

<b>Matter of Ingraham (Daphne)</b>
2017 NY Slip Op 31340(U)
June 21, 2017
Surrogate's Court, New York County
Docket Number: 2015-3669
Judge: Nora S. Anderson
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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 : NEW YORK COUNTY

New York County Surrogate's Court  
Date: June 21, 2017

-----X  
In the Matter of the Application to Compel an  
Accounting for the Trust known as the Daphne  
Trust, created under an Instrument dated  
September 24, 2003, by

CYNTHIA P. INGRAHAM,  
  
as Grantor.

File No. 2015-3669

-----X  
-----X  
In the Matter of the Application to Compel an  
Accounting for the Trust known as the Molly  
Trust, created under an Instrument dated June 17,  
2003, by

CYNTHIA P. INGRAHAM,  
  
as Grantor.

File No. 2015-3669 A

-----X  
ANDERSON, S.

The prior decision and order of the Court, dated May 30, 2017, is hereby vacated and substituted by the following:

In these two proceedings, petitioner Affinity Trust Limited, the sole trustee of two separate inter vivos trusts established by Cynthia P. Ingraham ("Grantor"), seeks to compel two former trustees of the trusts to account. A few months after the accounting petitions were filed, one of the former trustees, Lewis Linn ("Linn"), filed his accounts for each of the trusts. However, the other former trustee, Diana Schwatka ("Schwatka"), objected to the petitions.

Grantor created the trusts in 2003 and funded them with approximately \$180 million. Schwatka, a friend of Grantor's, was a co-trustee of both trusts from the outset until she resigned in August 2011. Highmount Fiduciary LLC ("Highmount") was Schwatka's co-trustee from 2003 to 2006, when it resigned. Highmount was succeeded by Linn, an accountant, whom

Grantor removed in 2014. Petitioner succeeded Linn and now serves as sole trustee of both trusts.

The terms of the respective trust instruments are virtually identical. During Grantor's lifetime, the trustees have absolute discretion to make distributions from income and principal to Grantor, her descendants, and unspecified charities. Grantor has a lifetime power to appoint part or all of the trust property to any individual, including to herself. In default of such appointment, the remainder at Grantor's death is to be held in further trusts for Grantor's descendants.

The current trustee cites its "concerns regarding the financial affairs" of the trusts during Schwatka's and Linn's respective trusteeships. Although Linn subsequently filed his accounting, Schwatka refused to do so, relying on releases executed by Grantor and by Linn, and on language in the trust instruments, which she argues relieve her of any obligation to account.

At the time Schwatka resigned as co-trustee, Grantor executed instruments by which Schwatka was released from any and all claims "related in any way to her role as trustee and/or the administration of the trust, provided that this release shall not cover claims arising as a result of . . . fraud or willful misconduct." In the releases, Grantor acknowledged that she had asked Schwatka to "forgo the preparation of a formal account" in order to save time and money, and that she "has examined the acts and transactions of [Schwatka] and . . . assents to such actions and transactions."

Linn, as sole trustee after Schwatka's resignation, also executed instruments releasing Schwatka from any and all claims relating to her role as trustee, but excepting claims stemming from any "fraud or willful misconduct" on Schwatka's part. In the releases, Linn "assent[ed] to any account (formal or informal) rendered by" Schwatka.

Schwatka contends that the releases she received from Grantor and Linn are binding upon petitioner, the current trustee. She requests that the court deny the instant petitions on the ground that the releases bar petitioner from seeking to compel her to account.

To reinforce her position, Schwatka cites the provisions of each trust instrument, which provide, in relevant part, that,

“The Trustees shall not be required to file any periodic judicial accounting . . . , even though otherwise required by law, but this shall not prevent the Trustees from having their accounts judicially settled at any time . . . if they should deem it advisable to do so. After the death of the Grantor, the Trustees may, but shall not be required to, unless requested in writing to do so by any income beneficiary thereof, account annually . . . to the oldest living income beneficiary. . . .”

