

Matter of Modell

2016 NY Slip Op 30380(U)

March 8, 2016

Surrogate's Court, New York County

Docket Number: 2001-1730

Judge: Nora S. Anderson

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This opinion is uncorrected and not selected for official publication.

SURROGATE'S COURT : NEW YORK COUNTY

New York County Surrogate's Court

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In the Matter of the Petition of
Abby Modell, as Co-Trustee and Income
Beneficiary of the Testamentary Trusts
Established by

Date: MARCH 8, 2016

MICHAEL MODELL,

File No. 2001-1730

Deceased,

for a Decree Revoking Letters of
Trusteeship Issued to Mitchell Modell
and Joel Goldberg and Other Relief
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A N D E R S O N, S .

This is a proceeding brought by Abby Modell to remove Mitchell Modell as her co-trustee of the three trusts established under the will of her husband, Michael Modell. At the call of the calendar, the court denied petitioner's motion (brought on by order to show cause) to suspend Mitchell Modell pursuant to SCPA §§ 711 and 719. This decision discusses the basis for such denial.

Michael Modell died on April 28, 2001, at the age of 48, survived by petitioner and their three children. Under Articles SECOND, THIRD and SIXTH of his will, decedent established trusts for the benefit of petitioner and their children. On August 22, 2001, letters testamentary issued to petitioner, and letters of trusteeship issued to her along with Joel Goldberg, who died on April 16, 2015,¹ and decedent's brother, Mitchell

¹ Petitioner also sought the removal of Joel Goldberg as co-trustee, but when he died the relief sought as to him became moot.

Modell.

At his death, decedent owned a one-half interest in retailer Modell's Sporting Goods ("Modell's"). The ownership interest became the primary asset of the trust established under Article SIXTH of the will (the "Marital Trust"). Mitchell Modell owns the other half of Modell's and manages its operations as the company's Chief Executive Officer.

The administration of these trusts proceeded for a number of years without court involvement. However, petitioner sought to remove her co-trustees in early 2010 and, in a separate proceeding, sought to compel them to account. The court directed the trustees, including petitioner, to account for all three trusts. The court also directed that the removal proceeding be held in abeyance and then consolidated with the accountings upon completion of jurisdiction (*Matter of Modell*, NYLJ, Nov. 4, 2010, at 26, col 5 [Sur Ct, NY County 2010]).

Mitchell Modell and Joel Goldberg filed their joint accountings first. Petitioner then filed a "zero accounting" for trust, *i.e.*, an account indicating that she was not, as a practical matter, actively involved in the trusts' administration and listing on each schedule a value of zero. Petitioner's three children, as remainder beneficiaries of the trusts, filed waivers and consents to their mother's accounts, but did not do so as to those of her co-trustees. When jurisdiction was complete in the accounting proceedings, SCPA §

2211 examinations were requested and, after the resolution of six discovery-related motions (*Matter of Modell*, NYLJ 1202622777524 [Sur Ct, NY County 2013]), pre-objection discovery began. Thereafter, Mitchell Modell and Joel Goldberg moved to dismiss the instant removal petition on the grounds that it failed to state a claim (CPLR 3211[a][7]) and, in any event, was barred by the statute of limitations (CPLR 3211[a][5]). That motion was denied (*Matter of Modell*, NYLJ, July 22, 2014, at 22, col 1 [Sur Ct, NY County 2014]).

Petitioner made the instant motion to suspend Mitchell Modell after he was deposed in connection with his accountings, but before he was deposed in the removal proceeding. According to movant, Mitchell Modell's deposition, as well as documentary evidence obtained through discovery, demonstrate that he has "disregarded his fiduciary obligations" to make distributions from Modell's to the Marital Trust that are equal to his distributions from Modell's to himself (as the owner of the other 50% of the company). Movant further asserts that Mitchell Modell has admitted to charging substantial personal expenses to Modell's, which establishes that he has a "want of understanding" of his fiduciary obligations. As a result, he is unfit to serve as trustee of not just the Marital Trust, but also, of the trusts established under Articles SECOND and THIRD.

Mitchell Modell, for his part, asserts that the

distributions of which movant complains were proper under an agreement he made with decedent as an accommodation after it became clear that decedent would succumb to cancer. Such agreement provided that Modell's would pay Mitchell Modell \$3 in salary, bonus and benefits for every \$1 paid to petitioner as the lifetime beneficiary of the trusts (the "75/25 Agreement"). According to Mitchell Modell, he agreed in exchange that Modell's shareholder agreements would be amended to eliminate a requirement that decedent's shares would be redeemed by the company upon his death with the redemption funded with the proceeds of a \$35 million insurance policy on decedent's life. As amended, the shareholder agreements allowed movant and her children to receive the proceeds of the life insurance policy while the shares remained with decedent's family in trust. Mitchell Modell claims that petitioner abided by the 75/25 Agreement without objection for more than six years after decedent's death until their relationship deteriorated and litigation ensued.

Under SCPA § 719, the court has the power to suspend the letters of a testamentary trustee even without process based upon certain enumerated types of conduct or "[w]here any of the facts provided in [SCPA §] 711 are brought to the attention of the court" (SCPA § 719[10]). However, it is also well established that the removal of a fiduciary pursuant to SCPA §§ 711 and 719 is tantamount to "a judicial nullification of the

testator's choice and may only be decreed when the grounds set forth in the relevant statutes have been clearly established" (*Matter of Duke*, 87 NY2d 465, 473 [1996]). Further, as the Court of Appeals stated in *Matter of Duke*, the summary removal of a fiduciary "will constitute an abuse of discretion where the facts are disputed, where conflicting inferences may be drawn therefrom [citation omitted], or where there are claimed mitigating facts that, if established, would render removal an inappropriate remedy" (*id.* at 473).

Within this framework, movant has failed to establish a basis for the immediate suspension of Mitchell Modell pending determination of the removal proceeding. Among other things, movant has not demonstrated that he poses an immediate threat to the well-being of the Marital Trust's major asset, its 50% interest in Modell's. Mitchell Modell, who owns the remaining stake in Modell's, has every incentive to maximize the value of the company. Indeed, movant does not dispute that the value of the Marital Trust's interest in Modell's has increased substantially since the Trust's creation. Nor are all of movant's material allegations of misconduct undisputed. Indeed, the voluminous record on this motion reflects the large extent to which the facts and circumstances of the trusts' administration are disputed.

Based upon the foregoing, the allegations of misconduct that form the basis for petitioner's removal proceeding - and

of the instant motion for suspension - should be considered along with the issues that will inevitably be raised in the pending accountings as the court initially contemplated (see *Matter of Modell*, NYLJ, Nov. 4, 2010, at 26, col 5, *supra*).

This decision constitutes the order of the court.

Dated: March 8, 2016



SURROGATE