

**Celauro v Celauro**

2007 NY Slip Op 31971(U)

June 29, 2007

Surrogate's Court, Nassau County

Docket Number: 0342720/2007

Judge: John B. Riordan

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

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GAETANA CELAURO, Individually and as Sole Income  
Beneficiary of the SALVATORE F. CELAURO REVOCABLE  
TRUST and the SALVATORE F. CELAURO IRREVOCABLE  
LIFE INSURANCE TRUST,

File No. 342720

Supreme Court  
Index No. 06-002423

Petitioner,

-against-

Dec. No. 340

WAYNE CELAURO, as Co-Trustee and Contingent  
Remainderperson of the SALVATORE F. CELAURO  
REVOCABLE TRUST and the SALVATORE F. CELAURO  
IRREVOCABLE LIFE INSURANCE TRUST, and DIANE C.  
CARTER as Co-Trustee and Contingent Remainderperson of the  
SALVATORE F. CELAURO IRREVOCABLE LIFE  
INSURANCE TRUST, et al.,

Respondents.

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This is a motion by the petitioner for summary judgment in a proceeding for removal of certain trustees of two inter vivos trusts. This proceeding was originally commenced in the Supreme Court as an Article 4 CPLR special proceeding. In an order entered June 20, 2006 the Supreme Court, Nassau County transferred this matter to this court.

Factual Background

Petitioner, Gaetana Celauro, is the widow of Salvatore F. Celauro who died testate on July 18, 2004 while a legal resident of Florida, but who maintained another home with Gaetana in Glen Head, New York. They had four children, Nathan Celauro, Salvatore F. Celauro, Jr. Wayne Celauro, and Diane Celauro Carter.

In a will dated October 26, 1992, Salvatore F. Celauro named his wife, Gaetana, and his son, Wayne Celauro, co-executors of his estate. That will was admitted to probate by the Florida

courts on December 1, 2004 and letters issued to Gaetana and her son, Wayne.

On October 15, 1992, Salvatore T. Celauro created a revocable trust (“the Exemption Trust”) in an agreement between himself as grantor and himself and Gaetana as trustees. Upon his death, Salvatore Celauro’s estate is payable to this Exemption Trust. In this trust instrument, upon his death, Wayne Celauro and Nathan Celauro are designated as successor trustees in that order. (Exhibit A to petition, Article NINE, Section A). Thus, at Sal Celauro’s death, Wayne and Gaetana were the co-trustees. On July 29, 2004, Gaetana resigned as co-trustee and Nathan Celauro by the terms of the instrument became the other co-trustee with his brother Wayne. The income of this trust is payable to Gaetana for her life. Wayne, Diana, Nathan and Salvatore, Jr.’s children are designated remainderpersons.

On May 2, 1991, Salvatore Celauro became the grantor of an irrevocable life insurance trust in an agreement with Wayne Celauro and Diane D. Celauro Carter as trustees. Wayne and Diane remain co-trustees of this trust which now has been funded by life insurance proceeds. Upon Salvatore Celauro’s death, this trust is divided into five subtrusts for the benefit of Gaetana, Nathan, Wayne, Diane and Salvatore, Jr.

It appears that these two trusts together own 18.8 percent of the combined shares of two closely- held family corporations, 4C Foods Corp. (hereinafter “4C”) and Celauro Sales, Inc. (hereinafter “CSI”). The balance of the shares are owned by Sal Celauro’s nephew, John Celauro, (56%) and by various other Celauro family members and family trusts. Gaetana Celauro individually owns 1.48% of the shares of 4C and CSI. 4C was started by Salvatore Celauro’s father as a grocery store and is now a major food distributor with annual sales in 2006 of approximately \$80 million dollars. Salvatore Celauro originally owned 26% of 4C while his brother Frank owned 56%. Frank’s 56% share passed to his son, John Celauro, upon Frank’s

death in 1978. Salvatore Celauro was president of 4C from 1978 to 1990 when John Celauro succeeded him; John continues in that capacity today. Salvatore Celauro served as Chairman of the Board of 4C until his death in 2004.

