SURROGATE'S COURT OF THE STATE OF NEW YORK - MONROE COUNTY

In the Matter of the Estate of		
VINCENT J. BRIODY,	)	**Decision & Order**
Deceased.	)	File No.: 2003 - 2439/B

Richard S. Levin, Esq., Lubelle Levin and Krenitsky, Rochester, New York, Attorneys for Debra Briody, Petitioner.

Christine F. Redfield, Esq., Rochester, New York, Attorney for the Estate, Respondent.

BACKGROUND

Decedent, Vincent J. Briody ("Decedent"), died on November 23, 2002, survived by his three children, three siblings, and ten nieces and nephews. Decedent's Last Will and Testament, dated October 17, 2002, was duly admitted to probate on January 25, 2005, and Preliminary Letters Testamentary were granted to Decedent's brother and sister, John P. Briody and Christine F. Redfield, jointly on October 18, 2003.

On November 18, 2009, Debra Briody, the former spouse of the Decedent ("Petitioner") filed a Verified Claim against the Estate alleging that she was entitled to a portion of the Decedent's Machine Tool Research ("MTR") 401(k) Profit Sharing Plan (hereinafter "401(k)"), which was received into the Estate in its entirety on January 13, 2004 by Respondent Christine Redfield, and was therefore owed $37,670.21, plus interest from January 13, 2004 and reasonable attorney's fees. On December 5, 2009, Ms. Briody filed the instant Petition demanding that $37,670.21 of the entire plan proceeds of $110,672.75 be delivered to Petitioner along with the interest and fees.

Respondent now agrees that Petitioner is entitled to a portion of the plan proceeds, but claims that the fault lies with the plan administrators, and therefore any interest due the Petitioner should be paid by the plan administrators and not the Co-Executors of the Estate. Additionally, Respondent contests the claim for Petitioner's costs and fees incurred from maintaining the instant action.

OPINION

It is incontrovertible that on November 19, 2003, Respondent Christine Redfield signed an Application for Distribution from a Qualified Retirement Plan as Co-Executor of the Estate to distribute the "Entire Vested Amount" of the Decedent's 401k plan proceeds as a single sum cash payment. Accordingly, the Decedent's account was liquidated and the proceeds of $110,672.75 were transferred to a non-interest bearing account and a check was sent to Christine Redfield. This check was not cashed, and a replacement check was sent to Christine Redfield on December 1, 2004. This check was also not cashed, and the plan proceeds have remained in the non-interest bearing account since. Ms. Redfield was also sent a 1099-R form for tax year 2004 by Matrix Capital Bank Trust Services indicating the $110,672.75 of income taxable to the estate.

It is also undisputed that the Decedent and the Petitioner entered into a separation agreement on February 17, 1999. In the separation agreement, allegedly prepared by or known of by Ms. Redfield, the Decedent granted the Petitioner a 50% interest in the Decedent's 401k plan as of January 1, 1999. The parties further agreed that a qualified domestic relations order ("QDRO") would be, "drafted, approved and signed by a court of competent jurisdiction to accommodate the joint ownership of the marital portion of said funds, and that each party is entitled to one half the total accumulation of said Plan as of the agreed upon date." *See* Pet., Ex. A.

The Decedent and the Petitioner divorced on November 19, 2002, at which time the separation agreement was incorporated in the Judgment of Divorce. The separation agreement, at Article XI, also contained a provision allowing for the recovery of reasonable attorney's fees and expenses should either party cause, "the occurrence or necessity for future legal action without just cause."

In informal correspondence with the Court dated April 21, 2010, Ms. Redfield claimed that MTR, "violated the terms of the trust account by issuing a check for the full amount when they knew a portion was to go to Ms Briody." However, the record is devoid of any evidence that MTR had any knowledge of the separation agreement. Robert F. Pizzo, counsel for MTR, stated in correspondence with Petitioner's attorney that MTR never had any indication or belief that the Petitioner would claim an interest in the benefit. Furthermore, Ms. Redfield's Application for Distribution from a Qualified Retirement Plan clearly indicated her intent that the entire account be liquidated in a lump sum payment, and belies her claim that the distribution was the fault of MTR.

Prior to death, the Decedent filed a death beneficiary designation form with MTR appointing his Estate as his beneficiary for his 401(k) plan. Additionally, Section 5.03 of the 401(k) plan agreement, states that if there is no surviving designated beneficiary, or spouse, that upon the participant's death, the account shall be paid to the Estate absent the receipt by MTR of a valid QDRO requiring payment to a former spouse. As the record contains no evidence that MTR ever received a QDRO, nor had any reason to believe that one existed, MTR clearly fulfilled its obligation to the Decedent, and in any case, is not a party to this action. Despite Ms. Redfield's numerous claims that it is MTR who is truly at fault in this situation, had she wanted MTR to answer to these allegations, it was within her rights to join it in this litigation. This was not done, and the Court has

only the very limited record before it upon which to make a decision.

