

M E M O R A N D U M

SUPREME COURT QUEENS COUNTY
SUPREME COURT IAS PART 5

-----x Hon. JAMES P. DOLLARD

KAEVON GOLSTON, an infant by his
mother and natural guardian,
SHAWN GOLSTON, and SHAWN GOLSTON
Individually,

Index No.: 13979/98

Plaintiffs,

Motion Date: Nov. 20,
2007

-against-

Calendar No.: 12 & 13

Seq. No. 39

DR. AJEY JAIN, DR. YVON DAMOUR,
GETWELL PEDIATRIC ASSOCIATES, P.C.,
DR. PHYLLIS WEINER, JAMAICA
PEDIATRICS, P.C., JAMAICA A
ASSOCIATES, P.C. DR. SADIQ
MANDANI,, DR. NETTA BLITMAN,
DR. DOUGHLIN K. GEOFFREY, DR.
E. FRIEDMAN, DR. MARIA LECHUGA,
JAMAICA HOSPITAL MEDICAL CENTER,
JAMAICA IMAGING ASSOCIATES, DR.
HAROLD TENENBAUM and DR. PARVIZ
BEHFARIN,

Defendants.

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This is a motion by Shawn Golston as parent and natural guardian of
Kaevon Golston and as Co-Trustee of the Kaevon Golston Trust (The
Trust) for omnibus relief directed against the former Co-Trustee,
Guardian Trust Company (Guardian). Guardian cross moves for an
order of the court accepting its resignation or to vacate an order
of the court and for related relief in connection with its
resignation as Co-Trustee. In addition Guardian moves for the
identical relief by Order to Show Cause.

The two motions are consolidated for determination.

The underlying action was to recover damages sustained by the
infant plaintiff as the result of medical malpractice. The action
was settled before trial on June 30, 2006. An infant's compromise
order signed on August 22,, 2006 provided for payment of the
settlement funds to be held in escrow by plaintiffs' then
attorneys. A distribution order was signed by the court on
September 8, 2006. The order provided inter alia for the creation
of The Kaevon Golston Trust (The Trust), authorized the plaintiff
Shawn Golston as mother and natural guardian of the infant

plaintiff Kaevon Golston to execute The Trust, appointed Shawn Golston and Guardian Trust Company (Guardian) as co-trustees of The Trust, provided for the immediate payment of \$2,427,144.00 to The Trust and for nine future annual installments of the proceeds of the settlement in the amount of \$300,000.00 each, to be deposited into The Trust. Guardian filed its order and designation on October 2, 2006 and received The Trust assets on October 12, 2006.

On December 18, 2006 Guardian executed a resignation as co-trustee. The "whereas" clause of the resignation states that Guardian "wishes to resign". The "therefore" clause states that Guardian "hereby resigns as co-trustee of the Trust, said resignation to be effective upon acceptance of same by the Supreme Court of the County of Queens, State of New York, and upon its discharge from liability for its acts as such Co-Trustee by Order of this Court, and upon the appointment by this Court of a successor Co-Trustee". The resignation further provided that "upon receipt of a copy of an Order of this Court by Guardian Trust Company, FSB, approving its resignation, discharging it from liability for its acts as such Co-Trustee, and appointing a successor Co-Trustee, Guardian Trust Company, FSB, will turn over all funds then in its possession to such successor Co-Trustee, in such manner as shall be agreed upon by Guardian Trust Company, FSB, and such successor Co-Trustee.

On December 21, 2006 the resignation was attached to a letter sent by William Lancaster, III (Lancaster) an attorney in the firm of Slade, Newman, LLP who was representing Guardian to Jay J. Sangerman (Sangerman) who then was representing Shawn Golston in regard to the Trust. The letter stated

"As we have previously discussed, Guardian Trust Company's resignation is contingent on (1) the Court's acceptance of the resignation; (2) the Court's appointment of a successor Co-Trustee; and (3) the Court's discharge of Guardian Trust Company from all liability for its acts as Co-Trustee. Only upon all such conditions being satisfied will Guardian Trust Company transfer the assets in its hands to the designated and appointed successor Co-Trustee. Also, we will need approval of our commissions and legal fees."

By letter dated January 2, 2007 Lancaster sent Sangerman calculations of the trustee's fees and a request for a copy of the proposed order for review. On January 17, 2007 Sangerman faxed a letter to Lancaster stating that "attached please find the order that will be submitted to the Judge, likely this week". There is no evidence that Lancaster expressed any objection to the form or contents of the proposed order prior to the submission and signing by the Court.

On January 24, 2007, upon the ex-parte application of the attorneys who had represented the plaintiffs in the underlying lawsuit, the Supplemental Order to change Trustee was presented to the Court. In support of such proposed order, the resignation of Guardian, a request by Shawn Golston to appoint United States Trust Company, N.A. (United) as successor Co-Trustee, and a consent and designation by United to serve as successor trustee together with its compensation schedule were submitted to the Court. It appeared that the proposed order substantially conformed to the terms stated on the face of the resignation. The Court was not advised of the December 21, 2006 Lancaster letter.