In November 2003 Gaetana Celauro became aware of allegations that in 2001 John Celauro had diverted substantial sums from 4C by (a) alleged unauthorized use of his 4C Amex card for expenses of entertaining his paramour, Grace Glatstein; (b) diversion of in excess of \$687,000 of 4C funds in overpayments to Glatstein's company, Golden Communications Corp. (hereinafter "Golden") who was 4C's media buyer; (c) fraudulently sharing with Glatstein the profits from almost \$10 million paid to Golden by 4C from 1991 to 2001; and (d) concealed co-ownership of Golden with Glatstein with control of its bank accounts and investments. It is alleged that Salvatore Celauro commenced a stockholder derivative action on behalf of 4C against John Celauro for these alleged diversions of 4C assets on September 12, 2003 in Supreme Court, Nassau County. It is asserted by petitioner that the complaint in that action was never personally served. On April 4, 2005 Wayne Celauro, Nathan Celauro and Sally (Salvatrice) McCracken (decedent's niece and a 4C Management employee) were given long term employment agreements by 4C. Gaetana had commenced a stockholder derivative action against John Celauro individually and as co-executrix of Salvatore Celauro's estate. Nathan Celauro as a co-trustee of the Exemption Trust had joined her as a plaintiff. After motions were made attacking the Exemption Trust and the decedent's estate status as plaintiffs based upon an affidavit of Wayne Celauro that as co-executor and co-trustee of the Exemption Trust he did not join in the action, Gaetana re-commenced the action as an individual stockholder against John Celauro and the members of the Board of Directors of 4C including Wayne Celauro. The action is pending in Supreme Court, Nassau County, presently in pretrial discovery.

Nathan Celauro was an employee of 4C since he graduated from college in 1978 and since 1986 was Sales Vice President. He was dismissed in September 2005. Since then he commenced litigation for his alleged wrongful termination and has settled that litigation. He is no longer employed by 4C.

#### This Proceeding

Petitioner's first cause of action is against Wayne Celauro and seeks: (1) that Wayne be removed as co-trustee of the Salvatore F. Celauro Irrevocable Trust ("the Exemption Trust") and as co-trustee of the Salvatore F. Celauro Irrevocable Life Insurance Trust ("Insurance Trust") and that Nathan Celauro continue to act as sole trustee of the Exemption Trust; (2) that Wayne be required to account to this court for all Exemption Trust property received by him and turn over and deliver to his co-trustee, Nathan Celauro, any and all records of the Exemption Trust from the date of receipt to the date of account; and (3) that an injunction issue against Wayne restraining and enjoining him from any further interference with the Insurance Trust or the Exemption Trust estate.

Petitioner's second cause of action is against Diane C. Carter and seeks: (1) that Diane be removed as co-trustee of the Insurance Trust and that Nathan Celauro become and act as sole trustee of this trust; (2) that Diane be required to account to this court for all Insurance Trust property received by her and turn over to Nathan Celauro, as successor trustee, any and all records of the Insurance Trust from the date of receipt to the date of the account and that an injunction issue against Diane restraining and enjoining her from any further interference with the Insurance Trust.

#### Grounds for Removal

The grounds asserted for removal of Wayne Celauro and Diane Carter are set forth in

SCPA 711, subdivisions 2 and 10. Movant asserts that these trustees improvidently managed or injured the trust property committed to their charge or by reason of other misconduct in their office, are unfit for execution of their office (SCPA 711[[2]) and that they violated or threaten to violate their trust or for any other cause are deemed to be unsuitable persons to execute the trusts (SCPA 711[10]). SCPA 711, subdivision 11, enacted in 1980, gives the Surrogate the power to remove trustees of an inter vivos trust on the same grounds in which the Supreme Court could have removed them (Laws of 1980, ch. 503, §10; *see* EPTL 7-2.6[2][a]). Thus, whether the action was transferred here by Supreme Court or originally commenced in this court, the Surrogate applies the same criteria for removal.

The Surrogate's Court has concurrent jurisdiction with the Supreme Court over inter vivos trusts (CPLR 7701; SCPA 209[6]). Subject to provisions of the CPLR, the Supreme Court has the power on application of any person interested in the trust estate to suspend or remove a trustee of an inter vivos trust who has violated or threatened to violate his or her trust or who for any reason is a person unsuitable to execute the trust (EPTL 7-2.6[a][2]). The Surrogate's Court ordinarily applies SCPA 711 and SCPA 719 to applications to remove fiduciaries to which it has issued letters. On the other hand, Supreme Court commonly applies SCPA 711 and SCPA 719 to applications to remove inter vivos trustees (*Matter of Smithers*, NYLJ Aug. 17, 2000, at 24, col 1 [Sup Ct, New York County]). The Supreme Court has found the grounds for removal listed in SCPA 711 and 719 as sufficient grounds for removal in the Supreme Court because of EPTL 7-2.6(a)(2)'s broad language "for any reason is a person unsuitable to execute the trust" (*Matter of Smithers*, NYLJ Aug. 17, 2000, at 24, col 1 [New York County Supreme Court]; Turano, McKinney's Practice Commentaries to EPTL 7-2.6; *see also Pyle v Pyle*, 137 App Div 568 [1st Dept 1910]). The court notes that the grounds for

