

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

In the Matter of the Application of THOMAS F.
BONADIO, Co-Executor of the Estate of

ANTHONY J. COSTELLO, Deceased,

for advice and direction pursuant to Surrogate's Court
Procedure Act §2107 and §2102(6)

File No. 2016-787/F

**Respondent Brett Costello's Memorandum of Law In Opposition
to The Petition for Advice and Direction Pursuant to SCPA § 2107
and § 2102(6) and In Support of Respondent's Cross-Motion to
Compel Arbitration and Amend the Letters Testamentary**

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Capacity as Co-Executor of the Estate
of Anthony J. Costello*

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PRELIMINARY STATEMENT

Respondent Brett A. Costello (“Respondent” or “Costello”) submits this memorandum of law, through the undersigned counsel, in opposition to the Petition of Thomas F. Bonadio (“Petitioner”) seeking advice and direction pursuant to the Surrogate’s Court Procedure Act (“SCPA”) § 2107 and 2102(6) and in support of Respondent’s cross-motion to modify the Letters Testamentary to reflect Petitioner’s limited role under the decedent’s Last Will & Testament (the “Will”), and in reliance on the averments set forth in Respondent’s answer to the Petition (“Answer”), as verified on September 8, 2017, the attorney affirmation of Edward P. Hourihan, Jr., dated September 8, 2017 (“Hourihan Aff.”), and the affidavit of Elaine Costello, sworn to on August 23, 2017 (“E. Costello Aff.”), all of which are submitted herewith.¹

ARGUMENT

POINT I

Petitioner’s Request Should Be Denied Because It Is Contrary to the Testator’s Express Intent As Is Set Forth Within The Four Corners Of His Will.

Petitioner’s requests—both for the Court to essentially remove Mr. Costello from managing and controlling the Businesses Interests and for the Court to bless Petitioner’s plan to orderly liquidate the Estate’s business holdings—are contrary to the testator’s express intent as is set forth within the four corners of his Will. See *In re Pozarny*, 177 Misc. 2d 752, 757-58 (N.Y. Sur. Ct. Erie Cnty. 1998) (citing *Roe v. Vingut*, 117 N.Y. 204 (N.Y. 1889)) (“a court must ascertain the intent of the testator . . . from the four corners of the will itself, searching for a dominant purpose or plan of distribution

¹ Although Respondent is filing Elaine Costello’s affidavit, she is represented in this proceeding by independent counsel—James G. Vazzana.

and reading and giving effect to individual parts in relation to that purpose”); *In re Debout*, 35 A.D.2d 1067 (4th Dept. 1970) (“it is the intention as expressed in the will which is determinative”) (quotation marks omitted).

The Will is clear on its face both that: (1) the decedent vested Respondent with the sole powers and authorities to control and manage the Business Interests (including the sole power to retain and continue any of the Businesses),² and (2) the decedent contemplated and intended that the Businesses would continue to operate if possible for the remainder of Elaine Costello’s life (his wife) and that his ownership interests would potentially pass to his descendants, as directed by Respondent. Petitioner’s requests to entirely usurp control of the Business Interests (and thereby the Businesses), as well as for the Court to advise and direct to liquidate the assets of the Businesses, are antithetical to the decedent’s Will and must be denied. See Answer ¶¶ 5-17.

More specifically, Article VII of the Will vests Respondent with the **sole powers and authorities to control and manage the Business Interests, and thereby the Businesses**. (A copy of the Will is attached as Ex. B to the Petition). Article VII states:

I hereby vest my son, BRETT COSTELLO, as Co-Executor and Co-Trustee, including his successor, with the following powers and authority . . . all of which may be exercised by him in his fiduciary capacity with respect to every business enterprise in my estate . . .

(A) To retain and continue to operate the business for any period that [Respondent] may deem advisable

(B) To vote any matter . . . To control, direct and manage the businesses . . .

(C) To hire and discharge officers and employees . . .

...

(H) To retain in the business any amount of the net earnings for working capital and other purposes of the business that [Respondent] may deem advisable

...

² The decedent owned majority interests (the “Business Interests”) in various business entities (the “Businesses”) at the time of his death. See Answer ¶¶ 5-6; Ex. C to Petition. The properties that Petitioner is suggesting should be immediately liquidated are all properties owned by the Businesses. Answer ¶¶ 13.

