

Matter of James T. Trainor

2010 NY Slip Op 31709(U)

June 30, 2010

Surrogate's Court, Nassau County

Docket Number: 343960/B

Judge: John B. Riordan

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

-----X
 In the Matter of the Petition of Audrey Maher
 Trainor, as Executor of the Estate of

File No. 343960/B

JAMES T. TRAINOR,

Dec. No. 26503

Deceased,

and as Natural Mother/Guardian of Delia Trainor,
 To Compel an Accounting and Discover Assets
 Respecting the Trainor Revocable Trust.

-----X
 This matter comes before the court pursuant to an order to show cause dated November 5, 2008, pursuant to which the petitioner, Audrey Maher Trainor, acting as executor of the estate of James T. Trainor and natural mother and guardian of Delia Trainor, sought the removal of Suzette M. McQuair as trustee of a certain revocable trust created by written agreement dated May 28, 2003 (the "Trainor Living Trust", also referred to herein as the "Trainor Revocable Trust" or the "Trust"); to surcharge Ms. McQuair in the amount of all principal and income diverted from the Trust and for the costs and expenses of the proceeding; and the imposition of a constructive trust upon all assets diverted from the Trust by Ms. McQuair. Other parties in interest, namely Sean DeJesus, Caren M. Scalise, Sharon Paeth and Tamara Trainor, have joined in the request for relief.

On November 22, 2006, this court signed an order restraining and enjoining Ms. McQuair "from assigning, transferring, disposing of, alienating or encumbering any monies or property, and all proceeds thereof of the Trainor Revocable Trust, other than for the immediate needs and support of Edith Trainor, or from moving such assets from the State of New York." The restraining order was reissued on January 2, 2007. At a hearing conducted on January 31, 2007,

the parties stipulated that Ms. McQuair would account for her actions as trustee on or before May 15, 2007 and that the restraining order would continue. Ms. McQuair was represented by counsel at the hearing. No accounting was filed and on November 26, 2007, another order to show cause was issued including a similar restraint.

On April 2, 2008, the court issued its Decision No. 158, ordering and directing Ms. McQuair to account within thirty days, suspending her trusteeship and continuing the restraint. No account was filed and the current order to show cause was entered on November 5, 2008. In response to the subject order to show cause, the court issued its Decision No. 157, dated May 5, 2009, removing Ms. McQuair as a trustee.

On February 12, 2010, as amended on March 2, 2010, petitioner moved for an ex parte attachment which was granted by order dated January 19, 2010. Petitioner's motion for confirmation of the attachment is sub judice and will be decided separately from the current petition.

An evidentiary hearing was held and concluded on April 22, 2010. Petitioner, Audrey Maher Trainor, was the sole witness. She testified without objection and the various documents identified on behalf of petitioner were all received in evidence without objection by respondent's counsel. Respondent, Suzette McQuair, did not personally appear. Her counsel did cross examine Audrey.

The Parties and the Trust. The Trust Agreement was received in evidence, According to the testimony, the Trust was set up by and for the benefit of Mrs. Edith M. Trainor. Edith had three children, Suzette McQuair, James T. Trainor and Patricia Morales. Patricia was allegedly incapacitated and incapable of properly managing money. The Trust was designed to hold all of

Edith's property for her benefit during her life and thereafter be divided equally among Suzette, James and Sean Paul DeJesus, Patricia's adult son. This was set forth in a letter dated January 14, 2004, over Edith's purported signature. It was received in evidence, and described the intent of the trust arrangement. Edith's property was to be divided into thirds and given to Suzette, James and Sean, who, in turn, would transfer the property to the Trust. Suzette, James and Sean were to serve as co-trustees. James died after the creation of the Trust on June 24, 2006 and is survived by his widow, petitioner Audrey Maher Trainor, who is the executor of his estate, and by a minor daughter, Delia Trainor. With certain exceptions, the Trust plan was carried out. It is further noted that the undisputed testimony indicated that Edith was receiving both a pension and Social Security benefits which Audrey believed were more than sufficient to cover her living expenses.

Suzette had the responsibility of caring for Edith and for at least some period of time in 2007-2008 also cared for Patricia. According to Georgia assessment records, Suzette purchased a property located at 45 Creekview Drive, Newnan, Georgia for \$120,000.00 on or before October 27, 2006, allegedly using Trust monies for the purchase. In or about November of 2006, Suzette moved to Georgia, taking Edith with her. Patricia joined them some time later. While not part of the record and unrelated to the subject matter of these proceedings, the court has been informed that Edith died some time prior to the trial date.

The Assets Purportedly Received by or for the Benefit of the Trust. The assets alleged to constitute trust property and the evidence in support thereof are described as follows.

1. House in Glen Cove, New York. A closing statement indicated that the net proceeds from the sale of Edith's Glen Cove residence was \$531,721.68 received by Edith on January 23, 2004. However, there is no proof these funds were deposited into any trust account or were otherwise in the possession or control of the respondent.

