

**Matter of Meltzer**

2009 NY Slip Op 31852(U)

August 13, 2009

Surrogate's Court, Nassau County

Docket Number: 345734

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 Estate of

JULIE W. MELTZER,

Deceased.

File No. 345734

Dec. No. 413

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In this miscellaneous proceeding, the co-executors under decedent's will, Laurie Meltzer and Donna Meltzer, are seeking to evict their sister, Cathy Alexander, and Cathy's son, Justin Alexander, from decedent's residential real property located at 6 Kejaro Court, Center each, New York.

The decedent, Julie Meltzer, died a resident of Nassau County on December 30, 2006, leaving a last will and testament dated July 13, 2006. The will was admitted to probate on March 19, 2007, and letters issued to Laurie and Donna as co-executors and co-trustees. After making some specific bequests, decedent left her residuary estate to her four daughters, Laurie, Donna, Cathy, and Shelley Egnor, in equal shares. Decedent placed Cathy's share in the "Cathy Alexander Supplemental Needs Trust" created pursuant to Article Fourth of her will. The will gives the trustees discretion in distributing income and principal to Cathy. At Cathy's death the remainder of the trust, if any, will pass to Cathy's son, Justin. Shelley is the named successor fiduciary. The estate contains approximately \$125,000.00 in personal property and three homes, which are valued in the aggregate at \$1,285,000.00.

In connection with the administration of the estate and the trust, five miscellaneous proceedings were filed with the court prior to the present matter. Some of the issues raised in these proceedings were resolved in a stipulation of partial settlement entered into by all of the interested parties, *viz.*, Laurie, Donna, Cathy, Shelley and Justin, on December 10, 2008. Insofar

as it is relevant to the issue before the court, paragraph 5 of the settlement agreement provides that Laurie and Donna, as co-trustees of the supplemental needs trust, would enter into a contract for the purchase of property located at 3 Tulip Circle, Walton, New York, which property Cathy and Justin agreed to use as their long-term primary residence. Pursuant to the agreement, the co-executors purchased 3 Tulip Circle and made it available to respondents as of March 16, 2009. Paragraph 5 further reflects that Cathy and Justin, who were residing in decedent's real property at 6 Kejaro Court, would vacate that property and move to 3 Tulip Circle. Paragraph 6 of the agreement obliges the fiduciaries to put 6 Kejaro Court up for sale within 90 days after respondents move out.

However, respondents have thus far refused to move out of 6 Kejaro Court, and the agreement does not specify a date by which they are required to do so. The co-executors ask that the court issue:

- (1) a decree directing Cathy and Justin to vacate the property located at 6 Kejaro Court;
- (2) a warrant of eviction directed to the Sheriff of Suffolk County , where the property is located; and
- (3) a decree surcharging the supplemental needs trust for the benefit of Cathy for all of the costs and expenses relating to the proceeding and eviction, including attorneys' fees, sheriff fees and expenses, and related storage expenses.

Respondents' counsel filed a verified answer in which it is asserted that since the stipulation did not include a specific date for respondents to move out of 6 Kejaro Court, "there cannot be one added now." A reply to the answer was then filed by petitioners' counsel, in which it was argued that the stipulation is essentially irrelevant to the proceeding before the

court, as the legal basis underlying petitioners' order to show cause and petition is the right of the co-executors to evict respondents from an estate asset, in order that it may be liquidated.

The matter was submitted for decision, but subsequently, respondent's counsel filed an "answer to reply" on June 6, 2009, in which counsel asked that the court (1) deny the motion for eviction; (2) impose sanctions on petitioners for frivolous litigation, and (3) revoke petitioners' letters testamentary. Counsel for petitioners objected to the court's consideration of this sur-reply on the grounds that (1) the court doesn't allow sur-replies without authorization; (2) the matter had already been submitted for decision; and (3) respondents advised the court that they will not vacate 6 Kejaro Court without a court order, forcing petitioners to bring this proceeding.

The first question before the court is whether petitioners are empowered, in their capacity as co-executors of the estate or as signatories to the stipulation of settlement, to evict Cathy and Justin from 6 Kejaro Court. The answer may depend, in part, upon the nature of the interest held by Cathy and Justin in the occupied property. When a residuary estate includes real property, and there are two or more residuary beneficiaries, the beneficial interest of each is that of a tenant in common (EPTL 6-2.2 [a]; *see Matter of Wellings*, NYLJ, April 26, 1989 at 26, col 6 [Sur Ct, Suffolk County]). However, an executor has the "right to possess and manage the decedent's realty so that he may sell the property in accordance with the statutory authority with which estate fiduciaries are imbued, as well as to collect the rentals thereof, and otherwise preserve the asset and make it productive to all those with a beneficial interest therein (*Matter of Taylor*, NYLJ, Feb. 2, 2005 at 22, col 1 [Sur Ct, Kings County], citing SCPA 1902; EPTL 11-1.1; *Estate of Pastorelli*, NYLJ, Nov. 21, 2002 at 25, col 5 [Sur Ct, Suffolk County]; *Estate of Semenza*, NYLJ, Sept. 15, 2000, at 28, col. 2 [Sur Ct, Bronx County]; *see also Matter of Wellings*, NYLJ,

Apr. 26, 1989 at 26, col 6 [Sur Ct, Suffolk County]). This right is superior to that of a beneficiary (*Estate of Pastorelli*, NYLJ, Nov. 21, 2002 at 25, col 5 [Sur Ct, Suffolk County]). In this case, it is not Cathy or Justin individually who holds a tenancy in common in 6 Kejaro Court, along with Laurie, Donna and Shelley. Rather, it is the co-trustees of the supplemental needs trust, *viz.*, Laurie and Donna, who are tenants in common with the other three residuary beneficiaries, Laurie, Donna and Shelley, in their individual capacities. Neither Cathy nor Justin has any direct title or interest in 6 Kejaro Court. Accordingly, the removal of Cathy and Justin from the premises located at 6 Kejaro Court is warranted.

Once it has been established that petitioners have the right to evict Cathy in their capacity as co-executors, this court need not even reach the question of whether the absence of a specific date in the agreement empowers Cathy and Justin to reside at 6 Kejaro Court indefinitely. The court also need not consider any of the other issues raised in the responsive papers filed with the court, some of which may be addressed within the context of the two ongoing accounting proceedings.

The motion is granted to the extent of an award of possession together with a warrant of eviction. Respondents are granted a thirty (30) day stay of the execution of the warrant. In addition, respondents are prohibited from interfering in any manner with the possession, control or management of said premises by the co-executors of the estate for the purpose of selling the premises, which the executors are authorized and empowered to do pursuant to EPTL 11-1.1.

Insofar as petitioners seek recovery from the supplemental needs trust of all of the costs and expenses relating to the proceeding and the eviction, including attorneys' fees, sheriff fees and expenses, and related storage expenses, that part of the application is denied.

Submit judgment of possession and warrant of eviction.

This constitutes the decision and order of the court.

Dated: August 13, 2009

JOHN B. RIORDAN  
Judge of the  
Surrogate's Court