Flanagan v Mack
2019 NY Slip Op 32908(U)
September 30, 2019
Supreme Court, Suffolk County
Docket Number: 24454/2012
Judge: Joseph Farneti

[* 1]

INDEX NO. 24454/2012

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

JACK FLANAGAN, an Infant by his Mother and Natural Guardian, JENNIFER FLANAGAN, and JENNIFER FLANAGAN, Individually,

Plaintiffs,

-against-

LAURENCE F. MACK, M.D., INFERTILITY ASSOCIATES OF LONG ISLAND, P.C., DAVID I. BERGMAN, M.D., PREFERRED WOMENS HEALTH, LONG ISLAND MEDICAL LASER, P.C., PREMIERE OB/GYN, PLLC, DANIEL FAUSTIN, M.D., MADONNA PHYSICIAN SERVICES, P.C., MADONNA SERVICES, LTD, IRA J. SPECTOR, M.D. and STEVEN A. KLEIN, M.D., P.C., MANA DEJHALLA, M.D., CHINWA C. OFFER, M.D., RAMI JAMIL NAJJAR, M.D., RAMI NAJJAR M.D. P.C., and MERCY MEDICAL CENTER,

Defendants.

DECISION AFTER HEARING

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Upon the following papers numbered 1 to 14 read on this petition TO PURCHASE REAL PROPERTY.
Order to Show Cause and supporting papers 1-3; Referee's Affirmation in Response and supporting papers 4, 5; Affirmation in Response to Referee's Affirmation 6; Affirmation in Support and supporting papers 7, 8; Letter from the Referee dated May 22, 2019 9; Affirmation in Support and supporting papers 10, 11; Transcript of Hearing Held on August 8, 2019 12; Depletion Analysis 13; Petitioners' Letter Brief dated August 19, 2019 14; it is,

ORDERED that this petition by KEVIN FLANAGAN, JENNIFER FLANAGAN and CAPITAL FIRST TRUST COMPANY, as Co-Trustees of the Jack Flanagan Settlement Trust (collectively "petitioners" or "Co-Trustees") for, among other things, an Order authorizing and directing the purchase of the subject premises by the Co-Trustees, in accordance with the statutes and rules of this Court, is hereby **DENIED** for the reasons set forth hereinafter.

The Court, upon motion of the petitioners, ordered that the parties and the appraiser appear for a hearing before this Court to inquire into the merits of this application concerning the acquisition of real property. The petitioner-mother of the infant plaintiff seeks a withdrawal of funds from the settlement trust for the purchase of residential real property. The petitioners seek this Court's approval for the acquisition of a new home for the Flanagan Family.

A hearing was conducted before the undersigned in accordance with the Court's prior Order on August 8, 2019. Petitioners' counsel submitted a transcript of the proceeding to the Court on September 16, 2019, in accordance with the Court's rules and as directed at the time of the hearing.

The Co-trustee Jennifer Flanagan entered into a conditional contract of sale for the purchase of the premises commonly known as 102 Edwards Avenue, Sayville, New York. The down payment of $75,000 was withdrawn from the settlement trust without court approval and without the benefit of the application. The petitioners averred that the down payment was not at risk due to the fact that the contract itself is conditioned upon court approval of the contract and the purchase transaction.

The withdrawal of funds from the settlement trust and the tender of those funds to the seller's representative constitutes an unauthorized invasion of the trust corpus. Counsel for the petitioners, after petitioners acknowledged withdrawing the $75,000 and paying it as a contract down payment, asserted that the down payment was subject to court approval. There was never any application to the court to obtain approval. Petitioners' and petitioners' counsel's attempt to justify the withdrawal after the fact does not pass muster. By definition, approval comes before an action is taken, not after. This withdrawal, however well intentioned, was contrary to law.

> To be clear, the ICO does not allow the claimant to spend funds "conditionally," and then seek leave after the fact. While, in light of the present order, the use of the funds has ultimately been approved, the applicant is cautioned that no money may be spent out of the trust without a court order, regardless of whether this is done upon particular conditions, or is to be returned per some agreement in the event the court does not approve

(*Joyner-Pack v State of New York*, 45 Misc 3d 734, 744 [Ct Cl, 2014]).

When questioned regarding the process leading up to the contract of sale, the petitioner-mother testified that she looked at a lot of different houses in the area and stated, "we have two older kids in the school district and the school district also pays for Jack to go to AHRC." Petitioner-mother explained she was happy with the services provided by the school district. The testimony further indicated that the physical floor plan of the intended new residence "makes it easy to move Jack in the wheelchair from room to room while the current house does not."

The petitioner-mother also testified there is space in the new residence to install a handicap bathroom, bedroom and therapy room on the first floor. There is direct access to a covered rear deck without any intervening stairs. The house is also located near a park with a handicap swing and handicap beach access which the family currently enjoys. Their current residence is also in Sayville, but according to the petitioner-mother, requires a drive to the beach while the new home is within walking distance. Petitioner-mother states that the current residence does not have the physical space to make the improvements as contemplated at the new residence. The current residence has multiple levels which make it difficult to move the wheelchair around.

The petitioner-mother was candid in testifying that she intended to pay the real estate taxes and homeowner's insurance from the corpus of the trust. The Court has not been informed whether the trust contributes to the real estate taxes and insurance costs of the family's current residence; the assumption is those obligations are currently paid by the petitioners.

Petitioner-mother in her testimony testified to a value of the current family home of $500,000, with an outstanding mortgage obligation of $360,000, resulting in net equity of approximately $140,000. Petitioner-mother testified that she and her husband, the co-trustee, would be willing to contribute any realized equity from the sale of the current residence "into the trust." Petitioner testified that all other expenses of the residence will be paid from the personal funds of the Co-Trustee parents.

Petitioners proffered the testimony of Howard Morris, a real estate appraiser associated with Rogers & Taylor, 300 Wheeler Road, Suite 302, Hauppauge, New York. Mr. Morris testified that the appraised value of 102 Edwards Avenue was $775,000. Mr. Morris' testimony was credible in all respects.

Testimony was received from James Creel, a trust consultant with First Capital Trust Company. He is assigned to the Huntersville, North Carolina office. Mr. Creel testified that it is his function to manage trusts for personal injury victims and to craft trust solutions that meet the needs of injured parties. Mr. Creel described the internal procedures of his office that reviewed the real property in question for its suitability and testified that "it's a good location for Jack, we believe it meets all Jack's needs." He testified, "it's a good fit for the family and Jack." There was no curriculum vitae or other professional credential examination of Mr. Creel or any member of his firm that participated in the review of the 102 Edwards Avenue property.

Mr. Creel testified that the current value of the trust at the time of the hearing was $1,565,000. He also testified as to the current annuity income of $4,000 monthly for fifteen years. At the end of those payments, an annuity of $2,247 per month for 30 years would then be payable. There are additional periodic lump sum payments totaling $510,000. Mr. Creel testified that it was his opinion that the real estate purchase was a prudent purchase for the trust.

Mr. Creel further testified that it was his opinion that at age 57 there would still be over $1,000,000 in the trust. However, the testimony did not include any calculation for the expenses incurred by the trust, such as the real estate taxes and homeowner's insurance. In addition, the petitioner-mother indicated that she is receiving $2,500 from the trust for the purpose of providing Jack's care. Mr. Creel offered no estimates as to the cost of renovation or its

impact on the trust estimates for the future. When asked by the Court about "the expense side of the ledger," he responded:

> What we looked at were the life care plan and the expected expenses that the life care plan says Jack will need, you know, wheelchairs, medical devices, beds, specialty equipment, that kind of thing. Also we're paying for care for Jack

(Hearing Tr p 29 L 1-7, August 8, 2019).

Mr. Creel was unable to answer the Court's questions with any specificity. The Court afforded the petitioners an opportunity to supplement the record with the work papers, calculations and reports of the First Capital Trust's file relative to this acquisition and the current expenditures and future assumptions. A Depletion Analysis was forwarded to the Court which the Court has deemed Petitioner's Exhibit "1." Included within the written analysis was a footnote which states, "*2019 YTD Distributions are excluding home down payment, vehicle purchase, & 1-time caregiver backpay."

The Court is concerned that the assumed monthly expense figure of $4,766.63 was arrived at using a six-month period from 1/22-7/29/19 then annualized for the additional calculations. There is no estimate of real estate taxes or homeowner's insurance or any line item delineation of what comprises the $4,766.63 monthly estimate. In addition, there is no figure for the vehicle acquisition cost or an accounting for "caregiver backpay."

