

Matter of Sackler

2016 NY Slip Op 32013(U)

July 28, 2016

Surrogate's Court, Nassau County

Docket Number: 249220Z

Judge: Margaret C. Reilly

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**SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

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Application of Gillian T. Sackler to Apply the Provisions of EPTL § 11-2.4 to Marital Trust A Created under the	DECISION
	File No. 249220Z
ARTHUR M. SACKLER REVOCABLE TRUST.	Dec. Nos. 31577
	31578
	31579

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PRESENT: HON. MARGARET C. REILLY

The following papers were considered in the preparation of this decision:

Notice of Motion for Summary Judgment with Exhibits 1
Affidavit in Support of Motion for Summary Judgment 2
Memorandum of Law in Support of Motion for Summary Judgment . . 3
Affirmation of Lauren J. Wachtler in Opposition to Motion for Summary
Judgment 4
Affirmation of Stephen R. Stern in Opposition to Motion for Summary
Judgment and 5
in Support of Cross Motion to Remove Gillian T. Sackler as Trustee . . 6
Memoranda of Law (2) in Opposition to Summary Judgment Motion . . 7
Reply Affirmation in Support of Motion for Summary Judgment 8
Notice of Cross Motion to Remove Gillian T. Sackler as Trustee 9
Memorandum of Law in Support of Cross Motion 10
Affirmation in Opposition to Cross Motion 11

In this miscellaneous proceeding, the petitioner moves for summary judgment dismissing the objections and granting her petition; the motion is opposed on various grounds including, among others, that the objectants have not had sufficient opportunity to engage in pretrial discovery. There is also currently pending before the court a cross motion to remove the petitioner as a trustee of the trust and a separate motion to lift the stay of discovery.

This is a proceeding commenced by the decedent's surviving spouse to apply the optional unitrust provisions of EPTL § 11-2.4 to a marital trust for her lifetime benefit under the revocable lifetime trust of her late husband (the trust). Specifically, the underlying petition seeks the following relief: that the court direct that the provisions of EPTL § 11-2.4 shall apply to the trust and that EPTL Article 11-A shall not apply to the trust, effective as of January 1, 2010¹, or as of such other date as the court deems appropriate, and that the court grant such other and further relief as the court deems proper. Objections to the petition were filed by or on behalf of all of the individual remainder beneficiaries (the decedent's children and grandchildren) and one of the two charitable remainder beneficiaries. Litigation between the parties in earlier probate, accounting, and miscellaneous proceedings continued for several years and was ultimately resolved with the execution of a 167-page settlement agreement. The terms of the trust, originally created on June 21, 1985, were modified and restated pursuant to the terms of the settlement agreement and the decree approving the settlement. It is alleged that the value of the trust as of September, 2015 was nearly \$64 million. The trustees of the trust are the petitioner and JPMorgan Chase Bank, N.A.

The ability to elect to administer a trust as a unitrust rather than a traditional income and principal trust became available in New York as of January 1, 2002, with the enactment

¹ The affirmation in support of the motion submitted by the petitioner's attorney indicates that although the petition contains this prayer that the statute be applied as of January 1, 2002, the petitioner no longer intends to pursue retroactive application of EPTL § 11-2.4.

of EPTL § 11-2.4.² Because this trust was in existence prior to January 1, 2002 and no action was taken pursuant to EPTL § 11-2.4 (e)(1)(B)(i) prior to December 31, 2005 to administer the trust as a unitrust, this petition is brought pursuant to EPTL § 11-2.4(e)(2)(B), which provides, “At any time, the court having jurisdiction of a trust to which this section otherwise would not apply, upon the petition of the trustee or any beneficiary of the trust and upon notice to all persons interested in the trust, may direct that this section shall apply to the trust and that Article 11-A shall not apply to the trust.”

Pursuant to the terms of the trust, the petitioner is entitled to all of the net income of the trust. Among the modifications to the trust agreed to in the settlement agreement is one that requires the consent of all of the decedent’s issue to any invasion of principal for the petitioner. The affirmation of petitioner’s counsel in support of the petition indicates that over the last four years the trust has generated average net income of 2.3%, resulting in annual payments to the petitioner of approximately \$1,470,000.00. If the trust were to be administered as a 4% unitrust, the payments to the petitioner as the current beneficiary would be approximately \$2,558,000.00. Although the objectants, by their counsel, strenuously objected to the petition from the outset, the objectants’ counsel agreed to refrain from pretrial disclosure in order to afford the petitioner the opportunity to convince the objectants and their counsel that administering the trust as a unitrust would be beneficial to both the income

² L 2001, ch 243. This chapter also enacted a new Uniform Principal and Income Act as EPTL Article 11-A as well as the statutory power of adjustment between income and principal in EPTL § 11-2.3(b)(5).

and the remainder beneficiaries, the theory being that if the trustees were free to invest for total return without being concerned about producing traditional accounting income, the principal of the trust would grow, pleasing the remainder beneficiaries, while at the same time pleasing the current beneficiary because a larger trust creates a larger current unitrust distribution. Although JPMorgan undertook to provide projections of the effect that unitrust administration would have on the trust, none of those projections proved beneficial to the remainder beneficiaries. Counsel for the parties then entered into a pretrial discovery schedule and this motion followed shortly thereafter.

