

**Tsavaris v Tsavaris**

2011 NY Slip Op 31889(U)

July 6, 2011

Sup Ct, NY County

Docket Number: 103246/11

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

LOUIS B. YORK

PRESENT: \_\_\_\_\_ J.S.C.

PART 2

Justice

Arthur F. Savaris

INDEX NO.

103246/11

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

Frank J. Savaris

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.**

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 7/8/11

Luy J.S.C.

**LOUIS B. YORK**  
J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 2

----- X  
**ARTHUR F. TSAVARIS**, Individually and as  
Co-Trustee of the Josephine Tsavaris Irrevocable  
Trust,

Index No. 103246/11

Plaintiff,

-against-

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appear in person at the Judgment Clerk's Desk (Room  
141B).

**FRANK G. TSAVARIS**, and **HARRY J. TSAVARIS**  
Individually and as Co-Trustees of the Josephine  
Tsavaris Irrevocable Trust,

Defendants.  
----- X

**LOUIS B. YORK, J.:**

This decision addresses the motion by Order to Show Cause of plaintiff Arthur F. Tsavaris (hereafter Arthur) requesting the removal of defendants Frank G. Tsavaris and Harry J. Tsavaris (hereafter Frank and Harry respectively) from their positions as co-trustees of the Josephine Tsavaris Irrevocable Trust. For the reasons discussed *infra*, the motion is denied and the action is dismissed.

**Facts**

The present controversy involves the disagreement among three brothers regarding the proper administration of the Josephine Tsavaris Irrevocable Trust (hereafter the Trust) of which the three are co-trustees. The Trust was created by Josephine Tsavaris (hereafter Josephine), who is currently in her 80s, in an agreement dated August 10, 2006 (Affidavit in Support of Motion For Removal of Co-Trustees, Ex. 1, Trust Agreement Creating the Josephine Tsavaris Irrevocable Trust [hereafter Trust Agreement]). According to the Trust Agreement, the Trust was created for the purposes of avoiding probate, and as a vehicle for asset management should Josephine become disabled or incapacitated.

The Trust Agreement, in its First Section, states in relevant part:

"During the lifetime of the Grantor, . . . the Trustees shall hold, manage, invest and reinvest the principal of the Trust, and any additions which may be made thereto, and collect and receive the income thereof, if any. The Trustees, in their sole and absolute discretion, may use principal and income toward the payment of any maintenance charges real estate taxes, and other expenses associated with maintaining the real property, as well as any other expenses of administration."

That section of the Trust agreement also provides that Josephine is the sole income beneficiary of the Trust, stating: "During the lifetime of the Grantor, the Trustees shall pay all of the net income of the trust to the Grantor, in quarterly or more frequent installments."

In addition Josephine has a testamentary power to appoint the remainder of the trust to any of her lineal descendants. If for whatever reason, this power is not exercised, then the Trust Agreement provides that the upon Josephine's death, the Trust will terminate with all assets of the trust to be distributed between Arthur, Frank, and Harry, in equal shares per stirpes.

The corpus of the Trust consists primarily of Josephine's home, a multiple dwelling house located in Bronx, New York, near the Throgs Neck Bridge. It had long been the practice of the family to live in one of the apartments while renting out the other three apartments. The trust provides for Josephine to retain a life estate in the apartment that the family used. The house is currently completely vacant. The previous tenants have all moved out and the apartments have not been rented again. In addition, Josephine moved out of the house in September of 2010 to live with the family of her son, Harry.

The present motion was initiated by Arthur by an Order to Show Cause. Arthur requests that Harry and Frank should be removed as co-trustees for the following reasons: their failure to deposit Trust income into a Trust Bank Account, their refusal to accept communications from Arthur regarding the Trust, and their continued refusal to come to an agreement with Arthur regarding financial arrangements to repair the house belonging to the Trust. In addition Arthur

requests that the court grant permission to him to make the financial arrangements and repairs that he deems necessary for the property to again be used to generate rental income.

