

**Matter of McCloskey Family Revocable Trust**

2012 NY Slip Op 32814(U)

November 13, 2012

Supreme Court, Suffolk County

Docket Number: 0014320/2012

Judge: John J.J. Jones Jr

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SHORT FORM ORDER

**COPY**

INDEX NO.: 0014320/2012  
SUBMIT DATE: 8/1/2012  
MTN. SEQ.#: 001

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 10 SUFFOLK COUNTY

Present:

HON. JOHN J.J. JONES, JR.  
Justice

MOTION DATE: 6/27/2012  
MOTION NO.: MD

-----X  
In the Matter of the Application of  
:  
McCLOSKEY FAMILY REVOCABLE TRUST,  
:  
SEEKING A TEMPORARY RESTRAINING ORDER  
AGAINST VALERIE VIGNONA, A REMOVAL OF :  
VALERIE VIGNONA AS A TRUSTEE AND  
REVOKING HER POWERS AS A TRUSTEE AND :  
DIRECTING THE RETURN OF MONIES  
IMPROPERLY WITHDRAWN FROM THE TRUST :  
-----X

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Upon the following papers numbered 1 to 37 read on this application for injunctive relief; Notice of Motion/Order to Show Cause and supporting papers 1-11 ; Notice of Cross Motion and supporting papers    ; Answering Affidavits and supporting papers 12-24 ; Replying Affidavits and supporting papers 25-34 ; Other 35-37 ; it is

**ORDERED** that the application by the Petitioner, McCloskey Family Revocable Trust, for an order enjoining the respondent, Valerie Vignona, from making any further withdrawals from the trust, permanently removing Valerie Vignona as a co-trustee of the trust, ordering the return of \$20,000 that Valerie Vignona withdrew from the trust on January 24, 2012, ordering the return, or alternatively an accounting, of the \$1200 that Valerie Vignona withdrew from the trust to pay for a post-funeral dinner, directing reimbursement by Valerie Vignona of \$1,541.44 used to pay for the parties'

mother's health insurance premiums, and for an order appointing the current successor trustee Michael V. McCloskey, to replace Valerie Vignona as co-trustee of the McCloskey Family Revocable trust is denied.

### **The Order To Show Cause**

The instant proceeding was brought on by order to show cause seeking various relief with respect to the McCloskey Family Revocable Trust ["the trust"], including a temporary restraining order enjoining Valerie Vignona, ["Valerie"], from withdrawing any further sums from the trust, the removal of Valerie as a co-trustee of the trust and revoking her powers as such, and directing the return of certain monies that Valerie allegedly withdrew from the trust.

The trust instrument was prepared by the Law Offices of Grabie and Grabie and executed on November 9, 2010. The Grantors of the trust are Carolyn Miranda ["Carolyn"], Michael V. McCloskey ["Michael"], and Valerie. Carolyn and Valerie are the co-trustees and Michael is the successor co-trustee. Carolyn, Michael and Valerie are siblings.

Upon the creation of the trust three bank accounts were opened at TD Bank. Although Carolyn describes a checking account as a "trust account" held jointly by Carolyn and Valerie [6151], the checking account statement annexed to the moving papers does not indicate that it is a trust account and has only Carolyn's name on page one of the statement. The checks for the account are titled in both Valerie and Carolyn's names. The parties do not dispute that the account designated as 6151 was assigned double signature checks and those checks were mailed exclusively to Valerie.

The main claim in the petition is that Valerie circumvented the double signature requirement on account 6151, a trust account, and the terms of the trust by making a \$20,000 withdrawal from 6151 using a withdrawal slip, as opposed to cashing a check. Writing a check would have required the signature of the co-trustee, Carolyn. Carolyn claims that Valerie insists she had the right to withdraw \$20,000 and refuses to provide an explanation for the withdrawal or an accounting.

The petition also claims that on December 31, 2010, Valerie withdrew \$1200 to pay for a post funeral dinner upon the death of their father, Frederick McCloskey ["Frederick"]. According to Carolyn's version, she and Valerie agreed that any money not used for that purpose would be redeposited into the trust account. Valerie has allegedly refused to account for any remaining monies from this withdrawal and has refused to provide receipts for the funeral dinner. Petitioner seeks an accounting from Valerie for the cost of the dinner. Carolyn claims that the failure to account is a breach of Valerie's fiduciary duty.