Pursuant to the terms of the Compromise Order dated the 25th day of October 2018, Capital First Trust Company shall have the sole authority to make distributions from the trust. The caregiver stipend of $2,500 per month was first authorized on October 25, 2018. In the absence of the breakout for the items, the Court is unable to determine the accuracy of the monthly assumptions in the Depletion Analysis.

Petitioners' argue the real estate taxes and homeowner's insurance payment through the trust would serve to "protect the investment" and "assure payment." While a laudable concern, these expenses are customarily routine items of support of the family. The Court is aware that the Co-Trustees currently

pay the cost of a mortgage and home equity loan, as well as the attendant real estate taxes and insurance premiums on their current residence. In addition, the $2,500 monthly caretaker fee is newly acquired income of $30,000 per year which impacts upon the parent's ability to pay the customary expenses of the family. In addition, if the Court were to approve this acquisition and the allocation of costs as requested by the petitioners, the net result would be a significant savings to petitioners in the net reduction of their current monthly housing expenses.

There was no testimony from petitioners itemizing their current housing-related costs. While the petitioners have offered to contribute any equity realized upon the sale of their current residence to the corpus of the trust they propose that the trust pay all of the housing costs of the new property. Petitioners aver that they would have sufficient income to "support the payments of all utilities, maintenance, repairs and all other expenses" of the property sought to be acquired at 102 Edwards Avenue.

The petitioner's bear the burden of proof concerning the central issue of the ability to afford the costs attendant to meeting the needs of the family in general and of the infant plaintiff in particular. Shifting the burden of the family's monthly housing costs to the trust is problematic. There was no testimony offered concerning the current income and expenses of the petitioners at their current Wyandanch Road residence. Prior to the hearing, exhibits were submitted to the Court regarding petitioners' W-2 wage statements, a list of assets and liabilities, and credit reports. There was no correlation offered concerning their current expenses for the family in the nature of an income and expense analysis. The Court has been left to divine from Exhibits "C" and "D" of the affidavit dated August 6, 2019, as to the family income and expenses as well as their budgeting practices.

There is a monthly Fifth Third Bank statement which indicates an outstanding principal mortgage balance of $248,299.88, reflecting a monthly payment of principal and interest of $2,086.97. In addition, there is a line of credit statement showing a balance of $65,265 as of July 2019, with an interest only payment minimum of $283.96. There are multiple statements for accounts ending in 8011 and 8014 each with approximate outstanding balances of $65,000. In the absence of some explanation or testimony, the statements are of limited use for the purpose of this hearing. Neither the mortgage statement nor

the line of credit account indicates any escrow for property taxes or insurance. There are no tax bill statements or insurance invoices submitted to the Court. There are statements for a 403(b) account in the amount of $24,181.76 and a Roth IRA of $13,999.56.

There is a handwritten summary which states monthly income of $7,646 and monthly real estate expenses of $2,291 with a net surplus of $5,355. The statement seems to include a real estate tax expense of $14,500 annually and insurance of $3,000 annual premium. There is no estimate of the real estate tax or insurance costs associated with the prospective purchase of 102 Edwards Avenue. There is a 42-page credit report submitted as part of the financial documentation for Jennifer Flanagan, and a 37-page credit report for Kevin Flanagan.

The 1040 U.S. individual Tax Return for 2018 shows total income at line 6 of $90,232. There is also gross profit from Jennifer Flanagan LCSW, PC, operating from 370 Wyandanch Road of $28,490.18 (Line 22 Form CT-3-S), which netted to K-1 income of $2,692.97. Line 11 of Form 1120S also shows rental income paid by this PC of $2,850. There are also utility payments of $7,063.32 deducted from the top line income of the PC, utility expenses which are incurred at 370 Wyandanch Road. Jennifer Flanagan is listed at Schedule B-1 Part II as 50% owner of Coastal Practice Consulting LLC, 53 Chestnut Street, Garden City, New York. There is additional 1065 Partnership Line 7 income for 2017 of $27,707 characterized as rental income which netted to $4,468 Line 22 ordinary business income. There is also a 2017 IT-204 Partnership return for Barry Lane Holdings LLC, with a New York State principal business activity listed as "Real Estate Holding," with a principal product or service of "Office Rental." There is IT-204 Line 116(a) income of $9,000 with a net operating loss of <$30,890>. There is a IT-204-IP capital account line J7 value of $250,824 which includes a <$15,444> line J4 2017 entry reflecting 50% of the operating loss. The K-1 shows a 25% interest for Jennifer Flanagan with a 2017 K-1 net loss of <$7,723>.

