

**Matter of Cohen**

2010 NY Slip Op 33651(U)

December 23, 2010

Sur Ct, Nassau County

Docket Number: 322866/C

Judge: John B. Riordan

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

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Petition of Kevin I. Cohen, as a Beneficiary of the Trust  
Created Under the Will  
of

File No. 322866/C

MICHAEL S. COHEN,

Dec. No. 27013

Deceased,

for an Order Voiding the Sale of Real Property.

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Before the court is a petition filed by Kevin I. Cohen in which he seeks to void a sale of residential property by Steven Zanon, as trustee of the trust created under the will of Kevin’s father, Michael S. Cohen. Alternatively, petitioner asks the court to direct a repurchase of the property from the buyer. For the reasons set forth below, the court denies the relief requested.

Background: Sale of the Residential Property

The referent residential property sold by Zanon as trustee of the trust was the home of decedent, Michael S. Cohen, located at 250 Chestnut Drive, Roslyn, New York. Under Article Fourth of decedent’s will, the property was bequeathed as part of the residuary estate to the trustee, to be held in a 10 year trust for the benefit of Kevin, decedent’s only child. The trustee was given the power to invest and reinvest the trust assets for the benefit of Kevin, with discretionary payments of income and principal for his health support, maintenance and general welfare. The trust will terminate on March 18, 2012, at which time the remaining principal, including accrued income, will be paid over to Kevin. In the event of Kevin’s death prior to the termination of the trust, Article Fourth provides that the property will then pass to decedent’s issue, who are Kevin’s two infant children, Jolie M. Cohen and Lindsay P. Cohen.

Kevin, together with his wife, Candace, their two children, Jolie and Lindsay, and Kevin's stepson, Andrew, resided together in the house until Kevin's incarceration in September 2009. After that date, Candace and the three children continued to reside in the house, but the trustee asserted that the house was at imminent risk of being foreclosed; trust income was insufficient to maintain the mortgage payments, real estate taxes and homeowner's insurance. On November 17, 2009, the trustee filed a petition seeking authorization to sell the property, indicating that he intended to use the proceeds from the sale of the house, after payment of the outstanding mortgage and arrears, to purchase a more affordable residence for the use of Kevin's family. The trustee's petition also asked that the court prohibit Kevin or Candace from interfering with any sale of the property.

In a decision issued by this court on June 3, 2010, the court denied the application of the trustee for authorization to sell the real property, finding that court approval was not necessary in order for the trustee to proceed with a sale. At the same time, the court approved a stipulation dated April 21, 2010 and entered into among the trustee, Candace and the guardians ad litem for Kevin and the infants, in which they all agreed that the trustee would list the house with a multiple listing service, with an asking price of \$1,300,000.00 or higher. They further agreed that the trustee would not sign a binder or contract, sell or encumber the property without a second so ordered stipulation signed by all the parties to the first agreement or an order of the court. Kevin refused to sign the stipulation but the court held that the trustee did not need the consent of Kevin in order to sell the house, or the consent of any other party or this court, except insofar as agreed to by the parties in the referent stipulation. The court noted further that

decedent's will places no restrictions on the trustee's ability to invest, purchase or sell trust assets, nor does it give any of these powers to Kevin.

Following the decision, a second stipulation, signed by all of the interested parties except Kevin, was submitted to the court. It stated that the trustee had received an offer of \$1,150,000.00 in cash for the house. Although it appears that the contract of sale was dated prior to the court's so ordering the stipulation, all parties to the agreement were in favor of the sale. Accordingly, the stipulation was so ordered by the court. The sale closed on August 24, 2010.

