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

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In the Matter of the Appointment of Trustees of the Trust for the benefit of Gertrude Feil under Article FIFTH of the Last Will and Testament dated November 5, 1996, of

LOUIS FEIL,

Deceased.

File No. 307981/R

Dec. No. 26813

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In the Matter of the Appointment of Trustees of the Trust for the benefit of Various Charities under Article SIXTH of the Last Will and Testament dated November 5, 1996 of

LOUIS FEIL,

Deceased.

File No. 307981/S

Dec. No. 26815

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Submitted for decision is the petitioner's motion, pursuant to CPLR 3211 (b) and 3212 for an order granting the following relief: 1) dismissing the affirmative defenses interposed in the two proceedings; 2) granting summary judgment to the petitioner and thereby dismissing the answers and granting the petitions; 3) issuing letters of trusteeship to Jay I. Anderson in connection with the Marital Trust established under Article FIFTH of the will of Louis Feil; and 4) issuing letters of trusteeship to Jay I. Anderson, Leonard Boxer, and Erika Feil Lincoln in connection with the Charitable Lead Annuity Trusts established under Article SIXTH of the Will of Louis Feil.

The two amended petitions seek the court's approval of Jeffrey Feil's appointment of additional trustees under the trusts mentioned in the previous paragraph. Mr. Feil is one of two current co-trustees of these testamentary trusts. His sister, Carole Feil, who is the other co-trustee, opposes the applications. Also opposing the two petitions are a group of contingent

beneficiaries of the trusts. Carole and this set of beneficiaries filed their respective answers to the petitions. Each answer contains a selection of affirmative defenses that will be discussed below.

For the reasons that follow, Jeffrey Feil's motion is granted in its entirety except as to the issue of commissions.

Louis Feil died on February 3, 1999, a resident of Nassau County. His will was admitted to probate by this court on June 10, 1999. Jeffrey Feil and his sister, Carole Feil, are currently the two co-trustees of the Martial Trust and Charitable lead Annuity Trusts established under Louis' will. When Jeffrey attempted to appoint additional trustees to the trusts, his sister refused to acknowledge the appointments, compelling Jeffrey to seek the relief requested in his two amended petitions.

The power to appoint additional trustees arises from Article NINTH (c) of Louis' will. It provides:

> "With respect to my estate and each trust hereunder, I authorize Jeffrey, if acting as a Fiduciary, or, if not, my individual Fiduciaries, by unanimous action, to appoint additional and successor fiduciaries from time to time. Any individual, bank or trust company may be appointed **. . .**"

If the level of trust and confidence Louis Feil placed in his son Jeffrey is not apparent from the foregoing language,, then one should consider this section from Article TENTH (A) of the will:

> "Action of Fiduciaries. 1. Disagreement between or among fiduciaries; majority action **. . .** except as otherwise provided in this will, the trustees of any trust shall act by majority, provided that Jeffrey, if acting as trustee, must vote in the majority for any action or decision to take place."

Assuming the authority to do so, the salient issue that always arises when trustees seek to increase their number is the matter of commissions. Article NINTH (E) of Louis' will anticipated this concern and provides:

> "Each fiduciary named in subdivision A and B of this Article [i.e., Jeffrey and Carole] shall be entitled to receive the compensation allowed to a sole executor or sole testamentary trustee . . . without regards to the provisions of Section 2313 of [SCPA] . . .
>
> Any other fiduciary shall be entitled to such reasonable compensation (which may be less than or in excess of that otherwise allowed by law) as may be specified in the instrument of appointment or, in the absence of such specification, to the compensation allowed to a sole executor or sole testamentary trustee."

Based upon the foregoing powers, Jeffrey designated his additional trustees and, in light of Carole's opposition, commenced these two proceedings to confirm his appointments. To allay the concerns of the Attorney General on the issue of commissions, Jeffrey asks the court to approve these appointments and to rule that there be no more than two trustees' commissions payable from each of the trusts and that these commissions are be shared equally among the existing and added trustees.

Carole Feil and the certain other beneficiaries ("beneficiaries") filed answers to the two amended petitions. In their opposition to the motion they make two general arguments: one, that the language used by the decedent in his will does not grant to Jeffrey the powers asserted by him; and two, the affirmative defenses raise questions of fact that require discovery. The affirmative defenses can be summarized as follows:

1) Jeffrey is acting unreasonably and in bad faith;

2) The doctrine of unclean hands bars Jeffrey from making the appointments;

3) Conflicts of interest bar the additional trustees from serving;

4) Bias bars the additional trustees from serving;

5) One of the additional trustees is disqualified;

6) The additions are not in the best interests of the trust;

7) There is insufficient justification for the additions;

8) The additions will prejudice the trusts; and

9) There is no authority to decrease Carole's commissions.

The construction of the will of Louis Feil.

The Surrogate's Court does not exist to rule on the wisdom, efficiency, or practicability of a testator's testamentary plan. It exists to enforce that testator's wishes, limited only by public policy considerations that are not at issue here. If the intent of a testator can be ascertained from a sympathetic reading of the instrument as a whole and in view of the facts and circumstances under which the provisions of the will were framed, then it is the court's duty to carry out that intent (*Matter of Fabbri*, 2 NY2d 236 [1957]; *Matter of Thall*, 18 NY2d 186 [1966], respectively).

