

Matter of Rosetti Family Irrevocable Trust

2024 NY Slip Op 34660(U)

August 1, 2024

Surrogate's Court, Albany County

Docket Number: File No. 2019-360/Q

Judge: Stacy L. Pettit

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State of New York

Surrogate's Court, Albany County

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

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

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

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

In the Matter 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/Q
2019-360/R
2019-360/S
2019-360/T
2019-360/U

Appearances: Thomas Collura, Marissa A. Coheley, Michael D. Zahler, Attorneys for
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Pettit, S.,

Pending before this Court is petitioner Richard G. Rosetti's application for relief against a fiduciary under SCPA 2102 (6). Respondent Jacqueline Rosetti Falvey has answered the petition and the matter is submitted for this Court's decision.

By virtue of the multiple proceedings pending in this Court related to the above-captioned lifetime trusts, petitioner and respondent are currently acting as co-trustees of these five irrevocable trusts, which were created by their parents, Richard C. Rosetti and Joan Rosetti, for the benefit of petitioner, respondent, and their descendants. Petitioner and respondent have been acting as co-trustees of these trusts since September 2023, when Richard C. Rosetti and Joan Rosetti were suspended as trustees by this Court pending a final determination on petitioner's applications for removal of these fiduciaries. Petitioner now asks this Court for an order, under SCPA 2102 (6), directing respondent to comply with certain directives with respect to issues affecting the trusts, and resolving any disagreements between the fiduciaries. Petitioner would like this Court to require respondent to provide petitioner equal rights of access, decision-making and management as to the trusts, the trusts' assets and entities wholly owned by the trusts. Respondent concedes that petitioner is entitled to certain information; however, she argues that his access should be limited, particularly with respect to management of business entities that are trust assets.

SCPA 2102 authorizes the commencement of a proceeding to require a fiduciary "[t]o comply with such directions as the court may make whenever two or more fiduciaries disagree with respect to any issue affecting the estate" (SCPA 2102 [6]; see *Matter of Stanley*, 240 AD2d 268, 270 [1st Dept 1997]). In any proceeding under SCPA article 21, "the court may grant appropriate relief, grant or deny the relief in whole or in part upon such terms as it deems proper and make such decree or order as justice shall require" (SCPA 2101 [4]).

The Court shall first consider petitioner's request for access to information concerning the trusts and their assets. Petitioner asserts that he has made numerous, repeated requests for access to information regarding the trusts, but respondent has not been cooperative in providing him with that information. Respondent counters that she has provided petitioner with much of the information he has requested, and states that she has facilitated his access to additional sources of information. Respondent argues, however, that there should be some limits to petitioner's access, and seems to believe that she has authority to determine what those limitations may be. Her assertion is arbitrary and lacks legal support.

Petitioner and respondent are currently acting as co-trustees of these five lifetime trusts. As co-trustees, they have equal rights to information and to act on behalf of the trust. In fact, respondent concedes in her papers that, "[a]s a trustee of the Trusts, [petitioner's] entitlement to information is plenary." Furthermore, under EPTL 10-10.7, when joint powers are conferred upon two fiduciaries, those powers "may be exercised jointly by both such fiduciaries or by the survivor fiduciary, unless contrary to the express terms of the instrument creating the power" (EPTL 10-10.7). The five trusts at issue here provide that the co-trustees shall have the right to determine, by a written authorization and consent signed by both co-trustees, whether one of them singly or both shall have the power to sign checks on, and to make withdrawal from, any bank account. The parties agree that the language of the trusts requires them to act together. Accordingly, in the absence of a written authorization and consent signed by both co-trustees, neither respondent nor petitioner has authority to individually sign checks or make withdrawals from trust bank accounts in their roles as a co-trustee of the trust. Rather, the co-trustees must act jointly in completing these activities. While there may be factual issues with respect to which specific accounts petitioner has gained access to and for what duration of time, there is no issue of fact with respect to petitioner's

rights and duties as a co-trustee of these trusts. Respondent and petitioner are of equal standing with respect to these trusts and they must act together in the trusts' best interests.

