

Matter of the Estate of Mesnick
2007 NY Slip Op 30423(U)
March 27, 2007
Surrogate's Court, Nassau County
Docket Number: 0280586
Judge: John B. Riordan
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SURROGATE'S COURT: STATE OF NEW YORK
COUNTY OF NASSAU

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Petition for a Compulsory Account and Related Relief
in the Estate of File No. 280586

DORIS RICHLAND MESNICK, Decision No. 98

Deceased.
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In this proceeding for a compulsory account, the petitioners are listed on the petition as Yolanda Sandulescu (Caico) and Alex Caico. The petition is signed by Yolanda only. She and Alex appear *pro se*. In paragraph 5 of the petition, Yolanda states that she is the "mother of Alex J. Caico, the son of Jon H. Caico, the father, who was left money under the estate of Doris Richland." The petition does not specify whether Alex is an infant. Yolanda requests that the executrix and trustee, Doris Ann Pignatelli, the daughter of the decedent, account for the "shares of the estate and the [dollar] amounts received by the distributees." Doris Ann opposes the relief sought in the petition.

The decedent died testate on September 22, 1992. Her Last Will and Testament dated June 29, 1992 was admitted to probate by decree of this court dated May 13, 1993. On the same date, letters testamentary issued to Doris Ann, and letters of trusteeship issued to Michael J. Lang, Esq. In a letter dated June 22, 2004 to Doris Ann's attorneys, a copy of which is annexed to Doris Ann's affidavit in opposition to the petition for a compulsory account, Mr. Lang "confirm[ed]" his resignation as trustee." The will names Doris Ann as successor trustee, but she never qualified (SCPA 708).

Decedent created a trust under Article NINTH of the will to be funded with her residuary estate. Article NINTH directs that the trustee hold the entire principal of the trust in one fund

until the time it was distributed, at which time the trustee was directed to divide the trust principal into nine equal shares to be held in further trust for decedent's children, with one share each to Mark, Jeffrey and John (as his name is spelled in the will), and two shares each to Doris Ann, George and Charles. John does not receive anything else under the will. Article NINTH [c][1] directs that the trustee "shall accumulate any income until my youngest child shall attain the age of 34 years or ten years from the date of this Last Will and Testament, whichever shall first occur when the Trustee shall distribute to each such child the child's total share plus any accumulated income." Since the will was dated June 29, 1992, the trust should have terminated not later than June 29, 2002.

Article NINTH further provides, in relevant part, as follows:

(2) If any child shall die after a separate share has been set apart for him or her, but before the entire share shall have been distributed to him or her, then the Trustee shall at the time of distribution as set forth herein distribute such share as follows:

(A) If the child is married with issue of his or her own the share of the said child shall be paid to his or her issue surviving.

(B) If the child is unmarried or has no issue of his or her own the share of the child shall be paid to my granddaughter, SHANA PIGNATELLI.

In her affidavit in opposition, Doris Ann asserts that the sole asset of the trust, real property located at 339 South Bay Drive, Massapequa, New York, was sold, that the proceeds were distributed in accordance with the terms of the trust and that the trust terminated. She states that, for those reasons, she has nothing for which to account. Annexed to Doris Ann's affidavit is the 2004 Form 1041 (U.S. Income Tax Return for Estates and Trusts), the 2004

IT-205 (New York State Fiduciary Income Tax Return) for the trust, and the final K-1s for the beneficiaries of the trust, including John.

Doris Ann argues that Yolanda lacks standing to petition for the accounting on the grounds that Yolanda is divorced from John and has no interest in the decedent's estate or in the trust. Yolanda filed the petition as Alex's mother. Under SCPA 2205[2][d], "any person in behalf of an infant" may petition for a compulsory account. However, nowhere in the petition is it alleged that Alex is an infant. Accordingly, the petition is dismissed, without prejudice to renew with proof that Alex is an infant, if that is the case.

A person interested in the trust is "[a]ny person entitled or allegedly entitled to share as beneficiary in the estate Where [the SCPA] provides that a 'person interested' may apply for relief, a verified allegation of an interest in fact, suffices for the purposes of the application, although the interest may be disputed, unless or until the fact of interest has been judicially determined and no appeal is pending therefrom (SCPA 103 [39])." SCPA 103 [8] defines a beneficiary as "[a]ny person entitled to any part or all of an estate."

Alex, as John's issue, is a contingent remainderman of the trust under Article NINTH [2] [A] of the will. As such, in the absence of a final determination by the court that Alex has no interest in the trust, he, or someone on his behalf if he is an infant, may bring a proceeding to compel an accounting under the trust (SCPA 2205(b), (d); *Matter of Hunt*, 84 App Div 159 [3d Dept 1903], *affd* 179 NY 570 [1904]; *Earle v Earle*, 73 App Div 300 [1st Dept 1902], *affd* 173 NY 480 [1903]; *Matter of Bearse*, 167 App Div 415, 422 [4th Dept 1915] [contingent remainderman]). The court would then have to inquire into whether Alex has an interest in the trust (*Matter of Woods*, 36 AD2d 880 [3d Dept 1971]) since a court will not allow objections to be filed "where the objecting party will not be benefitted by them, even if sustained (*id.*).

The court notes that Doris Ann has not judicially accounted as executor or as trustee. Nor has she been discharged by decree of this court. Doris Ann does not allege that she has been discharged by John on a receipt and release basis. Proof of a duly executed receipt and release by John would likely lead to a finding that Alex has no interest in the trust and is not entitled to compel an accounting.

Finally, Doris Ann asserts that Yolanda's petition is premised on "bad faith and with actual malice" and requests an order directing Yolanda to pay to the estate "a sanction or attorneys' fees in the amount of \$600.00," the amount Doris Ann's attorney represents it cost for him to review the file, counsel his client and prepare responsive papers. Doris Ann's attorney did not file an affirmation of legal services, as would be necessary if the court were to decide to award attorney's fees. However, in this case, there is no proof that Yolanda acted in bad faith or with malice. The request for attorney's fees or for sanctions is denied.

This decision constitutes the order of the court.

Dated: March 27, 2007

JOHN B. RIORDAN
Judge of the
Surrogate's Court

