

**Matter of Rosetti**

2020 NY Slip Op 35744(U)

August 24, 2020

Surrogate's Court, Albany County

Docket Number: File No. 2019-360/F

Judge: Stacy L. Pettit

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

*State of New York*

*Surrogate's Court, Albany County*

---

In the Matter of the Accounting by Richard Rosetti,  
as Trustee of the Rosetti Family Irrevocable Trust  
dated December 7, 2010, commonly known as the  
Rosetti Family Irrevocable Trust VI.

DECISION AND ORDER

File Nos. 2019-360/F  
2019-360/G  
2019-360/H  
2019-360/I  
2019-360/J  
2019-360/K

---

In the Matter of Accounting by Joan Rosetti, as  
Trustee of the Rosetti Family Irrevocable Trust  
dated September 2, 1992, commonly known as the  
Rosetti Family Irrevocable Trust I.

---

In the Matter of the Accounting by Richard Rosetti,  
as Trustee of the Rosetti Family Irrevocable Trust  
dated January 4, 1993, commonly known as the  
Rosetti Family Irrevocable Trust II.

---

In the Matter of the Accounting by Joan Rosetti, as  
Trustee of the Rosetti Family Irrevocable Trust  
dated December 7, 2010, commonly known as the  
Rosetti Family Irrevocable Trust V.

---

In the Matter of the Accounting by Richard Rosetti,  
as Trustee of the Rosetti Family Irrevocable Trust  
dated July 1, 1997, commonly known as the Rosetti  
Family Irrevocable Trust III.

---

In the Matter of the Accounting by Richard C.  
Rosetti and Joan Rosetti as Co-Trustees of the  
Rosetti Family Irrevocable Trust dated May 12,  
1996, commonly known as the Rosetti Residence  
Trust IV.

---

**Appearances:** Thomas F. Gleason, Esq., Attorney for Petitioners Richard C. Rosetti and Joan Rosetti, Gleason, Dunn, Walsh & O’Shea, Albany

Thomas J. Collura, Esq., Attorney for Respondent Richard G. Rosetti, Hodgson Russ, LLP, Albany

Michael Koenig, Esq., Attorney for Respondents Megan Falvey, Alexandra Falvey Watson and Matthew Falvey, Hinckley Allen, Albany

---

**Pettit, S.,**

Pending before this Court are six intermediate accountings for trusts established by petitioners Richard C. Rosetti and Joan Rosetti. One of the trusts is a residence trust (Trust IV) and the five remaining trusts are non-residence trusts (Trusts I, II, III, V, VI). With respect to the residence trust, petitioners’ children, Jacqueline Falvey and respondent Richard G. Rosetti are income beneficiaries and, upon petitioners’ deaths, the remainder shall be distributed to Falvey and respondent, per stirpes. As for the non-residence trusts, Falvey and respondent, along with petitioners’ grandchildren, are income beneficiaries, and the remainder of those trusts shall be distributed to petitioners’ grandchildren. Currently, the only grandchildren are issue of Falvey (the Falvey children); respondent Richard G. Rosetti does not have any children. The Court requested that the parties brief the issue of whether a guardian ad litem should be appointed for respondent’s unborn children, as beneficiaries of the trusts with potentially different interests than the Falvey children.

Respondent requested that the Court appoint a guardian ad litem to represent the remainder interests of his unborn children in the non-residence trust proceedings and that the Court allow him to virtually represent the remainder interests of his unborn children in the residence trust proceeding. With respect to the non-residence trusts, respondent argues that no other party can virtually represent their interests, because no other party shares their interests.

Although the Falvey children appear to share the interests of respondent's unborn children, as they are all remainder beneficiaries of the non-residence trusts, respondent has filed objections suggesting that the Falvey children are currently benefitting from the trusts and the actions of the trustees in a way that his unborn children do not. As respondent has alleged that the trustees have mishandled the trusts based in part on these circumstances, he contends there is a conflict between the interests of the Falvey children and his own unborn children. Thus, the Falvey children cannot represent the interests of respondent's unborn children. Respondent also asserts that the Falvey children cannot virtually represent the interests of his unborn children under SCPA 315 (5) because the trusts do not expressly authorize horizontal representation.

Furthermore, respondent himself cannot represent the interests of his unborn children because he is only an income beneficiary of the non-residence trusts, while they are remainder beneficiaries. Since none of the current parties to the proceeding can represent the interests of respondent's unborn children, he requests that a guardian ad litem be appointed on their behalf for the non-residence trusts.

As for the residence trust, respondent requests that the Court permit him to virtually represent the remainder interests of his unborn children because their interests are derived from his interest; thus, they have the same interest under SCPA 315. In addition, he asserts that his economic interest in the residence trust is aligned with the interest of his unborn children. Petitioner has submitted an affidavit in accordance with 22 NYCRR 207.18.

The Falvey children argue that a guardian ad litem should not be appointed on behalf of respondent's unborn children because the economic interest of the unborn children is sufficiently similar to that of the Falvey children such that the Falvey children can virtually represent their interests. They further assert that the appointment and compensation of a guardian ad litem will

only further diminish the trust assets, thus harming respondent's unborn children. Petitioners agree with the arguments of the Falvey children, but also note that they do not object to the appointment of a guardian ad litem.


SCPA 2210 directs that all beneficiaries of a trust shall be cited in an accounting proceeding (see SCPA 2210 [9]). Unborn beneficiaries may be represented by a guardian ad litem or by virtual representation under SCPA 315 (see SCPA 315 [2] [a] [iii]; Matter of Silver, 72 Misc 2d 963, 969 [Sur Ct, Kings County 1973]). The appointment of a guardian ad litem protects the finality of the Court's decree (see SCPA 406) and removes the possibility of a conflict of interest that may arise under virtual representation.

Given respondent's allegations in this proceeding, the Court finds it is prudent to appoint a guardian ad litem to represent the interests of respondent's unborn children with respect to the non-residence trusts (see Matter of Silver, 72 Misc 2d at 970). The Court further finds that respondent shall represent the interests of his unborn children with the respect to the residence trust, as he has the same remainder interest in that trust as his unborn children (see Matter of Adler, 77 Misc 2d 651, 653 [Sur Ct, 1974]). Accordingly, it is hereby

ORDERED that John M. Cyzgier, Jr., Esq., is appointed as guardian ad litem for respondent Richard G. Rosetti's unborn children in the five pending accounting proceedings for the non-residence trusts (Trusts I, II, III, V, VI – 2019-360/F, G, H, I, J); and it is further

ORDERED that Richard G. Rosetti shall virtually represent the interests of his unborn children in the pending accounting proceeding for the residence trust (Trust IV – 2019-360/K).

Dated and Entered: August 24, 2020

  
 \_\_\_\_\_  
 Hon. Stacy L. Pettit, Surrogate