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

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In the Matter of the Application of Andrew Sinzheimer and Marsha Sinzheimer Regarding a Trust under the Agreement of

RONALD SINZHEIMER and MARSHA SINZHEIMER,

Settlors,

dated January 27, 1997.

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DECISION and ORDER

File No.: 2015-1418

M E L L A, S. :

The following papers were considered in deciding this motion:

Papers	Numbered
Notice of Motion for an Order granting Petitioners permission to file Jury Demand, with Exhibits A through E, dated November 17, 2015	1
Memorandum of Law in Opposition to Motion to Permit Filing of Jury Demand, dated December 16, 2015	2
Memorandum of Law in Support of Motion to Permit Filing of Jury Demand, dated January 5, 2016	3
Affidavit of Andrew Sinzheimer in Support of Motion to Permit Filing of Jury Demand, with Exhibit A, sworn to January 5, 2016	4
Memorandum of Law in Further Opposition to Motion to Permit Filing of Jury Demand, dated January 21, 2016	5
Affidavit of Sharon Marinucci, with Exhibits A and B, sworn to January 21, 2016	6

This is a motion by petitioners Andrew Sinzheimer and Marsha Sinzheimer for an order deeming their jury demand timely filed, or in the alternative, for an order permitting them to file the demand in the discretion of the court (CPLR 4102 [e], 2001). The underlying

proceeding is based on allegations that a removed corporate trustee is wrongfully withholding trust assets from the currently serving individual trustee.

A jury demand must be served and filed within six days after service of the answer (SCPA 502), subject to enlargement of the six-day period by five days where the answer is served upon a party's attorney by mail (CPLR 2103 [b] [2]). The answer here was served by mail on petitioners' counsel on September 30, 2015. Petitioners served a jury demand on counsel for respondent Bank of America, N.A. (the Bank), by mail on October 7, 2015 and presented it for filing in the court on October 9, nine days after service of the answer. Their attempt to file was within the expanded time period, and petitioners are correct that their jury demand was timely. Nonetheless, the court denies the motion to permit petitioners to file their demand because they are not entitled to a jury trial in this proceeding.

The case concerns subtrusts valued in total at approximately $183,000 under the Ronald and Marsha Sinzheimer Family Trust created in 1997 by Marsha Sinzheimer (Marsha) and her late husband, Ronald.[1] The trust instrument contains various provisions for the appointment, resignation, and removal of trustees, pursuant to which the former individual trustee, John E. Beverly, purported to remove the then acting corporate co-trustee, Merrill Lynch Bank & Trust Company, FSB, now a division of respondent, in January 2013. John E. Beverly subsequently resigned; petitioner Andrew Sinzheimer (Andrew) was appointed as individual trustee in his place and continues to serve in that capacity.

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[1] One subtrust is created under Article Nine (B) and sometimes referred to as the "Credit Shelter Trust," and one is denoted under Article Three as the "Sinzheimer Family Irrevocable Trust." The assets of the Credit Shelter Trust flow into the Sinzheimer Family Irrevocable Trust upon the death of Marsha Sinzheimer.

Petitioners and the Bank disagree as to whether the trust instrument requires a corporate trustee to serve with the individual trustee. Andrew maintains that there is no such requirement and has demanded that the Bank deliver the trust assets to him, as sole trustee. The Bank has refused to transfer the assets until a successor corporate trustee is in place, or until ordered to do so after resolution of this issue by the court.

The right to trial by jury in surrogate's courts is governed by SCPA 502. As applicable here, the statute provides a right to jury trial where such right is afforded by the State Constitution, which in turn depends on whether the cause of action is equitable in nature, or legal. A scholarly treatment of the relevant historical background may be found in *Matter of Luria* (63 Misc 2d 675 [Sur Ct, Kings County 1970]), where Surrogate Sobol explains,

> "In each instance it must be determined whether the nature and substance of the relief requested is in law or in equity. If in law and included among those cases where jury trial is historically mandated by the Constitution or by statute, a jury trial must be had on demand. If the relief demanded is traditionally cognizable in equity there is no right to trial by jury for none was available at common law" (*id.* at 682 [internal citations omitted]).

