

**Matter of Robert A. Koch Living Trust**

2014 NY Slip Op 33297(U)

January 18, 2014

Sur Ct, Monroe County

Docket Number: 2009-2309

Judge: Edmund A. Calvaruso

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**SURROGATE'S COURT OF THE STATE OF NEW YORK – COUNTY OF MONROE**

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In the Matter of the

**ROBERT A. KOCH LIVING TRUST**

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**DECISION AND ORDER**

File No: 2009 -2309

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In the Matter of the Application of **ERIC T.**

File No. 2013-967/A

**SCHNEIDERMAN**, Attorney General of the

State of New York, for an Order to Compel

**BONNIE A. PAONE** and **SCOTT C. GARD**

To Render and File a Final Account as Fiduciaries

of Deceased Fiduciary **OLGA A. Koch** as Trustee

of the **ROBERT A. KOCH and OLGA A. KOCH**

**CHARITABLE REMAINDER UNITRUST**

Under Agreement Dated January 22, 1999.

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**APPEARANCES**

Harris Beach PLLC (*Christopher DiPasquale, Esq. of Counsel*) for Deborah Hartman as Successor Trustee of the Robert A. Koch Living Trust; Trevett Cristo Salzer & Andolina P.C. (*Don H. Twietmeyer, Esq. of Counsel*) for Scott C. Gard and Bonnie A. Paone as co-executors of the Estate of Olga A. Koch; Office of the New York State Attorney General (*Audrey Cooper, Esq.*) on behalf of charitable beneficiaries pursuant to EPTL §8-1.1(f); Stephen Pullum and Thomas Van Ness, Esq. (*pro se*) as Successor Co-Trustees of the Robert A. Koch and Olga A. Koch Charitable Remainder Unitrust; Andrew Fussner as V.P. for Estate Settlement for American Heart Association as a charitable remainder beneficiary (*pro se*); Paul Weiss Rifkind Wharton & Garrison LLP (*Darren W. Johnson, Esq. of counsel*) for Memorial Sloan-Kettering Cancer Center as a charitable remainder beneficiary; James Ludlam, Esq. as Assistant Secretary and Legal Counsel for the Arthritis Foundation, Inc. as a charitable remainder beneficiary.

## PROCEDURAL HISTORY

Robert Koch established a lifetime trust (hereinafter referred to as the "Living Trust") under an Agreement dated January 14, 1999 which was later amended by an Agreement dated May 28, 2004. Under the terms of the Living Trust, the settlor received income together with whatever principal on his request. Upon the Robert's death, the Agreement directed specific distributions to his spouse and children and divided the remainder into two separate shares, one to fund a Family Trust and the other for a Marital Trust. Robert and his spouse, Olga Koch, were the co-trustees of the Living Trust until he resigned on November 17, 2005. Olga Koch continued to serve as trustee. The Agreement named Deborah Hartman as successor trustee upon the passing of Olga Koch.

The Robert A. Koch and Olga A. Koch Charitable Remainder Unitrust (hereinafter referred to as the "CRUT") was created by an Agreement dated January 22, 1999 and provided the couple with an annual unitrust amount of 7.5%. Upon the death of their survivor, the remainder is directed equally among the Memorial Sloan Kettering Cancer Center, the Arthritis Foundation, the Covenant House, and the American Heart Association. The CRUT was initially funded with \$200,000 and the couple served as co-trustees until Mr. Koch resigned on November 17, 2005 while Olga Koch remained as sole trustee. The successor co-trustees of the CRUT are Stephen Pullum and Thomas Van Ness.

Robert Koch died on October 27, 2007 and his passing triggered the creation of the Family Trust and the Marital Trust, both of which provided income to Olga Koch and invasions of principal as necessary for her health, support, maintenance and education. Olga Koch and Mr. Koch's daughter, Deborah Hartman, are the co-trustees of the Family Trust and the Marital Trust. The remaindermen of both sub-trusts are Mr. Koch's four children from a prior marriage.