removal of the trustee of an inter vivos trust under EPTL 7-2.6(2)(a) are identical to the statutory grounds set forth in SCPA 711(10) for removal of a testamentary trustee.

More specifically, petitioner's grounds for removal are that Wayne and Diane have failed to comply with the grantor's instructions to consider the petitioner's happiness and welfare in administration of these trusts. They have allegedly displayed hostility and antagonism toward Gaetana which has purportedly interfered with their administration of the trusts. They have failed to cooperate with Gaetana and her son Nathan who is co-trustee of the Exemption Trust. They have failed to consult with Gaetana and Nathan as to matters affecting the trusts. They lack fidelity to the trust and they have allegedly verbally and mentally harassed Gaetana because of her stockholder derivative action. They have allegedly refused to communicate with Gaetana or Nathan as to matters affecting the trusts and there are no prospects for future communications. They have purportedly put their own personal interests ahead of Gaetana's interests and general welfare and Wayne Celauro has a conflict of interest in his administration of the trusts.

More directly, with respect to Wayne Celauro, it is alleged that he should be removed for his alleged misconduct in failing to support Gaetano's derivative action and in affirmatively opposing her suit. In an affidavit filed June 19, 2005, Wayne Celauro stated that all issues surrounding John Celauro's alleged use of corporate moneys for personal use were settled and the corporation was reimbursed in full. He stated that on April 4, 2005 he entered into a ten-year employment contract with 4C and CSI, along with Nathan and Sally McCrackin, and on April 5, 2005 all shareholders executed a new shareholders' agreement. Gaetana asserts that as trustee and executor, Wayne is legally obligated to join her derivative action as a fiduciary and his opposition to the action is misconduct which warrants removal as a trustee. Gaetana argues that when Wayne submitted an affidavit in opposition to her derivative action he put his own

personal considerations and future gain ahead of the interests of the trust and the income beneficiary. Gaetana has submitted portions of Wayne's deposition in the derivative action and emails between Nathan and Wayne in support of summary judgment on this contention.

Gaetana has also submitted additional testimony of Wayne wherein he accuses his mother of not telling the truth in certain affidavits and that he has not spoken to her since March 29, 2006. Furthermore, he has held a draft copy of Gaetana's will which was removed from Nathan's office at 4C after Nathan was fired. Gaetana alleges that Wayne has deliberately refused to inform her of shareholder and Board meetings of 4C, failed to communicate with her as to any matters affecting the 4C stock, the primary asset of the Exemption Trust, and refused to give her or Nathan, as co-trustee, any information concerning trust income and expenses. Allegedly, Wayne has refused to provide Gaetana or Nathan with a copy of Salvatore Celauro's death certificate which the New York State Tax Department sought from Gaetana and continues to refuse to provide it, despite a direction from one of this court's attorneys to do so. Wayne's emails to Nathan indicate his resistance to turn over to Nathan a death certificate without explanation of the necessity.

Gaetana also alleges that Wayne has acted in his own financial interest in conflict with his fiduciary duty and to the detriment of the trusts. Through the trusts and her own individual interests Gaetana receives income from approximately 20.5% of 4C and from 3.5% of CSI. Nathan, Wayne and Diane have a collective interest in the income of 5.2% of 4C stock through their own interests and through the Insurance Trust, but they have a collective interest in 19.3% of the income of CSI through the Insurance Trust or individually. Wayne and Nathan own 2% of 4C shares individually and Diane owns 1% of 4C shares. 4C has always been a Subchapter S corporation that paid distributions of profits to 4C shareholders. CSI has always been a

marketing corporation with no income. Thus, the trusts receive Subchapter S distributions based upon their interests from 4C. In October 2006 the Board of Directors of 4C, of which Wayne Celauro is a member, determined to have Subchapter S distributions made from CSI, not 4C, thus reducing distributions to these trusts from 20.5% to 3.5%. This allegedly reduced the income to Gaetana by 81% and increased the collective income to Wayne, Nathan and Diane by 271%. In an answer to Nathan's email as why these funds were distributed through CSI and not 4C, Wayne replied, "discretion of management." It is alleged that Wayne Celauro voted his own personal interests on this issue as a member of the Board and the management team and he should have maintained a neutral position on this issue as trustee, as has Nathan.

