

**Matter of Barnette**

2022 NY Slip Op 33831(U)

August 11, 2022

Surrogate's Court, Kings County

Docket Number: File No. 2014-2487/E

Judge: Carol Robinson Edmead

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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 KINGS

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In the Matter of the Petition of Samuel Wysinger  
And Abel Wysinger, To Compel To  
Distribute a Legacy from the Estate of

**DECISION and ORDER**

File No: 2014-2487/E

**JAMES BARNETT a/k/a JAMES BARNETTE,**

Deceased.

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**E D M E A D, A.S.**

Before the Court is the petition of Samuel Wysinger (Samuel) to compel a distribution in the Estate of James Barnett a/k/a James Barnette (the decedent), and Samuel’s motion to disqualify Brian M. DeLaurentis, Esq., who appeared as counsel to Isis Ausar, the administrator of the decedent’s estate (the Administrator) in this proceeding bearing File No.: 2014-2487/E.<sup>1</sup>

**Procedural History and Background**

The decedent died on December 21, 2006, survived by two distributees, his grandsons, Samuel and Abel Wysinger (Abel). However, no Surrogate’s Court proceedings were filed until July 1, 2014, when the Administrator filed a petition for letters of administration as Samuel’s designee. In an Affidavit of Delay, Samuel explained the eight-year delay in the filing of an administration petition by stating, “I did not know that I needed to become the Administrator of my grandfather’s estate.” Samuel designated the Administrator, his romantic partner at the time,

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<sup>1</sup> This and related proceedings pertaining to the estate of James Barnette have been disposed as follows:

File No. 2014-2487 (Decree dated April 20, 2015 granting letters of administration)

File No. 2014-2487/A (Turnover proceeding settled per stipulation of settlement, see orders dated November 12, 2019; February 13, 2020; and March 16, 2020).

File No. 2014-2487/B (Purported Last Will and Testament filed, no probate proceeding filed and probate denied per court’s order dated February 13, 2020).

File Nos. 2014-2487/C/D (Proceeding withdrawn per stipulation dated June 20, 2022).

File No. 2014-2487/E (Proceeding disposed of pursuant to the court’s decision and order of today).

as he was ineligible for letters of administration due to a felony conviction. Samuel's sibling Abel consented to the Administrator's appointment. In the administration proceeding, Samuel informed the Court that he had known the Administrator for over twenty-five years and trusted her to serve as the estate's fiduciary. Accordingly, on April 20, 2015, the Court issued letters of administration to the Administrator (File No. 2014-2487).

On October 3, 2016, the Administrator, proceeding *pro se*, filed a verified petition seeking the turnover of the real property known as 36 MacDonough Street, Brooklyn, New York (real property) (File No. 2014-2487/A, "the turnover proceeding"). The Administrator's petition alleged that Herman Walker Jr. (Walker), decedent's purported caregiver, unduly influenced the decedent to transfer the decedent's real property to Walker. The Administrator also alleged that the decedent lacked the mental capacity to understand the nature and effect of such a transfer. Thereafter, on or about March 28, 2017, the Administrator retained D.L. Bentley, Esq. to represent her in the turnover proceeding.

Walker was served with a citation in the turnover proceeding, but failed to appear and defaulted. On December 13, 2017, the court held an inquest in the turnover proceeding (File No. 2014-2487/A). Pursuant to a decree dated November 20, 2018, the court declared the deed purporting to transfer ownership of the real property to Walker null and void (the Turnover Decree). After the issuance of the Turnover Decree, on December 5, 2018, Walker filed with the court a written instrument purporting to be the last will and testament of the decedent ("the purported will" filed under File No. 2014-2487/B). According to the purported will, the decedent specifically devised the real property to Walker.

Thereafter, on December 21, 2018, Walker, appearing by counsel Yevgeny Levin, Esq., moved to vacate the Turnover Decree, alleging improper service and asserting that the transfer of the real property to him was valid. Walker further alleged that his grandmother and the decedent

were married, and that decedent treated him like a grandson. Walker also asserted that he cared for the decedent from the time he became ill until his death and when the decedent died, he paid for the decedent's funeral. Walker alleged that it was decedent's intent to leave the real property to him.