On October 5, 2009, Robert's children, (hereinafter referred to as the "Petitioners") commenced a proceeding to compel the account of Olga Koch, as sole trustee of the Living Trust. They allege she exceeded her authority as trustee when in February of 2007 she transferred \$720,538 from the Living Trust to the CRUT. The Petitioners maintain the transfer enhanced Olga Koch's unitrust payout from the CRUT which significantly exceeded her right to income under the Living Trust. Additionally, the Petitioners maintain the \$720,538 should have funded the Family Trust and Marital Trust and the transfer of those assets to CRUT divested their interests as remaindermen the aforementioned trusts. As a result, they seek to restore the Living Trust with \$720,538 plus interest from the date of the transfer and a formal account from Olga Koch as trustee of the Living Trust.

A citation was issued and served on Olga Koch, the Office of New York State Attorney General's Office (hereinafter the "Attorney General"), the Memorial Sloan Kettering Cancer Center, the Arthritis Foundation, and the American Heart Association. Olga Koch filed a verified Answer in which she averred the transfer was within the scope of her authority as trustee of the Living Trust and was necessary to provide adequate funding for Robert's nursing home and medical expenses.

During the pendency of the above-mentioned proceeding, Olga Koch passed away on March 21, 2013. Her Will was probated by this Court and Bonnie Paone and Scott Gard were appointed as co-executors of her estate. Subsequently, the Attorney General, pursuant to EPTL §8-1.1(f) petitioned to compel the account of the Estate of Olga Koch as personal representative of the sole trustee of the CRUT. Process was issued to all the interested parties of the CRUT and the Petitioners were also joined in the proceeding against the Estate of Olga Koch (hereinafter the "Estate").

Upon a motion with notice to all parties herein, the Petitioners were allowed to amend their pleadings in their initial compel account proceeding to include the Estate as a respondent and also named Deborah Hartman, as Trustee of the Robert Koch Family Trust, as the Petitioner.

By way of this Court's Order dated June 12, 2014, both of the compel account proceedings were consolidated.

During the course of the proceedings, the Attorney General, counsel for the Estate and the Petitioner confabbed several times with the Court to resolve the issues presented. An Order dated April 29, 2014 directed a partial distribution of \$50,000 to each of the four charitable beneficiaries of the CRUT. Upon an apparent settlement in which the Living Trust would receive funds from both the Estate and the CRUT, the Estate circulated a Notice of Settlement among the interested parties and included a proposed decree directing a payment of \$300,000 from the CRUT to the Living Trust and settling the CRUT account filed by the Estate.

Upon the service of the Notice of Settlement, Memorial Sloan Kettering Cancer Center, the American Heart Association, the Arthritis Foundation, and the named successor co-trustees of the CRUT filed what has been stylized as objections to the proposed account and settlement set forth in the proposed decree.

Subsequently, the Attorney General moved for summary judgment alleging the terms of the Living Trust are clear, that Olga Koch did not exceed her authority in making the transfer to the CRUT, and that the CRUT should be distributed to the charitable remainder beneficiaries.

The Petitioner filed a cross-motion for summary judgment in which she avers that Olga Koch's indisputably breached of her fiduciary duty as trustee of the Living Trust and there should be a constructive trust imposed on the funds she improperly transferred to the CRUT. A constructive trust would require the CRUT to remain in place, notwithstanding the death of its beneficiaries, and allow restitution from either the Estate, the CRUT, or both.

### **DECISION**

As a preliminary matter, the Court notes it did not consider the filings offered by the charities or the successor co-trustees of the CRUT. Pursuant to SCPA §302, pleadings in a Surrogate Court proceeding shall consist of the petition, answer, or objection and account, with no other form of pleadings unless directed by the Court. In addition, SCPA §303 mandates that all pleadings are to be verified in the manner provided by CPLR §3020. None of the responses from the charities or the successor co-trustees were verified, nor were they accompanied by the proper filing fee for an objection or answer as required by statute. SCPA §303;

SCPA§2401(9)(iv). As such, their papers were treated as a nullity. *In re Taschereau*, NYLJ July 24, 2009 at 44 (Surr. Ct. New York Co.); *In re Estate of Gross*, 79 Misc.2d 204 (Surr. Ct. Queens Co. 1974). Nevertheless, the Attorney General adequately represented the interests of the charitable remainder beneficiaries pursuant to EPTL §8-1.1(f).