Respondent should be mindful that, to the extent she continues to act independently, without her co-trustee, or refuses to take the steps necessary to facilitate petitioner's access to the trusts, including but not limited to the financial accounts and records, such behavior may be considered by the Court in an application to suspend or remove her as co-trustee (*see* SCPA 711 [11]; EPTL 7-2.6 [a] [2]). That being said, the Court recognizes that the many trusts and real estate entities at issue here constitute a vast and complex real estate enterprise, with many moving parts, accounts, employees, etc. Thus, even with respondent expending her best efforts, petitioner may still occasionally have access issues due to his relative newness in managing these assets and the levels of security associated with the financial accounts. The Court similarly cautions petitioner that, should his actions be found to be harassing and wasteful of trust assets, he too could be the subject of an application for suspension or removal of a fiduciary. Respondent's suggestion that petitioner's micromanagement of the various business entities may be disruptive and not beneficial to the trusts is somewhat compelling. The Court notes that all of the family members associated with these trusts are aligned – with the exception of petitioner, who separated himself from the family business some time ago. As a discretionary beneficiary currently lacking descendants, he presently stands to gain very little from his purported efforts to improve the business. Finally, if the parties cannot manage these trusts jointly, the Court may also entertain applications to appoint a tie-breaker trustee to resolve future disputes (*see e.g. Jessup v Smith*, 223 NY 203, 207-208 [1918]; *Matter of Duell*, 121 AD3d 493, 493 [1st Dept 2014]; *Matter of Modell*, 2018 WL

4745924, *3 [Sur Ct, New York County 2018]; *Matter of Jacobs*, 127 Misc 2d 1020, 1023 [Sur Ct, NY County 1985]; *Matter of Pelgram*, 146 Misc 750, 756 [Sur Ct, NY County 1933]).¹

The Court next considers petitioner's request that respondent be directed to provide him with equal management authority with respect to the trusts and the business entities in which they have ownership interest. Petitioner explains that the trust assets consist of wholly-owned entities, which in turn own a significant portfolio of residential, retail and commercial real estate valued at more than \$100 million and AMM Common Paymaster, LLC. As its name suggests, AMM is a limited liability company acting as the common paymaster (*see* 26 USC 3121 [s], 3306 [p]) for the trusts and the trust real estate entities and manages operations for all five of the trusts. The sole member of AMM is Trust III. AMM is responsible for payments regarding payroll, operating expenses, and payments to shared vendors on behalf of the trust entities, and the trust entities reimburse AMM on a monthly basis. Petitioner notes that respondent had previously acted with the suspended trustees as a director, officer or manager of the trust entities and has full access to information as a result. In support of his petition, petitioner asserts that he has spent significant time and resources to obtain information concerning the assets, liabilities, revenue, expenses and operational information concerning the trusts and trust entities from respondent. He states that respondent has refused to provide him with this information and with direct access to trust assets and trust entity personnel and third parties – which information has been available to her. As a result, petitioner states that he is being prevented from participating in the management of trust assets and fulfilling his fiduciary duties as co-trustee.

¹ With respect to Trust II, a 2011 amendment to the trust set up such a procedure, directing that “in the event that the co-trustees are unable to agree on a course of action the Grantors’ trusted advisor, Eugene Sneeringer shall cast the deciding vote.”

With respect to Trust III and AMM, the parties disagree as to whether this limited liability company is manager-managed or member-managed. While respondent agrees that petitioner is entitled to information as a co-trustee, she argues that his access to AMM is limited based on his status. Although recognizing that AMM’s sole member is Trust III, respondent argues that AMM is manager-managed, as opposed to member-managed, and that petitioner is not entitled to the information he seeks because he is not a manager. The Court disagrees. Under the Limited Liability Company Law, “[u]nless the articles of organization provides for management of the limited liability company by a manager or managers or a class or classes of managers, management of the limited liability company shall be vested in its members who shall manage the limited liability company in accordance with this chapter, subject to any provisions in the articles of organization or the operating agreement and section four hundred eighteen of this article granting or withholding the management powers or responsibilities of one or more members or classes of members” (Limited Liability Company Law § 401).

