

Matter of Scalamandre
2013 NY Slip Op 33576(U)
December 19, 2013
Surrogate's Court, Nassau County
Docket Number: 2013-376023
Judge: Edward W. McCarty III
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SURROGATE'S COURT OF THE STATE OF NEW YORK
 COUNTY OF NASSAU

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 In the Matter of the Application of Peter Scalamandre and
 Jill Scalamandre Clark, Petitioners, For a Decree Approving
 The Amendment to the Provisions of the Irrevocable Trust
 Created by Joseph Scalamandre, Trustor, for the Benefit of
 Peter Scalamandre, Beneficiary, of the

File No. 2013-376023

Dec. No. 29117

PETER SCALAMANDRE FAMILY
 IRREVOCABLE TRUST dated May 23, 2002,

Pursuant to EPTL 7-1.9.
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Before the court is the petition of Peter Scalamandre and Jill Scalamandre Clark, co-trustees of the Peter Scalamandre Family Irrevocable Trust, seeking what is denominated as approval of amendment of the trust "pursuant to EPTL 7-1.9." The co-trustees seek reformation of certain language of the trust for the alleged purpose of fulfilling the grantor's intent. For the reasons that follow, the application is granted.

Joseph Scalamandre, as grantor, created the Peter Scalamandre Family Irrevocable Trust under agreement dated May 23, 2002 between himself, as grantor, and Peter Scalamandre and Jill Scalamandre Clark, as co-trustees. The assets of the trust consist of shares of three New York corporations, with their principal places of business in Nassau County. Section 6, entitled "Administrative Provisions" provides that the trust shall be governed by, and administered pursuant to, the laws of the State of New York.

According to the petitioners, the trust agreement includes a power of substitution in Section 1.6 which allows the trust to be a defective grantor trust pursuant to the provisions of Section 675 (4) of the Internal Revenue Code. Section 1.6 of the trust provides as follows:

"1.6. Power of Substitution: The term "Power of Substitution" shall refer to Grantor's right and power, acting in a nonfiduciary capacity,

to withdraw any asset of the Trust Estate while simultaneously substituting other property of an equivalent value.”

Petitioners contend that the continued administration of the trust as an intentionally defective grantor trust has now become impracticable and that, if not modified, grantor trust status will result in the grantor’s tax objectives in establishing the trust being defeated. With an intentional defective grantor trust, the income is attributable to the grantor as opposed to the trust. Accordingly, petitioners seek to modify the trust by deleting Section 1.6 in its entirety.

In addition, petitioners seek to amend the trust to correct what appears to be a scrivener’s error in Section 1.7. Section 1.7 of the trust provides as follows:

“1.7. Principal and Income: Except as may otherwise be specifically provided in this trust and subject to the later provisions of this section, matters relating to the right of Beneficiaries among themselves as to principal and income shall be governed by **Florida Chapter 738 (Principal and Income)** from time to time existing. In the event that **Florida Chapter 738** shall contain no provision concerning a particular item, the Trustee shall have the power to determine what is principal or income of the applicable Trust and apportion and allocate, in the trustee’s reasonable discretion, receipts and expenses as between these accounts. All of the foregoing powers shall be subject to the Trustee’s duties to treat equitably both the income Beneficiaries and remaindermen under the Trust. In this connection, the following shall be observed by the Trustee:

- (A) A reasonable reserve for depreciation of all income producing depreciable real and personal property, and capital improvements and extraordinary repairs thereto, shall be charged to income from time to time.
- (B) A reasonable reserve for depletion of all depletable natural resources including, but not limited to, oil, gas, mineral and timber property shall be charged to income from time to time.
- (C) A reasonable reserve for amortization of all intangible property having a limited economic life including, but not limited to, patents and copyrights shall be charged to income from time to time.
- (D) All distributions by mutual funds and similar entities of gains from the sale or other disposition of property shall be credited to principal.
- (E) All premiums paid and discounts received in connection with the

purchase of any bond or other obligation shall be amortized by making an appropriate charge or credit to income.

(F) All premiums paid in connection with life insurance shall be deemed paid from principal of Trust, and charged against Trust principal.” (Emphasis added)

Petitioners ask for court approval to replace the language of Section 1.7 with the following:

“1.7. Principal and Income: Except as may otherwise be specifically provided in this Trust and subject to the later provisions of this section, matters relating to the right of Beneficiaries among themselves as to principal and income shall be governed by the New York Revised Uniform Principal and Income Act from time to time existing. In the event the New York Revised Uniform Principal and Income Act shall contain no provision concerning a particular item, the Trustee shall have the power to determine what is principal or income of the applicable Trust and apportion and allocate, in the Trustee’s reasonable discretion, receipts and expenses as between these accounts. All of the foregoing powers shall be subject to the Trustee’s duties to treat equitably both the income Beneficiaries and remaindermen under the Trust. In this connection, the following shall be observed by the Trustee:

(A) A reasonable reserve for depreciation of all income-producing depreciable real and personal property, and capital improvements and extraordinary repairs thereto, shall be charged to income from time to time.

(B) A reasonable reserve for depletion of all depletable natural resources including, but not limited to, oil, gas, mineral and timber property shall be charged to income from time to time.

(C) A reasonable reserve for amortization of all intangible property having a limited economic life including, but not limited to, patents and copyrights shall be charged to income from time to time.

(D) All distributions by mutual funds and similar entities of gains from the sale or other disposition of property shall be credited to principal.

(E) All premiums paid and discounts received in connection with the purchase of any bond or other obligation shall be amortized by making an appropriate charge or credit to income.