In support of its motion for summary judgment, the Attorney General argues the Petitioner only seeks restitution from Olga Koch and that the CRUT was not a party to the original compel account proceeding. This argument is without merit as the charities were joined in the initial proceeding as presumptive remainder beneficiaries of the CRUT whose interest would be impacted in the event the transferred funds were restored to the Living Trust. Several of the charities filed notices of appearance in the Petitioner's compel account proceeding. Furthermore, Olga Koch filed a response to the initial petition in her capacity as trustee for both the Living Trust and the CRUT and sought a Court order to have the CRUT pay the legal expenses she incurred as trustee in the defense of initial proceeding. Through her pleadings, Olga Koch submitted to this Court's jurisdiction individually and as trustee of both the CRUT and Living Trust.

Moreover, even though the Agreements which created both the Living Trust and the CRUT were executed in Florida, SCPA§207(1) provides "the surrogate's court of any county has jurisdiction over the estate of any lifetime trust which has assets in the state, or of which the grantor was a domiciliary of the state at the time of the commencement of a proceeding concerning the trust, or of which a trustee then acting resides in the state or, if other than a natural person, has its principal office in the state." When the Petitioners commenced their proceeding, Olga Koch, as trustee for both trusts, was a resident of Monroe County and remained so until she passed away. When Roberts' children amended their petition to re-assert the claims against the Estate pursuant to EPTL§11-3.2(a)(1), process was once again served on the charitable beneficiaries, successor co-trustees of the CRUT, and the Estate.

Throughout the course of both proceedings, the charities and successor co-trustees have availed themselves to this Court's jurisdiction, having appeared either directly or through the Attorney General. The charities also received the benefit of a partial distribution of \$50,000 from the CRUT as authorized by this Court's order dated April 29, 2014. Therefore, it cannot be said that the interested parties in both proceedings are unaware of the claims against the transferred funds held by the CRUT.

The CPLR directs a summary judgment "motion shall be granted if, upon all the papers and proof submitted, the cause of action shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." CPLR §3212(b). Summary judgment is the procedural equivalent of a trial and is a drastic remedy which should not be granted when there is any doubt as to the existence of a triable issue. *Andre v. Pomeroy*, 35 NY2d 361, 363 (1974). The moving party is entitled to summary judgment only upon a prima facie [748] showing that it should prevail as a matter of law. *Winegrad v. New York Univ. Med. Center*, 64 NY2d 851, 853 (1985). Upon such a showing, the burden shifts to the opponent, who must set forth facts on an evidentiary nature sufficient to require a trial of any issue of fact as mere assertions, baseless conclusions or unsubstantiated allegations will not suffice in overcoming a

motion for summary judgment. CPLR §3212[b]; *Ehrlich v. American Moniger Greenhouse Mfg. Corp.*, 26 NY2d 255 (1974); *Zuckerman v. New York*, 49 NY2d 557 (1980).

Specifically for its motion, the Attorney General must show as a matter of law that Olga Koch was within her authority as trustee to transfer \$720,537.63 from the Living Trust to the CRUT. Conversely, to prevail on her cross-motion for partial summary judgment on their constructive trust claim, the Petitioner must show Olga Koch breached her fiduciary duty as trustee of the Living Trust when she transferred its assets to the CRUT.

The Attorney General claims the facts of this case are undisputed. Robert Koch established the Robert A. Koch Living Trust by an Agreement dated January 14, 1999 which was later amended and restated by an instrument dated May 28, 2004. By way of a writing dated November 17, 2005, Robert Koch resigned as co-trustee of the Living Trust and Olga Koch continued on as sole trustee up until she passed in 2013. The couple also established the CRUT under an Agreement dated January 14, 1999 which was then funded with \$200,000. It is also undisputed that on December 28, 2006, while acting as trustee of the Living Trust, Olga Koch transferred securities worth \$720,537.93 from the Living Trust to the CRUT.

The Attorney General states as trustee, Olga Koch had a fiduciary obligation to act in accordance with the terms of the Living Trust Agreement which specifically conferred upon her the power and discretion to move assets from the Living Trust to the CRUT. The transfer took place during Roberts's lifetime and had the effect of increasing the annuity payment to himself and Olga as beneficiaries of the CRUT. It is argued that the broad authority to invade principal is a manifestation of Robert Koch's desire that he and his wife be the primary beneficiaries of the Living Trust and their interests superseded those of remaindermen in the Living Trust.