Characterization of the "relief demanded" as cognizable in law or equity, or in a combination of the two, is based upon the facts pleaded, not the pleading's "demand" per se (*Magill v Dutchess Bank and Trust Co.*, 150 AD2d 531, 531 [2d Dept 1989] ["The critical consideration is whether the facts stated show that the action is equitable or legal in nature. The fact that the complaint demands a money judgment does not necessarily establish that there is a right to a jury trial"]).

The allegations in the petition here are not framed squarely to support any readily identifiable specific proceeding. The petition asks the court to "enforce" the removal of the

Bank and to direct it to deliver the trust assets to Andrew, as sole trustee. It asks in the alternative for damages at the highest market value of the trust assets during a period commencing "within a reasonable time" of Andrew's discovery of what he refers to as the Bank's "conversion" of the trust assets, plus interest. The petition also requests an award for the commissions the Bank charged for the period after February 1, 2013, while it managed the investments in accordance with authority delegated by Andrew's predecessor. Lastly, the petition seeks $400,000 in punitive damages.[2]

The allegation that the Bank has wrongfully withheld the trust assets states a claim for breach of fiduciary duty, an equitable claim for which there is no right to a jury trial (*e.g. Matter of Coyle*, 34 AD2d 612 [3d Dept 1970]; *Matter of Rappaport*, 150 AD2d 779 [2d Dept 1989]). The allegations also support a request for construction of the trust to determine whether Andrew has authority to serve as trustee without a corporate co-fiduciary. No right to trial by jury exists in construction proceedings (*e.g. Matter of Walsh*, 147 Misc 103 [Sur Ct, Erie County 1933]).

Petitioners contend that the gravamen of their petition sounds in conversion, for which they would unquestionably have a right to a jury trial in many circumstances. Typically brought under SCPA 2103, a proceeding for delivery of allegedly converted assets involves a determination of title for which the New York Constitution historically guarantees the right to a jury (*see generally Matter of Comfort*, 234 App Div 19 [2d Dept 1931] [decided under

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[2] The petition is captioned "Petition for the Enforcement of the Removal of U.S. Trust, Formerly Operating as Merrill Lynch Trust Company, and Immediate Conveyance of Trust Assets to the Individual Trustee." The court bases its analysis of the claims on the allegations in the petition, and not on this label.

predecessor to SCPA 2103]). The question here, however, is not one of title, but rather one of the Bank's right in these narrow circumstances to temporarily withhold delivery of the trust assets to Andrew. Petitioners have not stated a cause of action for conversion.

Bradley v Roe (282 NY 525 [1940]) involved similar facts. Defendants, who were temporary administrators of a decedent's estate, recovered from the decedent's safe deposit box a stock certificate that was registered in the name of plaintiff's assignor. Plaintiff alleged that the decedent had held the certificate only for safekeeping. When defendants refused plaintiff's demand for the certificate until she first established her right to the stock in an appropriate court proceeding, plaintiff sued for conversion. The Court of Appeals ruled that the fiduciaries were justified in requiring proof of plaintiff's entitlement, and held that plaintiff's claim for conversion should have been dismissed on summary judgment.[3] It noted that the temporary administrators never asserted control over the stock as individuals, never made an unconditional refusal to deliver the stock, and would have been at their peril--subject to a charge of waste--if they delivered the stock to an individual who was not entitled to it. The court narrowed the general definition of "conversion" to exclude it from application in these circumstances, stating, "Where a person is rightfully in possession of property, continued custody of the property and refusal to deliver on demand of the owner until the owner proves his right, constitutes no conversion" (*id.* at 531). That is precisely the situation in the present case. (*See also Mehlman Mgt. Corp. v Fan*, 121 AD2d 609, 610 [2d Dept 1986]; *cf. Hill v Severn*, 23 AD2d 902, 903 [3d Dept 1965] [finding no conversion where attorney retained

[3] The *Bradley* case was decided under the then applicable Rules of Civil Practice, before New York established separate procedures for motions to dismiss and motions for summary judgment as now provided in the CPLR.

client funds pending determination of fees owed, "since [attorney's] retaining of that sum was for a reasonable purpose"]; *United Credit Corp. v J.L.E. Indus.*, 251 AD2d 69, 70 [1st Dept 1998] [finding no conversion or wrongdoing by attorney for retention of client's escrowed funds "in light of [client's] failure to provide the promised documentation in support of its claim"].)