(J) To sell or liquidate all or any part of any business at any time and price and upon any terms and conditions (including credit) that [Respondent] may determine.

The vesting of these powers solely in Respondent is consistent with Respondent having worked alongside his father for 30 years, during which time Respondent worked on all aspects of and directly managed the decedent's real estate and aviation businesses, primarily under the name Anthony J. Costello & Son Development, and that Respondent was named co-manager under many of the entity operating agreements. (Answer ¶ 14.) Respondent has been CEO since 2013, and previously served as President. (*Id.*, Ex. A) The vesting of these powers solely in Respondent is also consistent with Elaine Costello's statements that the decedent expressed to her on numerous occasions his intent that Respondent would have sole powers to control and manage the Business Interests after his death, including by making public events of transferring executive authority to Respondent on three occasions. See E. Costello Aff.

In contrast, the Will makes clear that the Article VII powers and authorities to, *inter alia*, control, manage, and retain and/or sell all or any part of the Businesses would vest in Petitioner **only in the event of** Respondents "death, incapacity or resignation, *without his having appointed a successor Trustee.*" See Will, Art. VII (emphasis added). None of these events has occurred. Thus, to essentially remove Respondent from his Article VII authorities would expressly contradict the decedent's intent as set forth in the Will, which the Court may not do. See *In re Debout*, 35 A.D.2d at 1067 ("The intention of a will-maker is to be found in the words used in the will, and when these are clear and definite there is no power to change them.")

As for Petitioner’s request that the Court advise and direct that the Estate orderly liquidate the primary assets of the Businesses (*i.e.*, Clinton Crossing, The Reserve, etc.)—in addition to being a request that Petitioner lacks standing to make (for the reasons described in Point II below)—this request also flies in the face of the decedent’s intent—as evidenced by the entire testamentary plan—that the Executor and Trustee “shall continue to hold and operate each business as a part of my estate *and the trusts herein created.*”³ See Article VII (emphasis added). In the words of Elaine Costello—the sole lifetime beneficiary of Trust B:

I do not support Tom Bonadio’s suggested plan for an orderly liquidation. I know—based on multiple conversations with Anthony—that, while he was always open to business opportunities, he envisioned that his company would have a long history with our family.

E. Costello Aff. ¶ 11. The decedent transferred executive authority to his son—who he had worked alongside for 30 years—with the express intent that Respondent “continue to build his legacy and work toward completing the various projects under development.” *Id.* ¶ 8. Elaine Costello—whose beneficial interest should be at the forefront of the Court consideration of the Petition—has “complete trust in Brett’s ability to manage the Businesses and the decisions that Brett is making” and “support[s] Brett’s plan to continue operating the Businesses.” *Id.* ¶ 10, 12.

³ More specifically, the decedent directed that—upon settlement of the Estate—the Business Interests would be transferred to and held by Trust B for the benefit of his wife, Elaine Costello, throughout her life. See Article V(A), V(B)(2). After the death of Elaine Costello, the decedent further directed that Trust B would continue “for as long as my Trustee determines that there is suitable management in place for the operation of the [Business Interests],” for the benefit of the decedent’s children and any of their issue. See Article V(B)(2)(d)(iii)(C)-(E). At that point, Respondent (and any qualified successor appointed by him) may also distribute the Business Interests (which are referred to as the “Voting Interests” in the Will) to one or more lineal descendants who “demonstrated the ability and desire to operate and manage” such interests. See Article V(B)(2)(d)(iii)(A). The Will allows for an orderly liquidation *only after* Elaine Costello’s death and even then *only if* “the Trustee determines that there is not suitable management in place for the continued operation of the Business Interests.” See Article V(B)(2)(d)(iii)(D).

Petitioner's requests should therefore be denied because—in addition to being improperly made (for the reasons described below)—the relief Petitioner seeks could not be further from what the decedent intended, as expressed by the Will.

POINT II

Petitioner Lacks Standing To Seek Advice and Direction Regarding Assets Over Which He Does Not Exercise Any Powers Under the Will.