In his affidavit in support of the motion, petitioner's attorney concedes that the petitioner "has more than sufficient income and other financial resources to support herself comfortably, and she has absolutely no 'need' for the additional income she will receive upon conversion of the Trust to a 4% unitrust" (Par. 12, Aff. in Support, T. Randolph Harris). Counsel posits that all of the individual remainder beneficiaries are also wealthy or will be upon petitioner's death and that they would not be in any financial need if the principal of the trust is diminished as the result of the conversion to a 4% unitrust.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851,

853 [1985]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Pursuant to EPTL § 11-2.4 (e)(5), the court must consider “all of the factors relevant to the trust and its beneficiaries” including, but not limited to: “(i) the nature, purpose, and expected duration of the trust; (ii) the intent of the creator of the trust; (iii) the identity and circumstances of the beneficiaries; (iv) the needs for liquidity, regularity of payment, and preservation and appreciation of capital; and (v) the assets held in the trust; the extent to which they consist of financial assets, interests in closely held enterprises, tangible and intangible personal property, or real property; the extent to which an asset is used by a beneficiary; and whether an asset was purchased by the trustee or received from the creator of the trust.”

Here, although benefitted by the rebuttable presumption that the optional unitrust provision should apply to the trust (EPTL 11-2.4 [e][5][B]), petitioner offers no admissible evidence relevant to the various factors that must be considered by the court on an application to apply the 4% unitrust to a trust to which it would otherwise not apply. The court therefore finds that the petitioner has failed to establish a prima facie case for summary judgment in her favor. That being so, the court need not even consider the sufficiency of the opposing papers.

Accordingly, the petitioner's motion for summary judgment is denied.

The objectant's cross-motion to remove the petitioner as a co-trustee of the trust is also denied. Although an application to remove a fiduciary should be made by a plenary proceeding rather than by motion (SCPA 711; *Matter of Brower*, 2011 NY Slip Op 31358[U][Sur Ct, Nassau County 2011]), where all the parties are before the court, the court may, in the interests of justice, convert a motion to a special proceeding or vice versa (CPLR § 103 [c]; *Matter of Mastroianni*, 105 AD3d 1136, 1137-1138 [3d Dept 2013]). The court finds that the interests of justice will be served by converting the motion to a special proceeding and addressing the merits of the motion now, rather than deny the motion on technical grounds and encourage the commencement of further proceedings seeking the same relief.

Turning to the merits, the objectants argue that simply by bringing the proceeding seeking unitrust administration for this trust, the petitioner, as one of the two trustees of the trust, has manifestly breached her fiduciary obligation to the remainder beneficiaries to administer the trust impartially and that such impartiality mandates her removal as trustee. The court disagrees. If the objectants' argument were sufficient to justify the removal of a trustee, then any time a trustee sought application of the unitrust option or exercised the statutory power of adjustment (EPTL 11-2.3 [b][5]) between income and principal, the trustee would be subject to removal for favoring the income beneficiary over the remainder beneficiaries. The court finds that the complained of conduct does not endanger the estate

or even seriously impede its administration. It is therefore insufficient to justify the petitioner's removal as co-trustee (*Matter of Braloff*, 3 AD2d 912, 913 [2d Dept 1957], *affd* 4 NY2d 847 [1958]). The cross motion, converted to a special proceeding, is accordingly dismissed.

Finally, the objectants' motion to lift the stay of discovery that resulted from the filing of the summary judgment motion is now moot. This matter will appear on the court's calendar for conference on September 26, 2016 at 10:00 a.m. to enter a discovery schedule.

This decision constitutes the order of the court and no additional order need be submitted.

Dated: July 28, 2016
Mineola, New York

E N T E R:

HON. MARGARET C. REILLY
Judge of the Surrogate's Court

cc: T. Randolph Harris, Esq.
McLaughlin & Stern, LLP
260 Madison Avenue
New York, NY 10016

Lawrence D. Mandelker, Esq.
Attorney for Respondent JPMorgan Chase Bank, N.A.
Seyfarth Shaw, LLP
620 Eighth Avenue
New York, NY 10018

Lawrence J. Wachtler, Esq.
Mitchell Silberberg & Knupp, LLP
Attorney for Respondents, The Arthur M. Sackler Foundation,
Elizabeth A. Sackler, Daniel N. Master, Steven I. Master,
Johanne L. Master, Laura Smith, Michael Sackler-Berner,
Desta Marika-Rich, Erik Marika-Rich and Denise
Marika
Tower 49
12 East 49th Street, 30th Floor
New York, NY 10017

Stephen R. Stern, Esq.
Law Offices of Stephen R. Stern, P.C.
Attorney for Respondents, Arthur F. Sackler, Neoma Lee Sackler
Hana Mei Sackler, Maile Noel Sackler and Malcolm
James Kalai Sackler
445 Broad Hollow Rd., Suite 124
Melville, NY 11747

Attorney General of the State of New York
Charities Bureau
Attorneys for Ultimate Charitable Beneficiaries
Attention: Laura Werner, Esq.
120 Broadway
New York, NY 10271