

**Matter of Aoki**

2016 NY Slip Op 32281(U)

November 10, 2016

Surrogate's Court, New York County

Docket Number: 2008-2604/A

Judge: Rita M. Mella

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This opinion is uncorrected and not selected for official publication.

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

New York County Surrogate's Court

Date: NOVEMBER 10, 2016

-----X  
Proceeding for the Settlement of the Account of  
Proceedings of KANA AOKI NOOTENBOOM,  
KEVIN AOKI, KYLE AOKI and KENNETH  
PODZIBA, as Trustees of the Benihana Protective  
Trust, created under Trust Agreement dated June 8,  
1998 by and between

DECISION and ORDER

ROCKY H. AOKI,  
as Grantor,

File No.: 2008-2604/A

and Kevin Aoki and Darwin C. Dornbush, as trustees,  
for the benefit of Rocky H. Aoki and others.

-----X  
Application of Keiko Ono Aoki, as Beneficiary and Executor  
For a Determination that Devon Aoki and Steven Hiruki  
Aoki Triggered the *In Terrorem* Clause of the Will of

ROCKY H. AOKI,  
Deceased.

File No.: 2008-2604/D

-----X  
Proceeding to Compel Keiko Aoki to File an  
Interim Account as Trustee of the Trust  
Under the Will of

ROCKY H. AOKI,  
Deceased.

File No.: 2008-2604/E

-----X  
M E L L A, S.:

The following papers were considered in determining these motions to withdraw as  
counsel, motion for disqualification and motions for admission pro hac vice:

Papers

Numbered

Notice of Motion To Withdraw as Counsel in /A, dated May 25, 2016, by  
Wilmer Cutler Pickering Hale and Dorr LLP, brought by Order to Show  
Cause, dated August 30, 2016, with Affirmation of No Prior Application,  
Undated, By Alan E. Schoenfeld, Esq., and Attaching the Authorizations and  
Consents, Acknowledged on May 27, 2016, by Keiko Ono Aoki

1, 2, 3

<u>Papers Considered</u> - Continued	<u>Numbered</u>
Notice of Motion to Withdraw as Counsel in /D and /E proceedings, dated May 27, 2016, by Wilmer Cutler Pickering Hale and Dorr LLP, brought by Order to Show Cause, dated August 30, 2016, with Affirmation of No Prior Application, Undated, by Alan E. Schoenfeld, Esq., and Attaching the Authorizations and Consents, Acknowledged on May 27, 2016 by Keiko Ono Aoki	4, 5, 6
Affirmation in Support of Motion of Farrell Fritz, P.C., to Withdraw in /A Proceeding, dated June 1, 2016, of John J. Barnosky, Esq., brought by Order to Show Cause, dated July 28, 2016	7, 8
Affirmation in Support of Motion of Farrell Fritz, P.C., to Withdraw in /D, and /E proceedings, dated June 1, 2016, of John J. Barnosky, Esq., brought by Order to Show Cause, dated July 28, 2016	9, 10
Response Opposing Motion by Farrell Fritz to Withdraw in /A, /D & /E, filed September 13, 2016, attaching Memorandum of Law, Entitled "Opposition To Motion to Withdraw," dated September 13, 2016, attaching as Exhibit A, the Affidavit, dated September 13, 2016, of Keiko Ono Aoki	11, 12, 13
Affirmation in Reply in /A, /D & /E proceedings, dated September 26, 2016, of David C. Rose, Esq., Regarding the Position of Devon Aoki and Steven Aoki, Attaching Exhibits A and B	14
Reply Affirmation in /A, /D & /E proceedings in further Support, dated September 22, 2016, of John J. Barnosky, Esq.	15
Notice of Motion in /A, /D & /E proceedings, dated September 21, 2016, of Menz, Bonner, Komar And Koenigberg LLP, to admit Joseph L. Manson III, Pro hac vice, together with Affirmation, dated September 21, 2016, of Patrick D. Bonner, Jr, Esq., in Support of Motion, attaching as Exhibit 1 the Affidavit, dated September 16, 2016, of Joseph L. Manson III, Esq., in Support, attaching Exhibit A	16, 17, 18
Notice of Cross-Motion, dated September 13, 2016, in /A proceeding of Petitioners to Disqualify Farrell Fritz, P.C., as Counsel to Keiko Ono Aoki	19
Petitioners' Memorandum of Law, dated September 13, 2016, in Support Motions of Farrell Fritz, P.C. to Withdraw and in Support of Petitioners' Cross-Motion to Disqualify	20
Affirmation in /A proceeding, dated September 13, 2016, of Robert J. Burns, Esq., in Support of Cross-Motion to Disqualify, attaching Exhibit 1	21

