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

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In the Matter of the Application of Richard L. Kay, as Trustee of the Himan Brown Revocable Trust dated November 21, 2005, as amended December 1, 2006, Created by

HIMAN BROWN,
Grantor,

To Determine that an In Terrorem Clause has been Violated by Melina Brown and Barrie Brown aka Barrie Stansted.

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DECISION and ORDER
File No.: 2010-2056/D

M E L L A, S.:

The following submissions were considered in deciding the motion and cross-motion described below.

Documents Considered	Numbered
Notice of Motion to Disqualify, Affidavit of Gary B. Freidman, Esq., and Affirmation of Michael S. Ross, Esq. with Exhibits	1-3
Notice of Cross-Motion for Attorneys' Fees and Sanctions, Affirmation of Judith M. Wallace, Esq., with Exhibits, and Memorandum of Law in Opposition to the Motion and in Support of the Cross-Motion	4-6
Reply Affirmation of Michael S. Ross, Esq.	7

In this proceeding by Richard L. Kay (Petitioner), as Trustee of the Himan Brown Revocable Trust (Revocable Trust), for a determination that an in terrorem clause was violated by Respondents Melina Brown (Melina) and Barrie Brown (Barrie), Petitioner moves for an order disqualifying the law firm of Carter Ledyard & Milburn LLP (Carter Ledyard or the Firm) from representing Respondents. Respondents have cross-moved for attorneys fees and sanctions.

Background

The background of this matter has been thoroughly discussed in various prior decisions of this court (*see e.g. Matter of Brown*, NYLJ, July 23, 2019, at 22, col 3 [Sur Ct, NY County]). As is relevant here, Himan Brown (Himan), the creator of radio programs such as "Dick Tracy,"

established a Revocable Trust on November 20, 2002. Between 2002 and 2006, changes were made to the Revocable Trust through multiple restatements. Some of those changes benefited Petitioner, Himan's longtime lawyer, and had a negative impact on Radio Drama Network (RDN), a charitable foundation Himan had established in 1984. Himan died on June 4, 2010, at age 99. In December 2015, RDN filed a petition (the 2015 Petition) seeking, among other things, the invalidation of certain of the provisions of the Revocable Trust. RDN alleges that Petitioner, who was an RDN director when the 2015 Petition was filed, made the changes to the Revocable Trust as part of a scheme to gain control of Himan's substantial assets.

Respondents, who are Himan's granddaughters and RDN directors, each received bequests in the amount of $3 million pursuant to the Revocable Trust's terms. Melina also received real property. In August 2019, Petitioner filed a petition (the 2019 Petition) alleging that Respondents violated the in terrorem clause contained in the Revocable Trust by authorizing and filing the 2015 Petition and then prosecuting the proceeding, and as a result, have forfeited all bequests they received pursuant to the Revocable Trust. Respondents moved to dismiss the 2019 Petition. A Decision and Order granting Respondents' motion to dismiss has been signed contemporaneously herewith.

Discussion

Pursuant to Rule 1.7(a) of the New York Rules of Professional Conduct (22 NYCRR 1200.0), unless certain requirements are met, "a lawyer shall not represent a client if a reasonable lawyer would conclude that either: (1) the representation will involve the lawyer in representing differing interests; or (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests."

While one may move to disqualify an opponent's counsel based on the above-referenced rules, "[a] party's entitlement to be represented in ongoing litigation by counsel of his or her own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted" (*Selim v Castillo*, NYLJ, Aug. 15, 2023, at 17, col 1 [Sup Ct, Bronx County] [internal quotation marks omitted]). In fact, "a court must 'carefully scrutinize[]' any attempt to disqualify counsel, and, accordingly, the movant, 'bears a heavy burden' to show that disqualification is warranted" (*id.* [internal citations omitted]; *see Mayers v Stone Castle Partners, LLC*, 126 AD3d 1, 5 [1st Dept 2015] [stating that "[a] movant seeking disqualification of an opponent's counsel bears a heavy burden"]). Where disqualification is premised on the representation of multiple clients, "the burden is on the movant to show the existence of a conflict of interest so as to require the . . . law firm to justify its dual representation" (*Matter of Isabel Moros Trust*, NYLJ, Jan. 23, 2004, at 3, col 1 [Sur Ct, Westchester County 2004]). It is well settled that "[d]isqualification of counsel rests in the sound discretion of the court" (*Hirshfeld v Stahl*, 194 AD2d 388 [1st Dept 1993]).