(F) All premiums paid in connection with life insurance shall be deemed paid from principal of Trust, and charged against Trust principal.”

In support of the application, the petitioners have submitted the affidavit of the grantor and the waiver of citation and consent of Peter Scalamandre, who is a co-trustee

and is identified as “the beneficiary” in the trust agreement.

The dispositive terms of the trust provide that, during the grantor’s lifetime, the trustee shall pay or apply so much of the net income and principal thereof to the beneficiary and his descendants in equal or unequal shares as the trustees, in the trustees’ discretion, consider necessary for health, education, support and maintenance. The same provisions apply after the grantor’s death. The trust terminates upon the beneficiary’s death, and the beneficiary has a limited power of appointment to dispose of the trust principal. In the event he fails to exercise the limited power of appointment, the remaining trust principal is payable per stirpes to the beneficiary’s issue, or, if none shall then be living, per stirpes to the grantor’s then living issue.

The petition does not indicate whether Peter has issue. If he does, his issue as permissible sprinklees have an interest in the trust. Although Peter may represent the interests of his issue in certain proceedings by virtual representation (SCPA 315), EPTL 7-1.9 specifically provides that the creator of an irrevocable trust may revoke or amend the trust in whole or in part upon the acknowledged written consent of “all persons beneficially interested in” the trust. The petition is not supported by the consent of anyone other than Peter. Thus, it is unclear whether relief may be granted under EPTL 7-1.9.

Nevertheless, although denominated a petition under EPTL 7-1.9, the court will treat the application as more properly an application for reformation of the trust.

Courts will rarely reform wills or trusts to correct mistakes (*Matter of Snide*, 52 NY2d 193 [1981]; *Matter of Merns*, NYLJ, Mar. 16, 2001, at 18, col 2 [Sur Ct, New York County]) unless the reformation effectuates the settlor’s or testator’s intent to take maximum advantage of the available tax exemptions and deductions (*Matter of Choate*, 141 Misc 2d 489 [Sur Ct, New

York County 1988]; *Matter of Merns*, NYLJ, March 16, 2001, at 18, col 2 [Sur Ct, New York County]). The courts have generally been sympathetic where the reformation is requested to cure various tax defects (*Matter of Gottfried*, NYLJ, Apr. 11, 1997, at 25, col 6 [Sur Ct, New York County]). In particular, courts have allowed reformations to allow a charitable remainder trust to qualify for the charitable deduction (*Matter of Stalp*, 79 Misc 2d 412 [Sur Ct, Kings County 1974]); *Matter of Witz*, 95 Misc 2d 36 [Sur Ct, Nassau County 1978]; *Matter of Kander*, 115 Misc 2d 386 [Sur Ct, Suffolk County 1982]; *Matter of Balleta*, NYLJ, Feb. 23, 1998 at 33, col 5 [Sur Ct, Westchester County]; *Matter of Bull*, NYLJ, Apr. 8, 1998, at 33, col 4 [Sur Ct, Suffolk County]; *Matter of Martin*, 146 Misc 2d 144 [Sur Ct, New York County 1989]; *Matter of Khadad*, 135 Misc 2d 67 [Sur Ct, Nassau County 1987]; *Matter of Lepore*, 128 Misc 2d 250 [Sur Ct, Kings County 1985]; *Matter of Pasquale*, NYLJ, Mar. 21, 1997, at 38, col 5 [Sur Ct, Suffolk County]; *Matter of Opperman*, NYLJ, Oct. 18, 1989, at 26, col 4 [Sur Ct, Kings County]; to maximize the generation-skipping transfer tax exemption (*Matter of Choate*, 151 Misc 2d 489 [Sur Ct, New York County 1988]); to maximize the credit shelter trust (*Matter of Quigan*, NYLJ, Nov. 17, 1994, at 34 col 4 [Sur Ct, Suffolk County]); to cure the trust so it will qualify as a subchapter S shareholder (*Matter of Mainzer*, 151 Misc 2d 203 [Sur Ct, New York County 1991]); and to limit a power in a trust instrument in order to avoid inclusion for estate tax purposes (*Matter of Gottfried*, NYLJ, Apr. 11, 1997 at 25, col 6 [Sur Ct, New York County]).

Here, it is clear that the intention of the grantor was to take advantage of any benefit that would minimize tax liability. Section 5.1 (I) provides that the trustees have the power “[t]o make any election available to the Trustee (including the method of payment of any qualified or non-qualified employee benefit plans or similar arrangements). The Trustee may take any action and

make any election to minimize the Trusts' and Beneficiaries' tax liabilities”

Accordingly, the relief sought concerning Section 1.6 is granted.

Concerning the branch of application regarding Section 1.7 and the reference to Florida statutes, the court notes that Section 1.7 and Section 6.3 are discordant. Section 6.3 recites that the “validity, construction and all rights shall be governed by New York law.” In *Matter of Hahn* (NYLJ, Nov. 7, 1997, at 32, col 1 [Sur Ct, Nassau County]), this court stated that “[i]t is well established that when errors in draftsmanship have occurred, courts may add, excise, modify or transpose language provisions of the instrument to harmonize it with and to effectuate the testator’s intent.” Accordingly, reformation is granted as requested with respect to Section 1.7.

The petition is granted in its entirety.

A proposed order has been submitted to the court and will be signed if found to be in proper form.

Proceeding accordingly.

Dated: December 19, 2013

EDWARD W. McCARTY III
Judge of the
Surrogate’s Court