### **Trust Bank Account**

When the Trust was initially set up, the co-trustees decided to deposit all trust income into an account in Josephine's name to which Harry would be added as a signatory for the purpose of paying expenses related to the property. The decision was made during a meeting of all three co-trustees with the attorney who drafted the Trust agreement, based on the recommendation of the attorney (Affidavit in Opposition to Plaintiff's Motion for Removal of Co-Trustees [hereafter Harry's Affidavit], ¶ 24). At some unspecified point in time, after consulting with a different attorney, Arthur came to the conclusion that the Trustees were obligated to open a separate bank account in the name of the Trust where the income was to be deposited (Affidavit in Support of Motion For Removal of Co-Trustees [hereafter Arthur's Affidavit], ¶ 9). The issue was discussed at a meeting on December 9, 2009, which was attended by the co-trustees along with their current respective attorneys. During that meeting, an attorney from the firm representing Harry and Frank again gave the opinion that the income from the trust did not need to be deposited into a separate trust account due to the fact that Josephine was ultimately to receive the money generated by the property. (Harry's Affidavit, ¶ 44). In January of 2010, Arthur unilaterally opened a new bank account in the name of the Trust (Arthur's Affidavit, ¶ 9; Harry's Affidavit, ¶ 47). Ultimately, Harry and Frank agreed to deposit Trust income into the account and Arthur began having all bills for the property sent to him which he then paid out of the Trust Account (Harry's Affidavit, ¶ 47). This practice continued only until May of 2010, when Harry again took over the payment of expenses related to the house (*id.*).

## **Repairs**

Beyond the dispute over the necessity of a Trust bank account, the co-trustees have also reached a standstill in regards to what, if any, action should be taken towards the continued maintenance and rental of the apartments. In December of 2009, Harry and Frank arranged for a contractor to inspect the house and give an estimate for necessary repairs. The contractor reported to Harry and Frank that no major work was necessary and gave them an estimate of \$21,635.84 for various repairs that could apparently be done in stages. (Harry's Affidavit, ¶ 44). After Harry and Frank discussed the matter with Arthur, Arthur arranged for a separate contractor to inspect the house, eventually resulting in an estimate of \$66,500 for repairs (Harry's Affidavit, ¶ 49; Arthur's Affidavit, ¶ 6). Arthur's contractor expressed concern about potential mold in the house, explaining, at least partially, the vast differences in the estimates (Arthur's Affidavit, Ex. 3 & Ex. 4).

The co-trustees have also come to an impasse regarding how best to fund repair work. Harry and Frank have taken the position that some, if not all, of the apartments should be rented with the rental income used to pay for the necessary repairs (Harry's Affidavit, ¶ 55). Arthur, based on the letter of his contractor, contends that none of the units should be rented until all of the repairs have been done and proposes taking out a mortgage on the house to fund the repairs (Arthur's Affidavit, ¶¶ 6-7).

## **Refusal to Receive Communications**

The dispute has become increasingly contentious as Harry and Frank have continued to disagree with Arthur as to how best to manage the Trust's property. Harry has stated that due to Arthur's continued and harassing demands that they act in accordance with his plans, he and Frank have requested that Arthur only contact them through their attorney (Harry's Affidavit, ¶

54). Whatever the reason, it is undisputed that some correspondence Arthur sent directly to the other co-trustees, has been returned unopened (Arthur's Affidavit, ¶¶ 12 & 16; Harry's Affidavit, ¶ 54).

