

Denver District Court, State of Colorado 1437 Bannock Street Denver, CO 80203	DATE FILED: August 18, 2021 4:23 PM FILING ID: CF15D42AC085A CASE NUMBER: 2019DR30398
In Re the Marriage of: Amy Elizabeth Moore, Petitioner, v. Benjamin Emanuel Moore, Respondent.	<p style="text-align: center;">▲ <u>COURT USE ONLY</u> ▲</p> Case No. 19DR30398
Nancy E. Rice – Special Master Judicial Arbiter Group, Inc. 1601 Blake Street, Suite 400 Denver, Colorado 80202 Phone: 303-572-1919 Facsimile: 303-571-1115	JAG Case No. 2021-0442S
ORDER RE: CUSHMAN TRUST	

This case came before the Special Master for an evidentiary hearing on July 21, 2021. The special Master heard from witnesses, reviewed evidence, and evaluated written closing arguments. All parties were present for the hearing, although the hearing had to be held at the offices of Sherman and Howard since Mr. Moore was unvaccinated and therefore not allowed by JAG rules to be physically present at JAG.

The issues related to the Cushman Trust were placed before the Special Master at Husband's's request and made an order of the Court as part of the April 17, 2020 Order from March 11, 2020 Contempt Advisement Hearing. Pet's Ex. 80, ¶ 1.C. While Respondent later objected to the Special Master hearing this matter, the Special Master ruled that the Cushman Trust was within the scope of her appointment.

Discussion

The Cushman trust was established and is administered as a Wyoming “qualified spendthrift trust” under Wyoming law. Husband, as the Settlor, and Opes Directed Fiduciary Services LLC, as Trustee, established the Trust on April 10, 2017. On the same day, Husband signed a Qualified Transfer Affidavit in order to set up the spendthrift trust, by which he transferred all his right, title, and interest in Winthrop Intelligence LLC, to the Trust. At the time the Trust was set up, the beneficiaries were Wife and the couples’ two children. The Trust Protector is Drue A. Moore, husband’s cousin. Husband testified that he created the Trust to protect “generational wealth” after discussing the Trust with his wife.

The Trust contains a “floating spouse” provision which defines the spouse as Wife, or the “person to whom Settlor is legally married at the time such status is to be determined, but only if a petition for legal separation or dissolution of marriage is not pending before a court of competent jurisdiction.” Since Wife filed for a legal separation on May 28, 2019, she is no longer a beneficiary of the Trust.

The issue before the Special Master is whether or not the Cushman Trust constitutes marital property despite the Wyoming Qualified Spendthrift Trust? There are three Colorado cases which provide guidance.

In Kaladic v. Kaladic, 589 P.2d 502 (Colo. App. 1978) a wife established an irrevocable, discretionary, spendthrift trust for her sole benefit eleven months prior to filing for a divorce. The assets she transferred, like those here, would have been marital but for the transfer. The Court of Appeals stated that a spouse has the right to make inter vivos transfer of property to any person, but to be valid, the transaction must be bona fide and not made with the fraudulent intent to defeat the other spouse’s marital rights in the marital estate. The Court determined that the transfer in this case was made with fraudulent intent because it was done with the purpose of defeating the other spouse’s marital rights in the assets. The transfer was set aside as fraudulent and illusory.

A second case, In re Marriage of Pooley, 996 P.2d 230 (Colo. App. 1999) discussed a different factual pattern. There, the wife set up an irrevocable, discretionary trust for her own benefit. This trust was also funded with what previously were marital assets. The Court stated that “because the proceeds here were in an irrevocable trust over which wife has no control” that neither the trust income nor the trust corpus was marital property, relying on another case, In re

Marriage of Jones, 812 P.2d 1152 (Colo. 1991.) The Court went on to note, however, that there was no evidence that the property was placed in the trust for an improper purpose. (Here the funds were from a personal injury settlement.) The Court noted as dicta that the trust was not created in anticipation of a dissolution of marriage proceeding nor was it done to defeat the husband's property rights.

Husband relies on a third case he argues is on point, In re Marriage of Rosenblum, 602 P.2d 892 (Colo. App 1979). This case holds that while a beneficiary of a discretionary trust does have rights, since those rights are merely an expectancy and do not rise to the level of property, they do not constitute marital property. Whether deciding whether the instant trust is the same or similar to the one in Rosenblum, Husband fails to note the dicta in Rosenblum stating that its holding is dependent upon the absence of any showing of a fraudulent transfer such as in the Kaladic case.

The question before the Special Master, then, is whether the Cushman Trust was made with a fraudulent intent to defeat the wife's right to marital property. A secondary question is whether the Trust provisions themselves create an illusory trust. Although Husband testified that it was not his intent to defraud his wife, the documentary evidence demonstrates resoundingly that there was such a fraudulent intent and that the Trust itself was illusory.

The Special Master finds the following facts with respect to whether this Trust was made with fraudulent intent and/or was illusory.

1. Although the Trust was created on April 10, 2017, Husband's 2017 Winthrop Intelligence K1 confirms that he owned a 50% interest in this entity at the end of 2017, eight months after he claimed to have transferred the interest to the Cushman Trust.