The financial net result of the acquisition as proposed by petitioners will be the elimination of $380,000 in mortgage and credit line debt and the elimination of the monthly payments associated with that debt of some $2,680 monthly, and the elimination of $1,460 per month in taxes and insurance.

Coupled with the $2,500 per month caretaker allowance is a net positive of $6,640 per month, or $79,680 per year.

> Pursuant to Uniform Rules for Trial Courts (22 NYCRR) § 202.67:
>
> (f) A petition for the expenditure of the funds of an infant shall comply with CPLR Article 12, and also shall set forth:
>
> (1) a full explanation of the purpose of the withdrawal;
> (2) a sworn statement of the reasonable cost of the proposed expenditure;
> (3) the infant's age;
> (4) the date and amounts of the infant's and parents' recovery;
> (5) the balance from such recovery;
> (6) the nature of the infant's injuries and present condition;
> (7) a statement that the family of the infant is financially unable to afford the proposed expenditures;
> (8) a statement as to previous orders authorizing such expenditures; and
> (9) any other facts material to the application.
>
> (g) No authorization will be granted to withdraw such funds, except for unusual circumstances, where the parents are financially able to support the infant and to provide for the infant's necessaries, treatment and education

(Uniform Rules for Trial Cts [22 NYCRR] § 202.67 [f], [g]).

Both petitioner-parents are employed as set forth in the financial review of petitioners' income and expenses as set forth herein above. The petitioner-parents have been supporting the subject infant and siblings as well as themselves. They have accumulated certain credit line debt of approximately $130,000 for which they have offered no explanation as to the disposition of those funds. Petitioners, by counsel, in the post-hearing brief allege that "the

current living situation while adequate at the moment will not be adequate as Jack ages. Their current house cannot be renovated to the extent necessary to provide for Jack in the future as he ages and while there is not an immediate need, the proposed purchase will be able to provide all that is needed in the future."

Petitioners argue that this rationale satisfies the requirements of Uniform Rules for Trial Courts (22 NYCRR) § 202.67 (g) and the relevant case law. Petitioners cite to *In re Marmol*, 168 Misc 2d 845 (Sup Ct, NY County 1996). Although an Article 81 matter, the court adopted the statutory analysis of CPLR Article 12 relating to the settlement funds of a minor. As it pertains to housing, the court in *Marmol* opined:

> To use Adonis' funds to house the family is to impose upon the child the obligation of support of his parents and siblings. But the infant's funds "are not community property for family use" (*Caban v Lonkey*, 53 Misc 2d 171, 172 [Civ Ct, NY County 1967])

(*In re Marmol*, 168 Misc 2d at 852).

The bulk of the ruling in *Marmol* related to the personal medical, therapeutic, and educational needs of the infant which were a result of the injuries sustained. The court in *Marmol*, in a thorough and extensive survey of the case law then-existing, compiled a series of seven requirements regarding the purchase of a family home which this Court finds useful in conducting the analysis in the case at bar:

> Extracting the guidelines from the above cases it may be concluded that the use of infants' funds for the purchase of a family home will be judicially authorized provided: (1) by clear proof the parents show they cannot afford the purchase price or a portion thereof; (2) the house has features beneficial to the child and accommodates his physical limitations; (3) the purchase price is fair; (4) title is vested in the child at least to the proportionate degree of his investment in the house; (5) necessary measures are taken, where needed, to

> safeguard the investment against the profligacy of the parent; (6) parents offer a quid pro quo; and (7) the funds remaining after the outlay are sufficient to meet the future needs of the infant and where the child is expected to remain incompetent, for the anticipated duration of his life

(*In re Marmol*, 168 Misc 2d at 852-853).

