

<b>Matter of Blackman</b>
2017 NY Slip Op 32857(U)
October 2, 2017
Surrogate's Court, Nassau County
Docket Number: 2012-371737/A
Judge: Margaret C. Reilly
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**SURROGATE’S COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU**

**In the Matter of the Application of Boca Raton  
Regional Hospital, Inc. for a Determination as to the  
Construction and Effect of Disposition of Property in  
The Richard Blackman Revocable Trust, as Referred  
to in, and Funded by, Article SECOND of the Last  
Will and Testament of**

**DECISION & ORDER**

**File No. 2012-371737/A  
Dec. No. 33015**

**RICHARD BLACKMAN,**

**Deceased.**

**PRESENT: HON. MARGARET C. REILLY**

The following papers have been considered in the preparation of this decision:

Motion . . . . .	1
Affidavit in Support and Exhibits (Eremia) . . . . .	2
Affidavit in Opposition and Exhibits . . . . .	3
Reply Affidavit (Eremia). . . . .	4
Memorandum of Law in Support of Motion . . . . .	5
Memorandum of Law in Opposition to Motion . . . . .	6

Before the court is a motion to disqualify an attorney under the Rules of Professional Conduct (22 NYCRR §1200.0) from representing Dr. Tim Williams. The motion is opposed.

On January 26, 2010, the hospital filed a petition for construction of Article “THIRD” to determine whether the hospital or Dr. Williams has discretion to determine the proper expenditure of trust funds.

The hospital now moves for an order disqualifying Fox Rothschild, LLP, as counsel for Dr. Williams in the construction proceeding. It is alleged that Jerold F. Glassman, a member of the Board of Directors of the hospital, and an attorney with Fox Rothschild, is in

a conflict of interest because of his fiduciary relationship with the hospital (*Fillipi v Elmont Union Free School District Board of Education*, 722 F Supp 2d 295 [EDNY 2010]).

22 NYCRR §1200.00 1.7(a)(1) provides in relevant part:

“(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

(1) The representation will involve the lawyer in representing differing interests; or

(2) There is a significant risk that the lawyer’s professional judgment on behalf of a client will be adversely affected by the lawyer’s own financial, business, property or other personal interests.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client.

(2) the representation is not prohibited by law.

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.”

The hospital contends that Mr. Glassman, in his capacity as a member of the Board and an attorney participated in Board discussions regarding the subject of this dispute. Counsel for the hospital submits documentary evidence that confidential materials concerning this dispute, including the minutes of hospital board meetings, were forwarded to Mr. Glassman’s e-mail account at the firm. Further, the hospital contends that Mr. Glassman was an attorney with the firm in February 2017 when Fox Rothschild represented Dr. Williams in litigation related to this proceeding in Palm Beach County, Florida.

The subject of this proceeding is a provision of the Richard Blackman Revocable Trust amended and restated July 18, 2011. Article “THIRD” (B) (3) of the trust provides for

the disposition of the residuary as follows:

“3. The balance of the Trust, or any trust property payable hereunder, together with the assets of any terminating trust established under this Trust, or otherwise, distributable under this Sub-Paragraph B.3 of this Trust, shall be distributed to the BOCA RATON REGIONAL HOSPITAL, INC (hereinafter referred to as “Hospital”), to be used for the Lynn Cancer Institute of the Hospital, at the direction of DR. TIM WILLIAMS. If the hospital is not in existence or is then in existence but it is not an organization described in Section 170 (c) of the Internal Revenue Code and is not deductible under Section 2055(a) of the Internal Revenue Code, then the property passing to the Hospital under this Sub-Paragraph B.3. of this Trust shall instead be distributed to such one or more organizations described in Sections 170 (b) (1) (A), 170 (c), 2055 (a) and 2522 (a) of the Internal Revenue Code as determined by the Trustees, and in such amounts and proportions as the Trustee [sic], in their absolute discretion, may determine, taking into account the Grantor’s charitable interest described herein and as evidenced by charitable gifts made by the Grantor during his lifetime.”

A party’s entitlement to be represented in ongoing litigation by counsel of his or her own choosing is a right which should not be abridged absent a clear showing that disqualification is warranted (*Aryeh v Aryeh*, 14 AD3d 634 [2d Dept 2005]). While the right to choose one’s counsel is not absolute, disqualification of legal counsel during litigation implicates not only the ethics of the profession but also the parties’ substantive rights, thereby requiring any restrictions to be carefully scrutinized (*S & S Hotel Ventures, Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d 437 [1987]). The party seeking to disqualify a law firm or an attorney bears the burden to show sufficient proof to warrant such a determination (*Aryeh v Aryeh*, 14 AD2d 634, *supra*). Whether or not to disqualify an attorney or law firm is a matter which rests in the sound discretion of the court (*Olmoz v Town of Fishkill*, 258 AD2d 447 [2d Dept 1999]).

A memorandum of law filed on behalf of Fox Rothschild states that Mr. Glassman is retired from practice in the State of New York. The firm does not deny that Mr. Glassman is associated with the Florida office although it alleges that he visits the Florida office only several days a year. Whether or not Mr. Glassman is associated with the firm as an attorney is not determinative. It is sufficient to show a conflict that he is associated with the firm in some capacity (*see U.S.A. Recycling, Inc. v Baldwin Endico Realty Associates, Inc.* 147 AD3d 697 [1st Dept 2017]). There is no substantial issue of fact raised concerning his connection with the firm that requires a hearing prior to determination of the motion for disqualification (*cf Poli v Gara*, 117 AD2d 786 [2d Dept 1986]). The hospital has submitted documentation that Mr. Glassman had access to confidential information relevant to this dispute. Mr. Glassman's representation of Dr. Williams therefore places him in a conflict of interest with the hospital.

The movant has met its burden of establishing grounds for disqualification under 22 NYCRR §1200 1.7 (a) (1).

Accordingly, the motion to disqualify, in the court's discretion, is **GRANTED**.

This constitutes the decision and order of the court.

Dated: October 2, 2017  
Mineola, New York

**E N T E R:**

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**HON. MARGARET C. REILLY**  
**Judge of the Surrogate's Court**

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