As described above, Respondent has sole authority to “sell or liquidate all or any part of any business at any time and price and upon any terms and conditions” that he may determine. Will, Art. VII(J). Petitioner does not disagree that the decedent granted sole authority with respect to the Business Interests to Respondent.⁴ But because Petitioner does not have any authorities or powers with respect to the Businesses, he also lacks standing to request the Court to advise and direct as to the sale of assets owned by the Businesses.

Under SCPA § 2107, a fiduciary may petition the Court “for advice and direction as to the propriety, price, manner and time of sale” of property of an estate whenever the value of the property “is uncertain or dependent upon the time and manner of sale,” and “in other extraordinary circumstances such as complex valuation issues, or tax elections, or where there is conflict among interested parties.” *See also Estate of Bernstein*, 13 A.D.2d 743 (1st Dept. 1961) (“it is only in extraordinary circumstances that the court should lend its approval to the executors’ proposed sale”). However, a petition

⁴ Instead, Petitioner curiously requests the Court to “advise and direct as to the *validity* of the direction under the Will of Anthony J. Costello that business matters be under the sole and exclusive control of the Co-Executor, Brett A. Costello.” *See* Petition, Wherefore Clause (emphasis added). It appears that Petitioner is requesting the Court to invalidate Article VII, which is not the purpose of a proceeding for advice and direction under Article 21 of the SCPA. Moreover, the Will has already been probated, and Petitioner has not brought a construction proceeding seeking to invalidate any Will provision.

for advice and direction should be denied if it merely seeks “to substitute the court's judgment for that of the fiduciary.” SCPA § 2107(3); *see also In re Osterndorf*, 75 Misc. 2d 730, 730-31 (N.Y. Sur. Ct. Nassau Cnty. 1973) (denying petition seeking advice and direction as to whether to sell property because the issue was “one of business judgment” and it was not an “extraordinary situation[]”). That is because “substantial compliance with the authorization so given shall relieve the fiduciary from any objection that the estate suffered a loss on account of the action taken under court advice and direction.” SCPA § 2107(1).

Relying on SCPA § 2102(6), which allows a proceeding to be commenced to require a fiduciary to comply with “such directions as the court may make whenever two or more fiduciaries disagree with respect to any issue affecting the estate,” a co-fiduciary may petition the Court for advice and direction if he or she disagrees with the other co-fiduciary **with respect to matters over which the co-fiduciaries have joint powers**. *See also In re Stanley*, 240 A.D.2d 268, 269-70 (1st Dept. 1997) (co-fiduciary may petition the court for direction) (citing SCPA § 2102(6)); *cf. In re Jacobs*, 127 Misc. 2d 1020, 1023 (N.Y. Sur. Ct. N.Y. Cnty. 1985) (noting that the Surrogate may advise co-fiduciaries who disagree with respect to the exercise of a jointly held power).

As a primary matter, the Petition should be denied because it is really just a veiled and improper request for the Court to simply substitute its business judgment for that of the fiduciary (*i.e.* Respondent). *See Matter of Lovell*, 23 A.D.3d 386, 387 (2d Dept. 2005) (“SCPA 2107 does not empower the Surrogate's Court to substitute its judgment for that of the executor, especially when the executor is exercising a specifically-granted power”); *In re Ebbets*, 139 Misc. 250, 252 (N.Y. Sur. Ct. Kings Cnty.

1931) (denying petition for advice and direction as to whether trustees should vote shares to place a mortgage on the corporation because the question presented was “not of law but of business judgment”).

Additionally, Petitioner is—admittedly—not seeking advice and direction with respect to matters over which he shares joint powers with Respondent under the Will. On the contrary, Petitioner is (improperly) using the Petition in an effort to gain power over the Business Interests that he does not now have. Thus Petitioner clearly lacks standing. *See Ehrlich v. Fidel*, 1999 NYLJ LEXIS 1106, at *1 (N.Y. Sur. Ct. Queens Cnty. Apr. 7, 1999) (declining to entertain petition for advice and direction pursuant to SCPA § 2102(6) where the petitioner did not have standing to bring such a proceeding).

POINT III

Any Interest Petitioner Has In The Assets That Are The Subject Of This Proceeding Is Only Through The Working Agreement—And The Court Should Compel Petitioner To Submit His Dispute To The Third Party Neutral As Required.