### Discussion

"The Supreme Court, in the exercise of its equity jurisdiction, has the power to remove a trustee of a trust, who is a party to the action, if the facts establish that the trustee was guilty of improper conduct in the administration of the trust" (DePicabia v Chester Natl. Bank, 50 AD2d 812, 813 [2d Dept 1975]). Furthermore, under the Estates Powers and Trust Law, upon application by an interested person, the Court is granted the power to "remove a trustee who has violated or threatens to violate his trust, ... or who for any reason is a person unsuitable to execute the trust" (NY EPTL § 7-2.6[a][2]). Notwithstanding this broad grant of power, the Court is mindful that removal of a trustee is a drastic remedy and should be used sparingly in a case such as this where it would frustrate the intent of the trust's creator (*see Matter of Duke*, 87 NY2d 465, 471-472 [1996]; *Matter of Braloff*, 3 AD2d 912, 913 [2d Dept 1957]).

The Court finds that the decision to deposit trust assets into an account belonging to Josephine rather than into a trust account was not a violation of trust that requires the removal of the co-trustees. This is not to say that the Court approves of the practice. The co-trustees' initial decision—to payout all income from the Trust to Josephine and then simply pay the expenses from her bank account—is understandable, but is not a sound practice. First, as Josephine is only entitled to the "net income" of the trust, to turn over all income, including that intended for the payment of expenses associated with the trust property, is contrary to the terms of the trust. In addition, by keeping the funds within an account under the name of the beneficiary, those funds could be subject to attack by Josephine's creditor's, who would not otherwise have any claims

\* 7]

against funds properly belonging to the trust (*see* Bogert's Trusts and Trustees § 596 [2010]).<sup>1</sup> However, given the fact that the mistake appears to have been inadvertent, that there is no evidence of an intent to harm the trust, and that there is no claim that Josephine did not receive the income to which she was entitled, the Court does not find that these actions necessitate the removal of the co-trustees (*see Matter of La Corte*, 7 AD3d 909, 910 [3d Dept 2004]).

Turning to the other issues, the obligation of the Court, with regard to an inter vivos trust, is to effectuate the intent of the grantor, guided by the words of the trust instrument, unless such intent is contrary to public policy or the law (*Sankel v Spector*, 33 AD3d 167, 171 [1st Dept 2006]). The Trust Agreement specifically selects all three of Josephine's sons to be the co-trustees of the Trust and further requires that actions taken by the trustees must be by unanimous consent. As such, it must have been expected that some delays and inefficiencies would be unavoidable as the co-trustees deliberated over the best course of action.

Ultimately, it is the determination of the Court that the facts of this case are not such that require the drastic remedy of removal of one or more of the co-trustees. Rather, the co-trustees need to set aside the needless bickering that seems to have characterized their recent relations and work towards fulfilling the fiduciary responsibilities that they have agreed to. Arthur, Frank, and Harry should all take note that neither side appears to be entirely free from blame. While Arthur's concerns over the safety of tenants that might rent the apartments is admirable, his continuing insistence on incurring extensive costs without having even fully investigated the existence or extent of the possible mold condition is patently unreasonable. Similarly, the decision by Harry and Frank to return unopened the correspondence from Arthur is similarly not

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<sup>1</sup> Arthur's decision to unilaterally create a trust bank account was also incorrect as the creation of such an account requires the agreement of all three co-trustees by the terms of the Trust Agreement. Given Arthur's concerns, his proper course of action at the time would have been to seek judicial guidance rather than also violate the Trust Agreement.

[\* 8]

in keeping with their obligation to work towards reaching a consensus as required by the Trust Agreement. That being said, the animosity that seems to have arisen between the co-trustees, if it continues, certainly could become an issue that would necessitate the removal of one or more of the co-trustees in the future (*see In re Hall*, 275 AD2d 979 [4th Dept 2000]).

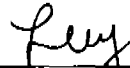
Therefore, for the reasons stated above, the motion is denied.

Based on the foregoing, it is

**ORDERED and ADJUDGED** that the motion requesting the removal of the defendants from their positions as co-trustees of the Josephine Tsavaris Irrevocable Trust is denied, and the action is dismissed.

Dated: 7/6/11

Enter:



\_\_\_\_\_  
Louis B. York, J.S.C.

**UNFILED JUDGMENT**

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**LOUIS B. YORK**  
**J.S.C.**