

**Matter of Jane D. Ritter Revocable Living Trust**

2015 NY Slip Op 31303(U)

March 31, 2015

Sur Ct, Nassau County

Docket Number: 2014-380517

Judge: Edward W. McCarty III

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

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 Accounting by Sabino Biondi as the Trustee of the

File No. 2014-380517

JANE D. RITTER REVOCABLE LIVING TRUST,

Dec. No. 30502

Under Agreement Dated January 12, 2000, as Amended.  
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In connection with the voluntary account of Sabino Biondi as trustee of the Jane D. Ritter Revocable Living Trust under agreement dated January 12, 2000, as amended, the trustee moves for a protective order pursuant to CPLR 3103 and for an order vacating a notice of deposition, dated October 6, 2014, served by respondents Mary Kathryn Rader and John Rader, on the grounds that the deposition notice seeks information beyond the scope and purpose of an examination pursuant to SCPA 2211 (2).

#### BACKGROUND

Sabino Biondi (Biondi) filed his account as trustee of the Jane D. Ritter Revocable Living Trust (the Trust) for the period of June 29, 2012, the date of his succession to office upon the death of the settlor, Jane D. Ritter (the settlor), through May 30, 2014. The respondents, Mary Rader and John Rader (Mary and John, or the respondents), are the daughter and grandson of the settlor, and John is the ultimate remainder beneficiary.

The Trust was created on January 12, 2000 and amended on October 24, 2003. The amendment named the settlor's attorneys, Biondi and Donald J. Farinacci (Farinacci), as successor trustees to act in the event of the settlor's death, resignation, refusal or inability to act. The settlor died on June 29, 2012, and Farinacci promptly renounced his appointment, leaving Biondi to act as the sole successor trustee.

After Biondi filed his account, Seth Rubenstein (Rubenstein), as counsel for Mary and

John, served a deposition notice on Biondi, expressing his intention to question Biondi “as to all matters and things relating to his administration of the Trust, including the manner in which he and Donald J. Farinacci became or were nominated as successor trustees and Donald J. Farinacci renounced such appointment.” The Notice further sought production of “all pertinent memoranda, correspondence, and diary entries.”

#### MOTION FOR A PROTECTIVE ORDER

Counsel for Biondi, Alan D. Zuckerbrod (Zuckerbrod), argues that the scope of an examination pursuant to SCPA 2211 does not extend to an examination concerning the circumstances in which the accounting fiduciary was nominated or in which the fiduciary’s co-trustee renounced his appointment, and it does not extend to the validity and effect of the trust agreement and its amendments. Although the scope of examination of an accounting fiduciary may be broad, it is limited to matters pertaining to the acts of the fiduciary over the assets entrusted to the fiduciary. Accordingly, Zuckerbrod maintains that to the extent that respondents’ deposition notice demands information concerning Biondi’s nomination as a successor trustee, or the validity of the trust and its amendments, or Biondi’s production of documents pertaining to these issues, those portions of the deposition notice must be stricken.

#### AFFIDAVIT IN OPPOSITION

In his affidavit in opposition, Rubenstein claims that “[i]t is difficult to imagine anything more relevant [in an SCPA 2211 examination] than how [Biondi] became a trustee.” Since SCPA 2211 provides the rights granted under CPLR Article 31, Rubenstein argues that the respondents are entitled to “full disclosure of all matter material and necessary”, and expresses the respondents’ concern about Biondi’s “entry into our family trust.” Rubenstein further notes

that there may have been a “special relationship of some sort” between the settlor and the attorney-draftsperson, that Schedule A was prepared by the settlor, rather than by the draftsperson of the trust, that parts of Schedule A were redacted, and that although the settlor was not obligated to explain her reasons for changing successor trustees, the change had a drastic effect, in that the nomination of two successor trustees, instead of one, could have led to payment of two full commissions. In support of his ability to question Biondi concerning the manner in which Biondi came to be appointed as successor trustee, Rubenstein goes on to cite two decisions permitting trustees to be questioned as to whether the decedent had been advised that full commissions could be paid to each of two nominated fiduciaries. Rubenstein further questions how Biondi could have been appointed to serve under the terms of the trust agreement, which Rubenstein claims requires the appointment of corporate, and not individual, fiduciaries.

