

NOT FOR PUBLICATION WITHOUT THE APPROVAL
OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO A-4672-07T2

IN THE MATTER OF THE ESTATE
OF JOHN H. HNAT, DECEASED.

Argued: January 12, 2009 - Decided: January 29, 2009

Before Judges Carchman and Simonelli

On appeal from the Superior Court of New Jersey,
Chancery Division, Probate Part, Ocean County,
Docket No. 174370.

Anne Baglivo Fitzpatrick argued the cause for
appellant Patricia Ann Sweeney (McDonald Law
Group, attorneys; Ms. Fitzpatrick, on the brief).

Joel A. Davies argued the cause for respondent
John J. Hnat (Taff & Davies, attorneys; Mr.
Davies, of counsel and on the brief).

PER CURIAM

Appellant Patricia A. Sweeney (Sweeney) appeals from the
April 21, 2008 order of a Chancery Part judge removing her as
executrix of the Estate of John H. Hnat (the decedent). We
reverse.

The decedent and Sweeney, a quadriplegic, lived together
for almost fifteen years. They would have married if not for
the potentially adverse impact marriage would have on Sweeney's

medical benefits. During the last ten years of the decedent's life, his son, plaintiff John J. Hnat (Hnat), and his daughters, Bonnie Myszka (Myszka) and Wendy Wildman (Wildman), had little contact with him.

The decedent appointed Sweeney as executrix of his Last Will and Testament (the Will). Among other things, the decedent bequeathed to Sweeney a life estate in the home where they lived. After her death or her permanent inability to live in the home, the property would be liquidated and the net proceeds divided equally between the children. The decedent also bequeathed to Sweeney \$50,000 to be used to pay the expenses associated with the disposition of the estate. Once all of the estate's obligations were fulfilled, the children would equally divide the remainder of the \$50,000. Also, the decedent bequeathed to Hnat a 1929 Ford, Haulmark trailer, and his antique guns and tools; to Wildman his 1931 Ford; and to Myszka his funeral plots located in the St. Josephs Cemetery. Decedent bequeathed the remainder of his estate, including personal property, to Sweeney and the children in equal shares.

The decedent died on September 26, 2007, at age seventy-three. On or about October 26, 2007, Sweeney was appointed executrix of the estate. She immediately retained counsel to

assist her in administering the estate.¹ Thereafter, among other things, Sweeney opened an estate account, closed the decedent's checking, savings and credit card accounts, submitted insurance claims for all policies the decedent held, and contacted Smith Barney regarding the decedent's IRA accounts. She also instructed her then attorney to prepare a draft of the inheritance tax return, which was not due until May 2008.

On January 10, 2008, Sweeney was hospitalized for respiratory failure following pneumonia. Following her hospitalization, she spent time in a rehabilitation facility. Sweeney has returned home and lives alone. There is no evidence of any further illnesses or hospitalization. In late January 2008, Sweeney directed her then attorney to obtain an appraisal of the home for inclusion in the inheritance tax return.

Hnat does not deny that during Sweeney's hospitalization, he entered the home without her knowledge or authorization, videotaped its contents, removed a dog that she and the decedent jointly owned, and removed many of the decedent's personal items, including the keys to the cars bequeathed to him and Wildman. Hnat also changed the locks, depriving Sweeney of access to her medical equipment.

¹ Sweeney subsequently terminated the services of that attorney after discovering that he was also providing legal advice relating to the estate to Hnat and his sisters.

On February 27, 2008, Hnat filed a verified complaint and order to show cause seeking Sweeney's removal as executrix solely on the grounds that she was unfit and unable to serve due to her medical condition and hospitalizations. He also sought his appointment as executor of the estate, despite the fact that the Will designated Wildman as alternate executrix.

The parties appeared before a Chancery judge on April 7, 2008, the return date of the order to show cause. Sweeney attended, but no plenary hearing occurred. Hnat argued that Sweeney was unable to fulfill her duties in a timely manner due to her physical limitations and recent illness. Hnat raised no friction or hostility claim. Nevertheless, based upon oral argument alone, the judge summarily removed Sweeney as executrix and appointed an independent third party as administrator of the estate, concluding that "it would be inappropriate for the parties who cannot cooperate with one another to proceed further. It would inevitably entail further avoidable counsel fees, time, energy and expense."

We review a trial judge's removal of a trustee, executor/executrix or fiduciary under the abuse of discretion standard. We will not disturb the judge's exercise of discretion in removing a trustee absent "manifest abuse." Wolosoff v. CSI Liquidating Trust, 205 N.J. Super. 349, 360

(App. Div. 1985) (citing 2 Scott on Trusts, 3d Ed. 1967). Whether the trial judge properly exercised his or her discretion "implies conscientious judgment and not arbitrary action." Id. at 363 (citing In re Koretzky, 8 N.J. 506, 535 (1951)).