Gaetana also alleges that Wayne acted in his own financial interests as trustee by voting for an amendment to the 4C shareholders' agreement which gives the company the right to purchase shares of 4C before transfer to another shareholder upon death or otherwise. Gaetana asserts that the amendment destroys her right to transfer the 4C shares held by these trusts and under the terms of the trusts pursuant to an exercise of a power of appointment in her will. Wayne testified that one of the reasons he went along with the amendment was that there was a possibility that Gaetana might transfer the trusts' shares to Nathan and disinherit Wayne.

Gaetana has also offered additional evidence of Wayne's animosity toward her and Nathan by his exclusion of her and Nathan from family gatherings, a meeting with her on June 15, 2005 wherein Wayne allegedly threatened her, and another meeting with Diane and Wayne on March 29, 2006 where he purportedly spoke to her full of anger and outrage that she had failed to give up the derivative action. This resulted in Gaetana obtaining a temporary order of protection against Wayne and Diane. Wayne has allegedly refused to account and refused to provide Nathan as his co-trustee with records of the trust and refused to provide her as co-

executor with the IRS closing letter for the estate in Florida which affects the Exemption Trust as the final recipient of the proceeds of the estate.

### Respondent's Contentions

Wayne Celauro has submitted an affidavit in opposition in which he alleges that his mother's affidavit is a work of fiction, engineered by his brother Nathan and her lawyer. He vigorously disputes each and every "fact" alleged by his mother. He opposes summary judgment until the court has the opportunity to weigh divergent accounts of events and interests and the credibility of witnesses. He attributes to his father the prescience to prevent Nathan from asserting Svengali-like powers over his mother by making him co-trustee and co-executor instead of Nathan.

With respect to his administration of the trusts, Wayne recognizes that the trusts derive the majority of their income from distributions made to them as shareholders of 4C and CSI. He states that the Exemption Trust is essentially a pass through trust, all distributions paid by the companies are promptly paid out by him as trustee to his mother. All checks are first sent to Nathan for his signature along with a corresponding deposit slip. Wayne states that he has retained and made available to Gaetana's counsel all bank statements and check registers relating to the Exemption Trust accounts since its inception. The Insurance Trust is also a pass through trust where all company distributions are added to the trust's capital account and the interest on its capital holdings is paid to Gaetana on an annual basis. The checks are first sent to Diane for her signature and then sent to Gaetana. He asserts that he has retained all records of this trust and made them available to his mother's attorneys. Wayne indicates that in September 2006 he made available to his mother's attorney all bank statements and check registers. He affirms that his mother has received every income distribution to which she is entitled and there is no indication of mismanagement of the trusts.

Addressing the alleged basis for his removal as co-trustee, Wayne Celauro asserts that most of the claimed grounds overlap and relate primarily to his refusal to involve the trusts in Gaetana's derivative action against 4C's Board of Directors. Notwithstanding Gaetana's assertions that this removal proceeding has nothing to do with the derivative action, Wayne asserts that a decision in this matter cannot be rendered until a resolution is had of the derivative suit. On the merits, Wayne Celauro asserts that the derivative lawsuit is baseless and frivolous and his refusal to expend trust resources on it is in keeping with his fiduciary duties. Trust involvement is unnecessary as the litigation is ongoing and if there is a shareholder recovery it will inure to the benefit of the trusts; the only result of trust participation would be to incur legal fees for the trust. Wayne also points out that the Trust instrument directs the trustees in balancing the happiness of Gaetana with her best interests and welfare, her best interests should normally prevail. Wayne posits that even if participation in the derivative action could somehow benefit the trusts, the benefit is conjectural and depends on the outcome of the derivative suit. Therefore, he argues there is at least a disputed question of fact of whether lack of participation of the trusts in the litigation is improper or whether participation would be wasteful and not in the best interests of the trust.

