

**Matter of the Estate of Kalikow**

2007 NY Slip Op 30431(U)

March 28, 2007

Sur Ct, Nassau County

Docket Number: 0340361

Judge: John B. Riordan

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SURROGATE'S COURT: STATE OF NEW YORK  
COUNTY OF NASSAU

-----X  
Proceeding by EDWARD M. KALIKOW and  
LAURIE K. PLATT, for the issuance of Limited Letters  
of Administration in the Estate of

File No. 340361  
Decision No. 237

PEARL B. KALIKOW,

Deceased.  
-----X

The decedent's two children, Edward M. Kalikow and Laurie K. Platt, have commenced a proceeding, by order to show cause, seeking an order (i) issuing limited letters of administration to Edward M. Kalikow and Laurie K. Platt pursuant to SCPA 702(8) and/or (10) and (ii) suspending the letters currently issued to respondents Eugene Shalik and James DeVita pursuant to SCPA 711 as follows:

(1) restraining Respondents and their agents, representatives and anyone purporting to act on their behalf, from completing and filing that portion of any estate tax return that concerns in part or in whole the valuation of the assets of the Sidney Kalikow Trust;

(2) authorizing only Edward M. Kalikow and Laurie K. Platt and their representatives to complete and file with the Internal Revenue Service and New York State that portion of any estate tax return of the Estate of Pearl Kalikow that concerns the valuation of the assets of the Sidney Kalikow Trust;

(3) authorizing only Petitioners Edward M. Kalikow and Laurie K. Platt and their representatives in the event said returns are audited to defend same at all levels, including, but not limited to, audits and appeals conferences, and in consideration therefor, directing Edward M. Kalikow and Laurie K. Platt to indemnify and hold

harmless respondents and the Estate of Pearl Kalikow from any and all additional tax liabilities, interest and penalties, if any, that are finally determined by the Internal Revenue Service and/or New York State to be due from the Sidney Kalikow Trust should said estate tax return(s) be audited and it be finally determined that additional tax, interest or penalties are due; and

(4) directing Eugene Shalik and James DeVita upon their being provided with that portion of any estate tax returns of the Estate of Pearl Kalikow that concerns the valuation of the assets of the Sidney Kalikow Trust, to make an application for deferral of the federal estate taxes under Sections 6161 and 6166 of the Internal Revenue Code, and a similar application for deferral of New York State estate taxes under applicable provisions of New York State tax law.

The order to show cause was returnable on March 20, 2007 at which time the court heard oral argument from counsel for petitioners and counsel for respondents.

### **BACKGROUND FACTS**

#### **Pearl B. Kalikow's Dispositive Plan**

The decedent, Pearl B. Kalikow, died on January 4, 2006, survived by two children, Edward M. Kalikow and Laurie K. Platt, the petitioners herein. A purported will dated July 16, 2003 and codicils dated September 29, 2004 and April 5, 2005 (herein collectively referred to as the "purported will") have been offered for probate by respondents Eugene Shalik and James DeVita, who are nominated as executors thereunder. By order dated April 5, 2006, preliminary letters testamentary issued to Shalik and DeVita. The purported will bequeaths the residuary estate to The Sunshine Foundation. The Sunshine Foundation is a charitable organization which was founded by the decedent during her lifetime. The preliminary executors are also the trustees

of The Sunshine Foundation.

At the time of her death, the decedent owned a 1% general partnership interest and a 50% limited partnership interest in Hewlett Associates. Article TENTH of the purported will provides as follows with respect to the decedent's limited partnership interest in Hewlett Associates:

“TENTH: If at the time of my death I own a limited partnership interest in Hewlett Associates, I direct that as soon after my death as may be practicable, my Executors (subject to the terms and conditions of the Partnership Agreement of Hewlett Associates) shall offer in writing (the “Offer”) to each of my children, EDWARD KALIKOW and LAURIE KALIKOW, the option to purchase for cash up to one-half (½) of said limited partnership interest that I may own at my death, at its value as finally fixed and determined for federal estate tax purposes after independent appraisal. If either such child desires to exercise his or her option to purchase said limited partnership interest, he or she shall notify the Executors in writing by certified mail, return receipt requested, within fifteen (15) days after the date of the Offer that he or she exercises his or her option to purchase said limited partnership interest. The closing of the purchase of said limited interest shall occur within sixty (60) days after the date of the Offer at a place designated by the Executors. If either of my said children shall not exercise his or her option to purchase all of his or her portion of said limited partnership interest, the other child may purchase the remaining portion, subject to the same terms and conditions set forth in this Article TENTH hereof.”