2. Husband submitted his tax return to Mid-First Bank as part of his effort to convince the bank to provide him with a multi-million-dollar real estate loan. A copy of Husband's Winthrop Intelligence 2017 K1 was submitted to the bank as part of the loan package. This document also confirms his continued ownership of Winthrop Intelligence at the end of 2017.

3. Husband's Personal Balance Sheet, Wife's Exbt. 5 was prepared by Husband in 2019. With this document Respondent affirmatively stated that he retained his interest in Winthrop Intelligence a year after he claimed it was transferred to the Cushman Trust.

Here he also confirms that he values his ownership interest in Winthrop Intelligence at \$9,475,000.

4. Husband's Notes to Mid-First Bank - 2018 - Wife's Exbt. 36. This communication from Husband was provided to Mid-First Bank in mid-2018 as part of Respondent's efforts to obtain a significant real property loan. Respondent attached his April 20, 2018 Personal Balance Sheet to this communication and once again represented that he maintained his ownership of Winthrop Intelligence. Husband's expert, Carol Warnick, said that if Husband represented that he was the owner of the Winthrop Intelligence in an effort to get bank financing, "that is a difficult fact. He should have been more careful."

5. The August 2018 Federal Lawsuit, Exbt. 39. Husband initiated federal litigation in which he held himself out as owning an interest in Winthrop Intelligence for purposes of obtaining venue in Colorado District Court. Husband's expert, Carol Warnick, suggested that if Moore continued to exercise control over the Trust at the time he instituted the lawsuit, that might suggest an illusory transfer.

6. Rental Application - Frisco Property Nov. 2018 - Wife's Exbt. 42. This application stated that Husband owned Winthrop and that Winthrop was a source of additional income.

7. Temporary Orders Exhibit T - Wife's Exbt. 7. During the October 25, 2019 Temporary Orders hearing, Husband submitted this exhibit which confirms his ownership of Winthrop Intelligence more than 2 1/2 years after the alleged transfer. Husband's expert, Carol Warnick, stated that the fact that Husband continued to state he had an ownership interest in the entity "troubled her, but it could have been just a mistake."

8. A statement against interest made by Husband's prior counsel, Michael Davis, regarding Husband's divorce planning, as follows:

Ben's generational wealth is tied up specifically with the goal in mind that an ex-wife can't get to it. And there are many attorneys who have worked on that longer and harder than you and I can ever imagine with that specific goal in mind.

9. The handwritten notes of Husband's expert, Carol Warnick, questioning whether the Trust constituted a "fraudulent transfer?"

10. The testimony of Husband's expert, ostensibly of assistance to his position, established that while Husband is not currently listed as a beneficiary, the Trust Protector could add Husband as a beneficiary at any time. In addition, Wife's Exbt. 72, which is a copy of Husband's handwritten notes, demonstrates that Husband intended that the Trust Protector change the beneficial interest of the trust to him. Once Husband has been named as a beneficiary, the Distribution committee has the ability to distribute income and principal to Husband in a non-fiduciary capacity.

11. Cross examination of the expert witness demonstrated that she was unfamiliar with the provisions of the trust, had unanswered questions about whether the trust was fraudulent, and was unfamiliar with the items delineated above which might constitute such fraud. While she opined that the Trust was separate property, the Court found her testimony to be impeached both factually and legally, and therefore of limited value.

Specifically, Expert Witness Warnick, when asked if Respondent had the right to direct the trustee to distribute all of the assets of the trust to the beneficiaries, stated that the trust was irrevocable, and Respondent did not have that right. When she was directed to Article Four, § 1, ¶ B.3, she acknowledged that Respondent did retain the ability to dissolve the trust.

Next, when asked if Respondent had the right to inspect financial records related to trust assets, Warnick said that Respondent did not retain that right. When she was directed to Article Nine, § 1, ¶ B.6, she acknowledged that Respondent retained the right to inspect trust records at any reasonable time.

Also, Warnick stated that, in her opinion, the distributions from the Trust were governed by the HEMS (health, education, maintenance, and support) standard. The HEMS standard is an ascertainable standard for distribution, which means it provides boundaries or rules for a Trustee when he or she is deciding what distributions are appropriate from a Trust. In fact, distributions from the Cushman Trust are not governed by the HEMS standard. Rather, the trustee is required to make distributions as determined by the Distribution Committee who are acting in a non-fiduciary capacity and who are specifically allowed to participate in "self-dealing." Pet's Ex. 48, Article Four, § 1.B. and Article Five, § 3.

While Husband is not currently listed as a beneficiary, Husband's Trust Protector could add him as an additional beneficiary at any time. Pet's Exbt. 48, Article Eight, Section 2.C.

Conclusion and Recommendation

The overwhelming evidence presented to the Special Master establishes that the Cushman Trust remains a marital asset. Husband maintained his ownership and control over

Winthrop Intelligence. The alleged transfer to the Cushman Trust was illusory and fraudulent. The Cushman Trust was created with the specific purpose of depleting or concealing marital assets in contemplation of these divorce proceedings.

Dated this 18th day of August, 2021.

A handwritten signature in cursive script that reads "Nancy E. Rice". The signature is written in black ink and is positioned above a horizontal line.

Nancy E. Rice, Special Master
Judicial Arbitrator Group, Inc.