

Bildner v Bildner

2023 NY Slip Op 33281(U)

September 21, 2023

Supreme Court, New York County

Docket Number: Index No. 160493/2019

Judge: Lyle E. Frank

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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: HON. LYLE E. FRANK **PART** **11M**

Justice

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PHILIP BILDNER, AS BENEFICIARY OF THE TRUST U/W
OF ALBERT BILDNER,

Petitioner,

INDEX NO. 160493/2019

MOTION DATE 08/02/2021

MOTION SEQ. NO. 002

- 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, ALBERT AND LIN
BILDNER FOUNDATION, INC., AS REMAINDER
BENEFICIARY OF THE TRUST U/W OF ALBERT
BILDNER,

**DECISION + ORDER ON
MOTION**

Respondent.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49

were read on this motion to/for RESTORE.

Petitioner brings this CPLR Article 77 proceeding to remove respondent Erlinda Ilusorio Bildner as trustee in a trust formed by Albert Bildner (Decedent)¹. Petitioner also seeks to compel distribution of the trust in the amount of \$192,153.99 for his education expenses. For reasons set forth below, the petition is granted in part.

Background

¹ The Court would like to thank Eric Chubinsky for his assistance in this matter.

The Petitioner is the grandson of the Decedent. In September 2004, the Decedent declared his last will and testament which included a trust to which the Petitioner is one of the beneficiaries. When the Decedent passed in 2012, responsibility of the trust was transferred to the Respondent as trustee. The language of the trust included in relevant part:

If one or more of my said grandsons are under the age of thirty (30) 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 his or their education and medical care.

Petitioner has made multiple requests, since January of 2013, for the Respondent trustee to make distributions to cover his undergraduate and graduate educational expenses, now totaling \$192,153.99. The Respondent repeatedly denied such requests. Petitioner then commenced an action seeking to remove the Respondent as trustee and compel distribution of the Trust on October 28, 2019.

On September 15, 2020, the Honorable Debra James, of this Court, issued a decision to deny this initial petition without prejudice. Justice James explained that under CPLR § 7701 “[a]ny part 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.” Judge James continued that she could “restore the proceeding to the calendar upon submission of the transcript of [Respondent’s] deposition.” This deposition has since occurred. In this deposition, Respondent clarifies that at the time of Petitioner’s initial request in 2013, she was not aware of “what [Petitioner’s] finances were like” and did not make any effort to find out. (Deposition Page 84). Respondent was also not aware of whether the Petitioner received any public benefits at the time of the request in 2013. (Deposition Page 85). In 2019, a similar

request was made by Petitioner to Respondent, and Respondent again made no effort to ascertain the financial condition of the Petitioner. (Deposition page 90).

Since the deposition of Respondent has occurred, Petitioner is again seeking to remove Respondent as trustee and to compel distribution of the trust in the amount of \$192,153.99 to cover educational expenses.

Discussion

“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 (1983). “[T]he 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.” *Matter of McDonald*, 100 AD3d 1349, 1351 [4th Dept 2012] (citing Restatement [Third] of Trusts § 50 Comment *e* on subsection [2]). “[E]ven when the trust instrument vests the trustee with broad discretion to make decisions regarding the distribution of trust funds, a trustee is still required to act reasonably and in good faith in attempting to carry out the terms.” *Matter of Wallens*, 9 NY3d 117, 158 [2007].

The *McDonald* case seems to be on point with the facts in this case. In *McDonald*, the court concluded that the trustee did not abuse discretion. *Id.* at 1351. Despite the language of the trust stipulating that the trustee “shall pay” the beneficiaries, the language also granted the trustee broad discretion to distribute the trust “as the Trustee deems advisable in [the Trustee’s] sole discretion not subject to judicial review.” *Id.* at 1350. Since the record in that case established that each beneficiary had college savings accounts that “were more than adequate to

provide for petitioners' college expenses" the court determined that the trustee did not abuse discretion. *Id.*

Here, the language of the trust states that the trustee "may pay" the beneficiaries, so there is again broad discretion being granted to the Respondent. (exhibit B). But importantly, this case is distinguishable from *McDonald* in that Respondent admitted in deposition that she did not make any effort to ascertain the financial condition of the Petitioner. Therefore, Respondent had no way of knowing, through her own disregard of Petitioner's financial situation, whether Petitioner had adequate means to pay for his education.

First, the Respondent contends that she had broad discretionary power to pay or not pay, including the authority to exclude petitioner as a beneficiary. The court finds this argument unpersuasive in light of the Second Department's ruling in *Boles v Lanham*, 55 AD3d 647 [2d Dept 2008]: "As a fiduciary, a trustee bears the unwavering duty of complete loyalty to the beneficiaries of the trust no matter how broad the settlor's directions allow the trustee free rein to deal with the trust. The trustee is liable if he or she commits a breach of trust in bad faith, intentionally, or with reckless indifference to the interests of the beneficiaries." *Id.* at 648[citations omitted]. Here, the court finds that the Respondent acted with reckless indifference to the interests of the Petitioner by not making a good faith effort to determine his financial needs, or lack thereof.

Second, the court rejects the Respondent's argument that a lack of support and maintenance standards limits the review of discretion. Respondent argues that since the language of the trusts states that the Respondent may distribute an amount to the beneficiary that she deems "advisable", and not an amount that she deems "necessary", the court should have "very limited" judicial review into the Petitioner's needs. (Memo of Law in Opposition Page 13). But,

the court is still persuaded by the holdings of the Second Department and Court of Appeals, which support the notion that a trustee does not have absolute discretion, and still has a duty to act without reckless indifference towards the beneficiary. (*See Boles*, 55 AD3d at 648; *McDonald*, 100 AD3d at 1351).

Thus, since the Respondent made no good faith effort to ascertain whether the Petitioner needed financial assistance, the court must find that the Respondent abused their discretion as trustee here. There must be a bare minimum standard for fiduciaries to exercise good faith, even when there is absolute discretion.

To the extent petitioner seeks removal of the respondent as the trustee, the Court finds that petitioner has not established any conduct on behalf of the respondent that would rise to the level to warrant removal. Accordingly, that portion of the petition is denied, and it is hereby

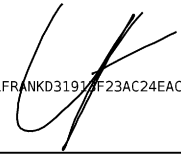
ADJUGED that the petition is granted in part to the extent that respondent is directed to distribute the amount of petitioner's educational expenses; and it is further

ORDERED that an assessment of petitioner's educational expenses is directed; and it is further

ORDERED that a copy of this order with notice of entry be served by the movant upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who is directed, upon the filing of a note of issue and a certificate of readiness and the payment of proper fees, if any, to place this action on the appropriate trial calendar for the assessment hereinabove directed; and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

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9/21/2023

DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE