

<b>Matter of Kaufman</b>
2014 NY Slip Op 33071(U)
March 31, 2014
Sur Ct, New York County
Docket Number: 2011-368209/C
Judge: Edward W. McCarty III
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SURROGATE'S COURT OF THE STATE OF NEW YORK  
STATE OF NEW YORK

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In the Matter of the Application of Allen M. Kaufman, M.D.,  
As Co-Executor of the Estate of

File No. 2011-368209/C

HYMAN KAUFMAN,

Deceased,

Dec. No. 29522

to Revoke the Letters Testamentary Issued to Kenneth Kaufman,  
as Co-Executor.

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Currently before the court in this estate are a motion by one of the two executors for the suspension and ultimate removal of the other and a cross-motion by the respondent on the motion to remove the movant as co-executor and trustee.

The decedent Hyman Kaufman died on September 7, 2011, survived by his two sons, Allen, the movant, and Kenneth, the cross-movant; they are the only people with an interest in the estate.

In 2010, Allen commenced a proceeding to remove Kenneth as executor and trustee of the estate of the decedent's predeceased spouse Ruth Kaufman; that dispute was resolved and the proceeding was withdrawn. Kenneth petitioned for and was granted limited letters in the estate of Hyman to pursue a cause of action against the nursing facility where Hyman resided and against Allen as Hyman's health care agent; that proceeding is pending. There is also an action commenced by Allen against Kenneth in Supreme Court and transferred to this court. That action is with regard to Kenneth's operation of Hyman's business, Newport Tire & Rubber, Allen alleging that Kenneth has essentially driven the business into the ground. Also pending is Allen's proceeding to require Kenneth to account for his conduct as Hyman's attorney-in-fact. The Supreme Court action also seeks Kenneth's removal as co-trustee and an accounting as co-

trustee of certain inter-vivos trusts.

Kenneth argues that the court must dismiss Allen's motion seeking a court order directing Kenneth to perform certain executorial duties because the relief sought should have been brought by petition rather than by motion and also because it would require the court to substitute its own judgment for that of the fiduciary. The procedural argument is easily disposed of: "[i]f a court has obtained jurisdiction over the parties, a civil judicial proceeding shall not be dismissed solely because it is not brought in the proper form...[i]f the court finds it appropriate in the interests of justice, it may convert a motion into a special proceeding, or vice-versa..."(CPLR 103[c]). In its discretion, the court converts both motions to special proceedings. As to the substitution of judgment, it is Kenneth's failure to perform routine fiduciary duties that forms the basis of Allen's motion seeking his suspension and ultimately his removal as executor and trustee.

Kenneth also argues that the court must suspend Allen for his refusal to perform his fiduciary duties and to abide by the terms of a so-ordered agreement the parties entered into in the Supreme Court action regarding the marketing and sale of Hyman's Florida cooperative apartment. Kenneth also complains that Allen will not agree to permit his attorneys' fees to be paid from the estates or trusts.

Allen counters that Kenneth's intransigence and refusal to cooperate with him have resulted in three pending crises which warrant an order either directing Kenneth's cooperation or his removal as fiduciary. Specifically, the brothers' contentious and litigious natures have resulted in the depository of some \$1 million in estate assets, Merrill Lynch, to indicate, in essence, that it wants out of the decedents' estates and seeks an order from the court regarding where the funds currently on deposit with Merrill should be transferred. Allen's initial allegation

that Merrill was threatening to liquidate the \$1 million in securities, with resultant losses and tax implications, appears to have been mistaken. Allen also argues that Kenneth confiscated personal property and that his failure to cooperate in the payment of expenses on the Florida cooperative apartment will result in the foreclosure of tax liens thereon, resulting in the loss and waste of estate assets.

The level of hostility between the two siblings is patently obvious in their papers and in their inability to agree on even the most routine aspects of estate administration. One example of the refusal or inability of the brothers to work together to fulfill their fiduciary duties to one another is that they had to enter into a written stipulation, negotiated by their respective attorneys, to open an estate bank account. That agreement was entered into on April 18, 2013, nearly a year ago, and at least as of the motion dates, and possibly as of the date of this writing, the brothers had been unable to accomplish this simple task. Also, Allen alleges that he has incurred attorneys' fees in excess of \$800,000.00 to date in his efforts to either get Kenneth to cooperate or to remove him.

“Friction, hostility or antagonism between a fiduciary and beneficiaries can ... disqualify [a] fiduciary, but only when such enmity threatens to interfere with the administration of the estate” (*Matter of Palma*, 40 AD3d 1157 [3d Dept 2007] [internal citations omitted]). While ordinarily an evidentiary hearing must be held to determine whether such friction and hostility would interfere with the proper administration of the trusts (*see generally, Matter of Duke*, 87 NY2d 465, 472 [1996]), where the hostility is undisputed and there is other uncontested evidence that conflicts are real, presently exist, and have actually affected the [fiduciaries'] decisions, removal can be had without a hearing (*Celauro v Celauro*, 2007 NY Slip Op

31971[U][Sur Ct, Nassau County], *rev'd on other grounds, citing Matter of Palma*, 40 AD3d 1157 [3d Dept 2007]). Furthermore, where it appears that the hostility between co-fiduciaries who are also beneficiaries is so great as to impede the efficient administration of the estate or trust, it would be imprudent to have either serve as fiduciary and an independent third party should be appointed (*see Matter of Beharrie*, 84 AD 3d 1227 [3d Dept 2011]; *Matter of King*, 38 Misc 3d 1204[A] \*\*\*12 [Sur Ct, Bronx County 2012]). Finally, “[a] fiduciary’s misconduct in dealing with related trusts as well as pending related litigation can be evidence of misconduct or insurmountable hostility between parties” (*Matter of Palma*, 40 AD3d 1157, 1158 [3d Dept 2007])[internal citations omitted]).

Here, the hostility between the two co-fiduciaries is palpable and undeniable. It is also of such a character that neither brother could be expected to act in the best interest of the other. Accordingly, the motion and cross-motion are both granted to the extent that the letters testamentary and letters of trusteeship issued to Allen Kaufman and the letters testamentary that issued to Kenneth Kaufman in the estate of Hyman Kaufman are revoked. The motion and cross-motion are otherwise denied. Letters of administration, c.t.a. and successor letters of trusteeship will issue to the Public Administrator of Nassau County upon his duly qualifying. The Clerk of the court is directed to mail a copy of this decision to counsel for the Public Administrator.

Settle decree.

Dated: March 31, 2014

EDWARD W. McCARTY III

Judge of the  
Surrogate’s Court