(Article IX, paragraph 9).

“No successor or additional . . . Trustee shall be liable or responsible for any losses or expenses resulting from or occasioned by anything done or neglected to be done in the administration of any trust created herein prior to becoming a . . . Trustee, nor be required to inquire into or take any notice of the prior administration of the trust.”

(Article IX, paragraph 10).

#### Analysis

Schwatka’s reliance on the releases secured from Grantor and Linn to insulate her from a duty to account is misplaced. The releases were not “full,” since they reserved the releasors’ rights to seek relief against Schwatka for any “fraud or willful misconduct.” Hence, the present case is distinguishable from *Genger v Genger* (120 AD3d 1102 [1<sup>st</sup> Dep’t 2014] *revg in part* 39 Misc3d 1235[A][Sup Ct, NY County 2013]), a precedent cited by Schwatka in which a “full release” barred the releasor from seeking relief (in the form of monetary damages, as opposed to an accounting) from a trustee. Nor can Schwatka claim that the instruments she received from Grantor and Linn effectively relieved her of the duty to account that is normally incidental to a

trustee's office and fundamental to any fiduciary relationship (*see Matter of Shore*, NYLJ, Mar. 27, 2008, at 35, col 2 [Sur Ct, NY County]; *Matter of Francis*, NYLJ, Mar 14, 2008, at 39, col 3 [Sur Ct, Westchester County]; *Matter of Odmark*, NYLJ, Feb. 5, 1996, at 31 [Sur Ct, NY County]). This is not to ignore that the terms of the releases from Grantor may at least arguably have constituted Grantor's waiver of a right to seek an accounting. But even assuming that Grantor's releases waived her right to compel an accounting from Schwatka, such releases would have foreclosed only Grantor (as opposed to trustees or other beneficiaries) from seeking an accounting. As for the releases executed by Linn as petitioner's predecessor trustee, their terms cannot be read as "clear and unambiguous" waivers (*Matter of Melnick*, 94 AD3d 472 (1<sup>st</sup> Dep't 2012) of an accounting per se, since they waived only a right to object in the event of Schwatka's mere negligence. Indeed, Linn's releases expressly referred to the prospect of accountings by Schwatka. Accordingly, Schwatka cannot claim that she is wholly relieved of her duty to account to the beneficiaries and to petitioner as successor trustee.

To the extent that Schwatka proposes to avoid an accounting on the basis of the above-quoted provisions of the trust instruments, those provisions are unavailing. The accounting now sought by petitioner relates not to a periodic account (the kind of accounting obligation from which the trustee was exempted under paragraph 9 of Article IX), but, instead, to a final account for Schwatka's proceedings as trustee during the approximately eight years in which she was in office. Without a full release from all beneficiaries or a formal discharge from the court, Schwatka occupies the usual position of a trustee who has left office, *i.e.*, she remains duty-bound to account (whether informally or formally) (*see Matter of Shore*, NYLJ, Mar. 27, 2008, at 35, col 2 [Sur Ct, NY County]). As for paragraph 10 of Article IX of the trust instruments, it

too does not aid Schwatka here. Petitioner may have relied on such provision if it had chosen to ignore the fact that Schwatka had never accounted (formally or informally) for her actions taken during her eight-year tenure as trustee. But the provision by no means prohibited petitioner from “inquir[ing] into or tak[ing] any notice” that Schwatka had not accounted within a reasonable time and from taking steps to compel her to account. Moreover, where a former fiduciary has failed to account within a reasonable time and full releases do not relieve her of the duty to account, the court itself may sua sponte order such accounting (*see* SCPA § 2205). In other words, Schwatka cannot avoid her obligation to account as a former fiduciary under these circumstances.

Accordingly, Diane Schwatka is directed to file an account of her proceedings with respect to each trust, together with petitions for the judicial settlement thereof, within forty-five (45) days of the date of service of notice of entry this decision and order.

Dated: *June 21, 2017*

  
\_\_\_\_\_  
SURROGATE