

**Matter of Harvey**

2012 NY Slip Op 33015(U)

November 30, 2012

Sur Ct, Nassau County

Docket Number: 346658/B

Judge: III., Edward W. McCarty

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

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Petition of Hollis Harvey, formerly known as Hollis  
Mayerson, to Punish Fredric L. Mayerson for Contempt  
and to Remove Him as Trustee of the **DOROTHY P.  
MAYERSON** Revocable Living Trust.

File No. 346658/B  
Dec. No. 28171

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Petition of Hollis Harvey, formerly known as Hollis  
Mayerson, to Punish Fredric L. Mayerson for Contempt  
and to Remove Him as Trustee of the **SAUL J.  
MAYERSON** Revocable Living Trust.

File No. 2012-369718  
Dec. No. 28172

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This is an application brought by Hollis Harvey for contempt in a compulsory accounting proceeding involving the trusts of her parents Saul and Dorothy Mayerson.

On November 27, 1996, Saul and Dorothy Mayerson created identical revocable trusts. Each provided that upon the death of the grantor and the grantor's spouse, the residuary was to be divided between the grantor's then living issue, per stirpes. Saul Mayerson died in 2002 and Dorothy Mayerson died in 2006. The grantors had two children, Hollis Harvey (petitioner) and Frederic Mayerson (respondent). Frederic Mayerson's share was to be distributed to him if he had attained the age of thirty-five. Hollis Harvey's share, however, was to be held in a supplemental needs trust which conforms to the provisions of Section 7-1.12 of the Estates, Powers and Trusts.<sup>1</sup> The trustee of the supplemental needs trust is Frederick Mayerson. The trust provides that the trustee has the discretion to make distributions for food, clothing, shelter or health care "even if such distributions may result in an impairment or diminution of her entitlements or eligibility for government benefits or assistance, but only if the trustee determines

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<sup>1</sup>It is not known, as the respondent has not accounted, whether the respondent set up one supplemental needs trust with assets from both of his parents' revocable trusts or whether he set up two trusts. The court, however, will refer to the supplemental needs trust in the singular, to avoid confusion.

that (a) the grantor's daughter's needs will be better met if such distribution is made and (b) it is in the grantor's daughter's best interests to suffer the consequent effect, if any, on her eligibility for or receipt of government benefits..." It is uncontroverted that Hollis Harvey is gainfully employed in a professional capacity and has not and is not receiving any benefits or assistance from the government. In the event that Hollis Harvey does not have children, the remainder of her trust will go to the grantor's then living issue, per stirpes.

Hollis Harvey alleges that she has never received any distributions of either income or principal from any trust established for her benefit. In May of 2010, Ms. Harvey commenced a proceeding to compel her brother to account for his actions as trustee under both trusts. An order issued on November 10, 2010, and the respondent was ordered to account within ten days after personal service of a certified copy of the order. The order was served on November 27, 2010. Frederic Mayerson failed to file an accounting of his actions which resulted in the instant application to hold him in contempt.

By order to show cause dated March 20, 2012, Hollis Harvey seeks to hold Frederic Mayerson in contempt for failure to obey an order of the court, to have his letters revoked, to appoint a successor trustee, or, in the alternative, to have him suspended. The application is opposed by the respondent, who alleges that the order is defective in that it sets forth that the proceeding is to punish "Marion Solomon" and that it reads "At the Surrogate's Court, held in and for the County of Queens, at the Courthouse located at 262 Old Country Road, Mineola, New York." The respondent further alleges that he has been working on the accounts and in his answer dated April 23, 2012, Mr. Mayerson states that he will complete the accountings within sixty days (or June 23, 2012), a date that has come and gone with no accountings filed with the

court. The respondent further argues that Florida law governs as paragraph Thirteenth subsection B of both revocable trusts provides that they shall be administered and construed under the laws of Florida. Finally, he argues that the petitioner has not met her burden to show that his failure to account was wilful resistance or neglect without good cause.

It is undisputed that this court has jurisdiction over the matter as the trustee resides in New York State and the trust assets are allegedly located in New York State (SCPA 207 [1] [either location of the assets or where the trustee resides confers jurisdiction]). It is also clear that the contempt proceeding is procedural rather than substantive and the law of the forum applies to determine whether notice was proper (*see generally* 16 Am Jur Conflict of Laws §3; 19A NY Jur Conflict of Laws §4).

An application for contempt must contain the prescribed notice "Warning: Your failure to appear in court may result in your immediate arrest and imprisonment for contempt of court" (Judiciary Law §756). The notice must appear on the face of the order to show cause. If the application does not contain the exact language, it is jurisdictionally defective (*Murrin v Murrin*, 93 AD2d 858 [2d Dept 1983]). In the instant matter, the requisite language is clearly present on the face of the order to show cause. Although there may be several typographical errors in the remainder of the document, it is clear that Frederic Mayerson is the subject of a proceeding to hold him in contempt for failure to obey an order of this court to account. Any attempt by him to avoid his obligations is pure posturing.