On March 26, 2019, the court issued an order (the March 2019 Order under File No. 2014-2487/A) directing Walker to file a probate petition within 60 days and to obtain jurisdiction over all interested parties, while the motion to vacate the Turnover Decree remained pending. The court further directed that in the event Walker failed to comply with the court order to commence a probate proceeding, the purported will would be denied probate and the court would issue an order of possession directing the Sheriff to remove Walker from the real property.

On April 26, 2019, the Administrator, Samuel, and Walker executed a stipulation of settlement (First Stipulation) whereby they agreed that the Administrator would sell the real property, and which provided, in part:

5. The Net proceeds on the closing of the 36 MacDonough Street Property shall be distributed as follows after payment of real estate, transfer taxes, water and sewage charges, reasonable legal fees of all parties, Estate Administration fees, Estate income taxes and other conventional closing costs (Gross costs) to the following:

40% to Walker;  
30% to Petitioner (Samuel Wysinger); and  
30% to Abel Wysinger.

However, Abel did not sign the First Stipulation.

On May 10, 2019, the Administrator, through counsel Mr. Bentley, filed a motion under File No. 2014-2487/A seeking to (1) vacate the March 2019 Order alleging that the matter was settled pursuant to the First Stipulation; (2) permitting the Administrator to sell the real property; (3) the issuance of a warrant of eviction for persons living in the real property; and (4) permitting

the Administrator to sell the real property to pay estate expenses. The motion was returnable on the court's calendar on May 23, 2019, at which time the motion was marked withdrawn.

Thereafter, on June 19, 2019, contrary to the motion returnable on May 10, 2019, Mr. Bentley, on behalf of the Administrator, filed another motion seeking, *inter alia*, the enforcement of the March 2019 Order directing Walker to file a probate petition within 60 days, as well as permission to eject Walker from the real property. Walker opposed the motion alleging bad faith on the part of the Administrator and asserting that he relied on the First Stipulation as a settlement of the dispute; and hence, he did not file a probate petition as directed in the March 2019 Order.

In a reply attorney affirmation dated July 15, 2019, Mr. Bentley alleged that Walker inaccurately portrayed certain events that occurred during the court appearance on May 23, 2019. Mr. Bentley further alleged that the court raised issues with the First Stipulation, in particular an indemnity clause in paragraph 8 therein, and instructed the Administrator to draft another stipulation removing the indemnity clause and fixing other issues. As a result, Mr. Bentley prepared an Amended Stipulation of Settlement, which Walker declined to execute. Mr. Bentley further asserted that the Administrator did not intend to renege on the First Stipulation but was "simply amending the Stipulation of Settlement as requested to by the Surrogate's Court." The Administrator submitted her own affidavit echoing the same version of events.

In the interim, an issue with respect to Abel's competency arose. On July 26, 2019, Abel executed an affidavit stating that he is competent and that he wished for the proceeds of the sale of the real property to be distributed in three equal shares to himself, Samuel and Walker. However, on the same day, Abel executed a New York Statutory Short Form Power of Attorney appointing Samuel as his attorney-in-fact. Further, it appeared that Abel was residing in an assisted living facility at the time. As a result, by order dated July 31, 2019, the court appointed a

guardian *ad litem* (GAL) for Abel to assess whether he understood the nature of the proceedings before the court and was able to independently participate.

On August 9, 2019, the Administrator, Samuel, Walker and the GAL appeared for a conference with former Supervising Court Attorney Thomas Basile. At that conference, Mr. Bentley, on behalf of the Administrator and Samuel, and Mr. Levin, on behalf of Walker, executed a stipulation of settlement (the Second Stipulation). The Second Stipulation provides, verbatim, as follows:

It is hereby stipulated and agreed between the parties before the court is a miscellaneous proceeding under 2014-2487<sup>2</sup> to recover real property to the Estate brought by the Administrator of the Estate, Isis Ausar. On file with the court is a purported will dated February 4, 2004 which purportedly bequeaths the real property which is subject of the aforesaid discovery proceeding to Herman Walker Jr. It is further agreed that the purported Will will not be admitted to probate and that the real property known as 36 MacDonough Street will be sold by the Administrator Isis Ausar for a price of no less than \$1.4 million. Any contract entered by the Administrator for the sale of the real property will be subject to the court approving the stipulation of settlement and the guardian ad litem's further report. In the event the Guardian ad litem and the Court approve the sale with the terms of the Stipulation, Walker shall vacate the real property within 30 days of the court's approval. In the event Herman Walker fails to vacate the property within 30 days, property known as 36 MacDonough Street, then the Administrator is entitled to obtain a final order of possession directing the Sheriff of the City of New York to remove Herman Walker Jr of possession of 36 MacDonough Street, Brooklyn, NY all floors and all rooms as well as any persons holding thereunder. The net proceeds thereafter upon the closing shall be held in the Escrow's account of the fiduciary's counsel pending a further order of this court [sic].

