

# **Breakfast with the Surrogates: Successful Strategies for Securing the Removal of a Trustee**

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**New York State Bar Association  
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**Breakfast with the Surrogates**

**REMOVAL OF FIDUCIARIES**

**I. Suspension, Modification, or Removal Without Process**

SCPA § 719 - In any of the following cases, the court may make a decree suspending, modifying or revoking letters issued to a fiduciary from the court or removing a lifetime trustee or modifying or suspending the powers of a lifetime trustee **without a petition or the issuance of process**:

- (1) Where a fiduciary directed to account fails to appear on return date of process or fails to account without a satisfactory excuse.
- (2) Where process cannot be served on the fiduciary by reason of absconding or concealing.
- (3) Default in supplying information as ordered by the court or neglecting or refusing to obey the order.
- (4) Where the will or lifetime instrument has been deemed invalid or ineffective.
- (5) Failure to provide required bond.
- (6) Convicted of a felony, judicially committed, or declared an incompetent.
- (7) Mingles funds or deposits them in an account other than as fiduciary.
- (8) Ancillary letters have been issued but original letters in domiciliary have been revoked.
- (9) Return of an absentee who can serve, or a fiduciary or committee on his behalf (in the case of temporary letters).
- (10) Where any of the facts of SCPA § 711 (*see infra*) are brought to the attention of the court.

**Failure to Account**

***Matter of Allen***, 2018 NYLJ LEXIS 875 (Sur Ct, Kings County 2018)

A trustee may be removed without a hearing when he fails to account after being ordered to do so by the court (SCPA § 719[1]). Here, the court cited the trustee's undisputed failure to account as a basis to suspend the trustee pending a hearing as to removal. Further, the court did not overlook the trustee's failure to notify the court of his change of address, thereby rendering personal service ineffectual; the utilization of the decedent's personal account as the trust's bank account; and the rejection of offers to purchase trust real estate, its subsequent sale for lesser

value, and the concomitant increase of liabilities.

### **Evading Service**

*Matter of Mitchell*, 2018 NYLJ LEXIS 20 (Sur Ct, New York County 2018)

Co-trustee removed when respondent failed to notify the court of his change of address (SCPA § 711[5]), thereafter evaded service of petitioner's removal citation (SCPA § 719[2]), and ultimately defaulted.

### **Misconduct Established by Undisputed Facts or Facts Brought to the Attention of the Court**

*Matter of Delaney*, 2018 NY Misc LEXIS 4905 (Sur Ct, Nassau County 2018)

In this proceeding for revocation of letters testamentary, a suspended fiduciary, whose letters were reinstated for the sole purpose of preparing and filing a formal accounting and the payment of up to \$50,000.00 in administrative costs, filed an accounting indicating that she paid upwards of \$148,000.00 in expenses. The Surrogate found that this constituted an unequivocal showing of severe misconduct and letters were revoked pursuant to SCPA § 719 and SCPA § 711(3) (neglecting or refusing to obey a court order).

*Matter of Kaufman*, 137 AD3d 1034 [2d Dept 2016]

Removal of co-executors and appointment of PA will be deemed an abuse of discretion where facts are disputed, conflicting inferences can be drawn, or mitigating factors exist. However, the Surrogate can remove a fiduciary without a hearing where the misconduct is established by undisputed facts or concessions, where fiduciary's in court conduct causes such facts to be within the court's knowledge, or where facts are presented during a related evidentiary proceeding. Here, there was undisputed evidence of conflict and mismanagement and removal without a hearing was permissible (*compare Matter of Modell*, 2016 NYLJ LEXIS 2419 [Sur Ct, New York County 2016] [discussing the failure to demonstrate by undisputed facts an immediate threat to the well-being of the trust so as to warrant the fiduciary's suspension pending the removal proceeding]).

*Matter of Silberkleit*, 50 Misc 3d 1226(A) (Sur Ct, Westchester County 2016)

After being compelled to submit to a psychiatric examination, which subsequently determined that she was indeed fit to serve as trustee and CEO of Archie Comics, respondent sought summary dismissal of her co-trustee's proceeding to revoke her letters of trusteeship. Co-trustee cross-moved, stating that the psychiatric report was insufficient, and that no hearing is required as the voluminous records before the court (which included accusations of erratic, abusive, and sexually inappropriate behavior towards Archie employees) clearly demonstrated respondent's

unfitness to serve (SCPA § 711[2],[8]). Given the sharply disputed factual contentions, the court determined that a hearing was necessary.

