

Matter of Aoki

2019 NY Slip Op 30973(U)

April 12, 2019

Surrogate's Court, New York County

Docket Number: 2008-2604/G

Judge: Rita M. Mella

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

New York County Surrogate's Court

Date: APRIL 12, 2019

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Application of Devon Aoki and Steven Aoki, as Beneficiaries
of the Trust created under the Will of

DECISION

ROCKY H. AOKI,
Deceased,

File No.: 2008-2604/G

for Construction of the Will of Rocky H. Aoki.
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M E L L A, S.:

The court grants this petition to construe the no-contest clause in the will of decedent Rocky Aoki in the manner requested by the petitioning remainder beneficiaries of decedent's testamentary trust (*see* EPTL 3-3.5[b][3][E]).¹ Specifically, this no-contest clause, by its language,² would not be triggered were these beneficiaries to petition to suspend, modify or revoke the powers of their trustee based on her activities while serving as trustee, or were they to inquire into such activities.

To construe the clause otherwise would permit a no-contest clause to eliminate the responsibility of the fiduciary serving under the will (EPTL 11-1.7[a][1]). This would, in turn,

¹There are no current income beneficiaries of this trust, only remainder beneficiaries when each turns 45 years of age. These presumptive remainder beneficiaries have petitioned for the construction of the no-contest clause. No one argued that representation under SCPA 315 applied, and the court appointed a guardian ad litem for the contingent remainder beneficiaries, who through cross-claims seeks the same construction relief as petitioners. The trustee's opposition papers are styled as a motion to dismiss the construction petition and the cross-claims asserted by the guardian ad litem.

²Article XXVIII of decedent's will states:
"If any beneficiary under this Will in any manner, directly or indirectly, contests this Will or any of its provisions, any share or interest in my estate given to the contesting beneficiary under this Will is revoked and shall be disposed of in the same manner provided herein as if the contesting beneficiary had predeceased me."

eradicate the very purpose of decedent's having, along with any attendant duties, a trust in the first place. In other words, a no-contest clause cannot convert a bequest in trust to one that is the equivalent of a fee simple transfer.

Petitioners, concededly, brought this proceeding "in an excess of caution" as a result of the decision in *Matter of Cohn* (72 AD3d 616 [1st Dept 2010]). However, that case is distinguishable and does not govern the circumstances now before the court. In *Cohn*, it is clear that one of decedent's children sought "to set aside the fiduciary nominations" (*Matter of Cohn*, NYLJ, March 11, 2009, at 32, col 5 [Sur Ct, NY County, Glen, S.]) of certain non-family co-trustees for trusts benefiting the family. Unlike the situation currently before the court, the *Cohn* petitioner was challenging not the acts of trustees as trustees, but instead the very appointment itself. Such a challenge was an attack on the testator's nomination of fiduciaries and thus fell within the proscriptions of the no-contest clause there.

Here, however, it is clear that respondent Keiko Aoki has been appointed pursuant to the will and has been serving as trustee for many years. The construction question, as framed here, unlike in *Cohn*, is whether an inquiry into respondent's conduct while serving as trustee could work a forfeiture under the no-contest clause, which makes this an entirely different matter (*see Matter of Merenstein*, NYLJ, Oct. 10, 2018, at 22, col. 5 [Sur Ct, NY County], *citing Matter of Robbins*, 144 Misc 2d 510 [Sur Ct, NY County 1989]; *Matter of Rimland*, 2003 NY Slip Op 50966[U] [Sur Ct, Bronx County]; *Matter of Lang*, 60 Misc 2d 232 [Sur Ct, Erie County 1969]; *Matter of Egerer*, 30 Misc 3d 1229[A], 2006 NY Slip Op 52713[U] [Sur Ct, Suffolk County]).

In this light, and despite the parties' substantial briefing on the issue, there is no need to analyze whether an inquiry into the acts of the trustee as fiduciary or a petition to modify,

suspend or revoke her authority to act as fiduciary would fall within the non-exclusive “safe harbor” provisions of EPTL 3-3.5 (see *Matter of Singer*, 13 NY3d 447 [2009]). Any “safe harbor” analysis would be superfluous because the no-contest clause at issue does not by its terms prohibit such an inquiry or petition.

