

**Matter of Carniol**

2010 NY Slip Op 30717(U)

February 18, 2010

Surrogate's Court, Nassau County

Docket Number: 337432

Judge: John B. Riordan

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

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 Accounting by Rhonda Carniol as the Executor of the  
 Estate of

File No. 337432

DAVID CARNIOL,

Dec. No. 895

Deceased.

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This is a first and final accounting of Rhonda Carniol.

The decedent, David Carniol, died on March 2, 2005. The decedent's will dated August 26, 1998 was admitted to probate, and letters testamentary issued to Rhonda Carniol on May 23, 2005. Article FOURTH of the will provides as follows:

"I give the proprietary lease or leases to, and the stock evidencing ownership of, any cooperative apartment or apartments which I own at the time of my death, together with any applicable insurance policies, including prepaid premiums, to my wife, DIANE CARNIOL, or, if she does not survive, to my trustee, in trust, who shall retain the apartment for use by my granddaughter, AIMEE ROBIN CARNIOL, if and for as long as she wishes to reside there. Payments for expenses regarding the use or preservation of the property, including maintenance, real estate taxes, insurance premiums, repairs, and interest and principal on any mortgage on any apartment or on the underlying property, and for capital improvements shall be made by my granddaughter. Neither my granddaughter nor my trustee shall be liable for loss, destruction, usage or waste of any apartment held hereunder, or for any decline in its value or its failure to appreciate in value.

My trustee may, with the consent of my granddaughter, sell any apartment held hereunder at any time for such price and on such terms and conditions as my trustee shall determine and invest as much or all of the proceeds as my trustee shall determine in another residence, on the same terms that apply to the original residence. Any proceeds of sale in excess of the amount used to purchase another residence shall be added to the trust under Article FIFTH.

Upon the death of AIMEE ROBIN CARNIOL, my trustee shall sell any apartment held hereunder for such price and on such terms and conditions as my trustee shall determine and distribute the proceeds of sale to the trust under Article FIFTH."

In addition, Article FIFTH of the will provides as follows:

“If my wife does not survive me and if either of my grandchildren, AIMEE ROBIN CARNIOL and STEVEN CARNIOL, survives me, I give the sum of One Hundred Fifty Thousand Dollars (\$150,000) to my trustee, in trust.

During the lifetime of the survivor of AIMEE ROBIN CARNIOL and STEVEN CARNIOL, my trustee shall pay or apply the income of the trust, at least quarterly, in equal shares to or for the benefit of my grandchildren, AIMEE ROBIN CARNIOL, and STEVEN CARNIOL, if they are both living or in its entirety to the only one then living during the term of the trust.

In addition, my trustee may distribute as much or all of the principal of the trust to or between, or apply the same for the benefit of AIMEE ROBIN CARNIOL and STEVEN CARNIOL, during the term of the trust, at such times and in such amounts, without regard to equality of distribution, as my trustee in his or her discretion, deems advisable for the health, support or maintenance of the beneficiary.

Upon the death of AIMEE ROBIN CARNIOL and STEVEN CARNIOL, my trustee shall distribute the remaining principal, if any, to the descendants of NORMAN CARNIOL then living or, if none, to my descendants then living.”

Decedent’s wife, Diane, predeceased him. Both Aimee Robin Carniol and Steven Carniol survived the decedent. The decedent was also survived by a minor grandchild, April Carniol, who is a daughter of Norman Carniol, and, therefore, a presumptive remainderman of the Article FIFTH trust.

Thereafter, the executor made an application to the court to allow the executor to modify the terms of the Article FOURTH trust created under the will. According to the executor, the co-op association advised that it would not approve a transfer to the trust and, additionally, that any person residing in the apartment needed co-op board approval, which would be granted only after all required forms were completed and the proposed resident appeared before the board. The executor was advised in writing on two occasions that the board would not approve a transfer to the trust.

The executor further claimed that the trustee of the Article FOURTH trust, Paul Carniol, obtained the required forms and sent them to Norman Carniol, Aimee's father, with a request that he assist Aimee in completing the forms. The trustee claims that he never received a response despite following up numerous times with Aimee's father. The executor further claimed that based upon Aimee's financial situation and "certain other aspects of her history," it was unlikely that the co-op board would approve her tenancy even assuming she could overcome the board's policy prohibiting transfers to a trust. The executor asked Aimee if she would consent to a sale of the apartment; however, Aimee never gave a definitive response to the executor's request.

The executor asked the court's permission to modify the terms of the Article FOURTH trust to permit her either to (i) sell the cooperative apartment and to pay the proceeds, net of the existing debt on the property and expenses of sale, to the Article FOURTH trust, or (2) transfer, with or without co-op board approval, the decedent's right, title and interest in the cooperative apartment to the Article FOURTH trust with a direction that the trust immediately sell such apartment. The executor also asked that the trustee be permitted to purchase a replacement apartment or home for Aimee and that any excess funds be used to defray the cost of housing, including rent on an apartment or home, utilities, real estate taxes and other appurtenant charges for Aimee for her lifetime, or until the trust proceeds are exhausted.

By decision dated June 26, 2008 (Dec. No. 96/2008), the court concluded that the testator did not foresee the possibility that Aimee would be unable to pay for the upkeep of the co-op apartment and withhold her consent to a sale, or that the board would not approve a transfer of the shares to a trust. The court was further concerned that estate assets were being depleted to maintain the apartment. Accordingly, the court approved an equitable deviation from the literal

terms of the will and authorized the executor to sell the cooperative apartment and pay the proceeds, net of the existing debt on the property and expenses of sale, to the Article FOURTH trust after repayment to the Article FIFTH trust of those funds previously used to pay the expenses on the co-op. In addition, the court scheduled a hearing to determine whether Aimee was able to pay the expenses of upkeep on a replacement residence recognizing that if she was not able to do so, the same problem would arise.