***Matter of Mercer***, 119 AD3d 689 (2d Dept 2014)

Surrogate Czygier's refusal to immediately suspend the fiduciary pursuant to SCPA § 719 was upheld. The removal of a fiduciary is akin to "a judicial nullification of the testator's choice and may only be decreed when the grounds set forth in the relevant statutes have been clearly established." Contrary to the appellant's arguments, the allegations of misconduct were sharply disputed, gave rise to conflicting inferences, and were identical to the objections to be determined in the accounting proceeding.

***Matter of Siri***, 2015 NYLJ LEXIS 4994 [Sur Ct, Queens County 2015]

In contravention of EPTL 5-4.6, the District Court presiding over decedent's wrongful death action occasioned by the crash of Flight 587 made a determination as to the allocation and distribution of the proceeds, lifted the Surrogate's Court restrictions in its letters of administration, discharged the fiduciary's bond, permitted deposit of the funds in an investment account, and discharged the administrator from all liability. There was no indication that an accounting had been filed, that creditors had been notified, or that a guardian ad litem had been appointed for the infant. The only contact the fiduciary had with the Surrogate's Court was the filing of her first accounting, and her subsequent failure to file 8 successive accountings. Suffice it to say, the Surrogate was not inclined to entertain the fiduciary's current application to withdraw additional funds. The Surrogate revoked the letters of guardianship based on the fiduciary's inability to obey court orders (SCPA § 719[10]; SCPA § 711).

***Matter of Terranova***, 2011 NYLJ LEXIS 3014 (Sur Ct, Queens County 2011)

On the eve of trial in a contested accounting proceeding, the trustee unceremoniously discharged his two prior attorneys and sent a third attorney in for the sole purpose of obtaining an adjournment, which was attempted by way of a letter from a medical practitioner's office claiming the trustee had an "irritable bowel" preventing his appearance. Ironically, the original of that letter was forwarded directly from the fiduciary to the court, with a return address that was entirely different than the one set forth in his petition. The Surrogate relied upon the catch all provision of SCPA § 719(10) and suspended the fiduciary immediately, noting that it was apparent that the fiduciary had changed his address without notifying the court (SCPA § 711[6]) and – by discharging his attorneys a week prior to trial, rejecting a previously agreed-to stipulation of settlement, and defaulting – was violating his trust as testamentary trustee (SCPA § 711[10]).

## **II. Suspension, Modification, Revocation or Removal for Disqualification or Misconduct (with process)**

SCPA § 711 - In any of the following cases a co-fiduciary, creditor, person interested, any person on behalf of an infant or any surety on a bond of a fiduciary may present to the court having jurisdiction a petition praying for a decree suspending, modifying or revoking those letters and that the fiduciary may be cited to show cause why a decree should not be made accordingly:

- (1) Respondent was, or has since become, ineligible or disqualified.
- (2) Wasted or improvidently managed or injured property.
- (3) Willfully refused or without good cause neglected to obey any lawful direction of the court.
- (4) Grant of letters was obtained by false suggestion of material fact.
- (5) By the terms of the will or trust, his office was to cease upon a contingency that has occurred.
- (6) Failed without sufficient cause to notify court of change of address within 30 days.
- (7) Removed property of the estate without the state without court approval.
- (8) Does not possess qualifications of a fiduciary by reason of substance abuse, dishonesty, improvidence, want of understanding, or who is otherwise unfit for the execution of the office.
- (9) In the case of a guardian, where he has removed or is about to remove from the state.
- (10) Testamentary trustee that has violated or threatened to violate his trust or is insolvent or for any other cause is deemed an unsuitable person to execute the trust.
- (11) Lifetime trustee, where the supreme court would have cause for removal.
- (12) Failure to file an account as directed by the court.

SCPA § 712 - Petition, process thereupon; suspension

Upon the issuance of process the court may by order suspend the respondent wholly or partly from the exercise of his powers and authority during the pendency of the proceeding. A certified copy of the order so made must be served with process, but from the time it is made, the order is binding upon the respondent and upon all other persons, without service thereof, subject to the exceptions and limitations prescribed in SCPA § 720 and SCPA § 721.

SCPA § 713 - Hearing; decree

Upon the return of process issued as prescribed in the preceding section the court may make a decree suspending, modifying or revoking the letters issued to or removing the respondent or modifying the terms of his appointment or may dismiss the proceeding upon such terms as justice requires.

SCPA § 2205 - Compulsory account and related relief on a court's own initiative or on petition;

who may petition

Subsection (1) allows the court to direct an accounting, suspend letters issued to a fiduciary for failing to appear on the return date of process without satisfactory excuse or failing to file an account as directed, appoint an eligible successor to succeed a fiduciary whose letters have been suspended, fix a date for a hearing on the issue of removal, and fix a date to take and state the account of a fiduciary who fails to file one or procure its settlement.