The surviving parent of Carolyn, Valerie, and Michael is Patricia K. McCloskey ["Patricia"]. Patricia has a monthly income of \$3,917.00. Patricia's monthly health insurance premium is supposed to be paid by Valerie. Valerie received Carolyn's permission to write a check from the trust account in the amount of \$1,541.44 payable to "Northrup Grumman" for past due health insurance premiums. Carolyn asserts that Valerie was to have paid the premiums with Patricia's income which was more than enough to cover the cost of the premiums. According to Carolyn, Valerie has failed to explain the need for the \$1,541.44 withdrawal from the principal of the trust which is a breach of Valerie's fiduciary duty.

The order to show cause seeks the following relief:

- 1) a restraining order directing Valerie not to make any further withdrawals from the trust
- 2) permanently removing Valerie as a co-trustee of the trust
- 3) ordering the return of \$20,000 that Valerie withdrew from the trust on January 24, 2012
- 4) ordering the return, or alternatively an accounting, of the \$1200 that Valerie withdrew from the trust ostensibly to pay for a dinner after the father's funeral
- 5) reimbursement by Valerie of \$1,541.44 that Valerie claims she used to pay for the mother's health insurance premiums
- 6) the appointment of current successor trustee Michael, to replace Valerie as co-trustee of the trust.

#### **Valerie's Opposition**

Valerie's opposition to the request for injunctive relief is supported by the affidavits of both Valerie and Patricia. According to Valerie, the trust was funded by the proceeds of the sale of the parents' former marital home. The purpose of the trust was to provide financial security for the parents after the sale of their home. The trust was to terminate upon the death of both parents, Frederick and Patricia, and the corpus of the trust was to be distributed equally among Valerie, Carolyn and Michael.

Valerie claims that the joint checking account, 6151, from which she withdrew the \$20,000, was funded with death benefits upon the death of their father, Frederick. The benefits were deposited for the express purpose of making it convenient for either account holder, Carolyn or Valerie, to make withdrawals and pay for funeral expenses without requiring the consent of the alternate account holder.

Valerie claims that at the end of 2011 in consultation with Patricia's doctors, it was decided that Patricia could no longer live alone. Patricia expressed her preference to move in with Valerie. Valerie told Patricia that significant renovations to Valerie's

home would be necessary and Patricia informed Valerie that Valerie should take the money that was needed for renovations from the trust. Valerie claims that Jeanette Grabie, a partner at the law firm that created the trust, advised Valerie to take the required money from the joint checking account, 6151.

Valerie further claims that “as a good faith gesture”, she drafted and signed an advancement agreement [“the agreement”], in which Valerie authorized a reduction in her portion of the remaining monies in the trust upon Patricia’s death in the amount received from the “trust bank account” that was necessary to build Patricia’s apartment in Valerie’s home. The agreement was signed by both Valerie and Patricia and dated January 24, 2012. Valerie claims she told Carolyn she had received the approval from attorney Grabie for this arrangement and gave Carolyn a full explanation of what Valerie planned to do with the money, an assertion which Carolyn disputes. The advancement agreement is addressed to Grabie and Grabie and provides it will be kept on file by that law firm.

Regarding the \$1200 withdrawn for the funeral dinner, Valerie claims that the balance remaining after the payment of all costs and tips was given to Patricia at Carolyn’s recommendation. Regarding the check in the amount of \$1,541.44 payable to Northrup Grumman and signed by both Valerie and Carolyn, Valerie states that this amount was used to cover medical expenses for Patricia during a brief period when there was a lapse in Patricia’s medical coverage. Valerie claims she has explained all this to Carolyn.

With respect to the affidavit submitted on Valerie’s behalf by Patricia, Patricia attests that the trust was set up with the proceeds from the sale of her marital home with Frederick and was to provide financial security for Frederick and Patricia until their deaths, at which point the remaining money in the trust was to be split among the three children. Patricia says that although she is not a co-trustee, the money in the trust was intended to be used for her benefit when and if she needed it.

Patricia also attests that she told Carolyn and Michael that she wished to live with Valerie who is her primary care giver and it was her desire that the funds in the trust be used to build an apartment in Valerie’s home for Patricia’s use.

