

Present: HON. ROBERT L. NAHMAN
SURROGATE

SURROGATE'S COURT: QUEENS COUNTY

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Probate Proceeding, Will of

JOSEPH CUNNINGHAM,

File No. 2006-1176

Deceased.
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In this proceeding for the probate of the instrument dated April 9, 2003, the objectant seeks an order dismissing the petition for failure to include a necessary party. The petitioner's cross-motion seeks to dismiss the objectant's motion, or in the alternative the Court's permission to amend the petition to include the necessary party.

The petition fails to disclose that the decedent was survived by a brother, his sole distributee, then a resident of Horizon Care Center.

The petitioner, the decedent's former spouse of more than 35 years, concedes that she knew at the time that she executed the instant petition that the decedent had had a brother. She argues that she did not deliberately withhold the required information because she did not know his whereabouts or whether he "was alive or dead" and that she told her then attorney that fact. It is clear from the transcripts of petitioner's deposition, however, that the petitioner made no effort to determine the whereabouts of the decedent's brother. Furthermore, in her affidavit of heirship submitted in support of the petition, petitioner affirmatively states that the decedent's mother had no children other than the decedent, a sworn statement that she knew to be false.

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The Court finds that the petitioner made false suggestions of a material fact in her petition and in her affidavit of heirship which would be sufficient to revoke letters or to otherwise remove a fiduciary for disqualification or misconduct. SCPA 711(4). The Court finds petitioner's conduct is sufficient to deny her request for permission to amend her petition.

Accordingly, the objectant's motion is granted and the petitioner's cross-motion is denied.

The petition is dismissed for lack of in personam jurisdiction.

The request for temporary letters of administration contained in the objectant's reply affirmation is denied without prejudice to commencing the appropriate proceeding for such relief.

Settle Order.

The Clerk of the Court is directed to mail a copy of this Decision to the parties who have appeared in this proceeding.

Dated: January 17, 2008



SURROGATE