SCPA § 2206 - Compulsory account and related relief; proceedings thereupon

Subsection (1) indicates that a petition to compel an account pursuant to SCPA § 2205 may request additional relief such as removal, suspension, the appointment of a succeeding fiduciary or to take and state an account of a fiduciary who fails to account as directed by the court.

### **Within the Court's Discretion**

*Matter of Bennett*, 2017 NYLJ LEXIS 2743 (Sur Ct, New York County 2017)

Although the decree appointing non-domiciliary aliens provided for their suspension in the event that their co-fiduciary, a New York State resident, moved outside of the state, the court refused to do so, despite the co-fiduciary's departure. The court distinguished between statutes aimed at the original grant of letters and statutes aimed at the revocation of letters already issued. Determining that the removal of the fiduciaries would disrupt the orderly administration of the estate, and in the absence of opposition, the court permitted the non-domiciliary aliens to continue to serve.

*Matter of Buffalino*, 2015 NYLJ LEXIS 1143 (Sur Ct, Suffolk County 2015)

Mother-son co-trustees of a disclaimer trust sought each other's respective removal. The court determined that the mother's removal of the son was expressly permitted and effective by the terms of the language of the instrument, and, therefore, resort need not be made to the fiduciary's alleged failings pursuant to SCPA § 711. As for the son's attempt to remove mom on the basis that she was acting "punitively" towards him, a remainder beneficiary, the court was not inclined to do so in the absence of a hearing pursuant to SCPA § 711(8).

*Duell v Duell*, 258 AD2d 382 (1st Dept 1999)

The First Department affirmed an order of Surrogate Roth which removed a co-trustee and split a trust into three separate trusts, holding that in light of the demonstrated antagonisms between the co-trustee and the trust beneficiaries, and the evidence establishing that those antagonisms resulted in actions by the co-trustee interfering with the proper administration of the estate, and upon proof tending to demonstrate that future cooperation was unlikely, the Surrogate's determination to remove the co-trustee was a proper exercise of discretion.

## **Waste, Mismanagement and Misconduct**

*Matter of Cassini*, 43 Misc 3d 1211(A) (Sur Ct, Nassau County 2014)

Petitioner sought revocation and/or suspension pursuant to SCPA §§ 711, 712, and 719 for paying personal claims without court approval, failing to comply with discovery orders, failing to maintain records, and making false and contradictory statements. The court declined to revoke the executor's letters without a hearing, but determined that immediate suspension pending the hearing was warranted in light of the executor's deficient record-keeping and accounting, her payment of personal claims without court approval, and the hostility and constant litigation amongst the parties.

*Matter of Cohen v Cohen*, 129 AD3d 521 (1st Dept 2015)

Evidence of antagonism between the trustee and beneficiaries was insufficient to warrant removal in the absence of evidence that the trustee took any action that interfered or adversely impacted on the trust that was currently unfunded.

*Matter of Psilakis*, 2016 NY Misc LEXIS 3926 (Sur Ct, Nassau County 2016)

Distributee/objectant sought the revocation or suspension of preliminary letters issued to the sole beneficiary and named executor of the estate on the grounds that he was mishandling the estate by collecting rent in cash, converting funds to his own use, and interfering with the management and sale of real property that were also partly owned and managed by the objectant. The Surrogate observed that, although the standard for removal of a preliminary executor is less than that of an executor, the testator's selection was nevertheless entitled to great deference. Further, the issues raised by the objectant could be addressed in an accounting proceeding after a determination on the probate, when the status of the petitioner was known. Accordingly, the petition was denied.

*Matter of Terzani*, 45 Misc 3d 1221(A) (Sur Ct, Dutchess County 2014)

Decedent, a former Marine, was shot in a standoff with State Police. His estranged wife was appointed temporary administrator, ostensibly to commence a wrongful death action on behalf of the estate. The decedent's parents successfully removed her as fiduciary after a hearing demonstrated that she not only failed to commence the action, but cavalierly discarded the decedent's personal belongings, including his cherished military keepsakes. Where friction between the fiduciary and beneficiaries interferes with the proper administration of the estate, (here, the wife's deliberate failure to pursue the wrongful death claim that might enure to her former in-laws benefit), removal is warranted.

## **False Suggestion of Material Fact**

*Matter of Carey*, 2016 NYLJ LEXIS 2967 (Sur Ct, New York County 2016)

Non-domiciliary alien represented in his petition that he was a U.S. citizen. The Attorney General's Office sought summary removal on the grounds that he was ineligible to serve with a non-resident co-fiduciary (SCPA § 711[1]) and because the letters had been obtained by false suggestion of material fact. The court refused, noting that revocation was not mandatory, calls for the "discriminating discretion" of the Surrogate, and a hearing was required to determine if the fiduciary wilfully misled the court.

