

STATE OF VERMONT
CALEDONIA COUNTY

FILED

SEP 26 2007

CALEDONIA
SUPERIOR COURT

HAROLD COLLERAN
Petitioner

v.

NANCY COLLERAN
Respondent

Caledonia Superior
Docket No. 158-7-07

Decision on Motions

Before the court are (1) a petition for a guardianship accounting and related relief under 14 V.S.A. §§ 3510-11; (2) Respondent's motion to dismiss the petition; and (3) Respondent's motion for V.R.C.P. 11(b) sanctions.

The following events derived from the record are not significantly disputed. Petitioner Harold Collieran became seriously ill in 2003 and, on April 1 of that year, executed a general power of attorney in favor of his wife, Nancy. On May 11, 2006 Harold Collieran filed for divorce in Orleans County. The case was docketed as 88-5-06 Osdm. Little information about the divorce is available to this court, but Attorney Bucknam, on behalf of the Respondent/divorce-defendant has asserted that a final hearing began in Orleans County on July 18, 2007 and was continued to September 25, 2007.

On July 11, 2007, exactly one week before the final hearing in the Orleans divorce apparently commenced, Harold Collieran brought an action against Nancy Collieran in this court, under 14 V.S.A. §§ 3510-11, seeking:

- (1) a declaration that the power of attorney was improperly executed and/or verbally revoked;
- (2) a declaration that Nancy Collieran breached her fiduciary duties;
- (3) an injunction prohibiting further actions under the power of attorney;
- (4) an accounting;
- (5) repayment of funds "appropriated for her own use" and attorney's fees.

On August 23, 2007, Respondent moved to dismiss the petition for failure to state a claim under V.R.C.P. 12(b)(6) and for improper venue under V.R.C.P. 12(b)(3). Respondent relies on facts outside the pleadings to develop an argument that collateral estoppel prevents this court from entertaining the petition. Contrary to Respondent's argument, estoppel cannot support Rule 12(b)(6) dismissal; that defense is appropriate to summary judgment. See *White Current Corp. v. State, Agency of Transp.*, 140 Vt. 290, 291-92 (1981) (overruled on other grounds) (Estoppel is an affirmative defense "unavailable for consideration on a motion to dismiss pursuant to V.R.C.P. 12(b)(6).").

The important question is whether Petitioner can obtain an accounting and the relief he seeks under 14 V.S.A. § 3510-11 while his divorce is ongoing.

The Orleans Family Court, by the very nature of an action for divorce, necessarily has concurrent jurisdiction over most or all of the issues raised by the petition. "It is a well-established rule that in cases of concurrent jurisdiction the court first acquiring it will retain it to the end, to the exclusion of other tribunals." *Whittier v. McFarland* 79 Vt. 365 (1906) (citing *Bank of Bellows Falls v. Rutland & Burlington R. R. Co.*, 28 Vt. 470 (1856)).

This court, as the second in time to be presented with an unresolved dispute in equity respecting the financial affairs of the same parties, presently lacks jurisdiction to entertain the petition. The Petitioner has not forfeited his rights under 14 V.S.A. § 3510-11 by virtue of being divorced; however, he must wait to pursue any claim in this court until a final judgment is rendered in the divorce, at which time the degree, if any, of issue preclusion by the divorce judgment will be ripe for evaluation. This court, lacking jurisdiction to act, expresses no opinion at all concerning Petitioner's past or present obligation to raise certain issues before the Orleans Family Court.

Respondent's Rule 11(b) motion fails to establish an improper purpose.

Order

For the foregoing reasons,

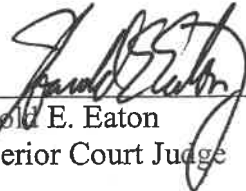
The "Petition Regarding Termination of Power of Attorney, Breach of Fiduciary Duty, Request for Injunctive Relief, and Request for Accounting" is DISMISSED WITHOUT PREJUDICE;

Respondent's Motion for Sanctions is DENIED;

Respondent's request for a hearing thereon is MOOT; and

Should Petitioner elect to re-file a substantively-similar 14 V.S.A. § 3510-11 petition following a final judgment in the divorce, the Clerk shall waive the filing fee.

Dated at St. Johnsbury, Vermont this 26 day of September, 2007.



Harold E. Eaton
Superior Court Judge