The Petitioner asserts Olga Koch had a duty to manage the trust assets not only for the benefit of Robert and herself as lifetime beneficiaries, but also for the benefit of the remaindermen. The transfer significantly divested Robert's children of their remainder interest. Furthermore, moving the funds to the CRUT inured to Olga's benefit as the enlarged corpus of the CRUT yielded a greater annual unitrust payout to Olga that exceeded any income she would have received under the Living Trust Agreement.

It is axiomatic that "a 'trustee owes the beneficiar[ies] an undivided duty of loyalty' . . . and 'a duty to act with the utmost good faith,' while administering a trust." *Matter of Coulter*, 77 A.D.3d 1287, 1289-1290(4th Dep't 2010) citing *Matter of Giles*, 74 AD3d 1499, 1503 (3<sup>rd</sup> Dept. 2010). To determine whether Olga Koch's distribution of trust assets was proper, it is well settled that "the trust instrument is to be construed as written and the settlor's intention determined solely from the unambiguous language of the instrument itself." *Mercury Bay Boating Club v San Diego Yacht Club*, 76 NY2d 256, 270 (1990); *Matter of Wallens*, 9 NY3d 117, 122 (2007). The Court must search "not for the probable intention of the settlor merely, but for the intention which the trust deed itself, *either expressly or by implication*, declares" then "give effect to the legal consequences of that intention when ascertained." *Central Union Trust Co. of New York v. Trimble*, 255 NY 88, 93 (1930).

Article III of the Living Trust reads:

*The Trustee shall hold, manage, invest and reinvest the trust property and during the lifetime of the Settlor, pay or apply for the Settlor's benefit all of the net income of the trust in convenient installments, together with all or any portion of the principal thereof as the Settlor may, from time to time, request. If at any time or times the Settlor is under a legal disability or by reason of illness or physical disability as set forth in Article X below is, unable properly to manage the Settlor's affairs, the Trustee shall use and expend for the benefit of the Settlor and for the Settlor's spouse, all or any portion of the net income and principal of the trust at such time and in such manner as the Trustee may deem advisable for the proper care, support, and education of the beneficiary, and any net income not distributed shall periodically be added to and commingled with the principal of the trust.*

During Robert's lifetime, the Living Trust Agreement provided Olga Koch with the broad discretion to invade principal. However, this authority was tempered insofar as such invasions had to be deemed "advisable" by her and required Olga Koch to act both reasonably and in good faith in executing the terms of the Living Trust in furtherance of the beneficiaries' interests including those of the remaindermen. *Matter of Wallens*, 9 NY3d 117 (2007); EPTL§11-2.1(a)1).

The Petitioner avers there is no dispute that the funds withdrawn from the Living Trust were not used for the "proper care and support and education" of Robert and Olga Koch. The record does not reflect a regular pattern of principal withdrawals which may support the notion that the income of the Living Trust was insufficient for Robert's needs. In her Answer, Olga Koch never alleged the income of the Living Trust was insufficient to care for Robert. It is notable the couple's 2006 tax return shows their adjusted gross income of \$379,935 and none of the parties herein contest the Petitioner's assertion that Olga Koch's own assets were sufficient to support Robert. *DiPasquale Aff. Ex. L, M, N and O*.

Instead, Olga Koch made a single lump-sum principal invasion of \$720,000 from Living Trust. The impact of the transfer was known to Olga Koch and her disregard for the Petitioners interest in the remainder of Living Trust is evident in her deposition testimony in which she opined that the Petitioners were entitled to nothing more than their initial cash legacies under Article IV(A) and (B) of the Agreement. *Olga Koch Deposition, 63:15-64:4, DiPasquale Aff. Ex. I*. Olga Koch was aware of the impact of the transfer to the CRUT as she stated in her deposition that the assets in the CRUT "wouldn't have anything to do with the children." *Olga Koch Deposition, 96:25-97:1, DiPasquale Aff. Ex. I*. The financial advisor retained by Olga Koch, Angelo Ponticello, stated in his deposition that, notwithstanding the implication of the transfer of assets from the Living Trust to the CRUT, Olga did not feel compelled to discuss it with the Petitioners "as long as they got the required amount as stipulated..." *Angelo Ponticello Deposition 112:11-112:24, DiPasquale Aff. Ex. J*. Furthermore, Olga Koch testified in her

deposition that upon Robert's death, she never funded the Family Trust and Marital Trust with the remainder of the Living Trust as directed under the Agreement. *Olga Koch Deposition*, 66:17-69:8, *DiPasquale Aff. Ex. I*.