Further, such discretionary action requires the trial judge to take account of the law applicable to the particular circumstances of the case under consideration. Should that judge misconceive the applicable law or misapply it to the factual complex, the result is an impermissible arbitrary act however conscientious the trial judge may have been.

[Ibid.]

Under N.J.S.A. 3B:14-21, a fiduciary may be removed for the following reasons:

- a. After due notice of an order or judgment of the court so directing, he neglects or refuses, within the time fixed by the court, to file an inventory, render an account or give security or additional security;
- b. After due notice of any other order or judgment of the court made under its proper authority, he neglects or refuses to perform or obey the order or judgment within the time fixed by the court; or
- c. He has embezzled, wasted or misapplied any part of the estate committed to his custody, or has abused the trust and confidence reposed in him; or
- d. He has removed from the state or does not reside therein and neglects or refuses to proceed with the administration of the

estate and perform the duties and trust devolving upon him; or

e. He is of unsound mind or mentally incapacitated for the transaction of business; or

f. One of two or more fiduciaries has neglected or refused to perform his duties or to join with the other fiduciary or fiduciaries in the administration of the estate committed to their care whereby the proper administration and settlement of the estate is or may be hindered or prevented.

To dismiss a trustee appointed by a will, "much more should be shown by those who wish to see them dismissed than would be the case where the trustees are appointed by the court". Braman v. Central Hanover Banl & Trust Co., 138 N.J. Eq. 165, 197 (Ch. 1946). Removal of a trustee appointed by will should be granted sparingly and with great caution. Ibid. Courts are reluctant to remove a fiduciary appointed by a will unless there is "clear and definite proof of fraud, gross carelessness or indifference." Id. at 196-97; see also In re Will of Landsman, 319 N.J. Super. 252, 270 (App. Div.) certif. denied, 161 N.J. 335 (1999); In re Beales' Estate, 13 N.J. Super. 222, 228-29 (App. Div.), certif. denied, 7 N.J. 581 (1951). Not only should the court be reluctant to remove fiduciaries, but "so long as an executor or trustee acts in good faith, with ordinary discretion and within the scope of his powers, his acts cannot be successfully assailed." Connelly v. Weisfeld, 142 N.J. Eq. 406,

411 (E. & A. 1948). Therefore, to remove an executrix, the court "must have some fact legally before it in order to justify a removal." Matter of Konigsberg, 125 N.J. Eq. 216, 219 (Prerog. Ct. 1939). Where, such as here, the facts for and against removal are disputed, a plenary hearing must be held. See Wolosoff, supra, 205 N.J. Super. at 366.

Here, no plenary hearing occurred. There is no proof that any of the reasons for removal set forth in N.J.S.A. 3B:14-21 exist. There also is no proof of fraud, gross carelessness, indifference to duty, or that Sweeney did not act in good faith or continues to suffer from an illness that prevents her from properly administering the estate. Thus, had Hnat asserted any of these reasons for Sweeney's removal and had the judge relied upon them to remove Sweeney, the result would constitute a manifest abuse of discretion.

The judge removed Sweeney for a reason not asserted by Hnat. That is, the judge summarily removed Sweeney due to assumed friction and hostility between the parties. "The general rule is that mere friction or hostility between a beneficiary and a trustee is not necessarily a sufficient ground for removal. If not, a beneficiary who otherwise lacks sufficient grounds for removal of a trustee could nevertheless compel that removal simply by instigating a fight." Wolosoff,

supra, 205 N.J. Super. at 360 (citations omitted); see also Braman, supra, 138 N.J. Eq. at 196). "[T]he mere fact that a beneficiary disagrees with a fiduciary's proper exercise of discretionary powers, or is resentful of the fiduciary's authority, or is antagonized by his personality, is not sufficient [cause for] his removal." In re Koretzky, 8 N.J. 506, 531 (1951). "Generally, in order for friction or hostility between the beneficiary and trustee to form the basis for removal, there must be a demonstration that the relationship will interfere materially with the administration of the trust or is likely to do so." Wolosoff, supra, 205 N.J. Super. at 360-61. There also must be proof that the friction or hostility arose out of the trustee's behavior. Ibid.; Starr v. Wiley, 89 N.J. Eq. 79, 90 (Ch. 1918).

Here, there is no evidence whatsoever that Sweeney caused any friction or hostility between the parties, either before or after her hospitalization. To be sure, Hnat did not even assert this as a reason for Sweeney's removal. Rather, the record indicates that Hnat "instigated a fight" with the appointed executrix and caused whatever friction and hostility may exist here, a fact the judge, in a manifest abuse of discretion, ignored.

We reverse and remand with direction to reinstate Sweeney as the executrix of the estate.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION