

Bildner v Bildner

2020 NY Slip Op 33022(U)

September 10, 2020

Supreme Court, New York County

Docket Number: 160493/2019

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT:	<u>HON. DEBRA A. JAMES</u>	PART	IAS MOTION 59EFM
	<i>Justice</i>		
-----X		INDEX NO.	<u>160493/2019</u>
PHILIP BILDNER, AS BENEFICIARY OF THE TRUST U/W OF ALBERT BILDNER,		MOTION DATE	<u>03/03/2020</u>
Petitioner,		MOTION SEQ. NO.	<u>001</u>

- v -

ERLINDA ILUSORIO BILDNER, INDIVIDUALLY AND AS
REMAINDER BENEFICIARY AND TRUSTEE OF THE
TRUST U/W OF ALBERT BILDNER, ANGELA ILUSORIO,
AS SUBSTITUTE TRUSTEE OF THE TRUST U/W OF
ALBERT BILDNER, DAVID PORTLOCK, AS SUBSTITUTE
TRUSTEE OF THE TRUST U/W OF ALBERT BILDNER,
MICHAEL LASKOFF AS SUBSTITUTE TRUSTEE OF THE
TRUST U/W OF ALBERT BILDNER, NICHOLAS BILDNER,
AS BENEFICIARY OF THE TRUST U/W OF ALBERT
BILDNER, JESSE BILDNER, AS BENEFICIARY OF THE
TRUST U/W OF ALBERT BILDNER, and ALBERT LIN
BILDNER FOUNDATION, INC., AS REMAINDER
BENEFICIARY OF THE TRUST U/W OF ALBERT
BILDNER,

**DECISION + ORDER ON
MOTION**

Respondents.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 13, 14, 15, 16,
17, 18, 20

were read on this motion to/for REMOVE RECEIVER/COMPEL ACCTING

ORDER

Upon the foregoing documents, it is

ORDERED the petition is denied, without prejudice, to an
application to restore this proceeding to the calendar, with a
copy of a transcript of the deposition of respondent Erlinda
Ilusorio Bildner; and it is further

ORDERED that on at least ten days in advance, petitioner
shall serve a notice upon such respondent for her deposition to

take place virtually or in person within thirty days of service of a copy of this order with notice of entry.

DECISION

Petitioner Philip Bildner (petitioner) brings this CPLR article 77 proceeding to remove respondent Erlinda Ilusorio Bildner (Lin) as the trustee of a trust established by his grandfather, Albert Bildner (Albert), and to compel a distribution in the amount of \$158,526.72 for his education expenses.

Background

Petitioner is 27 years old and a third-year student at Harvard Law School (NY St Cts Elec Filing [NYSCEF] Doc No. 1, verified petition, ¶ 3). Albert, petitioner's grandfather, died on June 4, 2012, leaving a last will and testament dated September 9, 2004 (id., ¶ 20).

Petitioner alleges that Albert established the trust under article THIRD of his will to pay for petitioner's "education and medical care" before petitioner turned 30 years old (id., ¶ 21). Specifically, article THIRD of the will provides that:

(A) If any of my grandsons, PHILIP BILDNER, NICHOLAS BILDNER or JESSE BILDNER, shall survive me, or, if none of my said grandsons shall survive me, and my wife, ERLINDA ILUSORIO BILDNER, also known as LIN BILDNER shall survive me, I give the sum of TWO HUNDRED FIFTY THOUSAND DOLLARS (\$250,000.00) to my Trustee hereinafter named, IN TRUST, NEVERTHELESS, who shall hold, invest and reinvest the same, shall collect the income therefrom and:

- (1) If one or more of [] my grandsons are under the age of thirty years, my Trustee may pay or apply to any said grandson who is under the age of thirty (30) years, so much or all of the net income therefrom and so much or all of the principal thereof in such proportions and amounts, without regard to equality of distribution, and excluding one or more of them as my Trustee, in her sole and absolute discretion, deems advisable for their education and medical care (any net income not so paid or applied shall be added to the principal periodically, but at least annually).
- (2) If: (a) none of my said grandsons shall survive me, or (b) all of my said grandsons shall have attained the age of thirty (30) years at the time of my death or (c) the last of my said grandsons has attained the age of thirty (30) years or has died before attaining the age of thirty (30) years, my Trustee shall:

- (i) if my said wife shall then be living, pay so much or all of the net income therefrom and so much or all of the principal thereof, to my said wife, as my Trustee, in her sole and absolute discretion deems advisable, quarter-annually, or at more frequent intervals (any net income not so paid or applied shall be added to principal periodically, but at least annually)."

