

<b>Matter of Killeen (Terian)</b>
2017 NY Slip Op 31571(U)
July 26, 2017
Surrogate's Court, New York County
Docket Number: 2002-3871/A
Judge: Nora S. Anderson
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SURROGATE'S COURT : NEW YORK COUNTY

New York County Surrogate's Court

July 26, 2017

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In the Matter of the Application of  
Thomas J. Killeen, to Revoke the  
Letters of Trusteeship Heretofore  
Issued to Juliana Curran Terian  
as Co-Trustee of the Trusts Created  
under the Last Will and Testament of

File No. 2002-3871/A

PETER G. TERIAN,

Deceased.

-----X  
In the Matter of the Application of  
Juliana Terian, as Co-Trustee and Sole  
Income Beneficiary of the Marital  
Trust Created under Article VI of the  
Last Will and Testament of

File No. 2002-3871/B

PETER G. TERIAN,

Deceased,

for a Decree Revoking the Letters of  
Trusteeship Issued to Robert Wurmbrand  
and Thomas Killeen, as Trustees of the  
Marital Trust and for an Accounting  
and Other Relief.

-----X  
In the Matter of the Accounting of  
Juliana C. Terian as Executor of the  
Estate of

File No. 2002-2002/E

PETER G. TERIAN,

Deceased.

-----X  
In the Matter of the Accounting of  
Juliana C. Terian as Co-Trustee of the  
Trust Established for Her Benefit Under  
Paragraph 2 of Subdivision A of Article  
VI of the Will of

File No. 2002-2002/F

PETER G. TERIAN,

Deceased.  
-----X

-----X  
 In the Matter of the Settlement of the  
 First Intermediate Account of  
 Proceedings of Thomas J. Killeen and  
 Robert Wurmbbrand as Two of the  
 Co-Trustees of the Trust Created under  
 Paragraph 2 of Subdivision A of Article  
 VI of the Last Will and Testament of

File No. 3871-2002/G

PETER G. TERIAN,

Deceased.

-----X  
 In the Matter of the Application for  
 the Resignation of Andrew S. Auchincloss  
 as Trustee and the Appointment of Thomas  
 J. Killeen as Successor Trustee of the  
 Trusts Created under the Last Will and  
 Testament of

File No. 2002-3871.4

PETER G. TERIAN,

Deceased.

-----X

A N D E R S O N, S .

In these proceedings related to the estate of Peter Terian, Juliana Terian as co-trustee and income beneficiary of the trusts established under decedent's will, Thomas Killeen as co-trustee, and Olivia Terian as sole remainder beneficiary of the trusts, have settled all issues between them subject to 1) the court's approval of Killeen's resignation as trustee and the appointment of Jacques L. Debrot as his successor, and 2) the court's granting the motion of the settling parties to discontinue/withdraw certain of the pending proceedings and motions involving issues resolved by the settlement. The latter

application is the subject of this decision.<sup>1</sup>

In view of their settlement, Killeen, joined by Juliana and Olivia, seek leave to discontinue with prejudice and without costs 1) Killeen's proceeding to remove Juliana as co-trustee (File No. 2002-3871/A), 2) Juliana's proceeding to remove Killeen and Wurmbrand as co-trustees as it relates to Killeen only (File No. 2002-3871/B), and 3) the proceeding by Killeen and Wurmbrand to settle their accounts as co-trustees as it relates to Killeen only (File No. 2002-3871/G). Movants also seek leave to withdraw with prejudice 1) Juliana's motion to vacate the 2009 decree appointing Killeen as a successor co-trustee (File Nos. 2002-3871/A and 2002-3871.4), 2) Juliana's motion to disqualify Clifford S. Robert, Esq., and his firm Robert & Robert PLLC, as attorneys for Killeen in the various proceedings (File Nos. 2002-3871/A,B and 2002-3871.4), and 3) Killeen's motion to suspend Juliana as co-trustee and to compel her deposition in his proceeding to remove her (File No. 2002-3871/A). Wurmbrand opposes the motion.

The determination of a motion to discontinue (CPLR 3217[b]) rests within the sound discretion of the court (see *e.g. Columbus 95<sup>th</sup> St. LLC v Greenidge-Joiner*, 36 Misc 3d 136(A), 2012 Slip Op 51368[U] [1st Dept 2012]). Further, as the

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<sup>1</sup> Simultaneously with this decision, the court is issuing a decision approving Killeen's resignation and the appointment of Debrot as successor co-trustee.

Appellate Division, First Department has observed "a party ordinarily cannot be compelled to litigate and, absent special circumstances, such as prejudice to adverse parties, a discontinuance should be granted" (*Burnham Serv. Corp. v Nat'l Council on Comp. Ins., Inc.*, 288 AD2d 31, 31 [1<sup>st</sup> Dept 2001] [citations omitted]). Wurmbrand, who was a respondent on Killeen's petition to remove Juliana as trustee, argues that he "joined in" Killeen's petition and Killeen's subsequent motion to suspend Juliana. Accordingly, he contends that Killeen should not be allowed to discontinue that proceeding and related motion unilaterally.

Wurmbrand offers no authority for his proposition that, by merely indicating in his answer that "[f]or the reasons stated in the Petition, I join in the relief sought in that Petition" he became a co-petitioner. Killeen never sought to amend his petition to add Wurmbrand as his co-petitioner. Nor did Wurbrand file a cross-petition seeking Juliana's removal. To this day, Wurmbrand has never specifically verified the allegations in Killeen's petition as is required of a co-petitioner (SCPA § 303).


Under these circumstances, discontinuance of Killeen's petition to remove Juliana as co-trustee (File No. 2002-3817/A) is appropriate. As a respondent in the proceeding, Wurmbrand cannot pursue the removal proceeding in the absence of Killeen, who no longer seeks to adjudicate Juliana's fitness to serve.

This renders moot the motion to suspend as well as all other pending motions in the removal proceeding. This is not to say, however, that Wurmbrand is precluded from commencing his own proceeding to remove/suspend Juliana if he chooses to submit his own verified allegations in such connection. Wurmbrand's remaining contentions are also without merit.

Based upon the foregoing, the motion is granted in its entirety. For the sake of clarity, the court notes that the following proceedings are still pending: 1) Juliana's proceeding to remove Wurmbrand (File No. 2012-3871/B), 2) Juliana's voluntary accounting as executor (File No. 2002-3817/E), 3) Juliana's voluntary accounting as trustee (File No. 2002-3817/F), and 4) Wurmbrand's voluntary accounting as trustee (File No. 2002-3871/G). In addition, the following motions remain sub judice in Juliana's proceeding to remove Wurmbrand (File No. 2012-3871/B): Wurmbrand's motion for summary judgment and for an order striking Juliana's expert reports and Juliana's cross-motion for summary judgment (to the extent it seeks removal of Wurmbrand and other relief).

This decision constitutes the order of the court.

Dated: July 26, 2017

  
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S U R R O G A T E