A hearing on the matter took place on June 5, 2009 and was continued on September 8, 2009. At the conclusion of the hearing, the parties were given until October 29, 2009 to submit memoranda of law; however, the court has not received a memorandum on behalf of any party. Norman Carniol and Aimee Carniol testified at the hearing, which was limited to the issue of whether Aimee could satisfy the expenses of upkeep if a replacement residence was to be purchased. Mr. Carniol testified that he advances Aimee money for expenses she cannot meet. He testified on direct examination that, for as long as he can, he will pay all of Aimee's living expenses if required. Mr. Carniol testified on cross-examination that for the past year he has given Aimee a couple of hundred dollars a week, plus he pays the costs of her health insurance. Mr. Carniol also testified that Aimee was a "handicapped person" because she was a substance abuser. According to Mr. Carniol, Aimee voluntarily put herself into a one-year program to change her habits, which she succeeded in doing. When asked whether he could offer a guarantee of payment for Aimee until the date of his death and, if so, the amount, Mr. Carniol testified that he did not have the ability to do that. Mr. Carniol also testified that he has been supporting Aimee, who is 38 years of age, directly or indirectly since she was 17. He further testified that he anticipated that Aimee would need \$1,000.00 to \$2,000.00 a month and he would

take care of that if she could not.

The next witness to testify was Aimee Carniol. Aimee testified that she was participating in a program at the Samaritan Village to eventually work as a case manager. Aimee testified that she has an associates degree in applied science of nursing and is a licensed practical nurse. Aimee further testified that if the trust purchased a residence for her, she would be willing and ready to occupy that residence.

At the continuation of the hearing, Mr. Carniol testified that Aimee was attending the University of the State of New York Continuing Education Program to become a licensed substance abuse counselor. A letter confirming Aimee's participation was submitted into evidence.

A guardian ad litem was appointed for April Carniol, a descendant of Normal Carniol, and a presumptive remainderman of the Article FIFTH trust. The guardian ad litem has filed a report wherein she concludes that Aimee has not made any showing that she will be able to pay the costs associated with a replacement residence. The guardian ad litem also concludes that allowing the remaining portion of the co-op sale proceeds to be applied towards the purchase of a new residence and subject to Aimee's ability to make payments is an unreasonable risk which jeopardizes the interests of her ward.

Based upon the evidence presented at the hearing, the court finds that Aimee Carniol, even with the assistance offered by her father Norman Carniol, is unable to show with any reasonable degree of certainty that she can meet the expenses of maintaining a replacement residence if the trustee of the Article FOURTH trust purchased such a residence for Aimee's benefit. The testimony of Normal Carniol consists primarily of unsubstantiated and conclusory

statements. Moreover, the court agrees with the guardian ad litem that the purchase of a replacement residence would present an unreasonable risk to the trust. Accordingly, the court finds that the net proceeds of sale in the amount of \$148,523.42 shall be allocated as follows. Expenses paid on the upkeep of the co-op in the amount of \$73,566.78 shall be refunded to the Article FIFTH trust. The balance of the net proceeds shall also be allocated to the Article FIFTH trust up to \$76,433.22, to allow for full funding of the Article FIFTH trust in the amount of \$150,000.00 as provided in the will. The Article FIFTH trust shall then be administered pursuant to the terms of the will.

Concerning the issue of who shall serve as the trustee of the Article FIFTH trust, the court is in receipt of the resignation of Paul Carniol and a renunciation of successor trustee by Rhonda Carniol. At the hearing, the parties indicated that they would like to submit considerations for the appointment of a successor trustee. Norman Carniol indicated verbally that he would like to serve. The court is also in receipt of correspondence from counsel for Steven Carniol recommending the appointment of Ernest R. Steignman. Mr. Steignman, who is an attorney, is the uncle of Aimee and Steven. The issue of Paul Carniol's resignation is not properly before the court. A petition seeking approval of his resignation by the court must be filed and a separate miscellaneous proceeding commenced. At that time, the court will consider recommendations for a successor trustee. Nevertheless, the court notes that although Steven has indicated his uncle's willingness to serve, the court is not in receipt of a writing from Mr. Steignman confirming his acceptance to serve as successor trustee. Moreover, Norman Carniol has not filed any writing confirming his willingness to serve.

Concerning the guardian ad litem's fee, the court notes that the guardian ad litem has

submitted an affirmation of services in which she states that she spent 6.8 hours on this matter. Her usual billing rate is \$425 per hour. Considering all of the factors used to determine the reasonableness of fees, the court fixes the fee of the guardian ad litem in the amount of \$2,000.00. The fee of the guardian ad litem shall be paid within thirty (30) days of the date of this decision.

Concerning the executor's commissions, the guardian ad litem questions whether the executor should receive a commission on the proceeds of the sale of the co-op. The executor was authorized to sell the co-op apartment pursuant to the court's decision and order. Accordingly, the sales proceeds are commissionable.

The accounting shows unpaid legal fees of \$20,000.00 and previously paid fees of \$25,591.29. Counsel is directed to submit an affirmation of legal services within twenty (20) days of the date of this decision. Upon receipt thereof, the issue of attorney's fees will be submitted for decision. The decision thereon will direct the settlement of a decree.

This decision constitutes the order of the court.

Proceed accordingly.

Dated: February 18, 2010

JOHN B. RIORDAN  
Judge of the  
Surrogate's Court