Ms. Redfield has been in control of the entire 401(k) proceeds for nearly seven years, and there is no evidence that she attempted to contact MTR or send the check back. Simply neglecting to negotiate the checks received is evidence only of negligence, not of an intent to rescind the transaction. Despite the fact that Petitioner's half of the 401(k) proceeds should never have been an asset of the Estate, Ms. Redfield's actions resulted in those funds being held by the Estate. As such, Ms. Redfield, as a fiduciary of the Estate is responsible for how those funds were managed during the time they were in her control. Executors, as representatives of the estate, are governed by the Prudent Investor Act. *See*, EPTL 11-2.3. "In determining whether a fiduciary has acted prudently, a court may examine a fiduciary's conduct throughout the entire period during which the investment at issue was held. The court may then determine, within that period, the reasonable time within which divesture of the imprudently held investment should have occurred." *Estate of Janes*, 90 N.Y.2d 41, 54 (1997) (internal quotations omitted). The Prudent Investor Act standard is quite forgiving, an executor will not be held liable for a simple judgment error resulting in an unforeseen loss, but the failure of the executor to act prudently in holding funds for investment constitutes negligence for which executor may be surcharged and made to forfeit commission." *Id*. It is a well settled principle that cash funds of an estate must be deposited in an interest bearing account. *See, In re Philp's Estate,* 29 Misc. 263, 61 N.Y.S. 241 (Sur. Ct. N.Y. Co. 1899); *Cooper v. Jones,* 78 A.D.2d 423, 435 N.Y.S.2d 830 (4th Dep't 1981). The retention of funds undisputedly belonging to Petitioner in a non-interest bearing, non-estate account for nearly seven years was imprudent. *See, e.g. Estate of Meister,* 123 A.D.2d 264, 506 N.Y.S2d 437 (1st Dep't 1986) ("The duty of an executor to keep estate funds not necessary for distribution within a reasonably short time invested is well

established").

Petitioner additionally claims that due to Respondent's failure to arrange for the proper disbursement of the 401(k) proceeds, she has been deprived of the opportunity to rollover the funds into an IRA, thereby accruing tax consequences. This may be true, however, the Court is unable to ascertain with the requisite certainty that this action would have occurred, and therefore, this claim may not be used in the Court's calculation of appropriate recompense in this case. It is agreed by the parties that the amount due Petitioner on January 13, 2004 was $37,670.21. This amount is derived from calculations conducted by MTR and communicated to Petitioner's counsel by letter dated April 24, 2008. *See* Pet., Ex. D. Interest shall be calculated at the prevailing rate from the date on which the check was issued by MTR, January 13, 2004 (*see, e.g. Estate of Janes*, 90 N.Y.2d 41, 55 (1997)), and this sum shall be paid by Ms. Redfield individually to Petitioner. To warrant such a surcharge, there must be a showing that the losses resulted from the fiduciary's failure to exercise, "such diligence and such prudence in the care and management [of the Estate], as in general, prudent men of discretion and intelligence in such matters, employ in their own like affairs." *Estate of Donner*, 82 N.Y.2d 574, 585 (1993). This burden has been met in this case.

As Petitioner has had to institute legal action to enforce Paragraph G of her separation agreement with Decedent, a proceeding which could easily have been avoided had Ms. Redfield undertook her fiduciary duties with more diligence and care, Petitioner's request for attorney's fees and expenses must be granted. While this amount is chargeable against the Estate pursuant to the terms of the separation agreement, the sum shall be surcharged against Ms. Redfield personally due to her role in the Estate's accrual of the unnecessary expense. *See, e.g. Estate of Witherill*, 37 A.D.3d 879, 881, 828 N.Y.S.2d 722 (3d Dep't 2007). Additionally, due to the willful mishandling

of estate assets, Ms. Redfield shall forfeit her commissions. *See, e.g. Matter of Donner*, 82 N.Y.2d 574, 587, 606 N.Y.S.2d 137 (1993).

Finally, it is noted that despite the cofiduciary liability rule (*see, e.g. Zimmerman v. Pokart,* 242 A.D.2d 202, 203, 662 N.Y.S.2d 5 (1st Dep't 1997)), the Court declines to apply it in this case because there is no proof that Mr. Briody participated in or was aware of Ms. Redfield's actions, and the disputed funds were requested by and issued to Ms. Redfield individually. Additionally, due to Ms. Redfield's status as a licensed New York State attorney acting in the capacity of Estate Attorney in addition to acting as Co-Executor, it is reasonable to assume that Mr. Briody relied upon her to predominantly handle the Estate matters. *See Estate of Witherill*, 37 A.D.3d 879, 881-882, 828 N.Y.S.2d 722 (3d Dep't 2007).

Therefore, in accordance with the above decision it is hereby

ORDERED, ADJUDGED and DECREED, that a separate Qualified Domestic Relations Order shall be made, requiring the Plan Administrator of the Machine Tool Research 401(k) Profit Sharing Plan to distribute to the Petitioner, Debra Briody, the sum of $37,670.21; and it is further

ORDERED, ADJUDGED and DECREED, that interest on the above sum, at the prevailing rate, shall be surcharged against Co-Executor Christine F. Redfield, Esq. from January 13, 2004; and it is further

ORDERED, ADJUDGED and DECREED, that Christine F. Redfield, Esq. shall forfeit the receipt of commissions under SCPA Section 2307 for her role as Co-Executor of the Estate of Vincent J. Briody; and it is further

ORDERED, ADJUDGED and DECREED, that the reasonable attorney fees and expenses incurred by Petitioner for the maintenance of the instant action shall also be surcharged to and paid by Co-Executor Christine F. Redfield, Esq., said fees to be set by the Surrogate in a separate Order upon review of an Affirmation of Services to be submitted by Petitioner's counsel within fifteen days of the date of this Decision and Order.

August 26, 2010

Edmund A. Calvaruso
Hon. Edmund A. Calvaruso, Surrogate

ENTER: