

From: Richard Kahn <[REDACTED]>
To: "jeffrey E." <jeevacation@gmail.com>
Subject: Fwd: Further re Marital Trusts -
Date: Tue, 10 Jul 2018 16:08:30 +0000

Richard Kahn
HBRK Associates Inc.
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Begin forwarded message:

From: Max Kohlenberg <[REDACTED]>
Subject: Further re Marital Trusts -
Date: July 10, 2018 at 11:40:35 AM EDT
To: 'Noam Chomsky' <[REDACTED]>
Cc: Richard Kahn <[REDACTED]>

Noam –

Thank you for your additional comments. Though I don't share your perspective as to several important aspects of what has transpired since you and Carol did your original estate planning (with all that has followed since) I appreciate how outrageous it has felt to you and I continue to deeply regret that.

I very much agree that additional litigation (I say "additional" because the proceedings brought by Harry's attorney are already underway) would be the last thing anyone would want, but as you reference it again, and as you refer to the conduct of "the Trustees" (which of course includes me as well as Harry) I have to proceed cautiously. Therefore, although I continue to believe I have undertaken my trusteeship entirely in accordance with the terms of the trusts and applicable law (and with nothing but goodwill towards you), I have to be mindful of what I put into our email exchanges. If there is litigation then it will be in those proceedings that I should account in detail for my understanding of how your estate planning and the administration of Carol's estate and her trusts should have been, as was, conducted. Accordingly, let me just make a few general statements for now:

1. Without going into additional detail about how your estate plan and Carol's estate plan were set up, let me clarify that when I refer to Carol's trust being "funded" with the Lexington home and the Cape house, what I mean is that both properties were conveyed by you and Carol (as joint owners) to Carol alone, in July of 2008. Copies of the deeds are on record. I can't attest to the signatures on them, but they can be viewed on the websites of the Middlesex County (South) Registry of Deeds and the Barnstable County Registry of Deeds. The conveyances were done so that at Carol's death the properties would (in accordance with the terms of her will) pass into her trust, which is what occurred.

2. When the Lexington house was sold the proceeds were held by the Exempt Marital Trust (as it owned the property). As you know, the trust also lent you about \$500K to facilitate the purchase of the Cambridge property.
3. The Cape property was distributed to you from the Non-Exempt Trust in 2010, after which you deeded it into the Gull Haven Lane LLC and gifted the LLC membership units (shares) to your children.
4. With respect to the distributions made from the trusts, I would again refer you to the reports that I sent to Deborah and Richard. That said, those reports only show the total amounts distributed to you or on your behalf from the trusts. From your gift tax returns and from Bainco's records it would be possible to detail how much you gave to each of your children and grandchildren (and how much you paid in tuitions) since 2009.
5. Lastly, in considering (a) your estate planning before Carol's death, (b) the pattern of withdrawals from the IRA and from the trusts, and (c) the gifting undertaken by you to family members, there is a clear demarcation between the period before your relationship with Valeria commenced (during which time your planning focused on providing for yourself, your children and grandchildren) and the years since your marriage. That demarcation is fully understandable, of course. I only ask that you bear it in mind as you consider why your advisors guided you as they did in the period before planning for Valeria's future needs became a concern.

Respectfully yours,

Max

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From: Noam Chomsky [[mailto:\[REDACTED\]](mailto:[REDACTED])]
Sent: Monday, July 09, 2018 6:26 PM
To: Max Kohlenberg
Cc: Richard Kahn
Subject: Fwd: Marital Trusts -

Thanks for the comments. A few more of my own, for clarification. In red.

I should add that Harry's recent behavior, including this utterly outrageous document, might make it necessary to go to litigation. The last thing I want, but he may force me to it. If necessary, I may have to make public the way the Trustees have handled the Trust since 2009, when I appointed Harry as trustee to replace me. Many serious questions. It is the last thing I want to be driven to, but there are some very ugly things in this proposal, not least the very clear implication that Valeria somehow wanted to marry an older man for the money and that she caused the increase of expenses -- easily refuted, it's easily documented that the cause was diversion of IRA funds for the benefit of the children and the exorbitant tax bills resulting. All so disgraceful I'm not going to let it stand.

----- Forwarded message -----

From: **Max Kohlenberg** <[REDACTED]>

Date: Sun, Jul 8, 2018 at 5:02 AM

Subject: RE: Marital Trusts

To: Noam Chomsky <[REDACTED]>

Cc: Richard Kahn <[REDACTED]>

Noam –

I'm not sure if you wanted further comments from me before responding to my message in greater detail, but I have added a couple of comments below in black text, where it seemed that a reply to your comments was appropriate.