It is further agreed that the net proceeds should be distributed thirty-three and thirty percent (33.33%) to Herman Walker, Jr., 2) thirty-three and thirty three percent (33.33%) to Samuel Wysinger and 3. Thirty-three and thirty three percent (33.33%) to Abel Wysinger should the Guardian Ad Litem report that Abel has a need therefore for a Supplemental Needs Trusts shall receive funds due Abel Wysinger. In no event should the net proceeds by distributed without further order of this court. Counsel assert that they have the ability to sign this document on behalf of their clients [sic].

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<sup>2</sup> The parties erroneously omitted to include the sub-file letter A after the File Number.

Thereafter, the GAL filed a report dated September 5, 2019, following an investigation of Abel's capacity and assessment of whether the Second Stipulation was in Abel's best interests. The GAL reported that Abel had been residing in an assisted living facility for seven years and prior to that, at a psychiatric hospital for approximately ten years, and prior to that, with his mother. The GAL wrote:

5. It appears from my meeting with ABEL WYSINGER that he has some basic understanding of this proceeding and the amount of money he may receive based on the proposed settlement. However, I do not believe that ABEL WYSINGER has the capacity to act unassisted in the proceeding. Mr. WYSINGER lacks that insight and understanding of the implications of the receipt of substantial funds on his continued eligibility for Medicaid and other programs he is benefiting from. Additionally, there could be potential money management issues and ABEL WYSINGER would be susceptible to people taking advantage of him and possibly stealing his money.

As for the Second Stipulation, the GAL opined:

13. Due to the uncertainty of litigation, the fact that the Last Will and Testament of JAMES BARNETT dated February 12, 2004 devised the real estate to HERMAN WALKER, Jr. only (which would give my ward no part of the house and only a One hundred (\$100) Dollar Inheritance), the time and fees. etc. involved in further litigation, the potential decline of the real estate market if these proceedings continue and the house is not sold, the parties have elected to resolve this matter as set forth above.

14. As the Guardian Ad Litem for ABEL WYSINGER, I approve of this settlement and I think it is in ABEL WYSINGER'S best interests. My recommendation is based on the above referenced factors enumerated in Paragraph 14 as well as the fact that I met with ABEL WYSINGER and he is in agreement with the settlement as well. Further, and as will be set forth in the section of this report, ABEL WYSINGER is on Medicaid and resides in a facility where all of his needs are met and he is supplemented by approximately \$206 per month which he manages to be satisfied with so whether he receives one-third (1/3) of the net proceeds via this settlement or one-half (1/2) of the net proceeds via intestacy (assuming the estate prevails in litigation), the impact of his life will be similar.

The GAL also recommended a consultation with an elder care attorney to assist with a supplemental needs trust and Medicaid planning for Abel. At the time, the Administrator had relayed to the GAL that she had consulted with a law firm, Littman Krooks, about a supplemental needs trust for Abel. The GAL reserved further recommendation pending the

firm's advice on the issue. Importantly, the GAL concluded that Abel had insufficient capacity to proceed in the litigation on his own and recommended a GAL be appointed for the duration of the litigation.

Given the GAL's recommendations, the court approved the Second Stipulation by decision dated November 22, 2019 (the November 2019 Order), and authorized the GAL to consent to the same on behalf of Abel. The court also ordered the real property to be sold pursuant to the Second Stipulation and upon the court's approval of a contract of sale. The court further directed Abel's share to be paid to a Supplemental Needs Trust to be established for his benefit.

On December 16, 2019, the Administrator filed a contract of sale dated December 2, 2019 ("contract of sale"), seeking approval to sell the real property for \$1,425,000. By decree dated February 13, 2020 (February 2020 Decree), the court, *inter alia*, approved the sale and directed that the net proceeds be held in an interest-bearing escrow account by Mr. Bentley as the Administrator's attorney. The February 2020 Decree also provided that in the event Walker fails to vacate the property within thirty days, the court shall issue an order of possession.