Moreover, to support her request that there be discovery regarding petitioners’ intentions, prior to decedent’s death, to prevent her appointment as trustee or regarding contacts between petitioners and others in the hopes of uncovering some collusion afoot to remove her as trustee, respondent does not argue that the no-contest clause is ambiguous. In the absence of such ambiguity, there is no warrant for the gathering of extrinsic evidence. Such evidence is simply not relevant to the will construction question before the court,³ which presents purely legal questions (*Matter of Cord*, 58 NY2d 539 [1983]; *Matter of Scale*, 38 AD3d 983 [3d Dept 2007]; see *South Road Assoc., LLC v Intl Bus. Machines Corp.*, 4 NY3d 272 [2005]; *Milonas v Pub. Employment Relations Bd.*, 225 AD2d 57 [3d Dept 1996]). Respondent’s request for discovery is thus denied.

Finally, the no-contest clause is not the only provision of decedent’s will about which the trust beneficiaries seek relief. They also seek a declaration that a provision of decedent’s will, which the parties refer to here as the “Business Acts Immunity Clause,”⁴ is void for violating

³The court notes in this regard that respondent had previously commenced a separate proceeding, in another context, seeking to determine that petitioners had by their actions triggered the no-contest clause, but that proceeding was discontinued with prejudice on the stipulation of all parties.

⁴Article XXI(AA)(3)(b) of decedent’s will reads as follows:

“The Executor or Trustee is permitted to be counsel to, or a partner of, employee, shareholder, officer or director of, any organization in which my estate, or any Trust under this Will, has any interest. Furthermore (i) she may receive dividends,

public policy to the extent that it may be relied upon to shield the trustee from a removal proceeding. While testators may not absolve a fiduciary of liability for failing to exercise prudence, diligence and reasonable care (EPTL 11-1.7), they may choose a trustee who may have a separate ownership interest in, or managerial or directorial duties regarding, trust assets or who has an employee relationship with an entity that is a trust asset (*see O'Hayer v St. Aubin*, 30 AD2d 419 [2d Dept 1968]). In other words, a fiduciary's duty of undivided loyalty may by explicit provision be relaxed, but not to the extent of eliminating a fiduciary's obligation to avoid improper self-dealing or actions taken in bad faith (*see id.*).

The line between divided loyalties which may be allowed on the one hand, for instance, the trustee's receiving a salary for work from an entity controlled by the trust (*see Matter of Block*, 186 Misc 945 [Sur Ct, Bronx County 1946]), and improper self-dealing or bad faith on the other hand (*see Matter of Hubbell*, 302 NY 246 [1951]), is difficult to discern in a vacuum, that is, without reference to specific acts. In this construction proceeding, the court does not have before it for review the acts of the trustee that petitioners may claim to be improper. However, to the extent that respondent would deny petitioners the ability to bring a removal or suspension proceeding on the basis of the Business Acts Immunity Clause, this clause cannot be read to prohibit inquiry into the trustee's acts in a court proceeding. If there is to be a determination as to the scope and effect of this clause, it must be made in a proceeding that actually raises the

profits, salary and other compensation from the organization, (ii) she shall be free to exercise all their powers as Executors or Trustees without restriction by reason of any interest they may personally have in any such organization; and (iii) she shall not be held accountable or surchargeable as fiduciaries under this Will for any action taken, or for failure to take any action, as counsel, or as partners, employees, shareholders, officers or directors.”

issue of the propriety of the trustee's actions (*cf. Carey v Cunningham*, 191 AD2d 336 [1st Dept 1993]).

Accordingly, the court grants the petition to the extent of determining that neither the no-contest clause nor the "Business Acts Immunity Clause" of decedent's will preclude inquiry into the testamentary trustee's acts as trustee or bar proceedings seeking the trustee's suspension or removal, or modification of her powers, based on the trustee's actions. It follows that the trustee's motion to dismiss the instant construction petition and the cross-claims of the guardian ad litem is denied.

Settle decree.

Clerk to notify.

Dated: April 12, 2019



SURROGATE