Wayne Celauro also addresses other issues raised by his mother Gaetana in her moving papers. He denies that he "personally attacked her" in his affidavit filed in the derivative action. He merely characterized the action as a vendetta against John Celauro. To the extent that he is alleged to have put personal considerations of future gain ahead of her interests by conspiring with John Celauro to conceal his alleged fraud in exchange for a personal employment agreement, he denies such a conspiracy. Her claim that he characterized her as a liar in a prior examination before trial leaves out pertinent testimony to the effect that he believes that the

untruths were concocted by Nathan Celauro. To the extent that Gaetana claims Wayne's actions with respect to Nathan's termination were improper, Wayne disputes that and asserts that Nathan was a menace to the company and his decision to support Nathan's termination was based on his "best business judgment." Wayne denies the attempt by Gaetana to characterize his relationship with Sal Celauro as "hatred," denies that he refuses to speak or communicate with her and suggests that she, who seeks orders of protection, is the one who refuses to communicate and that, in any event, these trusts, which merely provide passive income, do not require trustee consultation with beneficiaries regarding investment decisions. He denies any wrongdoing with respect to trust accounts and asserts he has provided all records of the trusts to her counsel. He denies animosity concerning family gatherings and presents a different version of the events of March 2006.

Concerning the reduction in Gaetana's Trust income from shareholder distributions, he denies that he arranged that change in concert with John Celauro. He states at paragraph 31 of his affidavit, "I, as an individual, have no power to effect the manner, amount or timing of company shareholder distributions, which is a corporate management decision."

Concerning his vote in favor of an amendment to the company's shareholders' agreement that grants the company a right of first refusal, he denies that such affects her income from the trusts as it applies only after her death. Gaetana, he asserts, has nothing to lose from the company's purchase of her shares after her death; only Nathan is affected and thus this argument is proof of Nathan's control of the petitioner in this proceeding.

Wayne Celauro and Diane Carter's counsel also argue that because the derivative suit and its determination are already in the hands of the Supreme Court, a continuation of this proceeding in the interim would be fundamentally wasteful. The court should not attempt to

conduct a mini trial of the derivative action while an actual trial is in the offing in that other forum and a stay of these proceedings pending final judgment in the derivative action should be granted.

### Petitioner's Reply

Nathan Celauro filed a reply affidavit which reviews three incidents in December 2003, May 6, 2004 and May 18, 2004 where it is alleged Wayne Celauro had certain heated disagreements with his father, Salvatore Celauro, concerning Wayne's divorce with his first wife and settlement negotiations with John Celauro concerning John allegedly frauding 4C. Presumably this evidence is offered to show Wayne's animosity toward his deceased father, his brother Nathan and his support of his cousin, John.

Gaetana has filed a reply affidavit in which she disputes certain allegations made in Wayne Celauro's affidavit. She takes the position that Wayne has failed in every respect to deny her factual statements as to his conduct as a trustee and offers instead a legal argument as to why summary judgment should be denied. Thus, she argues the court should treat her uncontroverted factual allegations and documentary evidence as true and conclude that there are no material triable issues of fact and remove Wayne as a trustee.

Gaetana then attempts to rebut Wayne's conclusory allegation by evidence that Wayne was not trusted by her husband, Salvatore Celauro, after 1992 and denies that there is anyone with powers over her. In addressing the amendment to the 4C stockholders' agreement, she argues that Wayne cannot be seriously contending that he is following the trust grantor's intent by effectively nullifying Gaetana's ability to appoint by her will the trust shares in 4C, a power granted by the trust instrument. Next she denies Wayne's assertion that all trust records have been made available to her attorneys. With respect to any stay of this proceeding pending the

outcome of the derivative action, she notes that under the preliminary conference order in that action, depositions are not scheduled for completion until July 2007. Estimating that a trial of that action and final determination will not occur until the end of 2008, she argues that a stay of this proceeding would be inappropriate.

For the first time, Gaetana raises an issue in the reply of Wayne and Diane improperly taking annual trustee commissions as trustees of the Insurance Trust for the years 2004 and 2005. She allegedly first became aware of that on March 24, 2006. It is claimed that the trustees took these commissions in violation of SCPA 2309(4) and Article Eleven of the Insurance Trust. This is alleged to be additional grounds for removal.