*Matter of King*, 147 AD3d 1286 (3d Dept 2017)

The court affirmed the Surrogate's determination that the incorrect specification of the county of the decedent's domicile did not amount to a false suggestion of material fact (SCPA 711[4]) so as to warrant revocation of letters testamentary, noting that the Surrogate's Court had jurisdiction to issue the letters regardless of the error and that the decedent's choice of executor was entitled to "great deference."

### **Unfit for Office**

*Matter of Burack*, 2015 NYLJ LEXIS 4598 (Sur Ct, New York County 2015)

Remainder beneficiary seeks removal of one of three trustees claiming that his disbarment rendered him unfit for office and that he was complicit with respect to his co-trustee's self-dealing. The court, emphasizing the testator's choice of the respondent, observed that respondent's voluntary resignation from the bar 20 years ago after acknowledging that he was the subject of an investigation concerning commingling of client assets did not, on its own, support a finding that the subject trust assets were in jeopardy. Moreover, there was no act of self-dealing on the part of respondent's co-trustee upon which to premise claims of complicity on the part of the respondent.

*Matter of Gerschel*, 2014 NYLJ LEXIS 4465 (Sur Ct, New York County 2014)

Petitioner sought removal of co-trustee and sole income beneficiary of two intervivos trusts, one dated 1950 and the other in 1969. This proceeding precipitated when respondent failed to comply with a settlement agreement providing for his resignation upon the filing of all tax returns due for the 1969 trust. Respondent contended that the proceeding was moot, as he filed the returns within one week of commencement of the proceeding. At a hearing, the sole witness testified that respondent conditioned the filing of his returns upon receipt of a distribution from the trust. The testimony was not rebutted. The court removed the respondent as trustee of the 1969 trust, noting that respondent could not "hold his fiduciary obligations hostage to his individual interests." Based on the outcome of that hearing, the court sua sponte removed respondent as trustee of the 1950 trust, deeming him "a person unsuitable" to execute that trust as well (EPTL § 7-2.6[a][2]; SCPA § 711[11]; SCPA § 719[10]).

***Matter of Levinson***, 166 AD3d 1196 (3d Dept 2018)

Surrogate properly refused to exercise discretionary power of removal of the successor trustee. Although the successor trustee failed to notify the court of his change in address (SCPA § 711[6]) the petitioner failed to demonstrate any prejudice to her rights or any negative impact on the trust.

***Matter of Moran***, 166 AD3d 1176 (3d Dept 2018)

Acknowledging that removal of a trustee is a “drastic” remedy and that not every fiduciary breach warrants removal, the court affirmed Surrogate Pettit’s refusal to remove the trustee (*see Matter of Moran*, 2017 NY Misc LEXIS 9318 [Sur Ct, Albany County 2017]). Despite the trustee’s delegation and lack of oversight regarding the management of trust assets, petitioner failed to demonstrate the trust assets suffered any harm. Additionally, although the fiduciary’s invocation of the 5<sup>th</sup> Amendment privilege permitted the court to draw a negative inference, it did not relieve the petitioner of his burden to demonstrate that the trust assets were put at risk.

***Matter of Shambo***, 169 AD3d 1201 (3d Dept 2019)

Medicaid filed objections to an accounting alleging that the failure to promptly sell decedent’s real property resulted in prolonged payment of carrying costs and diminution of estate assets that could have been used in payment of its claim. After 2211 examinations, summary judgment was granted by the Surrogate in favor of objectant on the issue of the administrator’s unreasonable delay in selling the property. The Appellate Court affirmed the decision and found that the Surrogate was also correct in removing the administrator pursuant to SCPA § 711(2) (fiduciary unfit for having wasted or improvidently managing assets), and SCPA § 711(8)(does not possess qualifications required of fiduciaries, improvident or otherwise unfit).

***Matter of Wingate (Perez)***, 2016 NY Misc LEXIS 634 (Sur Ct, Queens County 2016)

In a scathing decision, the Surrogate refused to entertain a petition commenced by malpractice attorneys, ostensibly as creditors, who complained that the fiduciary’s refusal to settle a malpractice action constituted a breach of her fiduciary duty. The court noted that the respondent apparently rejected the proposed settlement as inadequate, and that her decision in this regard was subject to liability from the estate’s distributees if any. Inasmuch as the petitioner and supporting papers failed to establish a prima facie basis for removal, the Surrogate refused to threaten the fiduciary with removal as a means to coerce a settlement for the benefit of the petitioner.