Olga Koch's sustained disregard of her step-children's interest in the Living Trust is also apparent in the protracted process of distributing their respective legacies under the Agreement. When Robert passed, Olga Koch paid herself her own initial cash legacy pursuant to the Agreement in full, yet only partially satisfied the legacies to Robert's children. The balance of the Petitioners' legacies were distributed by Olga Koch a year later upon the threat of litigation.

The Court of Appeals observed that a fiduciary's duty requires "not honesty alone, but the punctilio of an honor the most sensitive." *Meinhard v Salmon*, 249 NY 458, 464 (1928). This strict standard is the usual and appropriate measure of a trustee's fiduciary obligations because the trustee must administer the trust for the benefit of the beneficiaries and cannot compete with the beneficiaries for the benefits of the trust corpus. *Mercury Bay Boating Club v San Diego Yacht Club*, 76 NY2d 256, 270 (1990). Thus, the trustee owes the beneficiary an undivided duty of loyalty and cannot, for example, take the economic benefit of a trust. *Matter of Scarborough Props. Corp.*, 25 NY2d 553, 558; *Matter of Rothko*, 84 Misc. 2d 830, 838 (Surr. Court New York Co. 1975).

Judge Cardozo's observation in *Carrier v. Carrier* supports the conclusion that discretionary power in a trustee must yield to fundamental fiduciary obligations: "[The trustee's] discretion, however broad, did not relieve him from obedience to the great principles of equity which are the life of every trust." *Carrier v. Carrier*, (226 N.Y. 114, 125 (1919)). In the present case, the discretion afforded to Olga Koch under the Living Trust Agreement did not authorize her to exercise that authority to the detriment of the remaindermen. The Agreement contains no clear expression by the settlor of an intention to allow gifts to third parties which would divest his children as remaindermen of the Living Trust. It is notable that other than the initial funding of \$200,000 in 1999, Robert Koch did not add to the corpus of the CRUT. This suggests Robert Koch intended a defined charitable benefit from when the CRUT was established, not an open-ended, un-defined benefit subsequently created by whim of his spouse.

Upon review of the Living Trust Agreement, the facts presented, and application of relevant case law, this Court finds as a matter of law that Olga Koch violated her fiduciary duty as trustee when she transferred \$720,537.93 in asset from the Living Trust to the CRUT. The transfer served Olga's own interests as a lifetime beneficiary of the CRUT while divesting the remaindermen the Living Trust.

The remedy of a constructive trust is peculiarly suited to circumstances in which a fiduciary has been guilty of self-dealing. "A constructive trust is then the remedial device through which preference of self is made subordinate to loyalty to others." *Birnbaum v. Birnbaum*, 117 AD 2d 409, 420 (4<sup>th</sup> Dept. 1986) quoting *Meinhard v Salmon*, 249 NY 458, 467 (1928). Generally, a constructive trust may be imposed "[when] property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest." *Beatty v. Guggenheim Exploration Co.*, 225 NY 380, 386 (1919); 1 Scott, Trusts [3d ed], § 44.2, p 337; 4 Pomeroy's Equity Jurisprudence [5th ed], § 1053, p 119).

A constructive trust may be imposed as an equitable remedy upon the showing of the following four requirements: (1) a confidential or fiduciary relationship, (2) a promise, (3) a

transfer in reliance thereon and (4) unjust enrichment. *Janke v. Janke*, 47 AD2d 445 (4<sup>th</sup> Dept. 1975), *aff'd* 39 NY2d 786. While the presence of these four elements is useful in most cases, the doctrine of constructive trusts is not rigid and its application "is limited only by the inventiveness of men who find new ways to enrich themselves unjustly by grasping what should not belong to them." *Latham v. Father Devine*, 299 NY 22, 26-27 (1949).

