

**Sheridan v Silver**

2021 NY Slip Op 32312(U)

November 16, 2021

Supreme Court, New York County

Docket Number: Index No. 158566/2021

Judge: Arlene P. Bluth

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

PRESENT: HON. ARLENE BLUTH PART 14

*Justice*

-----X

VIRGINIA SHERIDAN

Petitioner,

- v -

HARRIS SILVER,

Respondent.

-----X

INDEX NO. 158566/2021

MOTION DATE N/A, N/A

MOTION SEQ. NO. 001 002

**DECISION + ORDER,  
JUDGMENT ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 23  
were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 24, 25, 26, 27, 28,  
29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44  
were read on this motion to/for DISMISSAL.

Motion sequence numbers 001 and 002 are consolidated for disposition. The petition (MS001) to *inter alia* revoke respondent's power of attorney over non-party Morris Silver is denied. The motion (MS002) to dismiss by respondent is granted.

**Background**

Petitioner brings this special proceeding to remove respondent's power of attorney over her husband of many decades (Morris Silver, hereinafter "Mr. Silver"). Respondent is Mr. Silver's cousin. Petitioner asserts that her husband is suffering from dementia and that she is the primary caregiver. She claims that respondent convinced Mr. Silver to execute a power of attorney that authorized respondent to act on Mr. Silver's behalf in October 2017.

Petitioner claims that respondent has rearranged Mr. Silver's will to reduce petitioner's potential inheritance and named himself as the executor instead of petitioner. She claims respondent has taken numerous steps to interfere with petitioner, including withholding funds from a joint account shared by petitioner and Mr. Silver. Petitioner argues that respondent has interjected himself into decisions about automobile repairs and their living arrangements.

She claims that respondent has recently demanded that she sign a postnuptial agreement with respondent (as Mr. Silver's proxy). Petitioner contends that respondent routinely uses funds belonging to Mr. Silver for inappropriate reasons, such as for matrimonial attorneys' fees even though respondent purportedly had no authority to hire a matrimonial attorney. Petitioner alleges that she wants to buy a new apartment to accommodate a live-in caregiver, but that respondent is frustrating those efforts. In fact, she claims he caused Mr. Silver and petitioner to lose a down payment for a new apartment.

In this proceeding, petitioner seeks to revoke the power of attorney, to compel respondent to provide an accounting and injunctive relief enjoining respondent from acting as an agent under power of attorney for Mr. Silver.

Respondent filed a separate motion to dismiss. He claims that petitioner does not fall within the category of persons entitled to an accounting nor has she satisfied her burden to revoke the power of attorney. He claims that in 2017, his cousin approached him in order to execute a power of attorney. Respondent insists he did not initiate any estate plans on behalf of Mr. Silver and that any issues with the estate will be decided in Surrogate's Court after Mr. Silver passes away.

He insists that it was his understanding that petitioner and Mr. Silver kept their assets separate during their marriage and that he simply endeavored to continue this practice.

Respondent emphasizes that outside counsel was present at the power of attorney execution and an attorney sent a letter to counsel for petitioner stating that the changes to the will were proper.

With respect to the purchase of a new apartment, respondent asserts that although he agreed more space might be helpful, it was petitioner who rejected every proposal for fulltime healthcare providers. He claims that petitioner made a series of unreasonable demands that essentially wrecked the deal for the new living space. Respondent explains that after an initial agreement for a new apartment, the Board at the apartment complex conditioned the purchase of the apartment on the fact that there would be no mortgage financing in connection with the closing. He insists that petitioner wanted Mr. Silver to fund the vast majority of the purchase price, improvements to the apartment (with petitioner deciding which improvements were necessary), and that Mr. Silver fund all of his own healthcare expenses. In fact, respondent claims that if these demands were not met, petitioner threatened to divorce Mr. Silver. Respondent insists he could not agree to these demands in accordance with his fiduciary duties to Mr. Silver and so the deal fell through. The threat of divorce compelled respondent to consult with a matrimonial attorney.

Respondent argues that he floated the possibility of a postnuptial agreement in order to resolve some of the disputes between petitioner and Mr. Silver but that he never forced her to sign anything. Respondent maintains he was simply acting in a manner he thought was in Mr. Silver's best interest. He claims he was only carrying out his fiduciary duties to his cousin.