The decedent also created a revocable trust, under an agreement dated July 16, 2003, between herself as grantor and herself, Shalik and DeVita, as trustees. The trust provides that upon the grantor's death, the remaining trust principal is to be paid over to The Sunshine Foundation.

#### The Sidney Kalikow Trust

Sidney Kalikow, the decedent's husband, died on May 4, 1990, leaving a will dated May 26, 1982, which was admitted to probate by this court on May 29, 1990. Under Article THIRD of Sidney Kalikow's will, a marital deduction trust was created for the benefit of his wife, Pearl.

The executors of Sidney's estate elected QTIP treatment of the Sidney Kalikow trust (the SK Trust) and thus it is taxable in Pearl's estate. Letters of trusteeship with respect to the SK Trust issued to his children, Edward M. Kalikow and Laurie K. Platt, and respondent Shalik. The SK Trust holds a 98.5% limited partnership interest in the Kalikow Family Partnership. The SK Trust terminated upon Pearl Kalikow's death. The assets of the SK Trust became distributable upon Pearl's death to two continuing trusts, one for the benefit of Edward M. Kalikow and one for the benefit of Laurie K. Platt.

#### The Various Entities

The SK Trust holds a 98.5% limited partnership interest in the Kalikow Family Partnership, L.P. The Kalikow Family Partnership, L.P. owns income producing real estate. The general partner of the Kalikow Family Partnership, L.P. is Kalikow Management Inc. Kalikow Management Inc. holds a 1% general partnership interest in the Kalikow Family Partnership. Kalikow Management Inc. is controlled by a trust for the benefit of Edward Kalikow and his issue. The decedent owned a 1% general partnership interest and a 50% limited partnership interest in Hewlett Associates. The assets of Hewlett Associates likewise consist of income producing real estate.

#### The Appraisals

The petitioners, presumably as co-trustees of the SK Trust, have engaged the services of James Levy of Appraisers and Planners, Inc. to value the underlying assets of both the SK Trust and Hewlett Associates. Mr. Levy had prepared the appraisal for many of the assets as part of Sidney Kalikow's estate. Mr. Levy has submitted an affidavit in support of petitioner's application. Mr. Levy avers that he had discussions with Shalik regarding the valuation of the underlying real estate owned by the SK Trust and Hewlett Associates. Mr. Levy states that

respondent Eugene Shalik advised him that he needed “high” appraisals due to the oversight of the Attorney General’s office on behalf of the charitable beneficiary. The preliminary executors did not engage Mr. Levy to perform the appraisals; however, the petitioners, purportedly in their capacity as co-trustees of the SK Trust, ultimately did. The preliminary executors instead retained Eric Haims to appraise the underlying real property of the SK Trust and Hewlett Associates for use in the preparation of the estate tax returns to be filed on behalf of the decedent’s estate.

According to petitioners, the appraisal prepared by Mr. Levy (the “Levy appraisal”) initially valued the assets of the SK Trust approximately \$37,000,000.00 less than the appraisal prepared by Mr. Haims (“the Haims appraisal”) and the assets of Hewlett Associates approximately \$11,000,000.00 less than the Haims appraisal. In view of the large discrepancy, the preliminary executors engaged a third appraiser, the firm of Cushman & Wakefield, to review both the Levy appraisal and the Haims appraisal. Both petitioners and respondents concede that, as a result of Cushman & Wakefield’s review, the disparity in the appraisals has been significantly narrowed as adjustments have been made to both the Levy appraisal and the Haims appraisal. On the return date of the instant order to show cause, neither petitioners nor respondents could identify with certainty the current disparity since, as of that date, the numbers had not been finalized. Petitioners’ attorney did advise, however, that he believed that, after the Cushman & Wakefield adjustments, the valuation differential between the Levy appraisal and the Haims appraisal as to valuation of the SK Trust assets was approximately \$10,000,000.00. In addition, the difference between the Levy appraisal and the Haims appraisal with respect to the underlying real property of Hewlett Associates had also been narrowed by reason of the Cushman & Wakefield adjustments.

