

**Matter of Jane D. Ritter Revocable Living Trust**

2015 NY Slip Op 31768(U)

September 10, 2015

Surrogate's Court, Nassau County

Docket Number: 2014-380517

Judge: Edward W. McCarty III

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

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Accounting by Sabino Biondi as the Trustee of the

File No. 2014-380517

JANE D. RITTER  
REVOCABLE LIVING TRUST,

Dec. No. 30991

Under Agreement Dated January 12, 2000, as Amended.  
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In connection with the voluntary intermediate account of Sabino Biondi, as trustee of the Jane D. Ritter Revocable Living Trust under agreement dated January 12, 2000, as amended, this court issued Dec. No. 30502 on March 31, 2015, in which the court reviewed the history of the proceeding and granted a protective order pursuant to CPLR 3103 and an order vacating a notice of deposition of the trustee, dated October 6, 2014, served by respondents Mary Kathryn Rader and John Rader, on the grounds that the deposition notice sought information beyond the scope and purpose of an examination pursuant to SCPA 2211 (2).

Now before the court is a decree of judicial settlement of the account of the trustee, dated June 1, 2015 and noticed for settlement by the trustee on June 11, 2015. Counsel for respondents Mary Kathryn Rader and John Rader filed an affidavit dated June 2, 2015 in opposition to the trustee's proposed decree. Counsel argues that the request is untimely, as he filed a notice of appeal dated April 23, 2015 of the decision and order of this court dated March 31, 2015. Counsel states that "[t]here is nothing to be accomplished by the premature entry of a Decree and, if there is a reversal, much to undo." Further, counsel argues that if the decree is signed, respondents will be deprived of their right to examine the trustee under SCPA 2211. Finally, counsel insists that remainder beneficiaries of the trusts who are necessary parties were not cited, so that any decree would be a nullity.

Counsel for Mary Kathryn Rader and John Rader also filed a supplemental affidavit dated

June 8, 2015, in which counsel argues that submission of the proposed decree was stayed by CPLR 5519, as the proposed decree represents an enforcement of this court's Dec. No. 30502.

Counsel for the trustee responded with a reply affirmation dated June 10, 2015 in support of the proposed decree on accounting. He begins by arguing that the affidavit filed by counsel for the respondents fails to comply with Uniform Rules for the Surrogate's Court Section 207.37 (2), which requires the filing of a proposed counter-decree. However, in the event the court entertains the affidavit filed by respondents in opposition to the decree, counsel for the trustee offers the following substantive arguments in response to the affidavit and in support of the decree:

1. Counsel for the respondents has taken no steps to stay the proceeding pending before this court or to stay the prior decision issued by this court.
2. Counsel for the respondents has not filed objections to the account or moved for permission to file late objections.
3. Counsel for the respondents has not given notice for an examination of the accounting party consistent with Dec. No. 30502 or for any other discovery.
4. Counsel for the respondents has rejected the trustee's suggestion, made at a court conference on May 19, 2015, that the parties stipulate to the examination of the trustee pending any appeal that counsel for the respondents may perfect. Counsel for the trustee notes also that although counsel for the respondents has appeared on behalf of both respondents, Mary Kathryn Rader and John Rader, the appeal was filed only on behalf of Mary Kathryn Rader.

5. Jurisdiction over all necessary parties has been obtained, no objections were filed, and the time for filing objections has passed. Although counsel for the respondents asserts that remainder beneficiaries were not served, counsel for the trustee responds that he was instructed by the court not to serve contingent remainder beneficiaries. In any event, if there was a failure to serve necessary parties, it will not affect respondents, who were properly served and will be bound by any decree entered in the court.

In a second reply affidavit, dated July 27, 2015, counsel for the trustee maintains that the accounting proceeding is not stayed under CPLR 5519 as a result of the appeal of this court's interlocutory order on an issue of discovery. Counsel for the trustee disagrees with the assertion made by respondents' counsel that the proposed decree represents an enforcement of the March 31, 2015 order, because the order simply vacated respondents' notice to take the deposition of the trustee, on the basis that the respondents sought to question the trustee concerning matters outside the scope of SCPA 2211.

In his affirmation, counsel for the trustee argues that CPLR 5519, relied upon by opposing counsel, is only applicable in seven specific types of proceedings, all of which involve the state or its political subdivisions, or which concern the court's direction to a party to pay money or deliver real or personal property. None of these characteristics are present in the current proceeding.

Moreover, the proposed decree settling the trustee's account is not a proceeding to enforce this court's order dated March 31, 2015, which vacated a notice of deposition. While Mary Kathryn Rader and John Rader have filed and perfected an appeal from this court's order, they did not move for a stay of the order.