There are conflicting considerations herein in that the purchase of the home will serve the future needs of the subject infant and the transactions anticipated will relieve the petitioner parents from significant mortgage and line of credit indebtedness. As stated in *Leon v Walker*, 1 Misc 2d 219, 221 (Sup Ct, NY County 1955), "[t]he parental duty of support of the family, and even the communal responsibility in the sense of public welfare, should not be permitted to be shifted to this infant because, fortuitously, she was gravely physically injured and successful in now having on hand what the family might consider a financial windfall" (*see also Conigliaro v Rosa*, 24 Misc 2d 15 [Sup Ct, Nassau County 1960]). Upon this principle, the Court refused the parent's application to pay off two mortgages which existed upon the family residence as those obligations were the parents' responsibility under their primary duty to support the minor. It would seem the case law would preclude this Court's grant of an Order to pay off the existing mortgages had that application been made directly.

> Finally, "the provision of shelter falls squarely within the realm of 'necessities' that are properly provided by parents for their infant children" (*Matter of C.R.*, NYLJ, June 1, 2011 at 30 [Surrogate's Court, Kings County]). As a result, an application by a parent-guardian to use the assets of the infant to purchase a home or to pay a mortgage will be closely scrutinized. With guidance from the law concerning applications to withdraw funds that infants receive from the settlement of an action [CPLR Article 12; 22 NYCRR 202.67(f)], the critical areas of inquiry with respect to this application include: (1) the proportion of the proposed withdrawal to the infant's total funds; (2) the parent-guardian's financial resources; (3) the relative proportion of the proposed contributions

> by the infant and the parent-guardian; (4) whether any tax or other financial advantages will accrue to the infant as a result of the proposed expenditure; (5) whether the house provides a unique or special benefit to the infant; and (6) whether the house represents a sound investment. (*See Lee v Brewer*, 26 Misc 3d 1216[A], 2010 Slip Op 50106[U] [Sup Ct, Orange County 2010]; *Matter of Louis*, 21 Misc 3d 1121[A], 2008 Slip Op 52246[U] [Sup Ct, Kings County 2008]; *Matter of Pineda*, 168 Misc 2d 845 [Sup Ct, NY County 1996])

(*Guardianship of B.E.s M.D.,* 2019 NYLJ LEXIS 2635, at *7-8 [Surr Ct, Dutchess County]).

The newly acquired real estate will remain an asset of the trust and other than liquidity differences between cash on deposit and real property as an asset the net effect to the trust's value is inconsequential. The parents' financial resources will be significantly enhanced and improved by this transaction given their relief from their current housing cost obligations. While the trust is providing 100% of the acquisition costs, the petitioners have offered to contribute 100% of the net equity in their current residence upon its sale. The parents have also offered to pay all utilities and maintenance cost associated with the new home. They have petitioned this Court to approve the payment of real estate taxes and homeowners insurance through the trust. The petitioner-parents are responsible for all of the costs and expenses for utilities, maintenance, real estate taxes and insurance at the current residence; transferring those responsibilities of support of the family to the trust is contrary to the law.

In addition, there is a significant discrepancy concerning the expected net equity which may result from the sale of the current residence. The outstanding balances of the mortgage and the two lines of credit and the presumptive $500,000 selling price and the contradiction between the hearing testimony and the calculation contained in the post-hearing brief is not a clear statement of quid pro quo contribution. No tax advantages to the trust of the acquisition have been put forth. The needs of the child are being met at the current residence and no unique or special benefit has been identified other than ease of movement and proximity to park and beach facilities that can be theoretically accessed without the need for the use of a motor vehicle. The Court

is mindful that a specially-equipped van has been purchased by the trust for the child's benefit and transportation is not a significant issue. The current residence is also located in Sayville. The house in a stable and desirable area such as Sayville would likely hold its value if not increase in value as long as it was properly maintained.

Troubling to the Court is the characterization of the child's needs as a future concern. While the petitioner-mother testified that it would be easier to navigate Jack's wheel chair in the proposed new residence, the position taken at the hearing and in post-hearing briefs was that Jack's needs are being adequately met in the current residence. There was no testimony by any professional occupational, physical or rehabilitative therapist addressing these points or Jack's current or future needs. There is no precedent cited by the petitioners nor is the Court aware of any applicable or relevant case law that speaks to hypothetical future needs. The burden of proof in cases such as these should be met by clear and convincing evidence.

Based upon the facts as they currently exist and the statutory and legal framework, and balancing the relevant factors concerning withdrawals of infants' or protected persons' funds, the application for an early withdrawal for the purchase of real property is **DENIED.**

The foregoing constitutes the decision and the Order of the Court.

Dated September 30, 2019

HON. JOSEPH FARNETI
Acting Justice Supreme Court