Here, as in *Bradley v Roe*, the Bank has never unequivocally denied Andrew's right to the assets. It asked only that Andrew first appoint a corporate co-trustee to serve with him, or await a court order determining his right to serve without one. Nor has the Bank, or its predecessor Merrill Lynch, exercised control over the assets in its corporate, rather than fiduciary, capacity. The assets have continuously been maintained in an account in the name of the trust, bearing Andrew's name as co-trustee.

Further, the reluctance of the Bank to surrender control solely to Andrew is not unreasonable, in view of the direction in Article Sixteen of the trust instrument, "If after the death of Ronald, the individual Trustee removes the corporate Trustee or there is otherwise no corporate Trustee, the individual Trustee shall appoint another bank or trust company (either within or without New York) to serve in its place." Nor has the Bank's possession of the assets been unduly prolonged. It was not until January 2015 that Andrew made formal demand for distribution of the trust assets. Prior to then, there is no indication that Andrew or his predecessor opposed appointing a new corporate trustee, and in fact they communicated with the Bank about their efforts to do so. The Bank filed a proceeding on May 8, 2015, seeking directions from the court (SCPA 2102[6]) regarding its authority to transfer the assets, just four months after Andrew made clear he had abandoned any plans to appoint a new corporate

trustee.

Even should it ultimately be determined that the Bank is obligated to turn over the trust funds to the sole individual trustee, it does not follow that its failure to do so on demand constituted a conversion (*Bradley v Roe*, *supra*, 282 NY at 534 ["[E]ven assuming that the certificate claimed is the property of the plaintiff, it conclusively appears that the defendants were entitled to judgment dismissing the complaint [for conversion]"]; *cf. Matter of Barrett*, 82 NYS2d 137, 142 [Sur Ct, Westchester County 1948] [finding no conversion where temporary administrator sold estate securities without court authorization as then required by statute, and observing "[t]here is no evidence of bad faith or of intentional wrongdoing"]).

Andrew also argues that his request for money damages entitles him to a jury, citing *Hebranko v Bioline Labs., Inc.* (149 AD2d 567 [2d Dept 1989]) for the principle that inclusion of a demand for equitable relief is not a waiver of the right to a jury where the monetary damages demanded would afford full relief. Petitioners, however, can not obtain full relief without a construction of the trust instrument, which, as discussed above, is an equitable proceeding.

Neither the Bank's proceeding nor the underlying proceeding here can be decided at this juncture because jurisdiction is not complete over all the necessary parties. Contrary to the allegations in the pleadings, Marsha and Andrew are not the only beneficiaries of the subtrusts. Both are discretionary beneficiaries, but their lives are among those that measure the subtrusts' term, and the presumptive remainder beneficiaries have not been cited. It should be noted that income and principal from the currently funded subtrust is payable to Marsha in the discretion of the trustees "as may be necessary for [her] health, support, maintenance and education." In a

letter dated January 8, 2015, Marsha made a written demand to Andrew–who is her son--for distribution to her of all the trust assets, for her "health, support and maintenance." Andrew's written demand to the Bank, made the same date, stated his intention to terminate the trust by delivering all its assets outright to Marsha. Andrew's announced intention to terminate the trust in favor of his mother were he given sole control of the assets underscores the need to join the presumptive remainder beneficiaries in any proceeding to construe his authority to serve alone. It also underscores the relevance in this case to the point made in *Bradley v Roe*, *supra* (282 NY 525), where the court observed that compliance with the plaintiff's demand for delivery would have placed the fiduciaries in peril. So too could the Bank be at risk here to claims from the trust remainder beneficiaries, if it delivered property to an individual who might later be found without authority to exercise discretion alone.

The court concludes that petitioners' claims are based in equity and that no right to a jury trial exists. Accordingly, the motion to accept filing of the jury demand is denied.

The underlying petition is held in abeyance until the issuance of supplemental citation to the presumptive remainder beneficiaries of the subtrusts. Petitioners are directed to amend their petition to include information as to the names and whereabouts of those beneficiaries, as determined under Article Six of the trust instrument.

This decision constitutes the order of the court.

Dated: April 14, 2016

SURROGATE