

Matter of Killeen (Terian)
2017 NY Slip Op 31572(U)
July 26, 2017
Surrogate's Court, New York County
Docket Number: 2002-3871/I,J
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 for Permission to
Resign and the Joint Application of
Thomas J. Killeen and Juliana C.
Terian for the Appointment of a
Successor Co-Trustee of the Trusts
Under the Will of

File No. 2002-3871/I,J

PETER G. TERIAN,

Deceased.
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A N D E R S O N, S.

This is an application by Thomas Killeen, co-trustee of the trusts established under the will of Peter Terian, to resign as trustee and a joint application by Killeen and co-trustee Juliana Terian to appoint Jacques L. Debrot as successor co-trustee. The third co-trustee, Robert Wurmbrand, opposes Debrot's appointment, but does not oppose the resignation of Killeen.

Peter Terian died on October 2, 2002, survived by Juliana and their infant daughter, Olivia, who is now of age and has filed a Waiver and Consent to the requested relief. Juliana and Olivia are the sole beneficiaries of the trusts. Shortly after decedent's death, letters testamentary issued to Juliana and letters of trusteeship issued to Juliana, Philip Schaeffer (an attorney) and Wurmbrand (an accountant). In December 2004, Schaeffer's application to resign was granted and he was replaced by Andrew Auchincloss, Esq. In February 2009, the request of Auchincloss for permission to resign was granted with Killeen replacing him.

Nothing about the administration of this estate or the trusts has been routine. For the last several years, Killeen and Wurmbrand have been united in litigating against Juliana (see e.g. *Matter of Terian*, NYLJ, Feb. 27, 2014, at 25, col 1 [Sur Ct, NY County 2014]; *Matter of Terian*, NYLJ, Jan. 4, 2013, at 22, col 2 [Sur Ct, NY County 2013]; *Matter of Terian*, NYLJ, Oct. 18, 2012, at 22, col 4 [Sur Ct, NY County 2012]). Among the pending proceedings are cross-petitions seeking removal and accountings by Juliana, on the one hand, and Wurmbrand and Killeen, on the other. Multiple motions seeking summary judgment and other relief are currently sub judice.

Recently, however, Killeen, Juliana and Olivia entered into a settlement agreement that did not involve Wurmbrand. As part of such agreement, Killeen agreed to resign and to join Juliana in seeking the appointment of Debrot as his successor. The parties also agreed that the settlement would become null and void if, by July 27, 2017, the court had not granted either this application or the companion application of Killeen, Juliana and Olivia, addressed in a separate decision, which seeks leave to discontinue/withdraw certain of the pending proceedings and motions involving issues resolved by the settlement.

There can be no dispute that Killeen may resign as trustee. Article IX(K) of the will provides that "[a]ny fiduciary may resign at any time." Nor can there be any dispute that three

trustees may serve concurrently with each other. Decedent initially nominated three trustees, three trustees have always served, and Article IX(M) of the will provides no limitation on the number of fiduciaries who may serve at any given time: "I authorize my individual Executor to appoint additional and successor Executors, and the individual Trustee of any trust to appoint additional and successor Trustees of that trust." Further, Article IX(B), defines the term "trustee" as the "Trustee or Trustees acting ... at a given time, regardless of the actual number ... of such Trustee or Trustees"

In view of the above, Wurmbrand's argument that a third trustee is "unnecessary" under the will is unavailing. The fact that Juliana argued at one point that Killeen's appointment in 2009 had been unnecessary and therefore should be vacated under SCPA § 706 is not a basis to deny Debrot's appointment. Significantly, Wurbrand does not offer any legal support for his thinly-veiled judicial estoppel argument, and the court is aware of no such support given that the issue was never adjudicated (see e.g. *Wells Fargo Bank, N.A. v Webster Bus. Credit Corp.*, 113 Ad3d 513 [1st Dept 2014]).

Nor is there merit to Wurmbrand's argument that Debrot's appointment should be denied because Wurmbrand was not involved in the decision to seek Debrot's appointment. Such argument rests on the general proposition that trustees should exercise their

joint powers together. But that proposition does not assume that trustees will always come to unanimous decisions. Thus, to the extent that the decedent intended the acting trustees to select jointly successor co-trustees, he also provided that only a majority of acting trustees could select a successor. Indeed, Article IX(D) provides: "Except as otherwise indicated, if the number of Fiduciaries authorized to exercise a power or discretion shall be greater than one, such power or discretion shall be exercised by a majority of such Fiduciaries" (see also EPTL § 10-10.7 [Exercise of powers by multiple fiduciaries; joint and several powers]).

Wurmbrand's only objection regarding Debrot is his inexperience in the automotive industry. He argues that such experience is necessary because the company that constitutes the trusts' major asset is an auto dealership. However, there is no specific requirement in the will that an additional or successor trustee have such experience. Like Killeen and Auchincloss before him, Debrot is an experienced attorney. Moreover, there is nothing in the record indicating that Debrot would not be a competent trustee. Nonetheless, Wurmbrand contends he has found a more suitable candidate who does have experience in the automotive industry. However, even if Wurmbrand had offered such candidate for consideration, Killeen and Juliana, as the majority of acting trustees, would still have had authority to appoint

Debrot as Killeen's successor (see Article IX[D]; EPTL 10-10.7).


Under these circumstances, the court will not prevent Killeen from resigning and joining with one of his co-trustees in selecting his successor, a development that the will clearly contemplates. To rule otherwise would leave the trusts with only two fiduciaries and introduce yet another issue to litigate, *i.e.*, the appointment of a third trustee. Contrary to Wurmbrand's contention, there is no reason to delay such an appointment until the court renders decisions on all pending motions that could result in the removal of Juliana or Killeen or both. According to Wurmbrand, if there is a basis for removal, neither Killeen nor Juliana should be permitted to designate a successor co-trustee. However, by this logic, fiduciaries would not be able to act and the administration of estates and trusts would come to a screeching halt during the pendency of a removal proceeding or proceeding challenging the validity of a fiduciary's appointment. Moreover, Killeen's resignation renders moot all pending motions seeking his removal or challenging his appointment.

Based upon the foregoing, this application seeking permission for Thomas Killeen to resign as trustee and to appoint Jacques L. Debrot as his successor is granted. Accordingly, it is hereby

ORDERED, ADJUDGED and DECREED that the letters of trusteeship issued to Thomas Killeen are hereby revoked, that

Jacques L. Debrot is appointed successor co-trustee to serve with Juliana Terian and Robert Wurmbrand without bond, upon his duly qualifying according to law, that letters of successor trusteeship shall issue accordingly, and that Thomas Killeen shall account for his proceedings as trustee.

Dated: July 26, 2017



S U R R O G A T E