Also, the petitioners and the respondents disagree over the discount to be applied once the underlying values have been established. The preliminary executors have retained the services of Empire Valuation to establish the discount to be applied. Petitioners allege that they had been initially advised that Empire Valuation had determined that a twenty percent (20%) discount should be applied; however, they were subsequently advised that Empire Valuation had fixed the discount at thirty percent (30%). The petitioners believe the appropriate discount should be forty percent (40%).

#### Petitioners' Argument

Petitioners argue that the relief requested is warranted because if the Haims appraisal is used the SK Trust will be subject to substantial unnecessary additional estate tax which will have a crippling financial impact on the trust and may actually require a liquidation of the trust's holdings. Pursuant to Section 2044 of the Internal Revenue Code, the SK Trust is includible in the decedent's estate even though the trust does not pass under the purported will since a qualified terminable interest property (QTIP) election was made for the trust by the executors of Sidney's estate. The purported will provides that any estate taxes imposed with respect to property includible in the decedent's estate but passing outside her will shall be apportioned against and paid by the persons in possession of or benefitted by such property. Thus, as is typically the case with a QTIP trust, the SK Trust is responsible for the estate taxes attributable to its inclusion in the decedent's estate.

Under the circumstances presented here, the SK Trust will be responsible for virtually all of the estate taxes since the decedent's residuary estate passes to The Sunshine Foundation, a charitable organization. Although, on the return date, neither counsel was able to precisely quantify the cost to the SK Trust if the Haims appraisal and the Empire Valuation discount were

used, petitioners' counsel alleges that the approximate cost to the SK Trust would be in excess of \$25,000,000.

The petitioners argue that the purported will, together with the other instruments executed by the decedent as part of her dispositive plan, create a conflict of interest for both Eugene Shalik and James DeVita. The purported will gives the petitioners an option to purchase the decedent's limited partnership interest in Hewlett Associates and the proceeds of that option if exercised are payable to The Sunshine Foundation. The preliminary executors are the trustees of The Sunshine Foundation. Thus, the petitioners contend that the preliminary executors have a desire to maximize the value of the underlying real property held by Hewlett Associates in order to maximize the amount passing to The Sunshine Foundation. Additionally, the petitioners argue that, despite this conflict, the preliminary executors have refused to bifurcate the appraisal process and use the Levy appraisal for the valuation of the assets of the SK Trust and the Haims appraisal for the valuation of the assets of Hewlett Associates. The petitioners assert that the preliminary executors have claimed that the use of two different appraisers and methodologies would undermine the validity of both appraisals. The petitioners contend that since the preliminary executors have insisted on a consistent appraisal approach for both Hewlett Associates and the SK Trust, they have put The Sunshine Foundation's interest to maximize the value of the Hewlett assets, above the SK Trust's interest to minimize the estate taxes. This conflict, it is argued, applies to both Eugene Shalik and James DeVita.

With respect to Eugene Shalik, the petitioners further allege that Mr. Shalik has a financial interest in obtaining higher values for the assets of the SK Trust. Eugene Shalik is a co-trustee of the SK Trust but apparently not of either of the continuing trusts for Edward M. Kalikow or Laurie K. Platt. The petitioners believe that Mr. Shalik intends to seek a paying out

commission which clearly will be higher if the trust assets are appraised at higher values.