The court then issued an order for possession dated March 16, 2020, granting exclusive possession to the Administrator and ordering Walker to be ejected. Thereafter, the sale of the real property closed on July 14, 2020. Mr. Bentley then filed an attorney affirmation dated August 6, 2020, stating that administration expenses amounted to \$485,028.21, leaving net proceeds in the amount of \$939,971.70 for distribution as follows:

\$268,792.59 to Herman Walker Jr.,

\$335,589.56 to Supplemental Needs Trust for the benefit of Abel Wysinger, and

\$335,589.56 to Samuel Wysinger.



Thereafter, Mr. Bentley filed an Emergency Affidavit dated August 25, 2020, seeking leave to make a distribution to Samuel on an expedited basis since Samuel was residing in a homeless shelter and in desperate need of funds. Mr. Bentley then filed another affirmation on September 15, 2020, requesting that the court approve distribution in accordance with the Second Stipulation and submitted numerous documents, including the closing statement for the real property, attorney invoices, seller's attorney check, title closing invoices, and other documentation of estate expenses. Mr. Bentley also referred to the filing of a petition by the Administrator to establish a supplemental needs trust for Abel's benefit.<sup>3</sup>

Thereafter, Mr. Bentley presented to the court a stipulation dated December 4, 2020, executed by him on behalf of the Administrator and Samuel, and the GAL on behalf of Abel, seeking to distribute the net proceeds from the sale of the real property as follows:

\$313,292.59 to Herman Walker Jr.,

\$313,292.59 to Supplemental Needs Trust for the benefit of Abel Wysinger, and

\$313,292.59 to Samuel Wysinger.

This stipulation provided that a partial distribution of \$275,000.00 be made to Samuel immediately. However, Walker was not a signatory to this stipulation. Accordingly, the court issued orders dated December 22, 2020 and February 17, 2021 respectively, directing virtual conferences for January 26, 2021 and April 13, 2021. It is unclear from the court's record whether the court conducted these conferences.

Thereafter, on October 18, 2021, Walker filed a petition to compel the Administrator to account (File Nos. 2014-2487C/D, "the proceeding to compel an account"), which was amended

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<sup>3</sup> Brian M. DeLaurentis, Esq. was retained by the Administrator to file the petition to establish a supplemental needs trust for Abel's benefit. On or about August 28, 2020, the Administrator filed a petition with this court to establish such a trust for Abel's benefit (File No.: 2020-2491). A guardian ad litem was appointed for Abel who recommended the establishment of a supplemental needs trust in his Report dated July 11, 2022.

on December 15, 2021 to be in proper form. Although Walker submitted a proposed citation to be issued, it does not appear that a citation was ever issued. Notwithstanding that a citation was not issued under File Nos. 2014-2487C/D, the Administrator filed a motion to dismiss the proceeding on the ground that Walker had no standing to compel an accounting, since he is not a distributee of the decedent. The Administrator further requested an order authorizing distribution of the net proceeds of the sale of the real property to Samuel and Abel only, notwithstanding the terms of the Second Stipulation that provided for a distribution to Walker.

Samuel filed an affidavit joining the motion and added that Walker presented fake documents to “steal my grandfather’s property” and that “[t]he court appointed Dwayne L. Bentley, Esq. as ‘Fiduciary’ of my grandfather’s James Barnette Estate; whom I hired and retained through signed contract with only my signature and his, as Attorney and Client [sic].”<sup>4</sup>

Samuel further stated:

Ms. Ausar, the Estate’s Acting Administrator is a lady that was in a personal relationship with me as my woman; whom I gave her the name, Isis Ast “ankh” Ausar, formerly known as “Carrie Eagen” in 1987. I requested that she act as Administrator, and she agreed. She has since become hostile and divisive, due to greed, health problems, personal resentment, and has become a rouge Administrator that cannot be trusted [sic].

Samuel requested that estate assets be distributed only to Abel and himself, and that the court “justly rectify through jurisprudence the matter at hand....”

Samuel, proceeding *pro se* and purportedly on behalf of Abel and himself as petitioners, filed a petition dated April 12, 2022 (File No. 2014-2487/E) to compel a distribution from the estate. The petition was signed by Samuel only; however, Samuel alleged that he had power-of-attorney over Abel. The petition seeks the following relief:

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<sup>4</sup> The court notes that Mr. Bentley is not the estate’s fiduciary. He has appeared in the various proceedings as the attorney for the Administrator and has also held himself out as Samuel’s attorney having signed the Second Stipulation on behalf of both the Administrator and Samuel. Mr. Bentley did hold the net proceeds from the sale of the real property in his escrow account as ordered by the court.