Any interest that Petitioner has with respect to the Business Interests arises only under the Working Agreement. And under the Working Agreement, Petitioner and Respondent agreed to comply with the following Dispute Resolution Procedure:

In the event of delay, disagreement or deadlock between the Parties as to any matter pertaining to administration of the Estate not subject to Costello’s ultimate control as set forth herein, each of Bonadio and Costello may consult with his respective counsel and authorize such counsel to attempt to resolve the same. If counsel for Bonadio and Costello are unable to resolve their dispute, or agree on a timetable for doing so, within 72 hours, then the parties shall engage Robert J. Lunn, Esq. to resolve the parties’ dispute, and his decision shall be final, conclusive and binding on the parties.

Working Agreement at § 9 (emphasis added), Ex. D to Petition.

It was Petitioner who originally proposed that he and Respondent avail themselves of a third party neutral in the event of a dispute between themselves under the Working Agreement. Hourihan Aff. ¶ 4. It was also Petitioner who suggested that Robert J. Lunn, Esq. serve as the neutral third party. *Id.* ¶ 6. The parties ultimately agreed that submitting disputes regarding administration of the estate to binding arbitration before a third party neutral (assuming they could not resolve the dispute between themselves or through counsel) would be an efficient way to resolve any such disputes without the Estate incurring the costs or suffering from the delays of court proceedings. *Id.* ¶ 5. In fact, Petitioner has invoked the Dispute Resolution Procedure previously. *See id.* ¶ 7.

But now Petitioner, after simply exchanging emails with Respondent, entirely disregarded the Dispute Resolution Procedure and rushed to Court to file this Petition, causing the Estate to bear the costs of this proceeding. *See Answer* ¶ 68-70. To the extent any of the interested parties request the Court to appoint a third party neutral to resolve disputes between Petitioner and Respondent, Petitioner and Respondent **already agreed** to such a remedy.

When parties to a contract agree to resolve a dispute via binding arbitration, a Court must compel arbitration of the matter. *CPLR 7503(a)*; *see also Matter of Blumenkrantz*, 14 Misc. 3d 462, 467 (N.Y. Sur. Ct. Nassau Cnty. 2006) (granting order directing a stay of an accounting proceeding and compelling arbitration). The Court should deny the Petition and direct Petitioner to submit his dispute—which is a “matter pertaining to the administration of the Estate,” *see Working Agreement* at § 9, Ex. D to Petition—to the third party neutral as Petitioner previously agreed. The Court should

further direct Petitioner to bear the attorneys' fees and costs associated with this proceeding, which was unnecessary in light of the Working Agreement.

POINT IV

To The Extent The Court Wades Beyond The Four Corners Of The Will Or The Working Agreement—Which It Need Not Do—An Evidentiary Hearing Would Be Required To Resolve Disputes of Material Fact Raised By The Pleadings.

Petitioner does not disagree that the plain language of the Will authorizes Mr. Costello, alone, to control and manage the Business Interests, or to continue holding them in his discretion. Instead, the Petition is a thinly veiled effort to suggest that Mr. Costello should be removed from his fiduciary responsibility to manage and control the Business Interests under Article VII of the Will, and to instead grant Petitioner with the authorities and powers otherwise granted to Respondent under Article VII.

If Petitioner intended to seek Respondent's removal, he must have done so pursuant to SCPA § 711, which sets forth specific bases upon which Petitioner must allege—**and prove**—that Respondent has *inter alia*:

wasted or improperly applied the assets of the estate, or made investments unauthorized by law or otherwise improvidently managed or injured the property committed to his charge . . . or by reason of other misconduct in the execution of his office or dishonesty, drunkenness, improvidence or want of understanding, [that] he is unfit for the execution of his office.

SCPA § 711(2), (8).

Petitioner's allegations are intended to suggest that Respondent is both unfit to manage and control the Businesses Interests and that he is conflicted in doing so because he is a salaried employee of the Businesses. Even if Petitioner had properly sought Respondent's removal, the Answer makes clear that Respondent has acted

prudently under the circumstances, and particularly given the decedent's express intent that Trust B hold the Businesses for the remainder of Elaine Costello's life and that they be managed in such a way so as to potentially pass to other descendants.