#### Representation of a Prisoner by a Guardian ad Litem

Petitioner is represented in this proceeding by a guardian ad litem appointed by the court based upon petitioner's incarceration. A prisoner is considered to be under a disability and in need of the services of a guardian ad litem when the incarceration results in the inability of the individual to make a procedural appearance in a proceeding (SCPA103 [40] [e]; SCPA 402; and *see Matter of McInerny*, Feb. 24, 2009 NYLJ, at 34, col 4 [Surr Ct, Bronx County]). However, petitioner, who is a licensed attorney admitted to practice in the State of New York, has simultaneously undertaken his own representation through voluminous correspondence and the filing of various papers, not all of which were in compliance with the procedural requirements of the CLR and the SCPA.

Petitioner's most recent filing is the present petition to void the sale of 250 Chestnut Drive or direct the repurchase of the property from the buyer. The petition conflicts with the position taken by Kevin's guardian ad litem who, along with Kevin's wife, the guardian ad litem for Kevin's minor children, and the trustee, signed both stipulations connected to the sale of the real property, as noted above. In *Matter of Gormely* (2 Misc 3d 233 [Sur Ct, Kings County

2003]), the court held that the recommendation of a guardian ad litem appointed to represent a prisoner interested in a Surrogate's Court matter would not prevail over his ward's expressed preferences regarding his position in a court proceeding. While a prisoner is deemed a person under a disability, the court distinguished between a ward whose mental incapacity requires that decisions be made by his guardian ad litem and the court and a ward who does not suffer from mental incapacity but, rather, is not able to actively participate in Surrogate's Court proceedings due to his incarceration. In the latter case, the court said, citing this court's decision in *Matter of Uellendahl*, NYLJ, Aug. 13, 1998, at 27, col 2 [Sur Ct, Nassau County]), the prisoner's "disability is only his inability to freely ambulate to the court" and "decisions about how and whether to proceed should be left to the ward, as he is of full mind and body. His right to pursue litigation shall not be disturbed" (*Matter of Gormely* (2 Misc 3d 233, 235 [Sur Ct, Kings County 2003])). At the same time, the court further directed that the guardian ad litem would continue to represent the imprisoned ward (*id.* at 236).

Accordingly, this court has considered the present petition filed by Kevin, but is not rescinding the appointment of petitioner's guardian ad litem. Kevin's status in this matter is that of sole discretionary beneficiary of income and principal during the duration of the trust. Article Fourth of decedent's will, pursuant to which the trust was created, grants the power to sell assets solely to the trustee. No such power was granted to petitioner. Moreover, the trustee is empowered pursuant to EPTL 11-1.1 (b) (5) (B) to sell real property unless the governing instrument directs otherwise. Petitioner has failed to establish any basis for voiding the sale or directing a repurchase of the property from the buyer. Indeed, petitioner has not introduced any reason for the court to interfere with the trustee's exercise of his power to sell the real property.

“The court will order the trustee to exercise a mandatory power or hold him liable for failure to do so, but it will not direct the holder of a discretionary power to act in any particular way or set aside a decision made by him in the use of that power, unless there has been an abuse of the discretion” (Bogert, Trusts § 89 [6th ed 1987]). A reasonable decision made by a trustee will not be disturbed (*see Matter of Roberts*, 61 NY2d 782 [1984]; *Glenn v Chase Lincoln First Bank*, 201 AD2d 908 [4<sup>th</sup> Dept 1994]).

#### Suspension of Letters of Trusteeship Issued to Steven Zanon

As discussed in this court’s prior decision dated June 3, 2010, the guardians ad litem had requested information and documents from the trustee, virtually none of which was provided. The information that was proffered raised additional questions concerning the legal title of trust assets. The guardians advised the court that they had concerns about the trustee’s management of decedent’s assets. At multiple court conferences held prior to the issuance of the court’s decision, counsel for the trustee assured the guardians and the court that the trustee would file his accounts, but the accounts were not filed.

In the prior decision, the court directed the trustee to file an account as fiduciary of the Article Fourth trust and to file an account for his actions in connection with an annuity contract created for the benefit of Kevin, within 45 days of the date of the decision. The accountings were thus due on July 19, 2010. No accounts were filed.