## ANALYSIS AND CONCLUSION

Uniform Rules for the Surrogate's Court Section 207.37 provides, in relevant part:

“§ 207.37 Submission of orders, judgments and decrees for signature

(a) Proposed orders or judgments, with proof of service on all parties where the order is directed to be settled or submitted on notice, must be submitted for signature within 60 days after the signing and filing of the decision directing that the order be settled or submitted. . .

(c) (2) Proposed counter-orders or judgments shall be made returnable on the same date and at the same place, and shall be served on all parties by personal service, not less than two days, or by mail, not less than seven days, before the date of settlement.”

CPLR 5519 provides, in relevant part:

“(a) Stay Without Court Order.

Service upon the adverse party of a notice of appeal or an affidavit of intention to move for permission to appeal stays all proceedings to enforce the judgment or order appealed from pending the appeal or determination on the motion for permission to appeal where:

1. the appellant or moving party is the state or any political subdivision of the state or any officer or agency of the state or of any political subdivision of the state; provided that where a court, after considering an issue specified in question four of section seventy-eight hundred three of this chapter, issues a judgment or order directing reinstatement of a license held by a corporation with no more than five stockholders and which employs no more than ten employees, a partnership with no more than five partners and which employs no more than ten employees, a proprietorship or a natural person, the stay provided for by this paragraph shall be for a period of fifteen days; or

2. the judgment or order directs the payment of a sum of money, and an undertaking in that sum is given that if the judgment or order appealed from, or any part of it, is affirmed, or the appeal is dismissed, the appellant or moving party shall pay the amount directed to be paid by the judgment or order, or the part of it as to which the judgment or order is affirmed; or

3. the judgment or order directs the payment of a sum of money, to be paid in fixed installments, and an undertaking in a sum fixed by the court of original instance is given that the appellant or moving party shall pay each installment which becomes due pending the appeal and that if the judgment or order appealed from, or any part of it, is affirmed, or the appeal is dismissed, the appellant or moving party shall pay any installments or part of installments then due or the part of them as to which the judgment or order is affirmed; or

4. the judgment or order directs the assignment or delivery of personal property, and the property is placed in the custody of an officer designated by the court of original

instance to abide the direction of the court to which the appeal is taken, or an undertaking in a sum fixed by the court of original instance is given that the appellant or moving party will obey the direction of the court to which the appeal is taken; or

5. the judgment or order directs the execution of any instrument, and the instrument is executed and deposited in the office where the original judgment or order is entered to abide the direction of the court to which the appeal is taken; or

6. the appellant or moving party is in possession or control of real property which the judgment or order directs be conveyed or delivered, and an undertaking in a sum fixed by the court or original instance is given that the appellant or moving party will not commit or suffer to be committed any waste and that if the judgment or order appealed from, or any part of it, is affirmed, or the appeal is dismissed, the appellant or moving party shall pay the value of the use and occupancy of such property, or the part of it as to which the judgment or order is affirmed, from the taking of the appeal until the delivery of possession of the property; if the judgment or order directs the sale of mortgaged property and the payment of any deficiency, the undertaking shall also provide that the appellant or moving party shall pay any such deficiency; or

7. the judgment or order directs the performance of two or more of the acts specified in subparagraphs two through six and the appellant or moving party complies with each applicable subparagraph.”

Although respondents did not file a counter-order, the court has considered the affidavit and the supplemental affidavit submitted on behalf of respondents in opposition to the proposed decree. The court finds the arguments in opposition to the entry of a decree to be without merit.

The timeliness of the proposed decree is not affected by whether respondents, who were duly served, disagree with the court’s direction that contingent remainder beneficiaries need not be served in connection with this proceeding. Respondents also rely upon CPLR 5519, which is designed to prevent a party who won in the lower court from enforcing a money judgment or order while an appeal is pending (Richard C. Reilly, Practice Commentaries, McKinney’s Cons Law of NY, Book 7B, CPLR 5519, at 450). CPLR 5519 (a) and (b) govern automatic stays, without the need for a court order, and paragraph (a) (1) is clear that these subsections apply only where the appellant or moving

party is a governmental entity (*see Grant v Metropolitan Transp. Authority*, 96 Misc 2d 683, 684 [Sup Ct, New York County 1978]). Moreover, the proposed decree does not represent an enforcement of this court's previous decision and order, which was limited to granting a protective order pursuant to CPLR 3103 and an order vacating the notice of deposition.

The proceeding for the judicial settlement of the trustee's account has not been stayed, no valid notice for discovery has been served, and no objections to the account have been filed. The proposed decree on accounting shall be signed.

This is the decision and order of the court.

Dated: September 10, 2015

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