

**Matter of Petition for Compulsory Accounting of
Mary L. Kinley 1989 Trust**

2007 NY Slip Op 31066(U)

May 4, 2007

Supreme Court, Albany County

Docket Number: 0005192/0061

Judge: Joseph C. Teresi

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In the Matter of the Petition for a Compulsory
Accounting of Mary L. Kinley 1989 Trust,
created under Agreement dated December
14, 1989 as amended.

DECISION and ORDER
RJI NO.: 519-06
INDEX NO.: 01-06-084580

Albany County Supreme County All Purpose Term March 23, 2007
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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TERESI, J.:

Petitioner brings this motion to force Respondent to judicially account for its acts and proceedings as Attorney-in-Fact for Mary L. Kinley (hereinafter Mary) and further alleges serious defects in Respondent's accounting as Trustee of the Mary L. Kinley 1989 Trust (hereinafter the Trust). Respondent opposes the motion and cross-moves for this Court to appoint an independent third party to determine whether it remains in the best interest of Mary and the Trust to continue to have Mary reside at home and pay the Guardian \$35 an hour for near constant care. Petitioner opposes the cross-motion.

After fully reviewing the record, this Court grants Petitioner's motion for an accounting

from Respondent as Mary's Attorney-in-Fact, denies Petitioner's Motion for further information regarding Respondent's accounting as Trustee and denies respondent's cross-motion for an independent third party to evaluate Mary's living situation.

Facts of the Case

On December 6, 2000, this Court appointed Petitioner to be the Guardian of the person of Mary L. Kinley, but specifically did not grant her financial guardianship over the Trust. The Guardianship Order granted Linda McCall "authority to direct Key Trust Company as Attorney-in-fact under the Power of Attorney dated May 3, 1995 and as Trustee of the Mary L. Kinley Trust... to pay for the care and maintenance of Mary L. Kinley." Petitioner, as Mary's Guardian is required to examine all relevant circumstances, including financial circumstances in order to determine the best care, treatment and place of residence for Mary. After a lengthy dispute with Respondents, following the denial of Petitioner's request to use the Trust to continue to finance a vehicle for herself to transport Mary, Petitioner demanded an accounting of Trust assets. Respondent refused, arguing that Petitioner did not have standing to compel an accounting. On March 10, 2006 this Court denied Petitioner's motion to compel an accounting. On October 19, 2006, the Appellate Division, Third Department reversed this Court and held that, as the personal Guardian of Mary, Petitioner did have standing to compel an accounting in Mary's stead.

Accounting as Attorney-in-Fact

Petitioner, who is in possession of Respondent's accounting as Trustee, now requests an accounting of Respondent's actions as Attorney-in-Fact alleging that "certain collections and disbursements presumably made on Mary's behalf are not accounted for by KeyBank as Trustee and in all likelihood only can be accounted for in Mary's personal account or accounts."

According to the Third Department, “a guardian must have the power to demand an accounting when the ward has a right to such action and upon refusal the court must order it” (*Matter of the Mary L. Kinley 1989 Trust*, 33 AD3d 1066, 1069 [3d Dept 2006]). In this instance, however, Mary could not demand an accounting from the Attorney-of-Fact who only exists due to her adjudicated incompetency. Respondent, however, does not dispute Petitioner’s entitlements to an accounting, but rather contends that aside from signing income tax returns and signing for health insurance coverage it has taken no actions as Attorney-in-Fact. Accordingly, this Court concludes that Petitioner is entitled to the accounting in order to completely understand Mary’s financial circumstances and facilitate care-making decisions and that Respondent should provide an accounting of the minimal actions it has taken as Attorney-in-Fact.

Accounting as Trustee

Petitioner contends that Respondent’s accounting as Trustee is incomplete due to a variety of deficiency and demands numerous surcharges and penalties for the perceived inaccuracies. This Court declines to review the accounting because Petitioner’s allegations are beyond the scope of the accounting as Ordered by the Third Department which was based upon Petitioner’s need to be able to “carry out her court-ordered duties as guardian, specifically, to examine Mary’s financial and other circumstances in order to facilitate decision making as to her care, treatment and living arrangements” (*Matter of the Mary L. Kinley 1989 Trust*, 33 AD3d 1066 [3d Dept 2006]). The Third Department specifically noted that Petitioner did “not herein seek the power to manage Mary’s trust or financial affairs as guardian of the property.” Although, Mary would certainly have the authority to manage her own financial affairs, that role was specifically denied to Petitioner during the Guardianship proceeding. Petitioner’s current

allegations regarding the content of the Trust exceed the scope of her authority as Guardian because Petitioner is no longer merely seeking information, but is attempting to micro-manage decisions made by the Trustee in a plethora of issues.¹

Appointment of an Independent Third Party

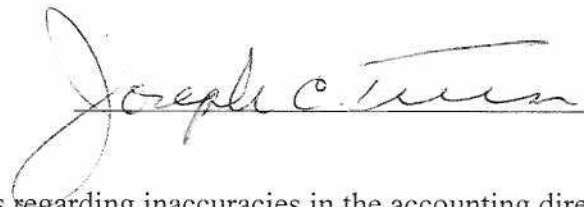
Respondent requests that this Court appoint an independent person to determine whether it is in the best interest of the Trust and Mary L. Kinley to continue to have her reside at home. Respondent contends that the cost of Mary's home care is exorbitant and that paying Petitioner #35 and hour hor Mary's care in addition to paying home aids is prohibitively expensive. Petitioner opposes this motion, contending that the Guardianship Order gives the authority to determine the best course of care for Mary, including her residence. Respondent offers no reply and cites no law for its proposition. Accordingly this Court, based on the plain language of the Guardianship Order denies Respondent's motion to appoint an independent person to review Mary's care decisions.

All papers, including this Decision and Order, are being returned to the attorney for the Petitioner. The signing of this Decision and Order shall not constitute entry or filing under CPLR § 2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

SO ORDERED!

Dated: May 4 2007

Albany, New York



¹ At least one of Petitioner's allegations regarding inaccuracies in the accounting directly relates to litigation wherein Petitioner, individually, is suing both the Trust and her Ward as named defendants.

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Petitioner's Order to Show Cause, dated March 22, 2007 with Attached Exhibits A-D.
2. Petitioner's Petition to Compel an Accounting, dated March 14, 2007 with Attached Exhibits A-D.
3. Respondent's Affidavit in Opposition, dated April 5, 2007.
4. Petitioner's Reply Affidavit, dated April 2007, with Attached Exhibit A.
5. Respondent's Accounting
6. Petitioner's Verified Objections to Accounting, dated April 11, 2007
7. Report of the Guardian Ad Litem, dated April 12, 2007.
8. Respondent's Order to Show Cause, dated February 23, 2007
9. Petitioner's Verified Answer, dated April 11, 2007