrix' order to show cause is granted to the extent that: (1) the letters testamentary that issued to the executrix are suspended ([SCPA 719](#) [1]); (2) counsel for the co-administrators of the estate of the post-deceased spouse, the executrix and any other interested party are directed to appear on September 13, 2010 at 9:30 A.M. in courtroom 406 for a hearing on the revocation of the letters testamentary that issued to the executrix and the appointment of the co-administrator(s) of the estate of the post-deceased spouse or any other interested party as successor fiduciary upon their filing the requisite papers and obtaining jurisdiction over all necessary parties; and, (3) on that hearing date, the parties should be prepared to discuss the turnover by the suspended executrix of all estate records and assets and whether a trial date should be fixed for the successor fiduciary to take and state an account on behalf of the suspended executrix or procure its settlement, and receive compensation for the legal services rendered in connection with that account (see [SCPA 2205](#) [1], [2206](#) [3]; [Matter of Hughes, 172 Misc 2d 990 \[1997\]](#); see also *Matter of Leo*, 11 Misc 3d

1092 [A] [2006]). Otherwise, the relief sought in the 'Wherefore' clause of the reply papers is denied.

This decision constitutes the order of the court denying the executrix' order to show cause, suspending the letters testamentary issued to the executrix and setting the matter down for a hearing on the issues set forth herein. The Chief Clerk is directed to mail a copy of this order to the attorney appearing for the executrix on her order to show cause at issue, on the suspended executrix at the address listed in her oath and designation, and on counsel for the respondents on the order to show cause at issue.

7/26/2010 NYLJ 26, (col. 6)

END OF DOCUMENT