#### REPLY AFFIRMATION IN SUPPORT OF MOTION FOR PROTECTIVE ORDER

Zuckerbrod asserts that Rubenstein’s affidavit entirely fails to address the basis for the motion for a protective order, namely, that an examination of his client pursuant to SCPA 2211 is limited to matters relating to Biondi’s administration of the trust. Counsel claims that it is Rubenstein’s intention to bring a removal proceeding, but that Rubenstein should not be allowed to use the examination pursuant to SCPA 2211 as a fishing expedition for information unrelated to the accounting proceeding. In response to Rubenstein’s expressed concern about whether the settlor was advised that two full commissions would become payable if two trustees served, Zuckerbrod notes that Farinacci renounced his position and never served as trustee, rendering moot Rubenstein’s assertion that the issue of two commissions is a reason for questioning Biondi about how he came to be nominated as a trustee by the settlor.

## ANALYSIS

The parties agree that Biondi can be questioned about his nomination as successor trustee. The issue before the court is whether such questioning is appropriate in the context of an examination of a trustee pursuant to SCPA 2211. Subparagraph (2) of SCPA 2211 states, in relevant part, that “[t]he fiduciary may be examined under oath by any party to the proceeding either before or after filing objections, if any, to the account, as to any matter relating to his or her administration of the estate [emphasis added].” The issue is whether Biondi’s “administration of the estate” includes the way in which Biondi came to be nominated as a successor trustee.

As noted above, one of Rubenstein’s key arguments for being allowed to question Biondi about how Biondi came to be nominated as a successor trustee is that the settlor’s nomination of two trustees could have resulted in payment of two commissions, an outcome which may not have been brought to the attention of the settlor. In support of this argument, Rubenstein cites *Matter of Laflin* (111 AD2d 924 [2d Dept 1985]), in which the Appellate Division affirmed this court’s decision to allow the filing of objections in an accounting proceeding to determine whether the attorney draftsman had properly advised the decedent that two full commissions could become payable to the two nominated executors. However, under the present facts, one successor co-trustee renounced his appointment, thus making moot the question concerning two commissions.

“SCPA 2211 allows for broad inquiry into the fiduciary’s administration of the estate in accounting. In fact, the purpose of conducting 2211 examinations is to obtain sufficient information to allow the parties to adequately frame their objections” (*Matter of Glasser*, NYLJ,

June 25, 2002, at 25, col 1 [Sur Ct, Suffolk County]). At the discretion of the court, and in the interests of financial economy as well as judicial economy, on rare occasions parties may even be allowed to conduct discovery in connection with issues outside the scope of the SCPA 2211 proceeding (see, for example, Surrogate Radigan's decision in *Matter of Kiliszek*, NYLJ, May 1, 2000 at 37, col 5 [Sur Ct, Nassau County]).

The proceeding before the court is a trustee's account, which covers the period from June 29, 2012, the date of the settlor's death, to May 30, 2014. The trust amendment by which the settlor nominated Biondi as successor trustee was signed in 2003, nearly nine years prior to the commencement of the present judicial account. Based upon all of the foregoing facts, the court finds that the respondents have failed to establish that the facts surrounding Biondi's nomination as a successor trustee are in any way relevant to the present accounting proceeding.

#### CONCLUSION

The motion for a protective order pursuant to CPLR 3103 and for an order vacating the notice of deposition, on the grounds that the deposition notice seeks information beyond the scope and purpose of an examination pursuant to SCPA 2211 (2), is granted.

This constitutes the decision and order of the court.

Dated: March 31, 2015

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