I will look forward to your fuller response in due course, if you are so inclined, but again noting that while providing me with the financial information that I've asked for would be helpful, you may instead want to focus on the subject of selecting my successor, and then to establishing with him or her a better understanding about distributions from the trusts.

Max

A. Max Kohlenberg

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From: Noam Chomsky [mailto:[REDACTED]]

Sent: Sunday, July 08, 2018 1:34 AM

To: Max Kohlenberg

Cc: Richard Kahn

Subject: Fwd: Marital Trusts

Before responding to your letter in full, I would like to clarify a few matters. Interspersed below.

Noam

----- Forwarded message -----

From: **Max Kohlenberg** <[REDACTED]>

Date: Sat, Jul 7, 2018 at 4:43 AM

Subject: Marital Trusts

To: Noam Chomsky <[REDACTED]>

Cc: Richard Kahn <[REDACTED]>

Noam –

Thank you for your reply. As you indicate that you are not being represented by counsel I will reply directly to you, with a copy to Rich (as you suggest). Please consider:

1. As a starting point, let me note that I think you and Rich may have misunderstood (at least initially) the terms of the settlement that Harry proposed through his attorney. Rich and I discussed this in a call about 10 days ago and I'm hoping that misunderstanding has been cleared up, but as I'm not a party to your exchanges (and Rich's exchanges) with Harry's attorney I can't be sure. I'm also not certain whether the terms of the proposed settlement have changed. All I can say for sure is that characterizing the offer as one in which distributions to you cannot exceed \$100K per year is not consistent with my understanding of what has been offered.

The reason why the proposal is too outrageous to discuss has nothing to do with the technicalities of the handout that Harry is graciously offering. I'll review the background, once again.

As I've discussed before, the Marital Trust was established in Carol's name for tax purposes. The obvious intention, clearly understood by Carol and me, and of course Eric Menouya, was that it would be available to the survivor -- Carol we assumed -- and then what remains would go to the beneficiaries. The idea that we intended that Carol would control "her" funds and I would control "mine" is too ludicrous to discuss, though I understand the legalistic conjuring that can be adduced to reach this conclusion. As you note, I was not working with you at the time you and Carol drew up your wills and trusts, but what you describe is not consistent with Eric's notes (which I have), nor with the facts as I understand them. You are right that tax savings were a major driver to the planning (and the plan did in fact result in substantial savings of both estate and income taxes) but it was not drafted with the expectation that Carol would survive you.

The question of who would be the survivor is irrelevant. Carol and I assumed that she would be the survivor, but there was no reason to tell anyone, and it has no bearing at all on the fact that our intention was that the principal would be available to the survivor, then going to the children

The decision to fund Carol's trust with both financial assets and your Cape and Lexington homes was made when Carol was already ill and (as far as the notes indicate) with the expectation that she would predecease you.

This is quite surprising, and I would like some clarification. Most important, I don't see how any significant decisions could have been made during those years, who could have made them, or why it was done. Obviously Carol could not have done so. She had to undergo massive brain radiation as soon as the biopsy was taken, and serious cognitive and physical decline was immediate. Nor could I have been involved. I very much wanted to keep her at home, rather than the only alternative -- a nursing home. I managed to do so for two years, until the end, but it required 24-hour care, and I was in no position to think about such matters. If I had been informed -- I don't recall anything of the sort -- I couldn't have paid any attention or granted truly informed consent. So I would like to learn more about these decisions.

Secondly, I don't understand them. How could the Cape and Lexington homes fund the Trust? Did the funds from selling the Lexington house go to the Trust? How was it funded before. Would appreciate clarification on this.

Of course we knew by then that she would predecease me. It was a medical miracle that she was able to survive that long, on experimental drugs, as a last resort.

The records that I have seen do not indicate what your expectations (or Carol's) were as to how the Marital Trusts were to be made available to you after Carol was gone – for that the independent trustee of the trusts (whether me or my successor) has to rely on the terms of the trusts themselves, the information that's given by the trust beneficiaries, and the law surrounding such trusts.

I'd be interested, of course, in knowing about the records you have seen, but it would hardly be surprising if there is no explicit record of what is obvious simply to common sense. We were a married couple who cared for each other and for our children, putting a Trust in Carol's name for tax purposes. What sort of lunacy would it be to set up a Trust for one of us to have access to but not the other? So of course you are unlikely to find notes about it. If Harry forces this to litigation, all of this will have to come up, either in court or in public in some other manner.