The proceeding to revoke and/or suspend Mr. Mayerson's authority to act as trustee is a substantive right (*see generally* 16 Am Jur Conflict of Laws §3; 19A NY Jur Conflict of Laws §4). As such it "falls within the course charged by choice of law analysis" (*Tanges v*

*Heidelberg N. Am Inc.*, 93 NY2d 48, 53 [1999]). The court is therefore required to isolate the issue, identify the policies embraced in the laws and examine the contacts of each jurisdiction to determine who has a superior interest in having its policies or laws applied (*Dym v Gordon*, 16 NY 2d 120, 124 [1966]). "As between two states, the law of that one which has the predominant, if not the sole, interest in the protection and regulation of the rights of the person or persons involved should, of course, be invoked" (*Matter of Clark*, 21 NY2d 478, 485-486 [1968]).

SCPA 719 provides that the court may remove a lifetime trustee or suspend his powers without process where the fiduciary, having been ordered to account by the court, fails to do so (SCPA 719 [1]). Florida law, in turn, allows for the removal of a trustee on the court's own initiative under the following circumstances: the trustee has committed a serious breach of trust; the lack of cooperation among co-trustees substantially impairs the administration of the trust; due to the unfitness, unwillingness or persistent failure of the trustee to administer the trust, the court determines that removal of the trustee best serves the interests of the beneficiaries; or there has been a substantial change of circumstances or removal is requested by all of the beneficiaries and the court finds that the removal best serves the interests of the beneficiaries and is not inconsistent with a material provision of the trust (Fla Stat. § 736.0706 [1] and [2]).

As set forth previously, New York has the most contacts with the trusts as the trustee resides in New York, the beneficiary resides in New York, the trust assets are allegedly in New York, the estate of Dorothy Mayerson was administered by this court, and the revocable trusts set forth that any trust for the benefit of Hollis Harvey is to be a supplemental needs trust in accordance with New York laws. Moreover, the Surrogate has a "particular duty...to see that [a fiduciary's] conduct shall conform to the dictates of equity and good conscience. Were this not

so, it would be entirely possible for them to cast discredit upon the entire system of decedent distribution " (*Matter of Enright*, 149 Misc 353, 354 [Sur Ct, Kings County 1933]). In order to supervise the administration of estates, New York allows the Surrogate to remove a fiduciary without a hearing in certain circumstances (SCPA 719). Where the misconduct by a fiduciary is established by undisputed facts or concessions, the Surrogate may revoke letters issued without process (*Matter of Duke*, 87 NY2d 465, 472 [1996]). Failure of a fiduciary to account despite repeated requests and court order, may warrant the removal of a fiduciary (*Matter of Weintraub*, 68 AD3d 679 [1st Dept 2009]). New York has a vested interest in requiring fiduciaries to comply with orders of the court to ensure the protection of the trust assets and the innocent beneficiaries. In light of the contacts of the revocable trust to this state and the important underlying policy that New York has in overseeing the administration of estates and trusts, the court determines that the law of the State of New York applies.

The time for the trustee to comply with the court's order has long passed. An individual who refuses or wilfully neglects to obey a lawful order of the court may be punished for contempt (SCPA 606, 607) upon a showing that he wilfully or neglectfully disobeyed a clear and unequivocal court order, thereby prejudicing the rights of another party to the litigation (*McCain v. Dinkins*, 84 NY2d 216, 225-226 [1994]). No account has been filed and, therefore, the rights of the beneficiaries of the estate have been prejudiced (*Matter of Hyans*, NYLJ, Jan. 23, 2004, at 26, col 6 [Sur Ct, Westchester County]).

Accordingly, the trustee is found to be in contempt of this court. The court hereby suspends the authority of the trustee to act in such capacity under both the Saul Mayerson Revocable Trust and the Dorothy Mayerson Revocable Trust. The court notes that although the

petition seeks the appointment of a temporary successor trustee in the event of the suspension of the trustee, the petitioner fails to nominate a successor. Accordingly, the court declines to appoint a successor at this time. The trustee is given leave to purge himself of such contempt by filing separate accounts of his proceedings as trustee together with petitions for their judicial settlement and all of the papers required to obtain the issuance of citations in the accounting proceedings, within thirty days from the date of personal service upon him of a copy of this order. Service of this decision and order on the respondent may be made either by certified mail or by overnight mail delivery.

In the event the trustee fails to purge himself of contempt as provided herein, his authority will be permanently revoked. The petitioner may bring a proceeding to appoint a successor trustee on notice to the successor trustee nominated under the trust agreement who has allegedly resigned.

This decision constitutes the order of the court and no additional order need be submitted.

Dated: November 30, 2012

EDWARD W. McCARTY III  
Judge of the  
Surrogate's Court