Notwithstanding any business successes the decedent attained during his life, he unfortunately passed away at a time when the Businesses were in a difficult position from a cash flow perspective given ongoing development projects—*i.e.*, CityGate and The Reserve. See Answer ¶ 34. Despite the hand Respondent was dealt, the management and operation of all of the Businesses have improved since the decedent's death. Answer ¶ 44. Debt service costs has decreased by 11%, cash flow has increased by nearly 40%, and revenue has increased by 16% since the Will's admission to probate. *Id.*; see also Ex. B to Answer (summary comparing the finances of the Businesses between 2016 and 2017, as well as recent efforts and current initiatives to continue reducing debt servicing costs and increase cash flow and revenue are attached hereto at Exhibit B).

In particular, Respondent renegotiated a 15-year lease with a major tenant of Clinton Crossings for Building D, which will allow for \$22 million in guaranteed revenue over the term of the lease. Answer ¶ 20-21. This lease allowed for a refinancing of Building D, which provided a necessary injection of liquidity to the Estate and the Businesses and cut the applicable interest rate by nearly 50%, for a total savings of \$720,000 annually. Answer ¶ 46-47. Additional refinancing of other buildings in Clinton Crossings are underway that will reduce debt service by an additional \$840,000 annually. *Id.* And Respondent is in the process of negotiating a sale of property at

CityGate with a major developer. *Id.* So progress is indeed being made to manage the debt of the Businesses and the Estate. *Id.*; see also Ex. B to Answer.

Petitioner's request for advice and direction to orderly liquidate Clinton Crossings, The Reserve, and "most of the real property holdings," see Petition ¶ 18, is based on pure speculation that "now is the time to sell" Clinton Crossings (and "most" of the other real property owned by the Business Interests) solely because of low interest rates. See Answer ¶ 85. But Petitioner is not taking into consideration that selling Clinton Crossings right now will deprive the Estate (and the other shareholders—Respondent and his siblings) of the benefit of the \$22 million in guaranteed income from Building D while also selling it at a discount due to the restrictions on the Building D lease. See Answer ¶ 21. Nor is he taking into consideration the penalty the Estate will incur if it prepays the outstanding principal balance on Building D, that Clinton Crossings provides cross-collateral to finance other projects (including City Gate, which Petitioner admits should be completed), or other lost opportunities with the Major Tenant (*i.e.*, the University of Rochester). See Answer ¶ 23-25, 97-98.

Petitioner also fails to put forth that a sale of The Reserve at this time—despite the admitted annual losses—will cause the Estate (and the other shareholders—*i.e.*, the decedent's children, who are each 10% owners) to lose millions of dollars (for which it—nor they—has sufficient liquidity) due to upfront development costs that were invested by the decedent, and personally guaranteed by him, during his lifetime and which will not be recouped on a wholesale of the project. Answer ¶ 26-27, 99.

What Petitioner presents is nothing more than a difference of opinion as to how the Businesses should be managed. But that is not Petitioner's call to make. Petitioner

has not alleged—let alone proven—that Respondent has acted imprudently and/or caused any losses to the Estate. There is no claim that any creditor is not properly secured. Moreover, the decedent acknowledged in his Will that the Estate “is engaged in a speculative enterprise at my express request” and he tasked Respondent alone, who worked alongside the decedent for 30 years in all aspects of the Businesses, to manage the inherent risks in operating them. See Will, Article VII; see also *id.* (setting forth the decedent’s intent that Respondent “not be held liable for any loss resulting from the retention and operation of any business unless the loss shall result directly from the Executor’s or Trustee’s gross negligence or willful misconduct”).

It is clear that—at a minimum—the pleadings raise disputed issues of material fact that must be vetted out in an evidentiary hearing prior to the Surrogate granting any of the relief requested by Petitioner. See *In re Estate of Greenway*, 241 A.D.2d 735, 736 (3d Dept. 1997) (“While it is not necessary for Surrogate's Court to conduct a hearing in cases where facts are undisputed, [w]here . . . the respondent interposes an answer which denies a material fact contained in the petition and no motion is made to dismiss [for failure to state a cause of action], the Surrogate must conduct a hearing”) (quotation marks omitted). Thus, to the extent the Court is not inclined to deny the Petition based on the plain language of the Will or the Working Agreement (for the reasons set forth in Points I-III above), which it should, the Court should order an evidentiary hearing in order to make fact determinations as to the fact disputes raised by the pleadings.