(NYSCEF Doc No. 3).¹

¹ Under Article THIRD of the will, the term "education" means "undergraduate, graduate and post-graduate education at an accredited college or university, and shall include, but not be limited to, application fees, tuition, room, board, books, supplies, fees, reasonable allowances and reasonable reimbursement for travel to and from the college or university for any such class member, and the term 'medical care' shall include, but not be limited to, health insurance premiums" (NYSCEF Doc No. 3).

Petitioner alleges that, over the past six years, he has made numerous requests for information and a distribution from the trust to cover his education expenses. Lin has, however, allegedly refused to make a distribution without any meaningful explanation (NYSCEF Doc No. 1, verified petition, ¶ 4). Petitioner alleges that Lin "has taken this position because she stands to inherit whatever funds are not used for [his] benefit" (id.). On January 11, 2013, petitioner sent letters via certified mail to the trustee's counsel, Barry Singer, Esq. (Singer) and Lin, requesting a trust distribution for his education expenses totaling \$17,369.06 (NYSCEF Doc No. 4). Petitioner allegedly did not receive a response from Singer or Lin (NYSCEF Doc No. 1, verified petition, ¶ 23).

On July 14, 2014, petitioner wrote to Singer "to discuss the trust and possible payment for [his] undergraduate and graduate fees . . . since [Lin] was unavailable to talk to [him] personally" (NYSCEF Doc No. 5). Singer responded that Lin, "in the exercise of her discretion, will not make distributions for your undergraduate and graduate fees" (id.).

Petitioner thereafter requested information concerning the administration of the trust and the trustee's exercise of her discretion in denying the distribution (NYSCEF Doc No.

6). Singer replied that petitioner was "not entitled to the information [he] requested" (id.).

When petitioner asked whether he could speak with Lin about the matter, Singer responded that:

"Philip,
Lin does not want to talk to or correspond with you. As I previously advised you, she has decided not to exercise the discretion given to her in your favor.
There is nothing else to say"

(NYSCEF Doc No. 7).

Four years later, in 2018, petitioner again requested a trust distribution for his undergraduate and graduate expenses (NYSCEF Doc No. 8). Lin's attorney responded:

"Philip,
The trust is a purely discretionary trust. You have no entitlement.
Barry Singer, Esq."

(id.).

In a letter dated June 21, 2019, petitioner requested a trust distribution for his education expenses totaling \$132,947.52 (NYSCEF Doc No. 9).

Petitioner alleges that, after the deduction of significant scholarship funds, petitioner's education-related expenses at the University of California, Berkeley and Harvard Law School have totaled \$158,526.72 to date (NYSCEF Doc No. 10).

The verified petition asserts two causes of action. In the first cause of action, petitioner seeks the removal of Lin as trustee, pursuant to EPTL 7-2.6 (a) (3), on the grounds that she

is unfit to continue serving as trustee by virtue of her: (1) conflicts of interest; (2) self-dealing and breaches of the duty of loyalty; (3) mismanagement of assets; (4) pattern of dishonest and self-interested behavior; (5) failure to protect the interests of the beneficiaries of the trust and otherwise carry out Albert's testamentary wishes; and (6) refusal to communicate with the beneficiaries of the trust (NYSCEF Doc No. 1, verified petition, ¶¶ 31-35). In the second cause of action, petitioner seeks a distribution from the trust in the amount of \$158,526.72 to cover his education-related expenses (id., ¶¶ 36-39).

Lin avers, in opposition to the petition, that she married Albert in 1989 and that they remained married until his death in 2012 (NYSCEF Doc No. 15, Lin Bildner aff, ¶ 3). She states that she is an officer of respondent Albert and Lin Bildner Foundation, Inc. (the Bildner Foundation), a private foundation (id., ¶ 4). She is also a member of the Board of Trustees of the Graduate Center Foundation for the Graduate Center of the City University of New York (CUNY's Graduate Center Foundation) (id.). The Bildner Foundation is a remainder beneficiary of the trust and makes charitable contributions to CUNY's Graduate Center Foundation (id.).