The AMM articles of organization are silent as to management of the company.² Accordingly, under the plain language of the statute, management of AMM is vested in its sole member, Trust III, “subject to any provisions in . . . the operating agreement and [Limited Liability Company Law § 418] granting or withholding the management powers or responsibilities of one or more members or classes of members” (Limited Liability Company Law § 401). Case law interprets this statute to permit the operating agreement to distinguish between members with respect to management authority, such as by designating one member as a managing member (*see*

² It must be noted that AMM was created while litigation involving these trusts was pending before this Court. Respondent, as organizer, filed the articles of organization for AMM on June 23, 2022. In June 2022, counsel for the former trustees had moved for a protective order to prevent the former trustees from being deposed by petitioner regarding the trust records in the context of accounting proceedings for each of the trusts.

e.g. State of New York v C and J Enters., LLC, 179 AD3d 1200, 1201 [3d Dept 2020] [limited liability company’s operating agreement named one of the two members as managing member]; *Nathanson v Nathanson*, 20 AD3d 403, 403 [2d Dept 2005] [provisions of operating agreement granting management powers to one member were legal]; *see also* 1 NY Prac, New York Limited Liab Companies and Partnerships § 5:9 [“in order to reserve the right to provide for management by managers, the Articles of Organization must explicitly provide for the possibility of management by managers to avoid the default provisions of the Act calling for management by the members”]). Here, AMM is a single member limited liability company, with Trust III being the sole member. Accordingly, there are not multiple members or classes of members from which to assign or restrict management authority. Although the AMM operating agreement does purport to withhold the management powers of its sole member in favor of managers, the Court finds that such language in the operating agreement is inconsistent with the Limited Liability Company Law in this respect (*see* Limited Liability Company Law § 202 [j], 417 [a]). AMM is member-managed by its sole member, Trust III, making petitioner and respondent, as co-trustees, the manager of the company, succeeding Richard C. Rosetti, who was previously acting as the trustee-manager until his suspension as trustee in September 2023. Accordingly, petitioner has, with his co-trustee, all of the rights of a member and a manager of AMM as are granted under the Limited Liability Company Law and the governing business documents of AMM.

As for petitioner’s request that the Court make a determination as to the management of the real estate entities held by the trusts, other than Trust III, including his request that the Court direct respondent to take action with respect to the appointment and removal of managers of the other business entities held by the trusts, the Court declines to do so. As the parties acknowledge, there are many businesses entities involved here, including limited liability companies and

corporations, each with their own governing organizational documents. The Court does not have access to all of the articles of organization and operating agreements for those entities; thus, the full picture is not available to the Court. The Court cannot make any direction with respect to the appointment or removal of managers or other matters that may be governed by operating agreements that are not before the Court. Moreover, even if that information was available to the Court, the Court is reluctant to interfere with the inner workings of these business organizations. The parties' papers indicate that the real estate entities are manager-managed, and that the trusts are majority members of most, but not all, of the other limited liability companies. To the extent there is disagreement regarding the level of access and involvement by the co-trustees in the other business entities, such a disagreement necessarily implicates the governing documents of those organizations and, potentially, other interested parties such as members, managers, shareholders and boards of directors. This Court is charged with directing petitioner and respondent in their roles as co-trustees under SCPA 2102, yet it seems that some of petitioner's requests are directed at respondent in her role as manager of the business entities and are based on the historical knowledge she has from that role. For example, petitioner requests that the Court direct respondent to provide him with a description of the duties, responsibilities, experience, authority, etc. of all trust employees including the ten office employees who are also employed by non-trust entities. As petitioner and respondent ascended to their roles simultaneously, this Court is not persuaded that respondent, as one co-trustee, should be directed to carry out tasks for the purpose of educating petitioner, the other co-trustee.

Finally, petitioner requests that the Court direct respondent to pay petitioner's co-trustee expenses including professional fees incurred to date from trust assets (specifically, \$42,736 in legal fees and \$246,704.83 in accountant fees), and also requests the Court to confirm that all

future expenses are to be paid in the regular course of business subject to the right of any interested parties to object to such payment in the future. Petitioner notes that respondent has been paying attorneys and accountants retained on her and the trusts' behalf. As respondent does not oppose petitioner's request to pay his current fees incurred to date, there is no dispute and such fees shall be paid. Respondent does, however, oppose paying petitioner's future fees without question. Petitioner likewise acknowledges that interested parties may have reason to object to the reasonableness of the co-trustees' expenses.