#### **Carolyn’s Reply**

In an apparent attempt to overcome the difficulty in identifying the trust property which was left blank in Schedule A of the trust agreement, Carolyn argues that Valerie has admitted in her opposition papers that the three accounts at TD Bank were trust accounts and therefore, under the terms of the trust agreement, a withdrawal from any of the TD Bank accounts required the consent of both trustees. That Patricia consented

to the \$20,000 withdrawal is irrelevant since Patricia is not a beneficiary of the trust. In fact, although the trust makes frequent references to a “beneficiary”, no beneficiary is named in the four corners of the trust agreement.

Counsel for Carolyn affirms that she spoke with Jeanette Grabie and Grabie denies advising Valerie to withdraw monies from the 6151 account for the benefit of Patricia. No affidavit from Gracie was submitted on the petitioner’s motion.

### **The Trust Provisions**

The trust names Valerie, Carolyn and Michael as the Grantors of the trust and Carolyn and Valerie as co-trustees. The trust states that the grantors are the owners of the property described in Schedule A. Notably, Schedule A, although signed by both Valerie and Carolyn, has nothing listed therein. Except for the two signatures, Schedule A is blank and undated.

The trust provides that it is revocable and that any distributions of principal from the trust estate must be made by the co-trustees with their mutual consent (Art. I). The trust also provides that “[the sale or disposition by the Grantors of the whole or any part of the Trust Estate shall constitute as to such whole or part a revocation of this agreement and the trust affected thereby” (Article V). The terms of the trust make continual references to the trust estate property as itemized in Schedule A.

The trust provides that any distributions of principal from the Trust Estate must be made by the Co-Trustees, with their mutual consent. The trust terminates upon the deaths of Patricia and Frederick if not terminated before that event.

The Grantors in their joint discretion reserved the right to unanimously amend or revoke in whole or in part the trust agreement and the trust created by it. No Trustees shall be liable for acts or omissions in administering the trust estate or any trust created by the agreement except for that Trustee’s own actual fraud, gross negligence or willful misconduct.

The trust makes numerous references to the powers of the trustees in relation to the trust beneficiary, including making distributions to meet the beneficiary’s need for food, clothing, shelter or health care (Article X [f]) but, as Carolyn concedes in her Reply to Valerie’s opposition to the motion, there is no beneficiary named in the trust.

### **Injunctive Relief requested**

Although the purpose of a preliminary injunction is to preserve the status quo pending a trial, the remedy is considered a drastic one, which should be used sparingly. *McLaughlin, Given, Vogel v. Nolan & Co.*, 114 A.D.2d 165, 172 (2d Dept. 1986). As a

general rule, the decision to grant or deny injunctive relief lies within the sound discretion of the Supreme Court. *Arthur J. Gallagher & Co. v. Marches*, 96 A.D.3d 791, 792 (2d Dept. 2012).

In order to prevail on a motion for a preliminary injunction, the movant must demonstrate, by clear and convincing evidence, (1) a likelihood of ultimate success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) that a balancing of the equities favors the movant's position. *Blinds and Carpet Gallery, Inc. v E.E.M. Realty, Inc.*, 82 AD3d 691, 692 (2d Dept. 2011).


A mandatory injunction, which is used to compel the performance of an act, is an extraordinary and drastic remedy which is rarely granted and then only under unusual circumstances where such relief is essential to maintain the status quo pending trial of the action. *Matos v City of New York*, 21 A.D.3d 936, 937 (2d Dept. 2005).

The petitioner has failed to demonstrate by clear and convincing evidence that it has a likelihood of success on the merits and will suffer irreparable injury if this extraordinary relief is not granted. At most, numerous issues of fact and credibility exist, not the least of which includes the nature of the revocable trust, what assets constituted the corpus of the trust given the blank Schedule "A" repeatedly referenced in the trust document, and whether the TD Bank checking account from which Vignona withdrew \$20,000 was subject to the provisions of the trust agreement.

Moreover, the petitioner has failed to make an adequate showing that irreparable injury will result if the relief sought is not granted before trial. All the relief requested is measurable and can be compensated in money damages. See *Trump on the Ocean, LLC v Ash*, 81 A.D.3d 713, 716 (2d Dept. 2011).

The petitioner's motion is denied in all respects.

DATED: 13 Nov. 2012

  
HON. JOHN J. JONES, JR.  
J.S.C.

CHECK ONE:  FINAL DISPOSITION

NON-FINAL DISPOSITION