Lin further states that Albert's will provides that his trustee may pay or not pay, in the trustee's sole and absolute

discretion, petitioner's education expenses (id., ¶ 7). The proportions and amounts of such payments are also subject to her discretion as trustee (id.). Furthermore, the will provides that she can exclude petitioner, as well as the other grandsons, as a beneficiary under the trust, in her sole and absolute discretion (id.). According to Lin, after Albert executed the will in 2004, he became estranged from petitioner (id., ¶ 8). This estrangement lasted at least several years until Albert's death in 2012 (id.). At the time that the will was executed, Albert was paying certain of petitioner's education expenses (id., ¶ 9). Lin further states that, before his death, Albert was paying a monthly trailer rental fee for petitioner's father, Alan (id., ¶ 10). She has continued to pay Alan's trailer rental fee because she believes that it is what Albert would have wanted (id.).

Petitioner provides affirmations, pursuant to CPLR 2106 (b), from Jesse Bildner and Nicholas Bildner, who are beneficiaries of the trust, in support of his petition (NYSCEF Doc No. 17, Jesse Bildner affirmation, ¶ 3 ["Using the Trust to pay for Phil's education is exactly why my grandfather set up this Trust"]; NYSCEF Doc No. 18, Nicholas Bildner affirmation, ¶ 3 ["I have no objection to Phil's request, and believe it is just the type of request that my grandfather intended the Trust's funds to cover"]).

DISCUSSION

"In interpreting a trust, courts must look to the intent of the settlor as expressed in the trust instrument. A court cannot look beyond the trust instrument where the donor's intent is expressed in clear and unambiguous terms. Absent ambiguity, a court may not read new terms into a trust instrument"

(Mercury Bay Boating Club v San Diego Yacht Club, 150 AD2d 82, 90 [1st Dept 1989], affd 76 NY2d 256 [1990] [citations omitted]).

"As a general rule the courts of this State will respect and not interfere with a trustee's decision unless it can be shown that the decision constituted an abuse of the discretion given the trustee by the testator" (Matter of Hoelzer v Blum, 93 AD2d 605, 612 [2d Dept 1983]). "Where a trustee has discretionary power, its exercise should not be the subject of judicial interference, as long as it is exercised reasonably and in good faith" (Haynes v Haynes, 72 AD3d 535, 536 [1st Dept 2010]). "The judicial deference afforded trustees under this rule is particularly broad where the testator has manifested an intention to grant the trustee greater than ordinary latitude in exercising discretionary judgment" (Matter of McDonald [Luppino], 100 AD3d 1349, 1351 [4th Dept 2012], citing Restatement [Third] of Trusts § 50, Comment c on subsection [1]). However, even with such extended discretion, the trustee is not relieved of "all accountability" (id.).

"Notwithstanding the extended discretion granted to the trustee by the testator, the exercise of the trustee's judgment in making discretionary distributions should be evaluated in light of the availability of other resources, including public benefits and the parental duty of support" (id.; see also Restatement [Third] of Trusts § 50, Comment e on subsection [2] ["A grant of extended discretion (Comment c) does not relieve the trustee of a duty to take into account, or of a duty to disregard, a beneficiary's other resources, although the extended discretion is a factor to be considered in the process of interpretation"]).

CPLR 7701 provides that "[a]ny party to the proceeding shall have the right to examine the trustees, under oath, either before or after filing an answer or objections, as to any matter relating to their administration of the trust, in accordance with the provisions of article thirty-one." There is no evidence that Lin appeared for a deposition.²

Therefore, the petition is denied, without prejudice to restore the proceeding to the calendar upon submission of the

² Petitioner served Lin with a notice of deposition on March 3, 2020 (NYSCEF Doc No. 19), shortly before Governor Cuomo issued a stay-at-home order in light of the ongoing Covid-19 pandemic. No copy of a transcript of such deposition is before the court.

transcript of Lin's deposition. At least ten days in advance of the date set for such examination, petitioner shall serve a notice the deposition upon Lin, which examination shall take place within thirty (30) days of service of a copy of this order with notice of entry.

<u>9/10/2020</u> DATE	<u><i>Debra A. James</i></u> DEBRA A. JAMES, J.S.C.				
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					<input type="checkbox"/>
					REFERENCE