The Parties' Contentions

Petitioner's motion is supported by the affirmation of Michael S. Ross, an attorney ethics practitioner and adjunct professor retained by Petitioner to provide an expert opinion on attorney ethics issues allegedly raised in this matter. Ross states that he has "no first-hand knowledge of the relevant facts" and that his opinions are based "on the facts set forth in [the 2019 Petition], as well as [his] review of accompanying exhibits" (Ross Aff. ¶13).

According to Ross, Carter Ledyard "previously advised Melina and Barrie – in connection with the Revocation Proceeding [*i.e.*, the proceeding commenced by the filing of the 2015 Petition] in which Carter Ledyard represented RDN – to pursue a course of action for

RDN's benefit which could trigger the in terrorem clause and lead to the forfeiture of millions of dollars by both Melina and Barrie" (Ross Aff. ¶33). He further opines that:

> "Carter Ledyard is laboring under both Rule 1.7(a)(1) and Rule 1.7(a)(2) concurrent client conflicts because: 1) the interests of RDN, Melina and Barrie are in direct conflict; and 2) Carter Ledyard's advice to Melina and Barrie is tainted by its potential malpractice exposure as a result of having previously advised Melina and Barrie to engage in conduct which could trigger the in terrorem clause, as well by its potential exposure to reputational and financial loss. The conflict is unwaivable because no 'reasonable lawyer' could conclude that they could represent each client effectively in this situation" (Ross Aff. ¶34).

Ross also observes that RDN only challenged certain Revocable Trust amendments, and not the amendment that resulted in Respondents each receiving an additional $500,000 in personal bequests under the terms of the Revocable Trust.[1] According to Ross, if Carter Ledyard's loyalty to RDN as RDN's counsel were undivided, it would have challenged the amendment that benefited Respondents as well (Ross Aff. ¶47).

In opposition, Respondents argue that: 1) Petitioner lacks standing to make this motion; 2) Petitioner's motion is procedurally defective as it consists solely of an affirmation by an attorney without factual knowledge; 3) Ross's affirmation is based on speculation about the content of attorney-client communications that neither Petitioner nor the court would be entitled to probe; and 4) disqualification where the movant lacks standing is an extreme remedy warranted only for unwaivable conflicts.

Respondents further contend that, in any event, there is no conflict because the interests of RDN and Respondents are aligned, but even if a conflict existed, such conflict would be waivable. They assert that contrary to the allegations in the 2019 Petition, "RDN is not an

[1] Under prior iterations of the Revocable Trust, Respondents each received $2.5 million instead of $3 million.

'entity' or 'vehicle' being used by Melina and Barrie, but a not-for-profit foundation to which they owe fiduciary duties to act in its best interest" (Mem. in Opp. at 17). According to Respondents:

> "[Ross] suggests that there is an unwaivable conflict whenever the same firm represents a nonprofit and its directors in litigation against a third party, and there are claims against the directors based on their official actions. It is telling that Ross does not cite a single case that actually says this. There is no adversity between Barrie and Melina Brown and RDN in this proceeding because [Petitioner] is suing them for the actions of RDN that advance RDN's interests" (Mem. in Opp. at 17).

Respondents also state that contrary to Ross's "false assumption that Carter Ledyard represented Respondents in 2015" (Mem. in Opp. at 2), "Carter Ledyard did not represent Respondents in their personal capacities prior to December 2019, when [Petitioner] served the Citation in this proceeding. Absent an attorney-client relationship, there is no potential malpractice liability based on advice allegedly given in 2015" (Mem. in Opp. at 11).

Regarding Ross's claim that RDN should have challenged the amendment that increased Respondents' bequests, Respondents point out that "RDN's [2015 Petition] in the Reformation Proceeding alleges that [Petitioner] *exploited* Himan's intention to revise his estate plan to increase bequests to his family to include subtle language revisions that Himan might not notice but that effectively diverted the bulk of his estate to the Charitable Trust controlled solely by [Petitioner]" (Mem. in Opp. at 18-19 [emphasis in original]). Respondents take the following position:

> "There is no requirement that a not-for-profit pursue a claim that no one has proposed and that has no basis in fact, whether the funds available to satisfy that claim are limited or not. RDN properly sought to invalidate only those provisions which it alleged were inconsistent with the intentions of Himan Brown, and this Court found the form of those allegations to pass muster. [Petitioner] and Attorney Ross do not get to dictate what positions [Petitioner]'s adversaries should take in litigation under the guise of a motion to disqualify" (Mem. in Opp. at 19).