### **Accounting**

In her petition, petitioner seeks an accounting of respondent's records pursuant to General Obligations Law § 5-1510(4). As respondent points out, this statute permits the Court to

require a fiduciary to provide books and records upon removal as the fiduciary. Of course, respondent has not yet been removed so this provision is inapplicable.

Section 5-1510(2)(e) allows the commencement of a special proceeding to seek the approval of receipts, disbursements and transactions taken by any agent. A spouse is entitled to bring such a proceeding under Section 5-1510(3).

However, petitioner incorrectly asserts that she is entitled to an accounting. This Court reads the statute to permit the Court to approve transactions, not for a spouse to receive all manner of documents. Moreover, the Court finds that petitioner has not met her burden to compel the Court to require approval of the transactions at issue.

Simply because petitioner disagrees with certain actions does not mean this Court should insert itself into this familial dispute. It is undisputed that respondent is acting under a broad power of attorney that is not subject to any limitations. Under these circumstances, the Court declines to intervene without some actual showing of wrongdoing. On these papers, petitioner only offers speculation and innuendo about supposed malfeasance.

Petitioner is upset about the loss of the apartment (and the associated down payment), but respondent offers his own view of what happened and blames petitioner. The parties also disagree about other issues (such as the basis for the proposed post nuptial agreement). Clearly, petitioner and respondent no longer get along and, according to respondent, that has required respondent to consult with real estate attorneys and matrimonial attorneys on Mr. Silver's behalf.

Petitioner focuses on the fact that respondent allegedly withdrew \$1.3 million from Mr. Silver's IRA accounts in 2020 and 2021. But the fact is that petitioner admits that she and Mr. Silver maintain separate financial accounts and even observes that "it is possible that the funds

were withdrawn for Morris' benefit" (NYSCEF Doc. No. 1, § 16). That petitioner is curious is not a reason to make the Court oversee expenditures made by respondent on Mr. Silver's behalf.

Simply put, this Court sees no reason to force respondent to turn over records where there is no allegation that he is engaging in self-dealing and where there is no concern that Mr. Silver is not receiving the care he needs. Squabbles about preferred living arrangements and how certain expenses are handled are beyond this Court's purview in this proceeding. The fact is that Mr. Silver picked his cousin to be power of attorney (and petitioner does not directly challenge the origin of the power of attorney) in 2017 and respondent is therefore entitled to take actions he believes to be in Mr. Silver's best interest.

### **Removal of Power of Attorney**

General Obligations Law §5-1505(2) sets forth the fiduciary duties for an agent acting under a power of attorney and section 5-1510(f) proscribes removal where the agent has violated his or her fiduciary duties. The Court finds that petitioner's allegations, even if true (as the Court must assume on a motion to dismiss), do not state a basis upon which the Court can revoke the power of attorney. Nor does the Court find that petitioner has raised a material issue of fact that requires a hearing about the potential removal respondent's role under the power of attorney.

"[A] hearing is necessary in a special proceeding only where the papers and pleadings raise a material issue of fact. In short, the standard for an evidentiary hearing is that which applies to summary judgment. Thus, I must take all the facts asserted by petitioners as true, and if they fail to provide a legal basis for the petition, then it may be summarily determined" (*Kotlow v Hanft*, 63 Misc 3d 1228(A) [Sup Ct, Albany County 2018] [discussing the standard for an evidentiary hearing involving a petition to revoke a power of attorney]).

No one disputes that Mr. Silver is suffering cognitively and that he needs full time care. Petitioner claims that respondent is systematically reducing her interest in Mr. Silver's future estate. Respondent offers a drastically different view: he claims that he is simply acting in the best interest of Mr. Silver and it is petitioner who is acting irrationally.

Although the parties disagree about the steps taken by respondent, this Court finds that petitioner's complaints amount to just that—complaints—and do not raise a material issue of fact about whether respondent should be removed as power of attorney. Petitioner impliedly acknowledges that, although she knew about it, she did not challenge the power of attorney and instead went along with it until recently, when she reached a “breaking point” (NYSCEF Doc. No. 1 at 13). Therefore, the question for this Court is whether respondent's actions, as stated by petitioner, raise a material issue of fact that could compel a hearing. This Court finds that they do not.

