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

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In the Matter of the Application of Craig Limmer
to Compel an Accounting by Brian M. Limmer
as Administrator of the Estate of

HANNAH LIMMER,

Deceased.

File No. 341050

Dec. No. 261

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Before the court is a petition for an order to compel an administrator to account. For the reasons set forth below, the requested relief is granted.

Hannah Limmer died on February 13, 2006, leaving no will. Her distributees are her two sons, Brian M. Limmer, a self-represented attorney, and Craig Limmer. On March 3, 2006, Brian applied to this court for letters of administration. In his verified petition, Brian estimated the gross value of decedent's personal property passing by intestacy to be less than $70,000. Craig filed a waiver of citation, renunciation and consent to appointment of administrator. On March 13, 2006, the court issued letters of administration to Brian.

On February 5, 2008, Craig filed a petition to compel an account. Citation issued and the matter was before the court on March 19, 2008. On March 26, 2008, Brian filed an affidavit in opposition to the petition to compel an account. Brian's opposition to Craig's petition raises four issues, each of which is addressed below by the court:

Respondent asserts that the citation refers to him as an executor, rather than as an administrator. On this basis, respondent asserts that the citation served upon him is null and void.

Respondent's assertion is incorrect. Service will not be vacated on the basis of a mere irregularity subject to correction (*Rosenberg v Caban*, 16 NY2d 905, 906 [1965]). The court

may disregard a harmless error *(Mitchell v Shoals, Inc.*, 19 NY2d 338, 341 [1967]). Most recently, the Court of Appeals held that a court should have disregarded a clerical error in the characterization of a party where the other party "indisputably understood [who were] the intended appellants. Accordingly, no substantial right of appellee has been or will be prejudiced . . . ." (*Tagliaferre v Weiler*, 1 NY3d 605, 606 [2004]). To the extent that the citation referred to respondent as an executor rather than as an administrator, that mistake may be, and is, disregarded by this court pursuant to CPLR 2001.

Respondent's second argument is that the estate contains no assets, and therefore he is not obligated to account. Respondent advises the court that after filing his petition for letters of administration, he discovered that all of decedent's assets were held in the "Hannah Limmer Family Trust," executed by decedent on November 30, 2000, which names decedent as grantor and Sam Panish as trustee. Thus, respondent's petition which reflected assets held in the intestate estate was in error, because all of decedent's assets were held in the trust. On this basis, respondent asserts that he has no obligation to account as administrator because the petitioner is seeking an account in connection with assets which are not held in the estate.

The court notes that the right of an interested party to petition for an order to compel an accounting is predicated upon SCPA 2205(2)(b), which provides that the court may require a fiduciary to account on the petition of a person interested. A person interested is defined in SCPA 103(39) as "[a]ny person entitled or allegedly entitled to share as beneficiary in the estate . . . ." The term "beneficiary" is defined in SCPA103(8) as "[a]ny person entitled to any part or all of an estate." Accordingly, petitioner is a "person interested" who has standing to seek a court order to compel an account, and the court may order such account. There is no threshold

requirement to show that an estate contains assets. If the court directs the fiduciary to account, the account itself will provide the fiduciary with an opportunity to accurately reflect which assets are held in the estate and which assets are held elsewhere, such as in an inter vivos trust.

Respondent's third point is that the distribution of decedent's estate is governed by the terms of the trust. Respondent takes the position that Article First (5) of the trust indicates unequivocally that decedent's inter vivos trust contained all of decedent's assets, and that any distribution to petitioner is predicated upon his passing a drug test administered by respondent (respondent's affidavit in opposition, paragraph 8).

A close reading of the cited section of the trust does not support this. The referenced portion of the trust provides in full:

> (5) FAMILY MEMBERS
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> At the time of the execution of this Trust,GRANTOR's family consists of:
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> GRANTOR and GRANTOR's children, BRIAN M. LIMMER and CRAIG E. LIMMER, herein sometimes referred to individually as "child" or collectively as "children". COREY LIMMER and AMANDA I. LIMMER, sometimes referred to individually as "grandchild" or grandchildren".
>
> Whenever in this Trust the Grantor makes a disposition of property to persons described therein as a grandchild, child, children, issue, descendants, or distributees or by any term of like import, the GRANTOR specifically and intentionally does not intend to include CRAIG E. LIMMER for reasons personal to GRANTOR and also known and discussed with him. CRAIG LIMMER has to date and shall continue to receive substantial monetary support from the GRANTOR despite GRANTOR's objection to his unfortunate lifestyle of not working and substance abuse. However, GRANTOR has made or intends to make a disposition of certain monies in accounts (savings, stock portfolios and/or pension) to be shared equally between BRIAN M. LIMMER and CRAIG E. LIMMER, per stirpes, subject to the following: Upon my death, the share of CRAIG E. LIMMER in any of the accounts set forth herein shall be held in trust by BRIAN M. LIMMER, as trustee, pursuant to the above terms herein, in an interest bearing account of trustee's choice, and shall be paid to CRAIG E.

> LIMMER on a quarterly basis in the sum of Twelve Hundred ($1,200.00) Dollars until CRAIG E. LIMMER reaches the age of Sixty-Five or the trust is exhausted, whichever is sooner. In the event CRAIG E. LIMMER predeceases the GRANTOR with no issue surviving, then those funds shall be paid to BRIAN M. LIMMER, per stirpes. However, upon my death and at a time chosen by BRIAN M. LIMMER, I direct him to test CRAIG E. LIMMER for the presence of any illegal substances in his body. If, in the absolute sole judgment and discretion of BRIAN M. LIMMER, any illegal substances are found in CRAIG E. LIMMER's body, then the interest of CRAIG E. LIMMER to any and all of the monies that would otherwise have been available to or for CRAIG E. LIMMER shall terminate and shall be paid directly to BRIAN M. LIMMER, per stirpes.

This language does not sustain respondent's assertions that (1) all of decedent's assets are contained in the trust, or (2) petitioner's interest in decedent's intestate estate (as opposed to his interest in decedent's inter vivos trust) is subject to drug testing or any other condition. The trust does not control the distribution of assets which were held in decedent's name at the time of her death. Therefore, the balance of respondent's affidavit in opposition, paragraphs 9 through 44, which addresses the application of conditions set forth in the trust, in view of petitioner's personal and medical history, is irrelevant to this matter, which is limited to the petition to compel an account in decedent's intestate estate. While the court notes respondent's concern for petitioner's health and well-being, this has no bearing on the duty of respondent to account. Respondent's affidavit in opposition lacks cogency in that it fails to address the key issue before the court, which is the obligation of an administrator to file a judicial account upon the timely petition of an interested party. The terms of decedent's trust, the assets held in the trust, and most significantly, the lifestyle and past history of the petitioner, are not relevant to the petition before the court.

A fourth point is presented by respondent in his affidavit filed April 16, 2008. Respondent believes that the court should treat all of decedent's assets as though they had been

held in the trust, because that was decedent's intent. Even if respondent could prove decedent's intention to transfer all of her assets to the trust, an intention never carried out cannot be treated as a completed transfer (*Farmer's Loan and Trust Co. v Winthrop*, 238 NY 477 [1924]). A lifetime trust is only valid as to the assets that have been transferred to the trust (EPTL 7-1.18).

The court finds that the administrator is obligated to account as the administrator of the estate. The relief requested is granted. Respondent is ordered to file and judicially settle his account as administrator of the estate of Hannah Limmer no later than 60 days from the date of this decision.

The court agrees with the administrator that he is under no obligation at this time to account for assets held in the trust. That account may be required if the petitioner seeks a further order to compel an account by the trustee of the trust. No such petition is before the court at this time.

The court further notes that respondent has not yet filed a list of assets reflecting the gross taxable estate, which would include assets held in trust, pursuant to the Uniform Rules for Surrogate's Court (22 NYCRR 207.20). The list was due by the later of (1) the date on which the New York State tax return would have been due, had one been required, or (2) six months after the issuance of letters (22 NYCRR 207.20[a]). The administrator is directed to file a list of assets no later than 30 days from the date of this decision.

Dated: June 4, 2008

JOHN B. RIORDAN
Judge of the
Surrogate's Court

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