In addition, Respondents take issue with the timing of the motion to disqualify, characterizing the motion as a ploy to delay a determination on Respondents' fully briefed motion to dismiss the 2019 Petition. They contend that Petitioner knew that Carter Ledyard represented Respondents when the parties "agreed to the briefing schedule at the initial appearance date for the [2019 Petition]" (Mem. in Opp. at 33), and that moreover, any purported conflict of interest would have arisen in 2015 (when, according to Ross, Carter Ledyard was advising Melina, Barrie, and RDN in connection with the filing of the 2015 Petition). Respondents further argue that they were prejudiced by Petitioner's delay in filing a frivolous motion to disqualify, and seek "an award of attorneys' fees payable by [Petitioner] to RDN pursuant to 22 NYCRR 130-1.1 and sanctions payable to the Court" (Mem. in Opp. at 3).

In reply, Ross states that whether Petitioner has standing is irrelevant, as a court may disqualify counsel sua sponte. He argues that a court may determine what legal advice was given by "allow[ing] parties to file disqualification motion-related materials under seal in order to protect privileged and confidential information" (Reply Aff. ¶19), and can also conduct hearings to elicit relevant information. Ross further claims that he never stated that Carter Ledyard represented Respondents as individuals in 2015. According to Ross, "[t]he conflict here arose in December of 2019, when Carter Ledyard *then* decided to represent Barrie and Melina in their individual capacities, after having rendered advice to them (either individually or as directors of RDN) which potentially triggered the in terrorem clause" (Reply Aff. ¶11 [emphasis in original]). More specifically, Ross posits that "Carter Ledyard has advised Melina and Barrie to indirectly challenge (i.e., through RDN) the Amendment to the Revocable Trust and, thereby, potentially trigger the in terrorem clause" (Reply Aff. ¶28). He also contends that the imposition

of sanctions would be inappropriate, because the arguments raised in support of the disqualification motion are "significant and not frivolous" (Reply Aff. ¶37).

Analysis

As an initial matter, the court notes that the timing of the motion to disqualify is problematic (*see Saftler v Government Employees Ins. Co.*, 95 AD2d 54, 60 [1st Dept 1983] [stating that "[t]he remedy [of disqualification] may not be invoked merely to aid as a tool in litigation, sought to gain for one party or the other some advantage unrelated to the merits of the action"]; *Salomone v Abramson*, 48 Misc 3d 318, 328 [Sup Ct, NY County 2015] [observing that "[r]estrictions on a party's right to select representation by a particular attorney should be carefully scrutinized because disqualification can be used as a tactic to 'stall and derail the proceedings, redounding to the strategic advantage of one party over another'"]; *Cremers v Brennan*, 196 Misc 2d 262, 264 [Civ Ct, NY County 2003] [noting the "well-recognized 'danger' that motions to disqualify can be tactical 'derailment' weapons in litigation"]).

Moreover, Petitioner, who does not claim to have been represented by the Firm at any point in time, lacks standing to seek the Firm's disqualification (*see Turner v Owens Funeral Home, Inc.*, 140 AD3d 632, 634 [1st Dept 2016] [stating that "[b]ecause plaintiffs never had any attorney-client relationship with [the law firm at issue], they do not have standing to seek disqualification"]; *Celi Elec. Light., Inc. v Sanders Constr. Corp.*, 41 Misc 3d 78, 80 [App Term, 1st Dept 2013] [noting that "[a]s a threshold matter, plaintiff, which is neither the present nor former client of the law firm of Morelli Ratner P.C., did not have standing to seek the law firm's disqualification from dual representation of the defendants"]; *Matter of Isabel Moros Trust*, NYLJ, Jan. 23, 2004, at 3, col 1 [Sur Ct, Westchester County] [similar]).

Even if Petitioner did have standing, Ross's affirmation is wholly inadequate as a basis for disqualification. Ross has no personal knowledge of the conduct that purportedly gives rise to a conflict (*see Zutler v Drivershield Corp.*, 15 AD3d 397 [2d Dept 2005] [finding that plaintiff failed to meet his burden where his "motion to disqualify the defendants' attorney was supported by affidavits that were speculative and conclusory as to the attorney's personal knowledge of the conduct at issue"]). His affirmation (*see e.g.* Ross Aff. ¶¶53 n2, 55) is rife with speculation (*see Kelly v Paulsen*, 145 AD3d 1398, 1400 [3d Dept 2016] [denying motion to disqualify where movant's claims were "not based upon record evidence" and were instead based on "mere speculation"]).[2]