POINT V

The Interests of the Decedent's Children As Minority Owners of The Various Businesses Are Not Before This Court.

Petitioner's statements that assets need to be sold in order to "fund the trusts" and to provide "distributions" to "the beneficiaries" (*i.e.*, meaning the decedent's children, not Elaine Costello) who "have yet to receive any lump sum distribution," Petition ¶¶ 11, 16, 23-24, is clearly intended to misdirect—if not the Court, then the decedent's children. As is set forth in the Answer, Elaine Costello is the only vested beneficiary of Trust B, which is to hold the Business Interests. See Will, Article V(A), V(B)(2). The decedent's children (including Respondent) are contingent remainder beneficiaries of Trust B—they will only potentially receive income from and/or the corpus of Trust B if they survive Elaine Costello and to the extent the Business Interests are not otherwise distributed to other of the decedent's lineal descendants, under the terms set forth in the Will. See Article V(B)(2)(d)(iii). Thus, there is no "lump sum" due to the decedent's children at this time, and absolutely no need (and it would be contrary to the decedent's intent) to liquidate the Business Interests in order "to fund" the Trusts. See Answer ¶¶ 6-10, 32-33.

Respondent's siblings are really before the Court in their interests as minority owners of the various Businesses. See Ex. C to the Petition. They are continuing to receive the same monthly draws (totaling about \$261,000 annually) as they did during the decedent's lifetime, in connection with their ownership interests, as well as any profits that result from the sale of assets held by the Businesses, even despite creditor obligations. Answer ¶¶ 34. Any issue that Respondents' siblings may have with his management of the Businesses—or their interest in obtaining "distributions" at this

time—is really in their capacities as shareholders, not beneficiaries. *Id.* ¶¶ 35-38. This is not the proper forum to invoke those ownership interests.

POINT VI

The Court Should Grant Respondent’s Cross-Motion To Amend The Letters Testamentary to Reflect Petitioner’s Limited Role Under The Will.

The Court should grant Respondent’s request for a Decree modifying the Letters Testamentary issued to Petitioner and Respondent under the Will to reflect that Petitioner does not have and may not exercise any powers or authorities with respect to the management or control of the Business Interests that were owned by the decedent as of the date of death, as is required by Article VII of the Will. As is stated in Point I above, the Will is clear on its face that the decedent vested Respondent with the sole powers and authorities to control and manage the Business Interests.


Under SCPA § 702(10), letters “may be granted limiting and restricting the powers and rights of the holder thereof . . . [t]o any other purpose or act deemed by the court to be appropriate or necessary in respect of the affairs of the estate, the protection thereof or to the proper administration thereof.” Petitioner has expressed a concern that “the assignment of the responsibilities in the Will” does not insulate him from liability. See Petition ¶ 7. While this concern is unfounded because Petitioner could not possibly have liability as to matters over which he has no authority, for the sake of clarity going forward and in the interest of the efficient and proper management of the Estate and the trusts, the Court should limit the Letters Testamentary to reflect Petitioner’s limited role under the Will, *i.e.*, that Petitioner does not have and may not exercise any powers or authorities with respect to the management or control of the Business Interests that were owned by the decedent as of the date of death, per Article VII of the Will.

CONCLUSION

For the reasons described herein, and in Respondent's accompanying Answer, the affidavit of Elaine Costello, and attorney affirmation of Edward Hourihan, this Court should deny the Petition, direct Petitioner to submit this dispute to the Dispute Resolution Procedure as required by the parties' Working Agreement, including binding arbitration before Robert J. Lunn, Esq., and pay the attorneys' fees and costs associated with this needless proceeding, or, if not, then order an evidentiary hearing as to the allegations raised in the pleadings. Respondent further requests that this Court grant his cross-motion and issue a decree modifying the Letters Testamentary to reflect Petitioner's limited role under the Will.

Dated: September 8, 2017

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