

Matter of Kenan

2023 NY Slip Op 31132(U)

April 12, 2023

Surrogate's Court, New York County

Docket Number: File No. 2003-1500/B

Judge: Rita Mella

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

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Petition to Compel Trustees' Account, Trust u/A

DECISION and ORDER

SARAH GRAHAM KENAN,

File No.: 2003-1500/B

Donor,

Dated December 1, 1965.
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M E L L A, S. :

The following papers were considered in determining
this motion to dismiss:

Numbered

| | |
|---|---|
| Amended Notice of Motion to Dismiss Petition to Compel Account, dated May 31, 2022 | 1 |
| Memorandum of Law in Support of Motion, dated May 31, 2022..... | 2 |
| Declaration of Joshua D. Weedman, Esq., in Support of Motion, dated May 31, 2022, with Exhibits A to V | 3 |
| Affidavit of Holt Kenan Hemingway in Opposition to Motion, sworn to August 1, 2022 | 4 |
| Affirmation of T. Randolph Harris, Esq., in Opposition to Motion, dated August 1, 2022, with Exhibits A to E | 5 |
| Memorandum of Law in Opposition to Motion, dated August 1, 2022..... | 6 |
| Memorandum of Law in Reply, dated September 15, 2022 | 7 |
| Declaration of Joshua D. Weedman, Esq., in Support of Reply, dated September 15, 2022, with Exhibit W | 8 |

This decision concerns the trust for the benefit of Frank H. Kenan and his issue (the FHK Trust) created under the agreement of his aunt, Sarah Graham Kenan, dated December 1, 1965 (the 1965 Trust). The trustees have moved to dismiss the petition of beneficiary Holt Kenan Hemingway to compel their intermediate account for the period from September 4, 2002 through

December 31, 2020. After the petition to compel was filed, the trustees submitted a voluntary account for the period from September 30, 2016 to December 31, 2021. The request for an accounting is thus moot for the period after September 30, 2016, leaving only the interval between September 4, 2002 and September 30, 2016, for the court's determination of the underlying petition and motion to dismiss.¹

The primary asset of the FHK Trust is one-half the stock of Flagler System, Inc. (FSI), which owns the famed Breakers Hotel in Palm Beach, Florida. The other half is held by another trust created under the 1965 Trust, one that is nearly identical to the FHK Trust except that it has different trustees and its beneficiaries are the issue of James G. Kenan, another nephew of the donor (the JGK Trust). The FHK Trust and the JGK Trust terminate at the expiration of ten years from the death of the survivor of the children of the respective nephew for whom the trust was created. The income from each of these trusts is payable in specified proportions among the nephew (during his life) and his issue, per stirpes. Principal is distributable outright on termination to the then living issue of the respective nephew, per stirpes. There is no provision for invasion of principal of either trust. Petitioner is a granddaughter of Frank H. Kenan, and therefore a current income beneficiary and presumptive remainder beneficiary of the FHK Trust. It was valued as of September 2016 in excess of \$400 million.

The trustees move to dismiss the petition to compel them to account, pursuant to CPLR 3211 (a) (5), on the ground that Ms. Hemingway, the Petitioner, executed a release based on a non-judicial accounting covering the transactions of the FHK Trust from September 2, 2002, to

¹ Intermediate accounts for all prior periods have been settled either informally or judicially.

September 30, 2016.² The document that Petitioner signed includes the customary recitations with broad provisions releasing and discharging the trustees:

“of and from any and every claim . . . for or on account of any and every matter or thing whatsoever arising out of or in any manner related to or connected with the Trust or the acts and proceedings of the Trustees, and ratifies and approves the acts, transactions and omissions (if any) of the Trustees in the investment, management, and administration of the Trust during the Accounting Period.”

The court may require a trustee to account on the petition of any person interested “upon it appearing that it is for the best interests of the estate”³ (SCPA 2205 [1]). What constitutes the “best interests” to justify issuance of an order to account rests in the discretion of the court (*Matter of Taber*, 96 AD2d 890, 890 [2d Dept 1983] [“In a proceeding to compel a fiduciary to account, the Surrogate acts in [her] discretion, governed by what is deemed to be in the best interests of the estate”]; *Matter of Thoms*, 76 Misc 2d 132, 134 [Sur Ct, Monroe County 1973]). On the facts of this case, the court determines that the formal accounting Petitioner requests is not in the best interests of the trust estate. A judicial accounting would provide no more information than what Petitioner has already received, while causing the FHK Trust to incur significant expense and would delay the settlement of the account that is pending for the subsequent period.

Matter of Mastroianni (105 AD3d 1136 [3d Dept 2013]) is analogous. That case concerned a trust that owned shares of a corporation which operated a business. The Appellate Division affirmed the Surrogate’s decision denying a petition to compel an account, where the

² Without determining the validity and effect of the release, for identification purposes the period covered by the non-judicial accounting will be referred to as the “released period.”

³ “Estate” is defined to include the property of a trust (SCPA 103 [19]).

trustee had already provided detailed financial information about the trust's assets and the corporation's operations.

The informal account that was attached to the document signed by Petitioner included all of the critical schedules that would be required in a judicial accounting, including statements of administration expenses charged to income and to principal; distributions of income and principal; computation of commissions; and principal and income on hand at the beginning of the account period and remaining at the close. Petitioner was also given all transaction statements for the entire period.

It is significant that Petitioner has not complained of or raised objection to the information revealed in that non-judicial account. Rather, she questions the propriety of a shareholders' agreement that the trustees signed in May 2015, during the released period. Among other things, the shareholders' agreement places restrictions on the sale of the FSI shares by granting rights of first refusal to FSI and certain family members. The agreement is nowhere disclosed or referred to in the non-judicial account, although it is undisputed that Petitioner was aware of it.

The agreement was the culmination of discussions and meetings over a period of more than five years among the presumptive remainder beneficiaries of the 1965 Trust, the trustees, and the directors of FSI, where they explored, in consultation with legal counsel, methods for keeping ownership and control of the Breakers Hotel within the Kenan family. Petitioner was invited to these meetings and does not deny that she attended at least two of them. She was also the recipient of numerous communications apprising the beneficiaries of the proposed terms and drafts as it progressed toward the final version. Petitioner and the other beneficiaries were given

advance notice of the trustees' intention to execute the agreement when it was ultimately finalized. Neither Petitioner nor any other beneficiary voiced an objection.

Petitioner argues now that the shareholders' agreement is a manifestation of "specific continuing violations of the express terms" of the 1965 Trust agreement. If this is the case, she can raise objections to the alleged violations in the pending trust accounting proceeding for the period commencing after the released period. A formal accounting for the released period would confer no additional benefit.

In accordance with the court's determination on its own initiative that a judicial accounting is not in the best interests of the FHK Trust, the court declines to compel such an account (*see* SCPA 2205 [1]), and need not address the validity of Petitioner's release agreement.

The petition to compel an accounting is denied, and the motion to dismiss the petition is denied as moot.

This constitutes the decision and order of the court.

Dated: April 12, 2023


SURROGATE