The court is aware that even when a movant lacks standing to seek disqualification of an opponent's counsel, "a court has the authority to act sua sponte to disqualify counsel if it finds a conflict of interest warranting disqualification" (*HSBC Bank USA, N.A. v Santos*, 185 AD3d 475, 477 [1st Dept 2020]; *see Matter of Risk*, NYLJ, Mar. 25, 2015, at 23, col 2 [Sur Ct, NY County] [similar]). However, as there is no conflict of interest here, no basis exists for this court to deprive Respondents of their chosen counsel.[3]

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[2] Ross's contention in his Reply Affirmation that he never claimed that Carter Ledyard represented Respondents in their individual capacities in 2015 is disingenuous. Ross's assertion that Carter Ledyard may face a legal malpractice claim is necessarily predicated on the theory that the Firm gave Melina and Barrie bad legal advice in 2015 while acting as their personal attorneys.

[3] Where, as here, no "substantial issue of fact exists as to whether there is a conflict of interest" (*Saftler*, 95 AD2d at 58), there is also no reason for this court to direct Respondents (or their counsel) to submit additional documents or to hold a hearing on the issue of disqualification (*see O'Donnell, Fox & Gartner v R-2000 Corp.*, 198 AD2d 154, 154-155 [1st Dept 1993] [finding that "[t]he IAS court ... properly denied, without an evidentiary hearing, the plaintiff's motion seeking to disqualify" defendants' counsel]; *Lyons v Lyons*, 50 Misc 3d 876, 890-891 [Sup Ct, Monroe County 2015] [declining to hold a hearing on a disqualification motion where no "clear showing" had been made that a hearing was warranted]).

Also without merit is Petitioner's contention that a conflict exists because through RDN, Respondents allegedly indirectly challenged the Revocable Trust amendments on the advice of Carter Ledyard, thereby potentially triggering the in terrorem clause. Even taking at face value Ross's speculative assertions with respect to the nature of the advice provided and to whom, Petitioner's position is untenable. As explained in detail in the contemporaneous Decision and Order granting Respondents' motion to dismiss the 2019 Petition, Respondents did not challenge the Revocable Trust amendments either directly or indirectly. Accordingly, Respondents were not at risk of losing millions by following the Firm's purported advice. The mere fact that Petitioner believes otherwise does not create an actual conflict or an appearance of impropriety (*see Matter of Isabel Moros Trust*, *supra* [denying motion to disqualify where "petitioner has not demonstrated any conflict or impropriety arising from the firm's concurrent representation of Dvorah and Dvorah's mother" regarding various inter vivos trust accounting proceedings]).

Petitioner's reliance on *Matter of Strasser* (129 AD3d 457 [1st Dept 2015]) is misplaced. In *Strasser*, the court concluded that the same attorney could not represent the co-guardians of an alleged incapacitated person (AIP), where that attorney had previously represented the AIP, and the interests of the AIP and the co-guardians were "materially adverse" (*id.* at 458). Specifically, the court stated that there was "clearly a potential conflict of interest due to the co-guardians' mutual financial dependence on [the AIP], their related competing financial interests under the terms of a certain trust, and their status as beneficiaries under [the AIP's] will" (*id.*). The co-guardians had "competing financial interests" because "[t]he more assets spent during [co-guardian Francine Strasser's] lifetime [would] of necessity mean less assets that [would] pass to [co-guardian Ika Brakha]" upon the death of Francine Strasser (*id.* at 458-459). Here, where Respondents have each received a fixed, one-time sum that (contrary to Petitioner's claim) they

are not at risk of losing through forfeiture, Petitioner has not established that Respondents' and RDN's financial interests under the terms of the Revocable Trust are "competing."

Petitioner's alternative argument that Carter Ledyard is conflicted because it only challenged some, but not all, of the Revocable Trust amendments on behalf of RDN, is also unavailing. Respondents correctly observe that Petitioner has failed to provide any valid basis for Carter Ledyard to challenge the increased bequests to Respondents. Respondents and RDN agree that those bequests were entirely consistent with Himan's intent, and Petitioner has not established otherwise.

The parties' remaining contentions with respect to the motion to disqualify are either without merit or are academic in light of the above determinations.

Although Petitioner's disqualification motion has been denied, the court declines to characterize it as frivolous. Accordingly, Respondents' cross-motion for sanctions and an award of attorneys fees pursuant to 22 NYCRR 130-1.1 is denied (*see Cremers v Brennan*, 196 Misc 2d at 267).

For the foregoing reasons, the motion and cross-motion are denied.

This decision constitutes the order of the court.

Dated: October 3, 2024

SURROGATE