In the present case, the Attorney General argues against the imposition of a constructive on the corpus of the CRUT as there is no evidence that Robert Koch was coerced, unduly influenced or otherwise induced by his wife to resign as co-trustee of the Living Trust nor was the resignation a result of any promise on behalf of Olga Koch. Additionally, the Attorney General states the assets of the Living Trust were not misappropriated and any alleged moral obligation Olga Koch had to retain those assets for the benefit of the remaindermen is insufficient to warrant a constructive trust.

In the alternative, the Attorney General posits that if a constructive trust is granted, it should be imposed only upon the legatees of the Estate as Robert's estate planning manifests an intent to benefit the charities named in the CRUT in addition to his wife and children. There is nothing to suggest he intended to benefit Olga's relatives who have been unjustly enriched by the transfer.

However this position is untenable as the assets which were improperly removed from the Living Trust are directly traceable to the CRUT. While it may be liable for damages resulting from Olga's actions as trustee, the Estate cannot be held liable for a constructive trust as the neither it, nor its beneficiaries, were unjustly enriched by virtue of the assets transferred from the Living Trust. Instead, the charities would be unjustly enriched by the impermissible transfer of assets to the CRUT.

The Petitioner maintains that the Living Trust assets were misappropriated and the remaindermen's equitable interest in those funds attached upon the transfer. When he executed the Living Trust Agreement, Robert Koch placed express limitations on the authority of the trustee and Olga Koch had a legal duty beyond a moral obligation to abide by the terms of the Agreement. The Agreement did not empower the trustee to make gifts to a third party and the transfer was, in effect, an unauthorized gift to the charities.

The mainstay of the constructive trust is prevention of unjust enrichment. *Sharp v. Kosmalski*, 40 NY2d 119, 123 (1976). Unjust enrichment, however, does not require the performance of any wrongful act by the one enriched. *Lengel v. Lengel*, 86 Misc. 2d 460, 465-466; *Miller v. Schloss*, 218 NY 400, 407(1916). While a bona fide purchaser of property upon which a constructive trust would otherwise be imposed takes free of the constructive trust, a gratuitous donee does not. *Simonds v. Simonds*, 45 N.Y.2d 233, 242 (1978). While the charities did not have a role in transferring the assets to the CRUT, they are in fact gratuitous donees under the constructive trust doctrine and "equity and good conscience" dictate they not retain benefit of the transfer. *Miller v. Schloss*, 218 NY 400, 407(1916). Furthermore, a constructive trust allows for the Petitioners to pursue relief against both the Estate and the CRUT. *Mater of Rothko*, 84 Misc. 2d 830, 872-73 (Surr. Ct. New York Co. 1975) *modified*, 56 AD 2d 499 (1<sup>st</sup> Dept. 1977), *aff'd* 43 NY2d 305 (1977).

Based upon the foregoing analysis, the Petitioner's motion for partial summary judgment is granted and a constructive trust shall be imposed on the assets held by the CRUT. The

liability of damages resulting from the transfer and allocation of the restitution shall be determined at a later date.

In response to the Attorney General's application, the Estate filed an accounting of CRUT covering the period from January 22, 1999 through March 21, 2013 on behalf of the deceased trustee. The Court has reviewed the Account and finds it to be in order. Insofar as the attorney fees sought by Estate's counsel, the Court has reviewed his Affirmation of services and approves the amount requested. The Affirmation recites that Olga Koch retained counsel in February 2007 to represent her in the initial compel account proceeding and when she passed, the co-executors of her estate continued to retain him during the course of these proceedings and enlisted his services in rendering a 1,240 page accounting for the CRUT. Timesheets attached to the Affirmation show that as of March 4, 2014, over 217 hours of legal work were devoted to the proceedings. Given the complexity of the work performed, the issues resolved, the results obtained, and the attorney's expertise and standing in the community, this Court finds the fees requested are both reasonable and necessary. *In res Estate of Potts*, 241 NY 510(1925); *In re Estate of Freeman*, 34 NY 2d 1 (1974). The Estate is directed to submit a proposed order for judicial settlement of the CRUT account and approving legal fees. The balance of the CRUT assets are to be held by successor co-trustees of CRUT until further order of this Court.

This decision shall serve as an Order of this Court.

Dated: Jan. 18, 2014

Rochester, New York

*Edmund A. Calvaruso*

Hon. Edmund A. Calvaruso  
Monroe County Surrogate