When I appointed Harry to replace me as trustee, I took for granted that he would handle the trust as I had. His behavior since, and this latest proposal, make it very clear how wrong that assumption was. This proposal calls for him to be in complete charge, which means, as he has shown, that I can only plead for some funds by accepting conditions that he knows I will not accept. You recall, I presume, that this was true even when I faced an enormous tax bill because my IRA was being depleted for the benefit of the family.

To refresh your memory, let me repeat again what was happening with my IRA until I learned about it. There is a mandatory withdrawal. Half was being distributed to family. The other half was being used for taxes and management fees for the entire estate. In order to pay Alex's medical expenses, and to pay \$50,000 a year for rent and upkeep on the house in Wellfleet that we had given to the children and that I was barely using, I had to withdraw extra funds from the IRA, with the onerous tax burden. The same when I withdrew something to live on. Under these circumstances, Harry refused to release funds from the Trust for tax relief without onerous and humiliating conditions that he knew I would not accept. Easy to predict what might happen under less extreme conditions. It was not until 2017 that I was able to overcome the accumulated burden of these actions.

In the previous paragraph you offer to "refresh my memory" and in the prior paragraph you say "You recall, I presume.....". Without going into detail, I have to note that my recollection of the events you describe is not consistent with yours (though it may not be entirely consistent with Harry's either – I am not sure).

In my case it is not recollections. When I began to understand what was happening, I looked into the matter, and have the documents at hand, including the mail interchanges about Harry's refusal. The rest is straightforward and unambiguous documents.

Since my own recollections may be the subject of testimony in the legal proceeding that Harry has initiated, or in one that you may commence, I think it better that I not recite my own recollections here.

Note that Harry's exhibit B, beginning with section 9, is utterly false, and consciously so. All of the above has been explained to him over and over. It is not only consciously false, but is framed as a vicious and ugly attack on Valeria, implicitly accusing her of responsibility for the escalation of expenses which, as Harry knows, was caused by the actions just described once again.

For such reasons, Harry's proposal is, as I said, too outrageous to discuss.

2. As you know, Harry's attorney has commenced a legal action that is intended to facilitate my resignation and the appointment of a successor trustee to take my place. Since you've wanted me removed for some time and since I've said (from the first time you and I met) that I only wanted to serve as trustee if all the family members wanted me to

serve, I'm looking forward to resigning as soon as the court determines how I am to do so and how my successor is to be selected.

3. Given that my replacement is impending, it might be worth waiting until my successor is in place before responding to my requests for financial disclosure, as it's possible that my successor won't share my views as to what the trustee of the trusts needs to know before making decisions about distributions. Likewise, if my successor will be identified soon it might make sense for me to hold off on any distributions and leave it to the new trustee to work with you on figuring all of this out. In this regard I'm kind of a "lame duck" trustee, wouldn't you say?

4. To the extent that you want to push forward while I remain the trustee, let me again state the basis for financial disclosure by you. It is that, as trustee, I owe a duty to you and I owe a duty to your children (as the remainder beneficiaries of the trusts). For the present my primary duty is to you and it is to distribute to you all income earned by the trusts, net of expenses,

Until I asked about the matter recently, I am aware of no income distributed to me earned from the trusts. I cannot be sure, because I have no record of having received any accounting of what is happening to the trusts, including distributions to others (or as required, to me). Could you then please send me the records on these matters since 2009, when I appointed Harry to replace me as trustee.

I provided reports on income, expenses and distributions to Deborah Pechet Quinan last October and I copied those reports to Richard (and updated them) in the last 60 days. I think it might be easiest if Richard forwarded those reports to you, but if he can't for some reason then I will do so when I am back in my office.

I would like to know more about this. Richard Kahn did forward reports to me, but all that I see is from the last few years, after I requested information. I don't have any records for the years since 2009, when I appointed Harry trustee, neither about the income that was supposed to be paid to me or about distributions from the Trust or any accounting of those years. So could you send them to both of us, along with documentation about any distributions that were made. In particular, I would like to know the reason why there is virtually no income from the trust -- whether it was paid to me from 2009 or not. And about the instructions for any distributions that may have been made from the Trust.

and to distribute to you (or pay on your behalf) additional monies as reasonably needed *to the extent that your income from other sources is not sufficient to support your reasonable expenses.*

Notwithstanding your statement that "As for the claim about concern for my later years, that has been thoroughly refuted" it has not been refuted in the context of my trusteeship and it remains my duty to consider distributions in light of the possibility that you will have a reasonable need for distributions from the trust for many more years, and perhaps in increasing amounts, depending on your circumstances in the future.

