

**Matter of Stuart**

2013 NY Slip Op 34266(U)

June 6, 2013

Surrogate's Court, Richmond County

Docket Number: File No. 2008-1017/L

Judge: Robert J. Gigante

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

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In the Matter of the Estate of

**MURIEL STUART,**

**File No. 2008-1017/L**

Deceased.

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This is a bitterly contested proceeding regarding the Arthur Stuart & Muriel Stuart Living Trust (hereinafter "Trust"), created February 20, 1998, which according to its preamble, was created for the initial benefit of the Grantor, and the disposition of the grantor's assets at death. Following Arthur Stuart's death on August 9, 2001, Muriel Stuart amended the Trust. Muriel Stuart died on November 16, 2008. The amendments to the Trust made by Muriel Stuart were upheld pursuant to this Court's Order of February 22, 2012, and: (1) allocated the remaining Trust principal as one-third to Ellen Stuart, one-third to Barry Stuart, and one-third to Shari Weber; and (2) designated the Trustees as Ellen Stuart, Barry Stuart and Dennis Trimper (hereinafter "Trustees").

On April 26, 2013, Shari Weber (hereinafter "Petitioner") by Order to Show Cause seeks an order, *inter alia*, restraining the Trustees from "selling, consigning, lending or otherwise disposing of any assets of the Trust." Petitioner was particularly concerned about the property located at 104 Jules Drive, Staten Island, New York 10314, for which a contract of sale had been entered into by the Trustees with a third party. Petitioner claims that she has previously offered to receive all of the Trust's properties, in kind, at their appraised values and that such in-kind distribution would benefit the Trust by saving taxes, fees and commissions. Further, the Trustees' rejection of her offers and failure to negotiate with her constitute bad faith and a failure to maximize Trust assets.

The Court temporarily granted the relief sought by Petitioner. In opposition, the Trustees contend that they exercised good faith in considering, and denying, Petitioner's offers to either purchase Trust properties or accept them in-kind. According to the Trustees, and supported by copies of e-mail correspondence included as exhibits to their opposition papers, Petitioner offered to purchase two of the Trust's four properties at their alternate date of death value, but not at fair market value. In response, counsel for the Trustees informed Petitioner that any fair market value offers to purchase the properties would be considered, however no such offers were made.

As for Petitioner's offers to accept the properties in kind, and to have this distribution applied against her share of the overall Trust, both Petitioner and the Trustees recognized that the in-kind distribution may be greater than the total share due to Petitioner. The Trustees evaluated this scenario and decided that it would not be prudent to extend credit to Petitioner. Based on this possibility, and the fact that both Petitioner and another beneficiary were interested in receiving the same Trust properties in kind, the Trustees determined that it would be best to place the properties on the market and sell them to a third party. As evidenced by copies of correspondence between the parties, the Trustees informed Petitioner in October 2012 that the properties would remain on the market, but that she was free to make offers as well. In March 2013, the Trustees entered into a contract of sale for one of the properties.

On May 1, 2013, the return date on the Order to Show Cause brought by Petitioner, the Court heard oral argument from counsel, and has considered all affidavits submitted both in support of and in opposition to the motion. Based on the foregoing, the Court finds that Petitioner's motion must be denied.

The trustee of a trust which terminated upon the death of the Grantee, has the power to hold and manage the trust property during the winding up period to the extent reasonably needed for the taking of these steps. During the winding up process, the trustee may continue to exercise those powers granted or implied in the trust instrument that are necessary to protect and preserve the trust property, including the power to sell (Neary v City Bank Farmers Trust Co., 260 AD 791, 793 [2d Dept. 1940]; Cerbone v Cerbone, 104 Misc2d 472 [Civ. Ct. Bronx Cty. 1979]). Specifically, in Cerbone, the Court held that remaindermen were not entitled to a distribution in kind, as such a distribution is valid only if all remaindermen consent (104 Misc2d at 474); see also Matter of Fello, 88 Ad2d 600 [2d Dept. 1982] (declining to interfere with executor's decision to sell where beneficiaries failed to unanimously and unambiguously demand the property in kind).

Here, Petitioner is the only Trust beneficiary requesting that she receive property in kind. Further, both parties agree that the Trust neither requires nor prohibits in-kind distributions, pursuant to Article X, section C. Accordingly, the Court finds that the Trustees are under no obligation or requirement to distribute property in kind to any Trust beneficiary.

Further, no proof was presented to establish that the Trustees acted in bad faith by failing to consider Petitioner's offers to purchase the real property. Petitioner failed to provide proof to establish that she made fair market value offers to purchase the properties as requested by Trustees' counsel in response to her initial proposal. In addition, Petitioner's contention that the Trustees are acting in bad faith by failing to obtain cost savings that would result from her receiving Trust properties in kind is also found to be without merit. The Trustees based their rejection of the in-kind proposal on several factors, including the fact that such a distribution may be greater than the total

share due to Petitioner, thereby putting the Trust in a position of having to recoup funds from Petitioner.

Accordingly, based on the foregoing, Petitioner's motion is denied in its entirety, without costs. The Court hereby directs the Richmond County Clerk to remove the notice of pendency against the Jules Drive property, and the Petitioner is directed to cease interfering with the Trustee's efforts to sell Trust assets and wind up the Trust.

This matter is restored is to the Court's calendar of **July 17, 2013, at 9:30 a.m.**

This decision shall constitute the Order of the Court.

Dated: June 6, 2013



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**ROBERT J. GIGANTE, Surrogate**