

Matter of Meyer

2014 NY Slip Op 33001(U)

November 25, 2014

Sur Ct, New York County

Docket Number: 2011-0138

Judge: Nora S. Anderson

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SURROGATE'S COURT : NEW YORK COUNTY

New York County Surrogate's Court
DATA ENTRY DEPT.

NOV 25 2014

File No. 2011-0138

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In the Matter of the Petition for the
Removal of Laurent Gerschel as Co-Trustee
of a Trust Created Under Indenture
Agreement dated April 18, 1969 by

ANDRE MEYER,

Grantor,

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A N D E R S O N , S .

Petitioner Francois Voss, trustee of two inter vivos trusts established by Andre Meyer ("grantor"), seeks removal of his co-trustee, Laurent Gerschel (grantor's grandson, herein "respondent"), who is the sole income beneficiary of both trusts. An evidentiary hearing on this application was held on March 31, 2014.

Grantor established two trusts, in 1950 and in 1969, for which he served as sole trustee during his lifetime. Petitioner and respondent, the named successor trustees, have been serving as co-trustees of the trusts for over 30 years. The trusts provide for petitioner to distribute all net income to respondent. Upon respondent's death, the remainder of each trust is to be distributed to, or held in further trust for, respondent's then living issue (the "remainder beneficiaries").

Although the petition seeks respondent's removal only as a co-trustee of the 1969 trust, petitioner's post-trial brief asks the court to *sua sponte* remove respondent as a co-trustee of the 1950 trust as well (see SCPA § 719[10]). Petitioner also seeks an order that costs of the instant proceeding be charged to the 1969

trust's income.

Background

The trusts have been the subject of several contested proceedings in this court. In early 2011, petitioner commenced a removal proceeding under SCPA § 711 based on respondent's alleged insolvency and unsuitability. The proceeding was discontinued pursuant to a settlement. Thereafter, respondent filed a petition to convert the trusts to unitrusts pursuant to EPTL 11-2.4, to which the remainder beneficiaries (respondents' four sons) filed objections, and they cross-petitioned for respondent's removal on the same grounds as those raised in petitioner's prior application.

On the eve of trial on the unitrust and removal issues, the parties entered into a stipulation which provided, *inter alia*, that: (i) both trustees resign from the 1950 trust upon the agreement of a specified bank to act as sole trustee; (ii) the bank serve as a co-trustee of the 1969 trust, along with respondent and one of the remainder beneficiaries; and (iii) petitioner resign as trustee of the 1969 trust "following the filing of all due 1969 tax returns, and following ... [any distributions] due and owing [respondent]."

The contemplated resignations and appointments, however, did not come to pass. Approximately three months after the parties entered into the stipulation, petitioner commenced the instant proceeding after he discovered that respondent had not filed

federal or state tax returns for the 1969 trust since 2009, despite the decades-long understanding that petitioner, who lives in Switzerland, could rely upon respondent to file the required returns. When petitioner inquired of respondent about the status of the returns for the trust, he was assured that the returns for prior years had been filed and that the trust's accountant would be seeking an extension of time to file the 2012 returns. However, petitioner thereafter learned that respondent had not in fact filed any tax returns for the trust since 2009. At that point, a dispute arose between the parties concerning the content and accuracy of a draft of the 2012 returns; whether a distribution would be made to respondent; and the fee, if any, due to the accountant for preparation of the returns.

Although petitioner, who is 83 years old, wants to resign as trustee of both trusts, he is concerned that respondent would be the sole trustee. The petition asserts that: (1) respondent assumed the primary responsibility for filing tax returns for the 1969 trust, yet failed to do so for several years; and (2) respondent conditioned any tax filing upon his receipt of a distribution from the 1969 trust.

Respondent argues that the instant petition should be dismissed as moot because he filed the required returns for the 1969 trust one week after the petition was filed. He claims that his delay in filing was due to his decision to consult with a second tax advisor and the ensuing arguments among the parties'

respective counsel over the advisor's opinion.

The Hearing

Petitioner called one witness, a lawyer who advised petitioner on trust matters since 2010. She testified that, prior to the commencement of this proceeding, she had urged respondent to file the returns without further delay, but respondent conditioned his filing upon receipt of a distribution from the 1969 trust. The court finds the lawyer's testimony to be credible. Respondent did not call any witnesses or present any evidence to rebut the lawyer's testimony.

Legal Analysis

Petitioner bears the burden of demonstrating that respondent "has violated or threatens to violate his trust" or that respondent is "unsuitable to execute the trust" (see EPTL § 7-2.6[a][2]; SCPA § 711[11]). In determining whether removal is warranted, the court must bear in mind that a settlor's choice of trustee should not be lightly overturned (see *Matter of Duke*, 87 NY2d 465, 473 [1996]; *Matter of Leland*, 219 NY 387 [1916]; *Matter of Atkins*, NYLJ, April 9, 2010, at 34, Col 6 [Sur Ct, NY County 2010]).

A trustee owes all trust beneficiaries a duty of care and "an undivided duty of loyalty," and must "act with the utmost good faith" in the administration of the trust (see *Matter of Gregory*, NYLJ, Nov. 26, 2012, at 20, Col 5 [Sur Ct, Suffolk County 2012];

Matter of Sarre, NYLJ, August 12, 1996, at 29, Col 2 [Sur Ct, NY County 1996]). Where a fiduciary fails to demonstrate such loyalty, his removal may be appropriate (see *Matter of Duell*, NYLJ, Sept. 22, 1997, at 5, Col 2 [Sur Ct, NY County 1997] *affd* 258 AD2d 382 [1st Dept 1999]).


The parties have submitted evidence concerning the content of the tax returns and the justification, or lack thereof, for the delay in filing. However, such issues have little bearing on whether or not respondent's removal is warranted. Of more significance to the court is: (1) respondent's failure to explain why he did not file returns for three years despite his acknowledgment that he had accepted sole responsibility for doing so, and (2) his failure to rebut or dispute evidence supporting petitioner's allegation that respondent conditioned his filing of the 1969 trust's returns on petitioner's authorizing a distribution. Even if, *arguendo*, respondent believed that petitioner was violating his fiduciary duty by refusing to make a distribution to respondent, the proper recourse would have been to seek relief from the court, rather than to self-help by holding his fiduciary obligations hostage to his individual interests.

With respect to the 1969 trust, the court, for the above reasons, concludes that respondent's removal is warranted. However, the question remains as to whether respondent should also be removed as co-trustee of the 1950 trust. Respondent argues that, since the petition sought his removal only with respect to

the 1969 trust, the court cannot remove him as co-trustee of the 1950 trust. The court's authority to remove a trustee *sua sponte* is established by statute (see SCPA §§ 719[10], 711[11]; EPTL § 7-2.6[a][2]). The grounds for respondent's removal from the 1969 trust surely indicate that he is "a person unsuitable to execute" the 1950 trust as well. Therefore respondent is removed from both trusts.

Accordingly, the petition is granted to the extent that it seeks respondent's removal. Moreover, respondent, as former trustee, and petitioner, as the remaining trustee, are directed to file, either separately or jointly, an account for each of the two trusts, together with petitions for the judicial settlement of the accounts, within 60 days of service of a copy of this decision, with notice of entry. To the extent that petitioner has requested that the costs of this proceeding be charged against respondent's income interest, that portion of his petition is denied without prejudice to the petitioner's right to seek such relief in the accounting proceedings.

This decision constitutes the order of the court.



S U R R O G A T E

Dated: 25 November 2014