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

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In the Matter of the Petition of Eric P. Milgrim, Public Administrator of Nassau County, as Temporary Administrator of the Estate of

WILLIAM M. PARENTE
a/k/a WILLIAM MICHAEL PARENTE, File No. 356816

Deceased,

for an Order Directing the Trustee of the William M. Parente Irrevocable Insurance Trust to Pay and Distribute Certain Trust Property to the Public Administrator, as Temporary Administrator of the Estate of William M. Parente a/k/a William Michael Parente.

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In this proceeding for an order directing the trustee of the William M. Parente Irrevocable Insurance Trust to deliver the trust property to the Public Administrator of Nassau County as administrator of William Parente's estate, the Public Administrator now moves the court for an order granting him summary judgment.

The decedent, William Parente, died April 20, 2009. It appears that William murdered his wife, Betty Ann, and their two children, Stephanie Ann and Catherine Ann, and then took his own life. It is also alleged that decedent was involved in a so-called "Ponzi scheme" in which certain individuals invested sums of money with the decedent.

The decedent created the William M. Parente Irrevocable Insurance Trust Agreement on January 4, 2007. The trust is the owner and beneficiary of a $5 million life insurance policy on decedent's life. The beneficiaries of the trust are the decedent's wife and children. Letters of temporary administration in the decedent's estate issued to the Public Administrator of Nassau County, who then filed a petition seeking a determination that, as the intended beneficiaries of

the trust had all predeceased the decedent, the policy proceeds are properly payable to the legal representative of decedent's estate. Letters of administration issued to the Public Administrator in November 2009. Joseph A. Mazzarella, the administrator[1] appointed in the estates of Betty, Stephanie and Catherine, did not answer the petition, but instead filed a cross-petition wherein he seeks a determination essentially disqualifying the decedent's estate or any of his heirs at law from sharing in the insurance proceeds and directing that the proceeds be payable to the distributees of the decedent's wife and daughters, other than William Parente. The Public Administrator filed an answer to the cross-petition. Answering papers to both the petition and cross-petition have been filed by Leonard C. Aloi, the trustee of the insurance trust, who takes no position on the merits of either the petition or the cross-petition and awaits an order from this court directing payment of the policy proceeds.

By decision and order dated January 29, 2010, the court granted permission to Bruce Montague, Anthony Salierno, Kathleen Salierno, and Leonard G. Gallo individually and as nominated executor of his late wife Dolores V. Gallo to intervene and to file papers in response to the Public Administrator's motion for summary judgment It is alleged that Mr. and Mrs. Gallo invested $700,000 with the decedent; that Mr. and Mrs. Salierno invested $1.95 million with decedent and that Mr. Montague invested $975,000 with the decedent. Although neither Mr. Gardy, Mr. Montague's attorney, nor Mr. Montague, who is also an attorney, have filed a notice of appearance on behalf of any other party, the motion made on behalf of Mr. Montague for permission to intervene is supported by the affidavits of no fewer than 27 people whose

[1]At the time of the commencement of this proceeding, Mazzarella was the temporary administrator of their estates; he has since received full letters of administration.

collective claims against the decedent for investment losses exceed $25 million.

Now before the court is the Public Administrator's motion pursuant to CPLR 3212 for an order granting summary judgment to him on the relief requested in his petition, authorizing and directing the trustee to pay and distribute the assets of the insurance trust to the Public Administrator in accordance with EPTL 7-1.7 and dismissing the cross-petition in its entirety. Papers in support of the motion were filed on behalf of Montague, Gallo and the Saliernos. Opposition to the motion was filed by Mazzarella on behalf of the estates of Betty, Stephanie and Catherine. An affirmation was filed by the trustee's attorney stating that the trustee takes no position with respect to the motion.