The Order was signed on January 24, 2007. It provided that Guardian's resignation was accepted effective immediately, that United was appointed as successor corporate trustee, that Guardian shall be allowed commissions although the court, contemplating that the amount of commissions would be determined at the time the outgoing Co-Trustee filed its final accounting, was left blank, and that Guardian shall forthwith turn over all property with certain exceptions that it was holding as trustee of The Trust to United as successor co-trustee in such manner as directed by United. It was further

"ORDERED, that, upon the turning over of all property of The Kaevon Golston Trust, Guardian Trust Company, FSB is hereby discharged as co-trustee of The Kaevon Golston Trust and released of all liability for its services as co-trustee; provided however, that Guardian Trust Company, FSB has not made any distributions, withdrawals or payment of expenses from The Kaevon Golston Trust except as authorized by this order; and provided, further, that the market value of the Trust is not substantially different from the closing amounts in the November 30, 2006 statement, showing an ending market value of \$2,446,860.35; and it is further

ORDERED, that this Court releases and discharges United States Trust Company, N.A. individually and as Trustee, and its respective executors, personal representatives, administrators, successors and assigns, from any and all liabilities or claims whatsoever of the prior corporate trustee and of the individual trustee to the date hereof, which any party or the Court may have against the prior corporate trustee and of the individual trustee to the date hereof by reason of any act done or omitted to be done as referred to in The Kaevon Golston Trust; and it is further

ORDERED, that the Court will permit United States Trust Company, N.A. to be indemnified from the Kaevon Golston Trust and save United States Trust Company, N.A., individually and

as a successor trustee, and its respective executors, personal representatives, administrators, successors and assigns, of and from any and all loss, costs, damages, claims and demands of whatever kind or nature that United States Trust Company, N.A., individually and as successor trustee, and its respective executors, personal representatives, administrators, successors and assigns, may suffer by reason of succeeding the prior corporate trustee, Guardian Trust Company, FSB, as successor trustee of The Kaevon Golston Trust".

The signed order together with the supporting papers was forwarded from Chambers in the usual course to be filed with the County Clerk. For reasons unknown it was either lost in transition or not filed or scanned by the County Clerk's Office.

Although Guardian contends it was never "served" with a copy of the order, it admits it received such copy and upon receipt it "promptly turned over The Trust assets in its possession to U.S. Trust as successor co-trustee of The Trust, retaining a small reserve for payment of any additional liabilities with respect to the Trust."

There is evidence that Guardian was sent a copy of the signed order by fax on January 27, 2007, that subsequent conversations and negotiations were had between Guardian's attorneys and Sangerman resulting in an agreement signed on February 8th or 9th, 2007 under which Guardian would turn over to United as quickly as possible all funds except for \$10,000.00 subject to further order of the Court and that Sangerman would submit an order amending the prior discharge order upon notice of settlement which would include a provision for unconditional release of Guardian and the disposition of the aforesaid \$10,000.00. On February 19, 2007, Ira L. Slade (Slade) of Slade & Newman, LLP sent a letter to Sangerman reminding him that he was to submit a revised order to the Court providing for the unconditional release of Guardian and stating that Guardian has taken necessary steps to transfer Trust assets except for the \$10,000.00 reserve. Such a revised order was never submitted. Relations between the Slade firm and Sangerman deteriorated over time, Sangerman objecting to commissions taken by Guardian and legal fees paid by Guardian. It would appear that Guardian transferred all but \$33,661.12 sometime between February 1st and February 28th, 2007 and all but \$11,083.14 between March 1st and March 31st, 2007. On April 30th 2007 Guardian was holding \$9,535.20.

As noted Sangerman never submitted a revised order to the court. Guardian served two sets of motion papers seeking to vacate

the January 17, 2008 order but these were rejected by the Motion Support Office because Guardian failed to pay the County Clerk filing fees and for technical problems in naming the wrong IAS Part, making them returnable on the wrong motion day and utilizing an incorrect title. On the Notice of Rejection dated August 28, 2007 it was noted that the Supplemental Order had not been entered. It would appear that this was the first time Guardian was made aware of this.

Neither side would appear to be blameless in this matter, the controversy one which should have been resolved without resort to petty bickering.

Initially Guardian having wished to resign should have sought court approval rather than delegating that responsibility. Having done so Guardian's attorneys after asking for and receiving a copy of the Order prior to its submission to the Court should have objected to Sangerman before it was submitted. When they received a copy of the signed order by Fax on January 27, 2007, the day it was signed, they should promptly have sought relief from the Court, and certainly before turning the assets over to United without having a copy of the Order with Notice of Entry.

Mr. Sangerman should have informed the Court of the contents of Mr. Lancaster's December 21, 2006 letter setting forth the parole conditions upon which it had made its resignation contingent. Also he should have served a copy of the Order with Notice of Entry. Had he attempted to do so he would have ascertained that the order had not been entered by the County Clerk. Had the Court been informed on a timely basis that the Order had been lost it is possible it could have been found and entered at that time. Mr. Sangerman having agreed in the February 8th and 9th written agreement to submit an order on notice amending the prior discharge order should have done so.

As an observation, however, the court most probably would not have granted an unconditional release of Guardian without the benefit of a final accounting.

At present there are substantial trust assets in the hands of the successor Trustee which according to the County Clerk Index file has not filed its order and designation.

The Order of January 27, 2008 discharging Guardian may or may not still exist but there is no question that it has never been entered. There is an outstanding dispute between Guardian and the Co-Trustee over Guardian's commissions and legal fees.

In order to provide some certainty as to the status of the

trust and to resolve the instant disputes the order to be entered hereon shall provide that Guardian's resignation as Co-Trustee is accepted and Guardian is discharged as such Co-Trustee nunc pro tunc as of February 1, 2007. Such discharge is conditioned on the Court accepting Guardian's final accounting which shall be filed within 45 days of the service of a copy of the Order with Notice of Entry. Any objections to the accounting shall be filed within 20 days after service and filing of the accounting. The order shall also provide that the amount of Guardian's commissions and legal fees be determined at the time the Court settles the accounting. The order shall appoint United as successor Co-Trustee nunc pro tunc as of February 1, 2008 and shall contain the last three decretal paragraphs set forth in the January 27, 2007 order.

The order of January 27, 2007 is deemed vacated.

The motions and the cross motion are granted to the extent indicated and in all other respects denied.

Settle Order.

Dated: March 31, 2008

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J. S. C.