By a facsimile letter sent to the court on August 20, 2010, counsel for the trustee advised the court that

“[w]e are working on the account and concede that the delay has been a function of vacations and concentration of putting together the sale [of the real property] which has been a significant task. I do not understand what [the guardian ad litem for Kevin] is referring to as ‘a failure of the trustee to

cooperate.’ Other than a delay in filing the accounting which we concede there has been absolutely no failure to cooperate in any fashion.”

The court responded with a letter directing the trustee to file his accounts no later than September 10, 2010. On that date, counsel for the trustee sent a letter to the court stating: “We are working on the Accounting and will file it as soon as we possibly can.” On October 18, 2010, counsel for the trustee followed up with an additional letter sent to the court in response to a letter to the court from the guardian ad litem in which he expressed his desire to see the trustee’s account. Counsel for the trustee advised the court that the trustee would file his account by the end of October.

SCPA 719 (1) provides that a court may suspend a fiduciary’s letters when the fiduciary has failed to account after having been ordered to do so by the court. Under these circumstances, neither a petition nor the issuance of process is required. In the present case, the fiduciary was originally ordered to account on June 3, 2010. Despite unfulfilled oral and written assurances by counsel, no account was filed and no satisfactory excuse was put forth for the fiduciary’s failure to comply with this court’s order.

Accordingly, the court hereby orders the trustee to file, within 30 days of the date of this decision, (a) an account as fiduciary of the Article Fourth trust and (b) an account for his actions in connection with the annuity contract for the benefit of Kevin, assuming that the annuity is not held in the trust, and to serve account citations upon all of the parties to the present matter. If the accounts are not filed within said time period, the court will issue an order permanently revoking the letters of trusteeship issued to Steven Zanon and appointing the nominated successor trustee, subject to his qualifying.

In the event letters are revoked and an account has not been filed, the court authorizes the guardian ad litem for the infants to commence a proceeding to take and state the account.

#### Guardian ad Litem Fees

In this court's decision issued on June 3, 2010, the matter of fixing the fees of the guardians ad litem was deferred until the filing of an additional affirmation of services and petitioner's accounts, as directed by the court. The affirmation of services was duly filed but, as noted above, the accounts are still outstanding.

Accordingly, the court will now set an interim fee for the guardians ad litem, each of whom has rendered continuous and outstanding service in connection with this matter since January 2010. In the earlier decision, the court addressed at length the various factors to be considered in evaluating the cost of legal services, whether provided by an attorney retained by a fiduciary or a court-appointed guardian ad litem. With these factors in mind, the court has carefully reviewed the affirmations of services provided by the guardians ad litem.

Wendy H. Sheinberg represents the interests of Jolie and Lindsay, decedent's granddaughters, who hold the remainder interest in the trust created for the benefit of Kevin under decedent's will. Ms. Sheinberg filed an initial report as well as a final report. She devoted more than 14 hours to this matter prior to April 15, 2010 and has provided additional hours of legal services since that date. The court awards an interim fee of \$5,000.00 to Ms. Sheinberg, to be paid within 30 days of the date of this decision.

H. William Hodges, III, represents the interests of Kevin I. Cohen hereunder. He filed a preliminary report and a final report. His affirmation of services reflects that he rendered more than 62 hours on behalf of Kevin prior to June 15, 2010, and the record reflects that he has

provided additional services since that date. The court awards an interim fee of \$18,000.00 to Mr. Hodges, to be paid within 30 days of the date of this decision.

This interim fee shall be paid out of the trust funds but, as always, the court reserves decision on the propriety of all fees until the end of these proceedings and whether the fees should be charged to some other source (SCPA 405). The court thanks each of the guardians ad litem for their invaluable assistance to date with this matter.

This constitutes the decision and order of the court.

Dated: December 23, 2010

JOHN B. RIORDAN  
Judge of the  
Surrogate's Court