### Respondents' Argument

Respondents Eugene Shalik and James DeVita oppose the application on numerous grounds. First, respondents argue that the instant application is in disregard of the court's prior ruling on this issue. Respondents argue that petitioners previously commenced a proceeding to compel the payment of the estate tax by the residuary beneficiary, The Sunshine Foundation. On October 3, 2006, a stipulation of settlement was entered into with respect to that application, which counsel claims bars the current relief. Second, respondents argue that petitioners have not provided any evidence to substantiate the claimed conflict of interest. Third, respondents argue that petitioners' reliance on Section 6018 of the Internal Revenue Code, which provides that if an executor is unable to file a complete return, he shall include a description of the property he is not including, is misplaced since that statute applies only if an executor is unable to make a complete return. Fourth, respondents argue that even if it is determined that Eugene Shalik has a conflict, James DeVita has no conflict and would be able to file the return with respect to the SK Trust. Fifth, respondents argue that removal is a drastic remedy and must be exercised sparingly and only upon a showing of serious misconduct. Lastly, respondents argue that the preliminary relief requested subsumes the entirety of the petition and, therefore, should be denied.

Respondents argue that they have acted properly with respect to the valuations of the SK Trust and Hewlett Associates as shown by their engagement of Cushman & Wakefield to review both the Levy appraisal and the Haims appraisal. The respondents steadfastly deny that they have attempted to influence the appraisal process and dispute Mr. Levy's assertion that Eugene Shalik informed Mr. Levy that the preliminary executors were looking for high appraisals.

Respondents argue that they have always acted in furtherance of their duty to “file a good faith, supportable estate tax return” and have afforded petitioners input into the valuation process.

### ANALYSIS

This contested application presents a novel issue as to whether, under certain specific circumstances, limited letters may issue for the purpose of preparing and filing a portion of the estate tax returns to be filed on behalf of a decedent’s estate.

#### Fiduciary Duties

A thorough analysis of this issue must begin with a discussion of the duties which a fiduciary owes to an estate and the beneficiaries thereof. It is well-settled that an executor has an absolute duty of impartiality to the beneficiaries of the estate (*Matter of Muller*, 24 NY 2d 336, 341 [1969], amended on other grounds 24 NY 2d 1029 [1969]; *Matter of Grawe*, 32 AD 3d 1309 [4<sup>th</sup> Dept 2006]). “[A]n executor owes a duty to all beneficiaries to be fair and impartial in all transactions that affect them; not preferring one to the detriment of others or conferring a benefit upon one at the expense of another . . . [h]ence, . . . neither. . . beneficiary has a right to expect that the executor will discriminate in his or her favor to the detriment of another. The executor must act in the best interests of the estate as a whole, which may incidentally benefit some beneficiaries more than others but not because of any partiality on his part” (*Matter of Darrow*, 120 Misc 2d 924, 926 [Sur Ct, New York County 1983]). A “fiduciary is under a duty of absolute loyalty to all beneficiaries and of fairness and impartiality to all. If in dealing with the respective beneficiaries their interests are so conflicting that the fiduciary cannot deal fairly with respect to them, he cannot properly act without applying to the court for instructions” (*Matter of James*, 86 NYS 2d 78, 81 [Sur Ct, New York County 1948]; *see also Matter of Heinrich*, 195 Misc 803, 809 [Sur Ct, Monroe County 1949]). The court in *Matter of James* (86 NYS 2d 78, 87

[Sur Ct, New York County 1948]) went on to state as follows:

“Where an executor or a trustee acts merely as a bystander while two beneficiaries attempt to adjust as between themselves matters which are in dispute and the fiduciary joins them in agreement merely to carry out the terms of the settlement, the fiduciary may not be called upon to aid or advise either disputant. But where he affirmatively undertakes to deal with one beneficiary for the benefit and profit of another he cannot be unmindful of his duty of loyalty to all beneficiaries and of his duty to effectuate the terms of his trust. Both beneficiaries are entitled to expect impartiality and even handed justice from the fiduciary.”

A fiduciary also has a duty to minimize the overall tax burden on the estate and its beneficiaries (*Matter of Rappaport*, 121 Misc 2d 447 [Sur Ct, Nassau County 1983]). With respect to that duty, in general, a “court will have no part in the determination of Federal taxes and will not assume the duties of the executor by compelling him to file a tax return in accordance with a determination made by [the] court.” (*Matter of Weiss*, 33 Misc 2d 773, 776 [Sur Ct, New York County 1962]; *Matter of Zietz*, 121 NYS 2d 864 [Sur Ct, New York County, 1953]). The courts have also recognized that the estate tax imposed on an estate is ultimately the function of the tax authorities which fix the tax (*Matter of Darrow*, 120 Misc 2d 924, 928 [Sur Ct, New York County 1983]). Typically, questions relating to whether a fiduciary improperly overpaid estate taxes is a question of surcharge in an accounting proceeding (*Matter of Burack*, NYLJ, Mar. 26, 1993; 26, col 3 [Sur Ct, Westchester County]). In *Matter of Darrow*, the court noted as follows:

“[A]n executor does not assess a tax on decedent’s estate; that is the function of the taxing authorities. An executor, has, however, an obligation to report all of the property that is by law subject to tax at its fair and reasonable value. In addition, the executor has an obligation to take such exemptions as the law allows and the best interests of the estate dictate. As we all know, the taxing authorities frequently do not accept the executor’s determinations. The estate’s interest in reducing the tax and the government’s interest in collecting all it can under the law are clearly conflicting interests” (*Matter of Darrow*, 120 Misc 2d 924, 928 [Sur Ct, New York County 1983]).

SCPA 702

SCPA 702(8) provides that limited letters may be issued, “in the discretion of the court, to represent the estate in a transaction in which the acting fiduciary could not or should not act in his or her fiduciary capacity because of conflict of interest.” SCPA 702(10) provides that limited letters may issue for “any other purpose or act deemed by the court to be appropriate or necessary in respect of the affairs of the estate, the protection thereof or to the proper administration thereof.” Thus, the application of SCPA 702(8) is discretionary with the court.

SCPA 702 was amended in 1993 to add subdivision (8) (L. 1993, c.514). “The new subdivision was enacted upon the recommendation of the EPTL-SCPA Legislative Advisory Committee, which suggested that while the authority to issue limited or restrictive letters in cases of potential or actual conflict already existed by virtue of the catch-all provision (formerly subdivision 8, now subdivision 10), the under-utilization of such a mechanism in those circumstances merited its explicit mention in the statute” (2 Warren’s Heaton on Surrogate’s Court Prac. §33.09 [7<sup>th</sup> ed.]). In *Matter of Stoller*, (4 Misc 3d 538, 540 [Sur Ct, New York County 2004]), Surrogate Roth noted that the additions of subdivisions (8) and (9) “reflect the Legislature’s understanding that the individual interests of fiduciaries may at times be at odds with the interests of the estates they have been appointed to serve, and they embody the Legislature’s practical response to such reality.”

Thus, SCPA 702(8) recognizes that, under certain circumstances, a fiduciary may be unable to carry out his duties because of a conflict of interest. It is clear, however, that simply because a fiduciary is both a trustee of a qualified terminable interest property trust and the executor of the surviving spouse’s estate, there is nothing inherently conflicting in the duty of loyalty that the fiduciary owes the trust and the duty of loyalty he owes to the estate (*Matter of*

*Weisman*, 173 Misc 2d 342 [Sur Ct, New York County 1997]). Accordingly, the fact that the respondent Shalik is both a trustee of the SK Trust and a preliminary executor does not, in and of itself, create a conflict. Moreover, the court is mindful that insofar as the conflict of interest is a situation created by the decedent's will, it will not be a basis for removal (*Matter of Weiss*, 33 Misc 2d 773 [Sur Ct, New York County 1962]).

SCPA 702(8) and (9) have typically been used to protect an estate from the prospect of self-dealing by the fiduciary (*Matter of Goldman*, 196 Misc 2d 968 [Sur Ct, New York County 2003]). Limited letters, however, have also been issued with respect to conflicts of interest relating to tax matters. In fact, in the estate of Joseph Leo Grande (Sur Ct, Nassau County, File No. 318886), this court granted limited letters to the trustees of a trust to act on behalf of the estate in the estate tax audit. The application was not opposed by the executor who it was alleged had failed to properly defend the estate tax audit.

Similarly, in *Matter of Goldman*, (196 Misc 2d 968 [Sur Ct, New York County 2003]), the court addressed the issue of whether limited letters should issue to a "special purpose trustee" in order to achieve a tax savings to the trust. In that case, the decedent's will provided that the trustees thereunder could confer upon any beneficiary a general power of appointment over the trust remainder. The trustees were advised that a substantial tax savings could be achieved if a power of appointment was conferred on the decedent's daughter. The trustees were concerned, however, that because they were contingent remaindermen of the trust, the granting of the general power of appointment would be considered a taxable gift by them. The trustees, therefore, petitioned the court under SPCA 702(8) and requested the appointment of a disinterested trustee for the purpose of giving the decedent's daughter a general power of appointment. The court went on to hold as follows:

“Although the conflict in this case is less apparent than the type to which subsections (8) and (9) are ordinarily applied, the trust is nonetheless vulnerable to harm because its best interests are at odds with the individual interests of its current fiduciaries. Consequently, this application appears to come within the general purpose of section 702, as amended, namely to further the best interests of the trust and its beneficiaries by the appointment of a disinterested fiduciary who can take some action, tax-related or otherwise, that the currently acting fiduciaries are reluctant to take.” (*Matter of Goldman*, 196 Misc 2d 968, 971 [Sur Ct, New York County 2003]).

In *Matter of Richardson* (NYLJ, June 24, 2004, at 27, col 3 [Sur Ct, New York County]), the court used SCPA 702(8) to grant limited letters to a trustee for the purpose of determining whether a residence should be sold or retained in a trust. In that case, the income beneficiary of the trust brought a proceeding to revoke letters of trusteeship issued to a co-trustee of the marital trust under which he had an interest. The trust held a residence, which petitioner wanted sold.

The trustees refused to sell the house. The court stated as follows:

“Neither a trustee’s conflict of interest nor hostility between a trustee and beneficiary necessarily constitutes grounds for suspension of a trustee’s powers. In all the present circumstances, however, including the conflict of interest concerning the trust’s primary asset, the conceded hostility among the parties and the trustee’s patent failure to act with impartiality, the Court has determined that the best interest of the trust will be served by the appointment of a third independent trustee.”

In *Matter of Richardson* (NYLJ, June 24, 2004, 27, col. 3[Sur Ct, New York County]), the court also rejected the argument that the application should be denied because petitioner would have a remedy in an accounting proceeding if the trust was found to be underproductive due to the trustee’s failure to sell. The court found that if the house lost substantial value because of the market, it was possible that the loss could not be compensated by a surcharge.

#### IRC §6018

With respect to respondents’ other arguments, the court agrees with respondents that petitioners’ reliance on section 6018 of the Internal Revenue Code is misplaced. IRC§6018(b)

simply provides that if the executor is unable to make a complete return, he shall include in his return a description of the property which he is not including and the name of every person holding a legal or beneficial interest therein.

#### Prior Stipulation

The court, however, disagrees with respondents' claim that the prior application and the stipulation put on the record somehow bars the instant application. The prior proceeding related to the issue of whether the estate or the SK Trust would make a payment of the estate tax with the application for an extension of the time to file. In the spirit of cooperation, the parties agreed on an amount that would be paid and the source of that payment and also agreed to give the petitioners a role in the estate tax process.

#### Ultimate Relief

Respondents further argue that to grant the preliminary injunction here would be in effect to grant the ultimate relief. It is well settled that to be entitled to a preliminary injunction, the petitioner must establish (1) the likelihood of success on the merits, (2) irreparable injury absent granting the preliminary injunction and (3) a balancing of the equities (*W.T. Grant Co v Srogi*, 52 NY 2d 496 [1981]; *Pearl Green Corp v Yau Chi Chu*, 8 AD 3d 460 [3rd Dept 2004]; *Albini v Solork Assoc.*, 37 AD2d 835 [2d Dept 1971]). Extraordinary circumstances warranting a preliminary injunction that gives ultimate relief to the movant may exist in two situations. The first situation is the case in which the movant clearly and definitely will win on the merits and the second is when the movant demonstrates irreparable injury and that preliminary injunctive relief is urgently needed in advance of trial to avoid such harm (Weinstein-Korn-Miller, NY Civ Prac ¶6301.04 [4]).

Here, the petitioners have established all of the elements required for a preliminary

injunction. The petitioners have at least arguably established that respondents' conflict of interest has affected their duty of impartiality (*Albini v Solork Assoc.*, 37 AD 2d 835 [2d Dept 1971]). It is clear that the relief is urgently needed as the estate tax returns must be filed on or before April 4, 2007. It is also apparent that the trust will suffer irreparable harm if the preliminary injunction is not granted. The potential damages from the use of the Haims appraisal and the Empire Valuation discount have been estimated at \$25,000,000.00. Moreover, as the court noted in *Matter of Richardson*, (NYLJ, June 24, 2004, at 27, col. 3 [Sur Ct, New York County]), a surcharge remedy in the accounting proceeding may be insufficient given the significant amount of potential damages and the showing petitioners would be required to make in order for a surcharge to be assessed (*see Matter of Burack*, NYLJ, Mar. 26, 1993 at 26, col 3 [Sur Ct, Westchester County])[to substantiate surcharge it must be shown that IRC would have accepted the lower value]).

For all of the foregoing reasons, pending a hearing on the permanent injunction, the court grants the preliminary injunction to the extent that the petitioners shall be granted limited letters for the purpose of completing and filing with the Internal Revenue Service and New York State any portion of the estate tax returns of the decedent's estate that concerns the valuation of the SK Trust. The court notes that the ultimate relief has not been granted. The court has not made a final determination as to who will have the ultimate right to file the estate tax return with respect to the SK Trust since the estate tax return may be supplemented (26 CFR 20.6081-1[d]). Neither has the court decided who will defend the interests of the trust in an audit. These issues will be resolved after a hearing. The hearing will be limited to the issue of the respondents' conflict of interest and its impact on their duty of impartiality. For example, the affidavit of James Levy puts at issue whether the co-preliminary executors have acted on the alleged conflict of interest

by favoring the interests of The Sunshine Foundation. Ultimate resolution of that issue, therefore, turns on the credibility of James Levy and Eugene Shalik. Accordingly, a hearing on the issue of the preliminary executors' conflict of interest is scheduled for April 16, 2007, at 9:30 a.m.

The petitioners are directed, in connection with the limited relief granted, to execute an indemnification for all additional estates taxes, interest or penalties as from time to time may be determined in respect of assets of the SK Trust.

Concerning the branch of the application which directs respondents to make an application for deferral of the federal estate taxes under Sections 6161 and 6166 of the Internal Revenue Code and a similar application for deferral of New York estate taxes under applicable provisions of New York State tax law, the court finds that the preliminary executors are bound to do so pursuant to the terms of the October 3, 2006 stipulation.

The court's ruling today is limited to the unusual set of circumstances with which it is presented. The court is compelled to note that it has not opened the door for judicial intervention in every instance where there is a dispute regarding valuation. The court's ruling should not be interpreted as authority for the proposition that an executor must use the valuation offered by the beneficiary. It is only under these limited circumstances where there is a conflict of interest which has arguably caused the fiduciary to breach his duty of impartiality that the court will consider this type of relief. In most cases, a surcharge in an accounting proceeding will offer an adequate remedy for a fiduciary's improper valuation of an asset. Here, given the magnitude of the potential estate tax liability, the possibility of a surcharge offers little protection, if any.

This constitutes the decision and order of the court.

Dated: March 28, 2007

JOHN B. RIORDAN  
Judge of the  
Surrogate's Court