Diane Carter

Gaetana also seeks removal of Diane on the grounds of her general misconduct in supporting Wayne, signing an affidavit in the derivative action seeking dismissal and sanctions against Gaetana and her animosity to her mother and failure to communicate with petitioner and her son Nathan. Gaetana also cites various portions of Diane Carter's depositions wherein Diane indicates she is not and does not want to be familiar with the business of 4C, displays lack of interest in the derivative action but has submitted an affidavit characterizing the suit as frivolous and a waste of time. Diane and Gaetana have ceased communicating. There is evidence that Diane harbors extraordinary bitterness concerning Gaetana's relationship with her father in his final years, a personal vendetta against her brother Nathan allegedly displayed directly by her vote for the amendment to the 4C Shareholder Agreement and by her letter to her mother received, according to Gaetana, on April 8, 2007, and her prior letter of March 26, 2006.

Diane Carter did not submit an affidavit in opposition to this motion. Wayne Celauro

states that Diane has never betrayed her fiduciary duties and Gaetana's allegations with respect to Diane are the same as those made against him: a refusal to support the derivative suit, animosity towards her and a failure to communicate.

In Gaetana's reply affidavit she states that Diane has not opposed this motion or denied the factual statements made by her mother in the moving affidavit. Thus, she concludes and argues that Wayne's affidavit is insufficient to raise an issue of fact as to Diane's removal and summary judgment must be granted as against Diane. Additionally, Gaetana, by her reply affidavit, adds to her grounds against Diane her claim that the trustees of the Insurance Trust improperly paid annual commissions to themselves for the years 2004 and 2005.

#### Summary Judgment

Summary judgment may be granted only when it is clear that no triable issue of fact exists (*see e.g. Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Phillips v Joseph Kantor & Co.*, 31 NY2d 307, 311 [1972]). The court's function on a motion for summary judgment is "issue finding" rather than issue determination (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]), because issues of fact require a hearing for determination (*Esteve v Abad*, 271 App Div 725, 727 [1st Dept 1947]). Consequently, it is incumbent upon the moving party to make a prima facie showing that he is entitled to summary judgment as a matter of law (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067 [1979]); *Zarr v Riccio*, 180 AD2d 734, 735 [2d Dept 1992]). The papers submitted in connection with a motion for summary judgment are always viewed in the light most favorable to the non-moving party (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610, 610 [2d Dept 1990]). If there is any doubt as to the existence of a triable issue, the motion must be denied (*Hantz v Fishman*, 155

AD2d 415, 416 [2d Dept 1989]).

If the moving party meets his burden, the party opposing the motion must produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that would require a trial (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In doing so, the party opposing the motion must lay bare his proof (*see Towner v Towner*, 225 AD2d 614, 615 [2d Dept 1996]). “[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to overcome a motion for summary judgment (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see Prudential Home Mtge, Co., Inc. v Cermele*, 226 AD2d 357, 357-358 [2d Dept 1996]).

#### Removal of a Trustee

The grounds set forth above for removal of these trustees are hostility and antagonism toward the income beneficiary which allegedly interferes with the administration of the trusts, their failure to cooperate with one of the other co-trustees, Nathan Celauro, their failure to consult with Gaetana and/or Nathan, their alleged harassment of Gaetana because of the derivative suit, their alleged refusal to communicate with Gaetana and Nathan, their allegedly putting their own personal interests ahead of Gaetana’s interests and general welfare and Wayne’s alleged actual conflicts of interests in the administration of these trusts.

In general, the court is typically less inclined to remove a trustee selected by the settlor (*Matter of Younkers*, 111 Misc2d 599 [Sur Ct, New York County 1981]; Scott and Asher on Trusts (5th ed.) §11:10.1). The decedent-settlor’s choice should be given great deference unless legally not qualified to act (*Matter of Hunter*, 6 AD3d 117, 127, *affd* 4 NY3d 260 [2005]). The grounds for disqualification are limited to those specified in SCPA 707 and 711 (*Matter of Shepard*, 249 AD2d 748, 749 [3d Dept 1998]) and the party alleging removal bears the burden of

proof (*Matter of Palma*, 2007 Lexis 5464 [3d Dept 2007]; *Matter of Rad*, 162 Misc 2d 229, 231 [Sur Ct, New York County 1999]).

With respect to friction, hostility, animosity and failure to communicate between trustees and beneficiaries, the fact that such hostility exists does not alone justify removal; if it were otherwise, beneficiaries could always, simply by quarreling with the trustee, force the trustee's removal (*Matter of Miller*, 48 Misc 2d 815 [Sur Ct, New York County, 1965]; Scott and Asher on Trusts [5th ed] §11:10 at fn 15). If the friction and hostility is such that it necessarily and seriously will impede administration of the trust, the court will remove a trustee especially if the trustee is at fault (*see e.g. Matter of Goldstick*, 177 AD2d 225 [1st Dept 1992]). Such enmity must clearly threaten to interfere with the administration of the estate (*Matter of Venezia*, 25 AD3d 717 [2d Dept 2006]; *Matter of Sadowski*, 21 AD3d 1034 [2d Dept 2005]; *Matter of Morningstar*, 21 AD3d 1285, 1287 [4th Dept 2005]; *Matter of Duell*, 258 AD2d 382, 383 [1st Dept 1999]).

Notwithstanding evidence demonstrating that there is palpable friction and hostility between petitioner and the respondent trustees, an evidentiary hearing must be held to determine whether such friction and hostility would interfere with the proper administration of the trusts (*Matter of Venezia*, 25 AD3d 717 [2d Dept 2006]; *Matter of Graves* 110 NYS2d 763 [Sur Ct, Monroe County 1952]; *see generally Matter of Duke*, 87 NY2d 465, 472-473 [1996]). Only in cases where the hostility is undisputed and there is other uncontested evidence that conflicts are real, presently exist and have actually affected the trustees' decisions can removal be had without a hearing (*Matter of Palma*, 2007 Lexis 5464 [2d Dept 2007]).

With respect to conflicts of interest in this case, there are three incidents which form the basis of the petitioner's case for removal. First, the lack of the support by these trustees of the

derivative action and their affirmative efforts against the suit since Wayne Celauro is now a named defendant as a member of the Board of 4C. Second, the determination of 4C and CSI to pass distributions through CSI rather than 4C for business reasons and the degree of Wayne Celauro and Diane Carter's participation in that Board of Directors' decision. Third, the amendment to the shareholders' agreement to permit the company to buy at fair market value shares before they are transferred or sold which petitioner alleges is contrary to the trust instrument and defeats her power to appoint 4C shares by her will and whether Wayne Celauro and/or Diane Carter's support for the amendment breaches their fiduciary duties.

It is a firmly established principle of law that a trustee owes a duty of undivided loyalty to the trust, which standard does not permit a trustee to create or occupy a position in which he or she has interests to serve other than the interests of the trust estate. Undivided loyalty is the supreme test and a trustee must not, under any circumstances, place herself or himself in a position whereby his or her personal interests will come in conflict with the trust (*Matter of Rothko*, 43 NY2d 305, 319 [1977]; *Sankel v Spector*, 33 AD3d 167 [1st Dept 2006]; *Matter of Hall*, 275 AD2d 979, 980 [4th Dept 2000]). But, it is also well settled that a mere potential conflict of interest does not warrant removal. Rather, it is an actual conflict of interest that justifies removal of a fiduciary (*Matter of Morningstar*, 21 AD3d 1285 [4th Dept 2005]).

In this case, there are questions of fact as to whether the derivative action is in the best interests of the trust and whether it actually is detrimental to the trust. These issues cannot be resolved until that action is resolved and judgment is final.

Similarly, there are questions of fact as to what role, if any, Wayne Celauro played in the business decision to pass distributions through CSI which apparently have inured to his personal benefit to the detriment of the trust income beneficiary and what role if any, he played in the 4C

shareholders' agreement amendment and whether that amendment was intended to defeat the provisions of the Exemption Trust. Because these disputed questions of material fact exist, the court cannot grant summary judgment (*Grossman v Grossman*, 2005 NY Misc Lexis 3335, 233 NYLJ 84 [Sup Ct, Nassau County, May 3, 2005]).

Since these grounds, other than the merits of the derivative suit, can be determined at a hearing on removal, the court will permit discovery in this proceeding against Diane Carter as to whether her hostility has or will affect administration of the Insurance Trust, and discovery of whether Wayne Celauro's actions regarding the business distributions of 4C and the 4C amendment combined with hostility affecting administration are sufficient grounds for removal. No discovery will be had on the derivative action and it shall not be the subject of the hearing unless it is resolved at that time.

The parties are directed to appear in this court for a conference on August 21, 2007, at 9:30 a.m. to schedule discovery and set a hearing date.

This is the decision and order of the court.

Dated: June 29, 2007

JOHN B. RIORDAN  
Judge of the  
Surrogate's Court