Whereas, petitioner asks the court to expedite a court date on its calendar on and/or before the date of April 22, 2022, and compel the fiduciary, D.L. Bentley, Esq., of my grandfather, JAMES BARNETT, who is deceased, to be 'compelled' to recover all monies disbursed to Administrator, Isis Ausar on April 4, 2022 'without' a 'Court Order' and/or the court's permission, and/or my Authorization, as Distributee of decedent, James Barnett, and Power of Attorney of my Brother, Abel Wysigner, who is also a Distributee [sic].

Samuel then amended his petition to compel a distribution on April 28, 2022 and sought to obtain jurisdiction over the interested parties. The court then issued a citation returnable on May 5, 2022, at which time jurisdiction remained incomplete over Abel and Mr. Bentley. With respect to jurisdiction over Abel, Samuel alleged that he, in effect, represented Abel as a co-petitioner due to his status as Abel's attorney-in-fact. However, since a GAL had been appointed for Abel in the turnover proceeding (File No. 2014-2487/A), who had reported that Abel had diminished capacity, the court declined to dispense with service of a citation upon Abel. On the citation return date, the court directed Samuel to review the original power-of-attorney and adjourned the matter to May 26, 2022, for Samuel to obtain jurisdiction over Abel.

Thereafter, with respect to the Administrator's motion to dismiss Walker's petition to compel an account (File Nos. 2014-2487C/D), the court denied the motion by Decision and Order dated May 9, 2022 and held as follows:

In a previous proceeding (2014-2487/A), the parties entered into a written stipulation dated August 9, 2019, and filed it with the court on December 16, 2019. According to the terms of the stipulation, the administrator agreed that Herman Walker was entitled to 33.3% of the decedent's estate. The administrator is estopped from arguing that the petitioner lacks standing in light of the prior stipulation (citations omitted), and, as such, fails to establish a prima facie showing that the petitioner lacks standing (citations omitted).

Thereafter, the Administrator retained new counsel, Brian M. DeLaurentis, Esq., and executed a Consent to Change Attorney on April 26, 2022.

Meanwhile, a second return date for Samuel's petition to compel distribution (File No. 2014-2487/E) was scheduled for May 26, 2022. The day prior on May 25, 2022, Samuel filed a

motion to disqualify Mr. DeLaurentis as counsel for the Administrator (File No. 2014-2487/E). However, on the return date, jurisdiction on Samuel's petition to compel distribution remained outstanding, and the matter was adjourned to June 30, 2022. Further, by Decision and Order dated May 31, 2022, the court denied Samuel's motion to disqualify Mr. DeLaurentis without prejudice as Samuel had not filed a notice of motion or served same on the parties.

Meanwhile, in Walker's petition to compel account (File Nos. 2014-2487/C/D), the Administrator and Walker entered into a stipulation dated June 20, 2022 providing that (1) the Administrator would file her petition to judicially settle her account within 60 days; (2) that Walker is a party in interest in the proceeding; and (3) that the proceeding was withdrawn. The court then issued a decision and order dated June 21, 2022 deeming the petition withdrawn.

Turning back to Samuel's motion to disqualify Mr. DeLaurentis in his petition to compel a distribution (File No. 2014-2487/E), Samuel filed a notice of motion on June 21, 2022, made returnable on June 30, 2022, and also filed an application seeking substituted service on Abel, which was granted by order dated July 18, 2022. On the return date, Samuel's motion to disqualify the Administrator's attorney and his proceeding to compel a distribution were adjourned to August 4, 2022, due to lack of jurisdiction over Abel and the Administrator's request for more time to file objections.

Thereafter, on July 17, 2022, the Administrator filed objections to Samuel's proceeding to compel a distribution asserting the following affirmative defenses:

- (1) Samuel Wysinger has been paid all sums due him from the estate; and
- (2) Samuel Wysinger has released all claims he has against the Estate.

On July 21, 2022, Samuel filed a reply to the Administrator's objections. The court rejected the reply for filing pursuant to SCPA 302, which provides that the pleadings before the court shall consist only of a petition and an answer or objections (see court's order dated July 29,

2022 [File 2014-2487/E]). Further, the court directed that the Administrator submit a copy of the release and a copy of the cancelled check proving payment to Samuel Wysinger, as alleged in her First and Second Affirmative Defenses, by 3:00 p.m. on August 3, 2022, the day before the next return date.

By the morning of August 4, 2022, the Administrator's attorney had not responded to the directive. At calendar call on August 4, 2022, the court inquired as to whether a receipt and release had, in fact, been executed by Samuel. Mr. DeLaurentis advised the court that he would email the documents immediately, and the case was marked for a second call. Mr. DeLaurentis then emailed the court three documents: (1) a Receipt and Release executed by Samuel in the presence of a notary public; (2) a copy of a check in the amount of \$275,000 dated December 11, 2020 payable to Samuel Wysinger and drawn from Mr. Bentley's IOLA Trust Account; and (3) a copy of a Bank of America Account Activity Transaction Detail indicating that payment had been made to Samuel. Upon receipt of the documents, the court provided a copy to Samuel, who had appeared in person for the calendar call. Upon presentation of the documents, Samuel did not deny signing the Receipt and Release, but alleged that he did not understand what he was signing.

Based upon the Receipt and Release and proof of payment to Samuel, the court dismissed Samuel's petition to compel a distribution on the record. The court also denied the motion to disqualify Mr. DeLaurentis as the Administrator's counsel, since the issue of whether to disqualify Mr. DeLaurentis from representing the Administrator in the proceeding was rendered moot by dismissal of the underlying petition.

Later that day, Samuel produced a copy of an email from Mr. Bentley dated August 4, 2022, stating that Mr. Bentley believed that Samuel would receive about \$320,000.00 from the estate, but that the Administrator directed him to pay Samuel only \$285,000.00. Based on that

direction, Mr. Bentley drafted the Receipt and Release that Samuel executed. Ostensibly, Samuel provided the email to the court in support of his allegation that he is still owed distribution from the Administrator.

### **Discussion**

Pursuant to SCPA 2102(5), an interested party may file a petition to compel a fiduciary to make an advance distribution of estate assets. In order to receive an advance distribution, petitioner must show that the estate assets are at least one-third more than needed to pay administration expenses and that he needs the money for his or his family's support or education. SCPA 2102(5); *Matter of Millbank*, 49 A.D. 2d 848 (1<sup>st</sup> Dept. 1975). Here, Samuel's petition is devoid of information regarding how much in administration expenses has been expended and how much remains to be paid. Notwithstanding that the petition does not provide this crucial information, the court cannot compel an advance distribution since documentary evidence submitted demonstrates that Samuel was already paid the bulk, if not all, of his share of the estate. The indisputable documentation reflects that Samuel received a distribution of \$275,000.00 in December 2020. The court notes that Samuel's petition failed to disclose that he received any distribution. Moreover, Samuel failed to disclose that he executed the Receipt and Release which states as follows:

The distributee does hereby acknowledge receipt from the Administrator of their share of the cash \$275,000.00 to Samuel Wysinger as per Intestacy Statute, which he shall receive after the distributee has signed and notarized this Receipt and Release document in the estate of the Decedent, and does hereby accept such cash and other property in full satisfaction of his interest in and to the principal and income for the Decedent's estate through the date of this Receipt and Release [sic].

Although Samuel seemingly asserts that he is owed an additional sum of approximately \$45,000.00, he admittedly signed the Receipt and Release which states that he received a distribution in full.

Once a party signs a receipt and release, the party is bound by its terms unless he can prove that the signature was obtained by fraud, duress or undue influence. *Matter of Kahn*, 144 N.Y.S.2d 253, aff'd 2 A.D.2d 893 (2<sup>nd</sup> Dept. 1956); *Matter of Volzslawsky*, 135 Misc. 877 (Surr.

Ct., NY County, 1924); *Matter of Leyden*, NYLJ, March 2, 1995, at 30, col 6. Where the validity of a release is challenged, “the fiduciary must affirmatively demonstrate that the beneficiaries were made aware of the nature and legal effect of the transaction in all its particulars.” *Matter of Birnbaum v. Birnbaum*, 117 A.D.2d 409, 416 (4th Dep’t 1986).