It is well-settled law that fiduciaries shall pay the reasonable expenses of administration, which include legal fees (*see* EPTL 11-1.1 [b] [22]). In addition, this Court has inherent authority to review and fix counsel fees (*see Matter of Wiggins*, 200 AD2d 813, 817-818 [3d Dept 1994]). When the Court determines the reasonable compensation of counsel, it does so after reviewing affidavits of legal services and contemporaneously-maintained billing statements, and considering a number of factors including the size of the estate and the difficulty of the legal issues involved (*see* 22 NYCRR 207.45; *Matter of Freeman*, 34 NY2d 1, 9 [1974], *citing Matter of Potts*, 213 App Div 59, 62 [4th Dept 1925], *affd* 241 NY 593 [1925]; *Matter of Von Hofe*, 145 AD2d 424, 425 [2d Dept 1988]). Petitioner and respondent are in agreement that they both must act jointly and that administration expenses must be reasonable. Accordingly, they shall work together to assess future professional fees and other administration expenses and make prompt payment of all reasonable expenses that benefit the trusts – and not those fees that are incurred for the benefit of petitioner or respondent individually (*see Matter of Rockefeller*, 44 AD3d 1170, 1173 [3d Dept 2007]; *Matter of Graham*, 238 AD2d 682, 687 [3d Dept 1997]; *Matter of Birnbaum*, 112 AD2d 778, 778 [4th Dept 1985]).

As the parties are well aware, litigation involving these trusts has been pending in this Court for over five years, with more than twenty proceedings having been commenced. In addition, the parties to these various proceedings have also appeared on matters pending in Supreme Court and Family Court. This Court, like petitioner, is encouraged by the assurances of respondent's counsel that he is approaching this litigation in a less adversarial manner and with hopes of finding a sensible path forward for the parties. While the parties are not presently being ordered to attend mediation, the value of mediation cannot be overstated, and the parties should not dismiss the option without some consideration if these disagreements continue. It is hereby

ORDERED that the petition is granted to the extent set forth above.

This constitutes the decision and order of the Court. You are hereby notified that this order has been entered this date in the office of the Clerk of Albany County Surrogate's Court. At the time of the filing of this decision and order, NYSCEF shall transmit by e-mail to the e-mail service addresses of record a notification that the decision and order has been filed and is accessible through NYSCEF. Such notice shall not constitute service of notice of filing or entry by any party (*see* 22 NYCRR 207.4a [h]).

Dated and Entered:
August 1, 2024
Albany, New York



Hon. Stacy L. Pettit, Surrogate

Papers Considered

- 1) Petition of Richard G. Rosetti for Relief Against a Fiduciary, verified April 22, 2024, with exhibits; Attorney Affirmation of Thomas J. Collura, dated April 23, 2024, with exhibits; Affirmation of Rachel Pirt in Support of Petition, dated April 23, 2024, with exhibit; Petitioner's Memorandum of Law in Support of Petition, dated April 23, 2024.
- 2) Answer of Respondent Jacqueline Rosetti Falvey, verified May 22, 2024; Attorney Affirmation of Dan Rottenstreich, dated May 22, 2024, with exhibits; Affirmation of Jacqueline Rosetti Falvey, dated May 22, 2024; Affirmation of Judith A. Flory, dated May

22, 2024; Affirmation of Kevin Berger, dated May 20, 2024; Respondent's Memorandum of Law in Opposition, dated May 22, 2024.

- 3) Petitioner's Reply Attorney Affirmation of Thomas J. Collura, dated May 28, 2024, with exhibits.
- 4) Affirmation of Matthew Falvey, dated May 22, 2024; Affirmation of Megan Falvey McVey, dated May 22, 2024; Affirmation of Alexandra Falvey Watson, dated May 22, 2024; Affirmation of Richard C. Rosetti, dated May 22, 2024.