The beneficiaries argue that the language employed by the decedent ("from time to time," "unanimous action," and the distinction between "fiduciary" and "trustee") indicates limitations on the power otherwise vested in Jeffrey by the decedent. It is a very ingenious argument and one that is supported by elegant argument. Unfortunately for the beneficiaries, it is entirely

unpersuasive because to accept such an argument would do violence to the plain meaning of the words, sentences, and paragraphs employed by the decedent in the totality of his will. It is for this reason that the case law has always charged the Surrogate with the duty to consider the document as an integrated whole and to consider the instrument as harmonious in all its provisions and in accord with the general testamentary plan of the testator (s*ee e.g. Matter of Sprinchorn*, 151 AD2d 27, 29 [3d Dept 1989]). The language employed by Louis Feil accomplishes his manifest purpose of granting broad powers to Jeffrey, powers that are entirely consonant with the construction advanced by Jeffrey.

The affirmative defenses in the context of CPLR 3211 and 3212 motions.

Louis Feil gave his son complete power to decide the very issue before the court. While the court is not prepared to accept Jeffrey's argument that he benefits from the "great deference" the courts traditionally give to the testator's selection of a fiduciary (*see Matter of Flood*, 236 NY 408 [1923]), the court does agree that his discretion is very broad and will not be disturbed by speculation and unsupported aspersions that only serve to frustrate the clear intent of the testator. Of course, there is one caveat to Jeffrey's scope of his powers. He may not appoint a trustee in contravention of SCPA 707, the statute that defines the eligibility requirements of a fiduciary. The affirmative defenses must be examined in this context as well as in the context that the allegations contained in the affirmative defenses are either directed to Jeffrey and his conduct (and he is already a fiduciary) or against the additional trustees. With regard to the latter, any aspersions cast their way do not arise from their discharge of a fiduciary's duties. As Jeffrey's attorney rightly points out, the type of evidentiary hearing requested by Carole and the beneficiaries most often arises in the context of a removal proceeding where a petitioner seeks

removal of a fiduciary for conduct as a fiduciary. Moreover, again as the attorney for Jeffrey points out, while an evidentiary hearing may be allowed prior to the fiduciary taking office, "[such] a hearing should be entertained only in extreme cases, in order to avoid unnecessary litigation" (*Matter of Younker,* 111 Misc 2d 599, 600 [Sur Ct, New York County 1981]). If the objecting parties hope to defeat the pending motion, then they must come forward with more than mere allegations against Jeffrey and his proposed additional trustees. They have not done so.

In some respects, these issues can be analogized to a probate contest over the suitability of a nominated executor or the issuance of letters to a preliminary executor. The courts consider two factors in such disputes: the deference given to a testator's choice of fiduciary (even though the will is yet to be probated); and the avoidance of litigation over what may be tangential to the primary issues of probate *(see* e.g. *Matter of Bayley*, 72 Misc 2d 312 [Sur Ct, Suffolk County 1972], *affd* 40 AD2d 843 [2nd Dept 1972]). In this case, the affidavits submitted in opposition to the motion display the long-standing animosity that exists in the Feil family. Ironically, most of the charges made in the affidavits concern the conduct of Jeffrey, who is already a fiduciary. Any allegations made against the added trustees are entirely speculative and do not rise to the level, under either CPLR 3211 or 3212, to deny Jeffrey his right to proceed in the manner he has chosen.

In its essence, the only issue before the court is whether Jay I. Anderson, Leonard Boxer, and Erika Feil Lincoln are eligible to serve as fiduciaries under SCPA 707. SCPA 707 (1) (e) is the usual vehicle for disputes like this. The section provides that a person is ineligible to serve as a fiduciary if he or she:

> "Does not possess the qualifications required of a fiduciary by reason of substance abuse, dishonesty, improvidence, want of understanding, or who is otherwise unfit of the execution of the office."

The fact that animosity exists in the Feil family is not a reason to grant a hearing on affirmative defenses that are supported by mere speculation and conjecture (*Matter of Palma,* 40 AD3d 1157 [3d Dept 2007] is not to the contrary).

It is unnecessary to pass on the set of affirmative defenses on an individual basis; they all share the same fatal infirmity on such a dispositive motion - they are unsupported by anything more than animus and their proponents "failed to specifically set forth how further discovery might reveal the existence of essential and/or material facts ... which would warrant the denial of summary judgment" (*Matter of Venner,* 235 AD2d 805, 809 [3d Dept 1997]).

Two commissions

The objectants are correct in one respect, however. It appears that in order to procure the Attorney's General acquiescence on the amended petitions, Jeffrey Feil agreed to cap the trustees' commissions at the current two.

Louis Feil was not only clear as to the broad scope of powers granted to his son, Jeffrey, he was equally clear that his daughter, Carole, must in no event suffer a diminution of her right to receive one full commission (Article NINTH [E], quoted above) on each trust governed by article NINTH(E). Article NINTH (E) also describes the mechanism by which reasonable remuneration of additional trustees may be decided. Therefore, if Jeffrey adheres to his "two commission" decision, then Carole must receive a single, full commission on the Marital Trust established under Article FIFTH and the Article SIXTH charitable lead annuity trusts. The other co-trustees

must divide the remaining single commission as they may agree. Of course, Jeffrey is free to come to some other accommodation with the additional trustees, as provided in the will. But he is not free to diminish Carole's commissions.

Finally, the court rendered a decision on another motion related to a compulsory accounting on an estate of this decedent. This court's decision, dated May 17, 2010, is hereby recalled and the motion is withdrawn due to a settlement between the parties.

The above constitutes the decision and order of the court.

Dated: September 30, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court