**Estate of Michael S. Cohen, 322866/E**

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Cite as: Estate of Michael S. Cohen, 322866/E, NYLJ 1202545431693, at \*1 (Surr., NA, Decided March 7, 2012)

Surrogate Judge Edward W. McCarty

Decided: March 7, 2012

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Before the court is a motion pursuant to CPLR 10031 filed by Wendy H. Sheinberg (Sheinberg), who was appointed on April 11, 2011 as guardian ad litem for Jolie M. Cohen and Lindsay P. Cohen, the contingent remaindermen of the trust (the trust) created under the will of decedent, Michael S. Cohen, for the benefit of his son, Kevin Cohen. Movant seeks an order (i) dropping and striking the Nassau County Attorney2 as an interested party in the accounting proceeding; (ii) disallowing the joinder of The Lawyers' Fund for Client Protection of the State of New York (the Fund)3 as an interested party in the proceeding; (iii) amending the petition and account to strike the name of the Nassau County Attorney and the Fund as interested parties; and (iv) dismissing the verified objections filed by the Nassau County Attorney and the Fund.

The motion is brought in connection with an intermediate account filed on January 7, 2011 by Steven Zanon (Zanon) as trustee of the trust. Paragraph 6 (a) of the petition and

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schedules D and H of the account indicate that the Crime Victims Project may be an interested party. On April 24, 2011, the Fund filed objections to the account on the basis of their claimed status as a creditor of Cohen, and asked to be added to schedules C and H of the account. On April 12, 2011 objections filed on behalf of the Fund were adopted by the Nassau County Attorney.

Movant asserts that a potential creditor of a trust beneficiary is not an interested party for purposes of the trust accounting. On that basis, she asks the court to remove these creditors as interested parties and dismiss their objections to the account.

BACKGROUND

Michael S. Cohen died on March 18, 2002, leaving a will which was admitted to probate by this court. Under the terms of his will, decedent directed that a trust would be created for the benefit of his only child, Kevin (referred to hereinafter as Cohen). The will further directed that the trust would terminate ten years after decedent's death. Accordingly, the trust will terminate on March 18, 2012, and all remaining principal and income will be distributed to Cohen if he is then living. In the event that Cohen dies before the termination of the trust, his minor daughters, Jolie M. Cohen and Lindsay P. Cohen, will become the remaindermen of the trust.

Presently, Cohen is imprisoned, having been convicted of criminal offenses involving client funds. As a result of these convictions, Zanon named the Crime Victims Project, which is a potential creditor of Cohen, as an interested party in a previous miscellaneous proceeding brought by the trustee for the court's approval of the sale of real estate held in the trust. When the trustee subsequently filed his account, both the Fund and the Nassau County Attorney filed objections, even though neither is a creditor of the decedent, the decedent's estate, or of the trust

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created under decedent's will.

ANALYSIS

Movant asserts that the Nassau County Attorney and the Fund are merely potential creditors of a trust beneficiary and therefore lack the status of interested parties. The connection between Cohen and the Crime Victims' Project is that the Crime Victims' Project represented Cohen's former clients in their claims against him. Cohen's connection to the Fund is based upon the Fund's payment of $288,750.00 to 10 of Cohen's former law clients.

In response, counsel for the Fund notes that after Cohen was ordered to pay restitution to his clients, a criminal restitution order was entered as a judgment against Cohen pursuant to CPL §420.10 on December 16, 2010. All of the clients who received money from the Fund assigned and subrogated all of their claims against Cohen to the Fund. The Fund asserts that it has an interest in the accounting proceeding because of unresolved questions as to whether certain estate assets being administered by the trustee, including an annuity, are actually part of the trust or are separate non-trust assets owned outright by Cohen. Counsel for the Fund refers to Cohen's withdrawal of $600,000.00 from an annuity in 2007 and argues that the Fund has a statutory obligation to determine whether the funds used to replenish the annuity were drawn from Cohen's client escrow accounts. Counsel maintains that Zanon appears to be administering non-trust assets in addition to trust assets, and argues that the Fund may have rights to these non-trust assets in its capacity as a judgment creditor or as the organization charged with the protection of client escrow funds. In support of his position that the Fund is therefore not in the same position as other creditors, counsel cites Matter of Bross (167 Misc 2d 37 [Sur Ct, New York County 1995]), which addressed the invasion of trust principal for (a) the benefit of the

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income beneficiary and (b) the claim of a trust remainderman, who was alleged to be a creditor, for reimbursement of nursing home expenses which he had advanced on behalf of the income beneficiary, who was his mother. Counsel also cites Matter of Drew, in which the court stated the following:

"A creditor of a beneficiary of an estate is neither a necessary party to an accounting proceeding…nor a person interested in the estate of decedent…In Matter of Riegel (165 Misc. 265), Surrogate Foley dismissed objections interposed to an accounting proceeding by a creditor of a beneficiary, stating at page 267: 'The law properly confines the right to compel an accounting or to object to an account to persons legally interested. It excludes from appearance in a proceeding alleged creditors of creditors, or of legatees and other classes of beneficiaries.' (See, also, Duncan v. Guest, 5 Redf. 440.)

However, the United States is not in the same position as an ordinary creditor and as was pointed out in Matter of Rosenberg (269 N. Y. 247, 251) the Surrogate has jurisdiction to enforce a lien for unpaid income taxes, and 'no policy of this State may interfere with the power of Congress to levy and collect taxes on income.'" (Matter of Drew, 10 Misc 2d 1045, 1046 [Sur Ct, Westchester County 1958]).

Counsel for the Fund also argues that allowing the Fund to seek information about the non-trust property from Zanon in the context of the accounting proceeding will be a more efficient use of time and costs than if the Fund sought this information by other discovery methods.

The court finds that the status of the creditors in both of the decisions cited above, Matter of Bross and Matter of Drew, is distinguishable from the status of the Nassau County Attorney and the Fund in connection with the trust accounting before the court. Matter of Bross involved the invasion of trust principal for the benefit of the income beneficiary; even the payment to the creditor which was authorized by the court was for funds he expended for the beneficiary's direct benefit. In Matter of Drew, the funds reachable by the governmental taxing authorities were not

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in trust but rather, were distributed to the county Finance Commissioner to be held for the benefit of an estate beneficiary pending further order of the Court.

Respondents also suggested that allowing them the status of persons interested in the account would be a more efficient way for them to uncover information about Cohen's assets than if they had to use other discovery methods. Counsel may very well be correct, but the goal of efficiency, however laudable, does not give rise to a privilege, right, or status which would otherwise be unavailable.

Persons interested is a defined term under SCPA 103 (9), and SCPA 103 (11) specifically excludes creditors from the category of persons interested. In Matter of Lainez (79 AD2d 78 [2d Dept 1981]), the Second Department held that a creditor of a beneficiary who is still alive is not a proper party to an account in which the beneficiary has an interest. The creditor of a beneficiary of an estate is not a person interested in the estate, nor is the creditor a necessary party to the account. In the present case, the Fund and the Nassau County Attorney are potential creditors of a living trust beneficiary; this status is insufficient for them to attain the status of persons interested in decedent's estate or in the account presently before the court. Accordingly, the Fund and the Nassau County Attorney should not have been listed on the petition or in the account as interested parties, nor should either have been permitted to join this proceeding.

"Parties may be dropped by the court, on motion of any party or on its own initiative, at any stage of the action and upon such terms as may be just" (CPLR 1003). The present motion asks that the court exercise its power to drop the Nassau County Attorney as an interested party, disallow the joinder of the Fund, amend the petition and account to strike the Nassau County Attorney and the Fund as interested parties, and dismiss their objections to the account.

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CONCLUSION

For the reasons set forth above, the motion is granted, without prejudice to respondents to commence a proceeding pursuant to Executive Law §632-a (6)4 to seek the issuance of a preliminary injunction restraining the payment of trust principal to Cohen upon the termination of the trust (Matter of New York State Crime Victims Board v. Harris, 68 AD3d 1269 [3d Dept 2009]; New York State Off. Victim Servs. v. Murray, 2011 NY Slip Op 32218U [Sup Ct, Albany County 2011]).

Pursuant to SCPA 2222-a, the clerk of the court will provide notice to the Office of Victim Services that Cohen is the remainderman/beneficiary of a terminating trust under the will of Michael Cohen. The court further directs that no payment shall be made to Cohen for thirty days following the termination of the trust.

This constitutes the decision and order of the court.

1. This section governs the nonjoinder and misjoinder of parties.

2. The division of the Nassau County Attorney's office interested in the account is the Nasssau County Attorney Crime Victims Project (the Crime Victims Project), for reasons explained more fully below.

3. The Lawyers' Fund for Client Protection of the State of New York is under the auspices of the New York State Attorney General and is administered by a Board of Trustees appointed by the New York State Court of Appeals. It was established under Chapter 714 of the Laws of 1981 to promote the good name of the legal profession by reimbursing losses resulting from the dishonest conduct of lawyers admitted to the New York Bar.

4. Executive Law §632-a (6) is better known as The Son of Sam Law. It is intended to provide an opportunity for crime victims to recover compensation from the convicted criminal.