

Matter of Curran

2014 NY Slip Op 33072(U)

March 13, 2014

Sur Ct, Nassau County

Docket Number: 2012-371942

Judge: Edward W. McCarty III

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

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

-----X

In the Matter of the Petition of the Guardian of

RYLIE AMBER CURRAN,

File No.2012-371942

Dec. No. 29547

An infant.

-----X

In the Matter of the Petition of the Guardian of

JACK KEVIN CURRAN,

File No.2012-371943

Dec. No. 29545

An infant.

-----X

Petitioner, the mother and guardian of the property of both Rylie Amber Curran [d.o.b. 12/27/2005] and Jack Kevin Curran [d.o.b. 12/12/2007] wrote to the court in twin letters dated December 5, 2013 to explain her actions with respect to the proceeds from life insurance on her wards’ father’s life for the benefit of her wards. The court has elected to treat the letters as petitions.

As set forth in the letter respecting Rylie, upon receipt of the insurance proceeds, the guardian opened a UTMA at Citibank instead of a guardianship account. In August of 2012, she opened two accounts at Merrill Lynch, an UTMA in which she deposited \$141,782.78 and a College Savings Plan into which she deposited \$235,000.00. An additional \$5,000.00 was deposited into an existing Capital One Account in Rylie’s name and \$100.00 was left in the original Citibank UTMA. Upon realizing her error in utilizing a UTMA, she closed the Merrill Lynch UTMA and opened a guardianship account at Citibank in which she deposited

\$132,597.55 received from that account, suffering a \$9,185.23 loss from liquidating Rylie's Merrill Lynch UTMA.

As set forth in the letter respecting Jack, upon receipt of the insurance proceeds, the guardian opened a UTMA at Citibank instead of a guardianship account. Upon realizing her error in August of 2012, she opened two accounts at Merrill Lynch, an UTMA in which she deposited \$141,782.78 and a College Savings Plan into which she deposited \$235,000.00. An additional \$5,000.00 was deposited into an existing Capital One Account in Jack's name and \$100.00 was left in the original Citibank UTMA. Realizing her error in utilizing an UTMA, she closed the Merrill Lynch UTMA and opened a guardianship account at Citibank in which she deposited \$133,372.18 received from that account, suffering a \$7,910.60 loss from liquidating Jack's Merrill Lynch UTMA.

In both instances, the guardian asks for forgiveness for her mistaken actions, permission to leave the College Savings Plans intact, and "permission to invest the money in the Citibank Guardianship Account[s] back into a UTMA at Merrill Lynch."¹

The father, Daniel D. Curran, died on June 28, 2012. The mother petitioned to become guardian of the children's property and on October 24, 2012, the court entered decrees in both proceedings appointing the mother guardian of their property. Letters of guardianship were issued on the same day. The mother's petitions for guardianship each provided that the deposit of insurance proceeds would be made "in the name of the guardian" at Citibank. Both decrees provided "...that the guardian collect and receive all money and property of the infant pursuant to SCPA § 1708 jointly with depository designated, Citibank, 320 Merrick Road, Lynbrook, NY

¹No proposed investment agreement was submitted with the informal petition.

11563 ... and such deposit shall be withdrawn or removed only on the order of the Court...” The letters of guardianship reiterated that “...such deposit or investment shall be withdrawn only on the order of the Court....”

The guardian of an infant’s property has the duty to protect, preserve and manage the infant’s property (SCPA 1723; *Delafield v Barret*, 270 NY 43 [1936]). The order appointing the guardian generally either restricts the guardian’s powers or provides for the guardianship property to be held jointly with the court clerk or a bank and a court order is necessary to dispose of them (SCPA 1708[1][c]). The orders entered in these proceeding followed this format. Except for limited powers listed in the statute, the guardian has no power to act on the child’s behalf without a court order.

“A fiduciary owes a duty of undivided and undiluted loyalty to those whose interest the fiduciary is to protect” (*Birbaum v Birbaum*, 73 NY2d 461, 466 [1989]). Moreover, a trustee is required to administer the trust solely in the interests of the beneficiary (*see Astro Mechanical Contracting, Inc. v Fleet Bank, N.A.*, 1 NY3d 324 [2004]).

While the record is scant, the guardian admits that her investment of the children’s funds with Merrill Lynch, without a court order, and her transfer of those funds back to newly created Citibank guardianship accounts, resulted in losses to Rylie of \$9,185.23 and Jack of \$7,910.60. The letters state only that the losses occurred from having to liquidate the Merrill Lynch UTMA accounts. The court does not know what culpability for these losses, if any, may be charged to Citibank and/or Merrill Lynch as neither entity may have been aware of the fact of the guardianship proceedings and thus on notice of the court imposed restrictions.

The actions by the guardian may result in a surcharge being assessed. The purpose of a

surcharge is to compensate distributees for loss caused by want of due care, and for money or other property coming into the personal representative's hands for which such representative fails to account (42 NY Jur2d Decedent's Estates § 2243 [2010]; 31 Am Jur 2d Executors and Administrators § 888 [2010]). The court, however, declines at this point to impose a surcharge and instead will address the issue in the final accounting of the guardian when the infants turn 18.

As to the College Savings Plans, the guardian should have obtained court authorization prior to making these investments. However, as there have been no losses, and the court would most probably have authorized such investment had it been requested to do so, no sanctions will be imposed. The investments in the Merrill Lynch College Savings Plans will be approved nunc pro tunc provided that an appropriate Investment Agreement [in each guardianship proceeding] is provided to the court for approval with Merrill Lynch and/or such other person or corporation as will be providing investment advice with respect to such plans, within 60 days of the date of this decision and order.²

The request to invest the balance of the wards' monies in an investment account with Merrill Lynch is denied without prejudice. Such action is governed by EPTL § 11-2.3[c] and SCPA 1708 [2] [c] and requires court-approved investment agreements with the custodian and investment adviser that accept the responsibility to protect and manage such funds. Appropriate papers must be filed before the court can consider this request.

This is the decision and order of the court.

Dated: March 13, 2014

EDWARD W. McCARTY III
Judge of the
Surrogate's Court

² The court's form for an Investment Agreement and the papers seeking approval are available upon request from the guardianship clerk.

