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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

IN THE MATER OF THE IRREVOCABLE TRUST OF JOHN LEONDIS

INDEX NO.: 6962/10

This matter arises out of a Petition, brought on by Order to Show Cause, to reform The Irrevocable Trust of John Leondis signed in 1991 (the "1991 Trust"), *nunc pro tunc or* retroactively. The applicants wish to reform the 1991 Trust and for this Court to give its approval of the same terms and conditions as the John Leondis Irrevocable Life Insurance Trust drafted in 2011 (the "2011 Trust"). The plaintiff maintains that certain mistakes were made by the drafter of the 1991

Trust which must be modified with retroactive or *nunc pro tunc* approval of this Court. The scrivener or writer of the 1991 Trust swore to the following:

> 1. On or about December 30, 1991, I was retained by the Petitioners to draft the Trust which owns a Second-to-Die Life Insurance Policy ("Policy"), for the purpose of capturing certain tax benefits available to the Petitioners while ensuring that the Policy's proceeds would inure to the benefit of the Petitioners' Beneficiaries. A true copy of the Trust is attached to the Verified Petition as Exhibit "A."
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> 2. It was the Petitioners' intent for the proceeds of the Trust to be held for, and distributed to, their three (3) children, Julie C. Leondis, Alexis D. Leondis, and Stephanie N. Leondis. (The Court notes that Mr. and Mrs. Leondis have had no additional children.)
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> 3. In or about January of 2010, in the process of reviewing the Petitioners' comprehensive Estate Plan with Levine DeSantis, P.C., it was brought to my attention that the Trust does not fulfill the intent of the Petitioners because, among other things, the Trust does not specify that the Trust *res* is to be distributed to the above-named children.
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> 4. In addition, the Trust fails to maximize the tax benefits available to the Petitioners at the time that same was drafted.
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> 5. Furthermore, only one Settlor, John Leondis, executed the Trust even though the property intended to be acquired by the Trust was Second-to-Die Life Insurance Policy payable only upon the death of both of the Petitioners. Accordingly, both of the Petitioners intended to contribute, and have contributed, money to the Trust to pay the Policy's premiums. Therefore, Joan Leondis is also a settlor of the Trust, even though she did not execute the original Trust document.
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> 6. The Petitioners did make it clear to me that they wanted to protect the policy proceeds in the Trust from the effects of any marital discord between their children and their respective spouses and they expected the Trust to continue for the benefit of their children's descendants. The Petitioners' intent was also to minimize the tax consequences with respect to any such intergenerational transfers. These provisions were unintentionally omitted from the original Trust document. These omissions were the result of a scrivener's error on my part that has resulted in the frustration of the original intent of the Petitioners.

> 7. Had I been aware of these material omissions, I would have drafted the Trust in the identical manner as the Trust that is attached hereto as Exhibit "A." [defined herein as the 2011 Trust]

The Court initially notes that all interested parties consented to the reformation of the 1991Trust with the following notation, dated August 18, 2010, from the New York State Attorney General representing the Department of State, Department of Tax and Finance ("State Taxation"):

> Please be advised that State Taxation notes that the original Trust agreements state they are "irrevocable and unamendable" and therefore, questions whether the Trusts can be reformed. State Taxation cannot predict the Estate Tax consequences of the proposed reformations of the Trusts since the determination of taxes associated with the Trusts will not be determined until the deaths of the Settlors.

The foregoing issue was raised by this Court at its initial meeting with counsel, in the context of the limitations imposed by the EPTL and of seeking *nunc pro tunc* (retroactive) approval of changes made to a 1991 document.

Prior to the enactment of the present EPTL 7-1.9, its predecessor permitted revocation, but did not specifically address an amendment to the instrument to correct minor mistakes, which could place interested parties in a precarious position, particularly if, as in most cases, they were unaware of the ultimate forum and law that would address the issues of the trust instrument. Even now, the question of whether or not a minor or legally disabled person may or must be represented by a Guardian ad Litem is not clear. Though the Court of Appeals seems to have taken the next step and maybe the only step, by holding that the beneficiaries' consent is not required if the amendment is "obviously" favorable to them, the question remains what is favorable to someone who cannot consent, or more aptly, consent to a more "obviously" beneficial amendment to the trust.

See *Matter of Cord,* 58 N.Y.2d 539; *Rosner v Caplow,* 90 A.D.2d 44. When viewed as a continuum rather than distinct determinations, the *Cord-Rosner* rules governing amendment or modification of a trust become more miscible and less distinct, failing to provoke the clarity necessary for the estate planner.

Public Policy

The Court next turns to the issue of concern to the State and Federal Governmental authorities, namely certainty. When a settlor attempts to create an Estate Plan, the reliability of such plan is paramount; most particularly, the knowledge that the plan will proceed as intended. The tax and administration costs will be assessed in accordance with the settlors wishes. The distribution to intended beneficiaries cannot be left to chance. In the instant matter, there were (3) mistakes that the Scrivener of the 1991 Trust swore that he made, which affected the stated wishes of the settlors. The Court found the sworn statements credible and consistent with mistakes articulated in the various submissions to this Court. Not only may those mistakes affect the plaintiff, but also, potentially, the governmental authorities, who may be affected by unanticipated or unforeseen tax consequences.

Conclusion

The adult children of the Settlors wished to have their future offspring, if any, receive portions of the residuary trust and to continue to have their respective shares retained in trust, subject to acceptable provisions consistent with the 2011 Trust. Both Joan and John Leondis had intended to be co-Settlors and contributors to the 1991 Trust, which has been corrected by the 2011 Trust. No research has revealed a rule, invoked from 1991 to date, that would reduce the taxes due or administrative costs incurred to governmental authorities. Thus, the reformations which were reflected in the 2011 Trust do not affect the 1991 Trust provisions, except as previously described.

The remaining question is whether this Court should make the 2011 changes retroactive or *nunc pro tunc* to the 1991 Trust. Having considered the circumstances of the factual presentation, as outlined above, this Court determines that the answer is yes. Since mistakes were made for which the parties mentioned in the trust were not responsible, they should not be held accountable for matters that they neither knew nor should have appreciated. Importantly, in accordance with *Matter of Cord* [58 N.Y.2d at 539] and other authority, the rule appears to be, and equity dictates, that the reformation be granted *nunc pro tunc* in a manner that is a clear benefit for the beneficiaries.

Even though there were in excess of fifty changes made between the 1991 Trust and the 2011 Trust, the Court finds that those changes are not substantial, do not require deletion or change, and are consistent with appropriate tenets of equitable relief. Accordingly, it is

ORDERED, that the Petition is **granted.** Submit judgment on 5 days notice, together with all supporting documentation.

This constitutes the Order of the Court.

Dated: September 6, 2011

J.S.C.

ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE