

Matter of Leon

2008 NY Slip Op 31292(U)

March 26, 2008

Surrogate's Court, Nassau County

Docket Number: 0215409/2007

Judge: John B. Riordan

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

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 In the Matter of The Petition of Geraldine Leon and
 Ronald J. Coulter, Trustees of the Trusts Under Will of
 William V. Tomasello f/b/o Emilia Tomasello Pace and
 Rosemary Tomasello Coulter ("Trusts")

File No. 215409

Dec. No. 879

For an Order revoking the Letters of Trusteeship of and
 removing Michael B. Wind as Trustee of the Trusts,
 compelling an accounting of the Trusts and Surcharging
 Michael B. Wind for Acts Taken to the Detriment of the
 Trusts, finding that David Wind not be Qualified to Serve
 as Successor Trustee and other Relief.

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In this miscellaneous proceeding, the respondent moves for an order directing the
 petitioners to reimburse the trust for attorney's fees paid in connection with this proceeding, or,
 in the alternative directing the petitioners to pay respondent's attorney's fees in connection with
 this proceeding from the trust.

William Tomasello died on December 14, 1981, leaving a will dated September 3, 1980,
 which was admitted to probate by decree dated December 30, 1981. He was survived by his
 wife, Marie, and his three children, Emilia Tomasello Pace, Rosemary Tomasello Coulter and
 Mary Ann Tomasello Ross. Under the terms of the will, four trusts were created one for each of
 Marie, Emilia, Rosemary and Mary Ann. Pursuant to the terms of the Will, upon the deaths of
 Marie and Mary Ann, their respective trusts poured over into the trusts for the benefit of Emilia
 and Rosemary. Letters of trusteeship for the trusts originally issued to Sadie Lasalata, Edward
 Tomasello and Oscar Wind. Sadie Lasalata died on November 30, 1990. On January 31, 1991,
 Michael Wind became her successor trustee. Edward Tomasello died on December 3, 2000, and
 Ronald J. Coulter became his successor trustee. Oscar Wind, the remaining original trustee, died
 on January 13, 2004, and successor letters of trusteeship issued to Geraldine Leon on December

19, 2004. Thus, the current trustees of the trusts are Michael Wind, Ronald J. Coulter and Geraldine Leon. In the event that Michael Wind shall fail or cease to act, David Wind is appointed as his successor.

Geraldine Leon and Ronald J. Coulter, two of the three trustees, have commenced a proceeding to remove Michael Wind as trustee and to revoke David Wind's designation as Michael Wind's successor. Respondent now moves for an order directing Geraldine Leon and Ronald J. Coulter to either immediately reimburse the trust for any fees paid to their attorneys in connection with this proceeding, or alternatively, to pay from the trust fund the attorney's fees which the respondent has incurred and will incur in connection with this proceeding.

Petitioners argue that respondent's motion should be denied for two reasons. First, petitioners argue that respondent's motion is defective procedurally since a request for fees can only be made by petition, in which all interested parties are cited. Second, petitioners argue that while they are authorized by the decedent's will to engage counsel for actions taken on behalf of the trust, the respondent "is simply defending himself from the serious allegations made in the Petition regarding his various breaches of fiduciary duty and the self-dealing" The petitioners further claim that they are protecting the trust by bringing this proceeding and, therefore, are providing a benefit to the trust.

Respondent argues that his primary position is that neither petitioners' attorney's fees in commencing and pursuing this proceeding nor his own attorneys fees in defending these allegations should be paid from the trust until the conclusion of this proceeding and only after notice and a hearing. In the alternative, respondent contends that, if petitioners' attorney's fees are payable out of the trust, respondent's attorney's fees should likewise be paid from the trust.

The law is well-settled that where a trustee has been removed for misconduct, the cost and expenses are his own personal obligation (*Jessup v Smith*, 223 NY 203 [1918]). In addition, “[u]nless there has been a final determination as to alleged misconduct of a trustee, such alleged misconduct cannot be interposed as a defense to the request for attorney’s fees or services rendered in defending the trustee” (*Matter of Iskyan*, 167 Misc 2d 492, 494 [Surr Ct, Nassau County 1996]). A fiduciary has the right to resist proceedings for his removal (2 Harris 5th N.Y. Estates: Probate Admin & Litigation §18.102). A successful defense by a fiduciary against such an effort is a defense of the trust itself, for which legal fees may be charged against the trust (*Jessup v Smith*, 223 N.Y. 203 [1918]; *Matter of Berg*, 91 Misc 2d 939 [Surr Ct, New York County, 1977]; *Matter of Goldman*, NYLJ, April 5, 2004, at 32, col. 4 [Surr Ct, Kings County]). The court also notes that prior to the 1995 amendment to SCPA 711, (L. 1995, c. 477), a fiduciary, even though he might be in the best position to know if his co-fiduciary is engaging in conduct warranting removal, did not have standing to bring a removal proceeding (*Matter of Braloff*, 3 AD2d 912 [2d Dept 1957], *aff’d* 4 NY2d 847 [1958]; *Matter of Parnes*, 263 AD 872 [2d Dept 1942]). As a result of the amendment, a trustee does have standing to commence a removal proceeding against his co-trustee, and, in some circumstances, may have a duty to do so, especially since a fiduciary may not remain passive where the actions of his co-fiduciary may result in loss to the estate (*Matter of Rothko*, 43 NY2d 305 [1977]).

Thus, at this juncture, both the legal fees of the petitioners in bringing the removal proceeding and those of the respondent in defending the removal proceeding are presumptively payable from the trust funds, subject, however, to possible reimbursement at the conclusion of this proceeding based upon the findings of the court. In addition, the court finds petitioners’ argument that respondent’s motion is procedurally defective without merit. The reasonableness

of the attorney's fees ultimately paid from the trust is not before the court at this time. The only question before the court is whether attorney's fees in connection with the proceeding may be paid out of the trust funds at this juncture.

This constitutes the decision and order of the court.

Dated: March 26 , 2008

JOHN B. RIORDAN
Judge of the
Surrogate's Court