I didn't respond before but perhaps I should have. I will be 90 years old in a few months. I'm not going to live forever. You know how much is in the Trust. You also know my spending habits. Harry would not have millions of dollars if I hadn't been working all my life and saving money for him and his sisters. Despite the ugly implications about Valeria in Harry's letter, nothing material changed after our marriage beyond what I described and can readily document, with one exception. In Lexington, I was living rent-free, the mortgage having been paid years earlier. Valeria and I decided that taking care of a big house with steps everywhere and everything else that owning a house in Lexington entails -- snow removal, etc., and a difficult drive to work through New England winter weather -- made no sense at my age, and that we should move to an apartment close to work with no steps or other problems.

Not your business, but one thing that shocked me about Harry's letter was his complaint that I moved from a house to a "new home" -- insinuation obvious -- in fact an apartment with no winter driving to my office and convenient for someone my age.

5. As for the specifics of disclosure, what I need to consider is (a) what your income was in 2017, since that was the basis for the tax payments you seek to have reimbursed, (b) what your income is likely to be this year and going forward, (c) what your expenses were in 2017 and are likely to be in 2018, and (d) whether any of your income (or other resources) are being used for purposes that the trust cannot support (such as gifts to third parties). So far, Rich has provided me with some rough information about your 2017 expenses. There are some gaps in that information, but nothing that can't be cleared up pretty easily (I think). Rich has also assured me that you have not made any gifts that have diminished your resources and I assume you would confirm that to me. What I don't have at this point is enough information about your income, so that I can consider what the gap is between your expenses and your income, which is the gap the trusts might help to close up. With respect to your income in 2017, all I can see is that your income tax obligations seem to be much higher than they were previously. I'm assuming that reflects a jump in income from (i) the profit made on the sale of the condominium, and (ii) large withdrawals from your IRA. If you want to provide me with more information (bearing in mind what I noted in item #3, above) then information about your 2017 income and what your income is likely to be this year is what I most need.

There is a very simple reason for the income tax obligations. The depletion of the IRA that I reviewed again above imposed a huge tax burden, which we were still attempting to deal with in 2017. After Harry's refusal to release some funds from the trust to pay the exorbitant taxes resulting from what was happening, I of course had to withdraw funds from the IRA to pay taxes on the whole estate, incurring a new exorbitant tax burden. Despite some small relief later from the trust after I had repeatedly pointed this out, it carried over through the 2017 tax bill. So for that reason, taxes were extremely high. That curious episode is at last finally over, leaving many questions unresolved about what was happening while I was paying little attention, relying on advisers to ensure that matters were proceeding appropriately

I hope this is helpful and will wait to hear more from you and/or Rich.

Max

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From: Noam Chomsky [mailto:[REDACTED]]
Sent: Friday, July 06, 2018 8:53 PM

To: Max Kohlenberg
Subject: Re: Marital Trust

I am not represented on this issue, so you can send the information to me directly, copying Richard Kahn.

Noam

On Fri, Jul 6, 2018 at 4:24 AM, Max Kohlenberg <[REDACTED]> wrote:
Noam –

Thanks for your message and your inquiry. I would like to reply in some detail, but before I do so please tell me whether you are now represented by legal counsel. If you are then I believe I'm obliged to copy your counsel on our exchanges. I would also plan on copying Rich Kahn, since my last communications about distributions to you from the trusts have been with him.

Please also bear in mind that since (according to Rich) you are preparing to bring a legal action against me, I have been in contact with my firm's malpractice insurance carrier. As my exchanges with you may also need to be reviewed with our carrier that may delay (and/or limit) my responses.

Max

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From: Noam Chomsky [mailto:[REDACTED]]
Sent: Thursday, July 05, 2018 7:53 PM
To: Max Kohlenberg
Subject: Marital Trust

Max,

I presume it is clear that the recent proposal transmitted by Harry's lawyer that I should be satisfied with a handout of 100k a year from the Marital Trust is too disgraceful for comment. I would like to know what further information you require for reimbursement for tax payment. We have previously transmitted a great deal of financial information in order for you to reimburse our taxes, including proof of payment and more. Exactly what more do you require, and with what justification? We see little reason that you cannot act on the information already provided. As for the claim about concern for my later years, that has been thoroughly refuted.

Noam

please note

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