Summary judgment may be granted only when it is clear that no triable issue of fact exists (*see e.g. Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Phillips v Joseph Kantor & Co.*, 31 NY2d 307, 311 [1972]). The court's function on a motion for summary judgment is "issue finding" rather than issue determination (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]), because issues of fact require a hearing for determination (*Esteve v Abad*, 271 App Div 725, 727 [1st Dept 1947]). Consequently, it is incumbent upon the moving party to make a prima facie showing that he is entitled to summary judgment as a matter of law (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067 [1979]); *Zarr v Riccio*, 180 AD2d 734, 735 [2d Dept 1992]). The papers submitted in connection with a motion for summary judgment are always viewed in the light most favorable to the non-moving party (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610, 610 [2d Dept 1990]). If there is any doubt as to the existence of a triable issue, the motion must be denied (*Hantz v Fishman*, 155

AD2d 415, 416 [2d Dept 1989]).

If the moving party meets his burden, the party opposing the motion must produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that would require a trial (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In doing so, the party opposing the motion must lay bare his proof (*see Towner v Towner*, 225 AD2d 614, 615 [2d Dept 1996]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to overcome a motion for summary judgment (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see Prudential Home Mtge, Co., Inc. v Cermele*, 226 AD2d 357, 357-358 [2d Dept 1996]).

The Public Administrator posits that EPTL 7-1.7 is applicable in this case and that it provides a sufficient basis upon which summary judgment may be granted. EPTL 7-1.7 provides, "Every legal estate and interest not embraced in an express trust and not otherwise disposed of remains in the creator."

The relevant language of the subject insurance trust is found in Article SECOND, Paragraph (2):

> "Upon the death of the Grantor's spouse, or upon the Grantor's death should she not survive him, the Trustees shall distribute the remaining principal and income in equal shares to the Grantor's children, STEPHANIE and CATHERINE, and to the issue, <u>per stirpes</u>, of any child of the Grantor who shall not then survive; provided however that if any child <u>or issue of a deceased child</u> shall then be under 30, the Trustees shall hold his or her share in a separate trust for each such issue . . ."

It is undisputed that Betty, Stephanie and Catherine predeceased William and that Betty died first, followed by Catherine, then Stephanie and finally William. It is also undisputed that

the trust is silent as to the disposition of the trust remainder in the event that Betty, Stephanie and Catherine predeceased William. Thus, on its face, EPTL 7-1.7 provides that the proceeds of the insurance trust revert to William or his estate (*see* EPTL 6-4.4, defining a reversion as "the future estate, other than a possibility of reverter and a right of reacquisition, left in the creator or in his successors in interest upon the simultaneous creation of one or more lesser estates than the creator originally owned").

In opposition to the motion for summary judgment, Mazzarella asserts that William should not be permitted to profit from his own wrongdoing and argues that the rule of *Riggs v Palmer* (115 NY 506 [1889]) applies to this case. In *Riggs v Palmer* (115 NY 506, 511 [1889]), the Court of Appeals articulated the basic principle that "[n]o one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime" *(Riggs v Palmer,* 115 NY 506 [1889]; *see also Matter of Covert,* 97 NY2d 68 [2001]; *Matter of Miller,* 17 Misc 2d 508 [Sur Ct, Nassau County 1959]. Although there is no express statutory provision denying, to one who killed, the right to inherit from his victim, (*but cf.* EPTL 4-1.6 regarding joint bank accounts), numerous cases since *Riggs v Palmer* have reaffirmed the applicability of the common-law general principle that one should not be permitted to profit by taking the life of another and, in particular, that one who feloniously murders shall not be entitled to share in his victim's estate *(Matter of Covert,* 97 NY2d 68 [2001]; *Matter of Jacobs,* 2 AD2d 774 [2d Dept 1956], *affd* 3 NY2d 723 [1957]; *Bierbrauer v Moran,* 244 AD 87 [4th Dept 1935]; *Matter of Miller,* 17 Misc 2d 508 [Sur Ct, Nassau County 1959]). These cases essentially hold that there is no vesting of the estate in the wrongdoer because the crime precludes the wrongdoer from becoming a distributee (*Matter of*