2. Florida Condo. A Florida Condo was deeded by Edith to Suzette, a copy of the deed, dated April 14, 2006 and recorded on May 5, 2006, being received in evidence. The Trust Agreement lists the condo as a Trust asset, but the evidence establishes that the condo was, in fact, conveyed by the decedent to the respondent by deed, free of trust.
3. UBS Bank Account. A bank account maintained by Edith at UBS Bank had a balance of \$100,000.00 as of January 30, 2004. According to Audrey, it was disbursed one third each to Suzette, James and Sean. The testimony was further that James and Sean transferred their respective one-third shares to the Trust as per the parties' agreement but again, there is no evidence of the Trust having received these funds.
4. Citicorp Investment Account. Edith maintained an investment account with Citicorp Investment Services that was earmarked for the Trust. According to a statement for March of 2004 received in evidence, that account contained 300 shares of stock in General Electric Company with a March 30, 2004 value of \$75,716.00. Again, however, there is no evidence that these funds were transferred to the Trust or that they were in the possession or control of the respondent.
5. E*Trade Account. Evidence was presented in the form of a statement from an E*Trade account maintained in the name of the Trainor Living Trust UAD 05/28/2003 for May of 2006, showing holdings as of May 31, 2006 with a value of \$50,587.34. The respondent has failed to account for these funds.

Respondent presented no evidence as to expenditures made by Suzette for the benefit of Edith. Audrey alleged that Suzette's Georgia home was probably purchased with Trust monies as Suzette had no other source of funds, but the court cannot enter judgment on speculation. However, admitted in evidence without objection from Suzette's attorney are bank statements and checks from a Trust account maintained at The First National Bank of Long Island, with payments to or for the benefit of Suzette of \$5,500.00, \$9,547.99, \$112,531.00 and \$250,393.00 in 2006. The evidence indicates that the monies were deposited in an account maintained by Suzette at Bank of America. While James' signature appears on these checks, which according to the testimony required dual signatures, several are dated when James was laying in a hospital's intensive care unit, two days before his death. Audrey testified that he was incapable of knowing

what he was signing at that time and that testimony is unrebutted.

Audrey also testified that Edith suffered from varying degrees of dementia commencing prior to creation of the Trust. To the extent that this testimony suggests a basis for overturning the Trust, the court notes that such relief was not requested. In any event, there is insufficient evidence for a declaration that the Trust is void and the court refuses to so conclude.

Surcharge. The purpose of a surcharge is to compensate distributees for loss caused by want of due care, and for money or other property coming into the personal representative's hands for which such representative fails to account (42 NY Jur2d Decedent's Estates § 2243 [2010]; 31 Am Jur 2d Executors and Administrators § 888 [2010]).

“A fiduciary owes a duty of undivided and undiluted loyalty to those whose interest the fiduciary is to protect” (*Birbaum v Birbaum*, 73 NY2d 461, 466 [1989]). Moreover, a trustee is required to administer the trust solely in the interests of the beneficiary (see *Astro Mechanical Contracting, Inc. v Fleet Bank, N.A.*, 1 NY3d 324 [2004]). Furthermore, a trustee is required to act reasonably and in good faith in attempting to carry out the terms of the trust even when the trust instrument vests the trustee with broad discretion to make decisions regarding distribution of the trust funds (see *in Re Estate of Wallens*, 9 NY3d 117 [2007]). Further, to establish conversion, the plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question to the exclusion of the plaintiff's rights. Tangible personal property or specific money must be involved (*Fiorenti v Central Emergency Physicians, PLLC*, 305 AD2d 453 [2d Dept 2003]).

Here, despite court orders and a stipulation executed by her counsel, Ms. McQuair has

failed to account. Indeed, the evidence plainly demonstrates that Suzette transferred funds from an estate bank account into one or more bank accounts maintained in her own name. It also appears that the Florida condominium was conveyed to the respondent without consideration and that she would have to prove the elements of a valid gift if this were a proceeding by the legal representative of the decedent's estate to recover that property. However, such relief is not available in this proceeding.

In light of Ms. McQuair's failure to account despite the orders of this court, and her transfer of Trust monies into her personal bank accounts, a surcharge is appropriate.

Conclusions. The court has already terminated Ms. McQuair's trusteeship and issued several orders directing her to account. She has ignored these orders and failed to account. Ms. McQuair has also failed to present any evidence as to what she did with the various trust assets that came under her control or as to any expenditures she made using trust assets for trust purposes.

From the uncontroverted evidence presented and received, the court imposes a surcharge against the respondent in the principal sum of \$428,559.30. Interest shall be calculated at the judgment rate from the date of the withdrawal of the sums from the First National Bank of Long Island. With regard to the unaccounted for sums in the E*Trade account, interest shall be calculated at the judgment rate from the date upon which the respondent was ordered to have filed her accounting.

Petitioner is also entitled to recover her costs, including attorney's fees for her diligent efforts to cause Ms. McQuair to account for actions as trustee of the Trust, since her successful prosecution of this case will benefit the trust as a whole (*see generally, Warren's Heaton on*

Surrogate's Court Practice, §106.04 [1] [a]). Petitioner is directed to file a bill of costs together with her counsel's affidavit of services and serve a copy thereof on respondent's counsel simultaneously with the settlement of the decree herein. The court will fix the amount of costs and fees in the decree.

Settle decree.

Dated: June 30, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court