During his appearance in court on August 4, 2022, Samuel asserted that he did not understand the significance of the Receipt and Release. Assuming *arguendo* that the Receipt and Release is deemed invalid and that Samuel is entitled to a further distribution, the court has not been provided with sufficient information as to the assets and liabilities of the estate in order to direct a further distribution at this time. Since the Administrator has yet to file an accounting stating the total expenses paid and/or remaining, and it appears that Samuel received the bulk or the total of his share of the estate, it is premature to direct a larger distribution to Samuel. Therefore, Samuel’s petition to compel distribution (File No. 2014-2487/E) is dismissed on the grounds that it is premature and the issues raised in the petition may be raised in an objection to the Administrator’s accounting.

In the interests of resolving the issues raised by Samuel’s petition, the Administrator shall file a petition to judicially settle her account with all relevant schedules attached by August 19, 2022. In addition to her obligation to obtain jurisdiction over the necessary parties in the accounting proceeding, the Administrator shall mail by August 19, 2022, copies of her petition and the attached accounting schedules to all parties with proof of service to be filed with the clerk of the court. Once the Administrator’s accounting is filed, Samuel may raise his objections as to the validity of the Receipt and Release and the amount he believes is still owed to him from the estate.

With respect to Samuel’s motion to disqualify Mr. DeLaurentis from representing the Administrator, the motion is denied as moot since the petition under which the motion was made

is dismissed. In any event, the motion to disqualify would be denied as there is no conflict of interests between Samuel and Mr. DeLaurentis. Samuel has never retained Mr. DeLaurentis to represent him in any proceeding before the court. Moreover, the Administrator is entitled to retain and to pay counsel of her choosing. EPTL 11-1.1(22). The court notes that during the various estate proceedings, Mr. Bentley represented both Samuel and the Administrator in the turnover proceeding (File No.: 2014-2487/A). Since that time, it appears that a conflict has arisen between the Administrator and Samuel, and she has chosen to be represented by Mr. DeLaurentis. Although Samuel argues that he did not authorize Mr. DeLaurentis' retention, the Administrator is permitted to hire an attorney of her choosing to represent her in the various estate proceedings. Of course, "[t]he Surrogate bears the ultimate responsibility of deciding what constitutes reasonable legal fees" (*Matter of Piterniak*, 38 A.D.3d 780, 781 [2d Dep't 2007]; see *Matter of Talbot*, 84 A.D.3d 967, 967-968, [2d Dep't 2011]), and "[a]n award of counsel fees and expenses is 'dependent upon a finding that [counsel's] services were necessary and beneficial to the estate'" (*Matter of Ajala*, 117 A.D.3d 550, 550 [1st Dep't 2014], quoting *Matter of Hofmann*, 284 A.D.2d 92, 95 [1st Dep't 2001]). The determination of the appropriate award of attorneys' fees are reserved for the accounting proceeding.

### **Conclusion**

Accordingly, it is hereby

ORDERED, the petition of Samuel Wysinger to compel a distribution is dismissed, and it is further

ORDERED, the motion of Samuel Wysinger to disqualify Brian M. DeLaurentis as counsel to the Administrator, Isis Ausar, in the proceeding under File No.: 2014-2487/E is denied as moot, and it is further



ORDERED, that the Administrator, Isis Ausar, shall file an account of her proceedings together with her petition for a judicial settlement and allowance of said account by August 19, 2022, and it is further

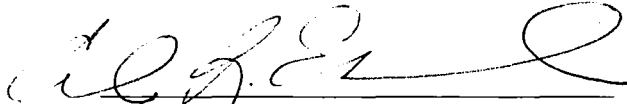
ORDERED, that the Administrator, Isis Ausar, simultaneously with the filing of her account, shall mail a copy of the same to all persons interested in the proceeding, and file proof of service of same with the court, and it is further

ORDERED, that the Administrator, Isis Ausar, shall cause a citation to be issued and complete service to be made, without undue delay, on all persons interested in the proceeding, including but not limited to Samuel Wysinger, Abel Wysinger and Herman Walker, Jr., and it is further

ORDERED, that the said Administrator, Isis Ausar, attend before the Court, at 2 Johnson Street, Room 319, Brooklyn, New York, from time to time as directed for the purpose of such accounting, and it is further

ORDERED, that all issues with respect to the sufficiency of the final distributions to be made to all interested persons, including Samuel Wysinger, Abel Wysinger and Herman Walker, and the administration expenses of the estate, including but not limited to the payment of reasonable attorney's fees, shall be determined in the accounting proceeding.

Dated: August // , 2022

  
HON. CAROL ROBINSON EDMED  
ACTING SURROGATE