Sparks, 172 Misc 642 [Sur Ct, New York County 1939]; *Matter of Wolf,* 88 Misc 433 [Sur Ct, New York County 1914]). The basic rule has been expanded so that the wrongdoer will not only be precluded from sharing in the decedent's estate as a legatee or distributee, but will also be precluded from sharing as a beneficiary of a life insurance policy on the life of the insured where the beneficiary has wrongfully caused the death of the insured (*Matter of Loud,* 70 Misc 2d 1026 [Sur Ct, Kings County 1972]).

However, Mazzarella has not provided the court with any controlling precedent that expands the reach of the *Riggs* principle to a case where the interest of the purported wrongdoer is a reversionary interest and the court's own research does not reveal any. Although, as Mazzarella points out, the Restatement of Restitution § 189 (particularly Comment f.) supports his argument, the Restatement is not binding authority (*Matter of Farraj,* 23 Misc 3d 1109A [Sur Ct, Kings County 2009]; *Thorn v Stephens,* 169 Misc 2d 832, n. 2 [Sup Ct, Westchester County 1995] ["The Restatement of Law is not binding."]; *Viall v Scott,* 943 F2d 56 [9th Cir 1991]; *see also Adamson v Bonesteele,* 295 Oregon 815, 825 [1983] ["the Restatement is not a code or a statutory scheme binding upon this court"]), nor does the Restatement cite to any case law authority for its position, a subject of long-standing criticism of the Restatements generally (*see* Myers McDougal, Book Review [of Volumes 1 and 2 of the Restatement of Property], *Illinois Law Review 32* (1937) at 532, cited in G. Edward White, The American Law Institute and the Triumph of Modernist Jurisprudence, 15 Law & Hist. Review 1, 35-36). Furthermore, this is not a case like *Riggs* where the killing of the victim enured to the wrongdoer's benefit as a beneficiary of the victim's estate, nor even like *Loud,* where the wrongdoer was the beneficiary of a life insurance policy on the victim's life. Here, the policy of insurance was on the

wrongdoer's life. William did not succeed to any property as the result of the killing of his wife and children because when they died the proceeds of the life insurance trust did not exist; the policy proceeds only became payable after Parente took his own life.

The Public Administrator correctly cites Justice Cardozo's admonition, in a case involving a trust that failed to dispose of its remainder, that there is a "duty imposed by law" to follow the statute (*Doctor v Hughes*, 225 NY 305, 309 [1919] [referring to Real Property Law § 102, EPTL 7-1.7's predecessor statute). Real Property Law § 102 was enacted in 1896, seven years after *Riggs v Palmer* was decided, and EPTL 7-1.7, the substance of which is virtually identical to Real Property Law § 102, was enacted in 1996, seventy-seven years after the Court of Appeals fashioned the so-called "slayer rule." "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of the statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete" (*Connecticut Natl. Bank v Germain*, 503 US 249, 253-254 [1992] [internal citations and quotation marks omitted]). Thus, even assuming William's culpability in the deaths of his wife and children, the court determines that the rule of *Riggs v Palmer* does not apply to the facts before the court and the assets of the insurance trust belong to William's estate.

And, while the court is not unsympathetic to the loss suffered by Betty's relatives, this is not a case where equity demands a different result. Betty's collateral relatives could not have had any reasonable expectation of benefit from the insurance policy on William's life. Thus, it can not be said that equity would be better served by directing the proceeds of the life insurance trust to Betty's relatives, leaving the victims of William's Ponzi scheme with no hope of recovering even a small portion of their losses.

Accordingly, the motion for summary judgment is granted; the cross-petition is dismissed. The trustee is directed to pay and distribute the assets of the insurance trust to the Public Administrator as temporary administrator of William's estate.

This is the decision and order of the court.

Dated: June 3, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court