Memorandum of Law in /A, /D & /E proceedings, dated September 27, 2016, of Keiko Ono Aoki, in Opposition to Cross-Motion and Farrell Fritz P.C. motions, attaching Exhibit A	22
In Proceedings /A, /D, and /E: Two Supplemental Affirmations, dated August 5, 2016 and August 23, 2016, By Alan E. Schoenfeld, Esq., in further Support of Motion to Withdraw, together with Supplemental Affirmation, Undated but filed August 24, 2016, of Peter J. MacDonald, Esq., in further Support	23, 24, 25
Affirmation, dated September 26, 2016, of Joseph L. Manson III, Esq., in /A proceeding, in Opposition to Cross-Motion to Disqualify	26
Petitioners' Reply Memorandum of Law, dated October 3, 2016, in /A proceeding in further Support of Cross-Motion to Disqualify	27

At the call of the calendar on October 4, 2016, the court granted the motion to admit Virginia attorney, Joseph L. Manson, Esq., pro hac vice, to represent Keiko Ono Aoki in the three proceedings at issue: the accounting for the Benihana Protective Trust, objected to by Ms. Aoki (Subfile 2008-2604/A); the proceeding to declare that the no-contest clause of decedent's will has been triggered (Subfile 2008-2604/D); and the proceeding to compel Ms. Aoki's account as trustee under the will of decedent Rocky Aoki (Subfile 2008-2604/E).

In each of these three proceedings, the law firms of Farrell Fritz P.C., and Wilmer Cutler Pickering Hale and Dorr LLP, also moved by order to show cause to withdraw as co-counsel to Ms. Aoki. The motions by the Wilmer firm for all three proceedings were granted by the court on the consent of Ms. Aoki.

The court also granted, over the opposition of Ms. Aoki, Farrell Fritz's motions to withdraw as her co-counsel in these proceedings. The partner-in-charge at the firm of Holland and Knight representing the trustees of the Benihana Protective Trust, who are Ms. Aoki's adversaries in the contested accounting for that trust, is now a partner at Farrell Fritz, the firm

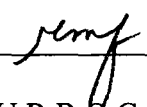
that represented Ms. Aoki for several years in these matters. Given the access this partner had to client confidences in his prior position as lead counsel for the trustees, and on the authority of *Kassis v Teacher's Ins. & Annuity Assn.* (93 NY2d 611 [1999]), the court concluded that Farrell Fritz's motions to withdraw must be granted. This was not a case where the presumption of disqualification is rebutted and the attorney's involvement in the prior firm is so attenuated that an "ethical wall" in the new firm that is adverse to the former client could remove the risk of disclosure of prior client confidences and avoid the appearance of impropriety inherent in this situation (*cf. Starwood Hotels and Resorts Worldwide v Aoki Corp.*, 2 AD3d 135 [1st Dept 2003]). That portion of Ms. Aoki's opposition which sought a sanction against the Farrell Fritz firm of a refund to her of all legal fees paid was denied without prejudice to seeking any appropriate relief in a later proceeding, including one pursuant to SCPA 2110.

In light of this resolution, the cross-motion by the trustees accounting for the Benihana Protective Trust to disqualify the Farrell Fritz firm was denied as moot.

No stay was requested, but counsel's withdrawal factored into the court's determination of the length of time within which Ms. Aoki was required to account as decedent's testamentary trustee, an issue that was resolved in a separate decision and order by the court in that proceeding (Subfile 2008-2604/E).

This decision, together with the transcript of the October 4, 2016 proceedings, constitutes the order of the court.

Dated: November 10, 2016

  
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SURROGATE