

Matter of Wolfgang Peter Supplemental Needs Trust
2016 NY Slip Op 32043(U)
May 11, 2016
Surrogate's Court, Nassau County
Docket Number: 2012-372733/C
Judge: Margaret C. Reilly
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**SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

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**In the Matter of the Application of Carmela Morris
for Leave to Resign as Trustee of the**

Wolfgang Peter Supplemental Needs Trust

**Established under Article Third of the
Last Will and Testament of**

HORST PETER,

Deceased.

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PRESENT: HON. MARGARET C. REILLY

DECISION

**File No. 2012-372733/C
Dec. Nos. 31605**

The following papers were considered in the preparation of this decision:

Petition of Testamentary Trustee for Permission to Resign and for the Appointment of a Successor Trustee.	1
Attorney Affirmation Amending Petition of Testamentary Trustee for Permission to Resign and for the Appointment of a Successor Trustee.....	2
Renunciation of Nominated Successor Trustee.	3

Before the court is the petition of Carmela Morris for permission to resign as the testamentary trustee of a supplemental needs trust established under Article Third of the will of Horst Peter. No opposition to the petition has been filed.

Carmela Morris (hereinafter referred to as the petitioner) was granted letters of trusteeship and letters testamentary in the estate of Horst Peter (the decedent) on June 18, 2013. As executor, the petitioner filed her account and was issued a final decree of judicial settlement in connection with the administration of the decedent’s estate on October 5, 2015. As directed in the decree, the supplemental needs trust established

under Article Third of the decedent's will for the benefit of Wolfgang Peter (hereinafter referred to as the trust) was funded with net assets received from the decedent's estate after payment of disbursements as ordered in the court's decree. In October of 2015, the petitioner created and funded an account titled the Wolfgang Peter Supplemental Needs Trust at Capital One Bank, placing \$236,142.48 into the account, which represented the estate's net assets, less a reserve of \$1,000.00, which was subsequently added to the account on November 9, 2015.

The petitioner states that she seeks permission to resign because she thinks it would be best if a court-appointed trustee managed the trust. She further advises the court that Wolfgang Peter (the beneficiary) does not want the trustee to serve, and the trustee does not think she can work with the beneficiary. In addition, the petitioner has filed the renunciation of the nominated successor trustee, Lisa A. Roldos. Finally, the trustee asks the court to waive the requirement that she file an account as trustee as she has not taken any steps to manage the assets aside from the ministerial duty of setting up the trust and funding it.

An administrator in office has no "automatic right to resign" (*Matter of Mathias*, NYLJ, Mar. 19, 2009, at 37, col 3 [Sur Ct, Bronx County] [citations omitted]). Pursuant to SCPA § 715, a fiduciary seeking to resign may file a petition with the court asking for permission to resign. Ultimately, permitting a fiduciary to resign is a question for determination by the court" (*see Matter of Cuccia*, NYLJ, June 16, 2000, at 30, col 4 [Sur Ct, Kings County]).

The petition also asks the court to accept the renunciation of the nominated successor trustee, Lisa A. Roldos. There is a clear distinction between a fiduciary renouncing office and a fiduciary seeking to resign. Neither the testator nor the court can force a nominated fiduciary to serve. Accordingly, the court accepts the renunciation filed by the nominated successor trustee, Lisa A. Roldos.

However, once a fiduciary has qualified for office and undertaken the responsibilities of office, an application to resign will be denied unless the fiduciary seeking to resign meets a two-pronged test: (1) the fiduciary must offer a legitimate reason for resigning; (2) the fiduciary must name a successor willing to serve in his or her place (*see Matter of Cohen*, NYLJ, Apr. 24, 2007, at 29, col 4 [Sur Ct, New York County]). In connection with the first part of the test, the fiduciary seeking to resign is required to present the court with a valid reason for being unable to continue to serve, such as health issues or possibly the fact that the fiduciary resides far from New York (*see Matter of Montrone*, NYLJ, June 9, 1995 at 1, col 4 [Sur Ct, Queens County]). In considering a fiduciary's petition to resign, the primary consideration for the court is the best interest of the estate (*Barch v Avco Corp.*, 30 AD2d 241, 248 [4th Dept 1968]).

In this petition, the reasons presented by the trustee for permission to resign are twofold: (a) that the beneficiary does not want the present trustee to serve; and (b) that the trustee does not think she can work with the beneficiary. The Court holds that the petitioner has met the first part of the test.

In the second part of the test, the trustee must nominate a successor to serve in her place, and the petition does not meet this requirement. As noted above, the nominated successor trustee has submitted her renunciation. In place of serving, the trustee asks the court to select and appoint a successor trustee. However, the court does not have access to individuals or banks willing to serve as a successor trustee of a trust of this size.¹ The petitioner and the beneficiary should identify a party willing to serve as successor trustee of the trust and then file a new petition with the court.

Accordingly, the court accepts the renunciation of the nominated successor trustee, Lisa A. Roldos.

The court, however, will not permit the petitioner's resignation until such time as there is a successor trustee who can qualify according to law. The petition is denied without prejudice to renew by filing a new petition naming a proposed successor trustee who can qualify in accordance with law.

This constitutes the decision of the court.

Dated: May 11, 2016
Mineola, New York

E N T E R:

HON. MARGARET C. REILLY
Judge of the Surrogate's Court

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¹While the court has the discretionary power to appoint the Public Administrator as a fiduciary under certain circumstances, the court refrains from doing so at this time.