The allegations in the petition depict a spouse who has grown increasingly frustrated as respondent has taken a more active role on behalf of Mr. Silver. Petitioner frequently refers to acts taken by respondent as “abuses of power,” but this Court finds that such conclusory language does not substantiate a basis for this Court to revoke respondent's fiduciary role. Petitioner simply failed to meet her burden to show there was some sort of misconduct; she has not shown that respondent is abusing his power over Mr. Silver, to whom he owes a duty.

The Court also observes that the parties all agree that petitioner and her husband have always split expenses from their own accounts and that Mr. Silver pays for his own care. This fact provides another justification for the denial of the petition and dismissing this proceeding. This is not a situation in which the fiduciary is taking money for his own purposes—respondent is simply using money from Mr. Silver's accounts to pay for his expenses (*In re Nellie G.*, 38

AD3d 547, 549, 831 NYS2d 473 [2d Dept 2007] [declining to revoke a power of attorney in a guardianship proceeding where the transactions in dispute did not result in the agent receiving a profit nor did they harm the principal]). He just isn't spending the money the way petitioner wants him to spend it.

The Court emphasizes that the arguments about the will are not relevant to this proceeding. The changes were made, according to petitioner, on the same day the power of attorney documents were signed; it is normal to execute health care proxies, powers of attorneys and wills at the same time. And, as respondent points out, any disputes surrounding Mr. Silver's estate will be decided after he passes away. It has no bearing on respondent's actions as power of attorney. Petitioner does not adequately assert that the power of attorney should be revoked because it was procured under duress or fraud. Indeed, although she knew all about it years ago, she has never asserted that Mr. Silver did not intend to appoint his cousin as his power of attorney or did not intend to make changes to his will that day in 2017.

### **Summary**

This Court understands that petitioner is justifiably upset. She has a sick husband and, after over forty years of marriage, she has to deal with his cousin over things she feels should stay within the marriage. But it was Mr. Silver who, when he was presumably well, appointed his cousin to act with the broadest possible powers. He did not appoint his wife of many decades nor his children (from an earlier marriage).

And the Court recognizes that the decision to give respondent fiduciary duties under the subject power of attorney contributed significantly to the disagreements at issue here. For whatever reason, Mr. Silver picked his cousin to have power of attorney responsibilities instead

of petitioner (his wife). That inevitably led to disputes about how Mr. Silver's assets should be expended. But that inherent and unsurprising tension is not a reason to remove respondent as power of attorney.

Respondent can only be removed upon a showing that he violated his fiduciary obligations to Mr. Silver – he has no fiduciary obligations to petitioner or to peace in the home. Nothing on these papers comes close to showing that he has violated his obligations to Mr. Silver. There has been no showing that he took money for himself, failed to provide for Mr. Silver's care, that Mr. Silver is running out of money, or that respondent did anything other than take steps that were in Mr. Silver's best interest. That this Court or petitioner might have made different decisions is besides the point. And petitioner did not point to anything that shows respondent failed to act with the requisite standard of care. Just because he had to hire matrimonial counsel (as he was entitled to do) is not a basis to grant the petition.

The Court also observes that petitioner seeks to remove respondent as power of attorney despite the fact that there is no currently pending guardianship proceeding or other application to ensure that Mr. Silver's interests are protected. In other words, petitioner's preferred outcome in this proceeding is to put Mr. Silver back in charge of his affairs (by revoking the power of attorney) when both parties agree that he is incapable of acting on his own behalf. That makes little sense. Of course, in the future, the best route might be to bring an Article 81 proceeding if petitioner believes that respondent should be removed as power of attorney. That way, someone would be appointed to protect Mr. Silver's interests (assuming that there is a basis to revoke the power of attorney).

Accordingly, it is hereby

ADJUDGED that the petition (MS001) is denied in its entirety and the motion to dismiss (MS002) is granted and the Clerk is directed to enter judgment along with costs and disbursements accordingly upon presentation of proper papers therefor.

11/16/2021

DATE



ARLENE BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: