

<b>Matter of French-Am. Aid for Children</b>
2016 NY Slip Op 30686(U)
April 14, 2016
Surrogate's Court, New York County
Docket Number: 2015-2312
Judge: Rita M. Mella
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SURROGATE'S COURT FOR THE STATE OF NEW YORK  
COUNTY OF NEW YORK

New York County Surrogate's Court

Date: APRIL 14, 2016

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In the Matter of the Application of French-American  
Aid for Children, Inc. for a Declaration of the Invalidity  
of a Purported Trust Created u/a dated March 25, 2010,  
by

DECISION

File No.: 2015-2312

FRENCH-AMERICAN AID FOR CHILDREN,

Grantor,

or for Alternative Relief.

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M E L L A, S.:

The following papers were considered in deciding Petitioner's motion for summary judgment:

<u>Papers Considered</u>	<u>Numbered</u>
Petitioner's Notice of Motion, Memorandum of Law in Support of Motion for Summary Judgment, and Affidavit of Gary B. Freidman, Esq., with Exhibits	1, 2, 3
Respondent Joerg Klebe's Memorandum of Law in Opposition to Petitioner's Motion for Summary Judgment, and Affirmation of David A. Sifre, Esq., in Opposition to Motion for Summary Judgment, with Exhibit A	4, 5
Reply Affidavit of Gary B. Freidman, Esq., with Exhibits	6

Petitioner French-American Aid for Children, Inc. ("Aid for Children"), a New York Type B not-for-profit corporation, incorporated in 1961 to promote the welfare of children in the United States and France, filed this application seeking a declaration of the invalidity of a trust. The trust in question was created under agreement, dated March 25, 2010, between Aid for Children, as Grantor, and Joerg Klebe ("Klebe") and Diane Ackerman ("Ackerman"), as Trustees.

Respondent Klebe opposes the relief sought, while Ackerman supports Aid for Children's petition. The parties have vehemently debated whether certain facts are uncontested in this proceeding, but the following events appear to be undisputed.

In November 2009, the Board of Directors of Aid for Children ("the Board") was informed, at one of its regular meetings, that an honorary member of the Board, Friedl Summerer ("Summerer"), had planned to leave a bequest in trust to the organization under her will.<sup>1</sup> The parties disagree as to whether accurate information was provided to the Board concerning this planned bequest, including whether or not any conditions were attached to the gift. In any event, as previously stated, a trust agreement was executed on March 25, 2010, naming Ackerman, the then President of Aid for Children, and Klebe<sup>2</sup> as co-Trustees.

On April 14, 2010, Ackerman, as President of Aid for Children, executed a document entitled "Assignment" which provided that "the undersigned does hereby irrevocably assign to Joerg Klebe and Diane Ackerman, as Trustees under the [March 25, 2010 Trust] Agreement, any and all property that it may hereafter receive as a beneficiary under the Will of Friedl Summerer." Summerer died two days thereafter. Between 2011 and 2013, Aid for Children received from the Summerer estate, and transferred to the Trust, more than four million dollars.

Under the Trust instrument's terms, the Trust is irrevocable, except that, pursuant to Article Fifth, the Board may amend the instrument to enable the Trust to qualify as an organization described by 501(c)(3) of the Internal Revenue Code ("the Code"). Under the

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<sup>1</sup> However, under Article Sixth(B) of the Summerer Will, dated November 9, 2005, the bequest to Aid for Children was an unconditional outright bequest.

<sup>2</sup> Klebe's connection with Aid for Children is through his wife, Imssy Klebe, who is a former President and a member of the Board.

original trust indenture, the Trust is established for the purpose of making contributions to Aid for Children or its successors, and to other charitable organizations. Under Article First (a), the Trustees were authorized to make discretionary distributions from income or principal to Aid for Children, or to “such one or more other organizations that qualify as exempt organizations under Section 501(c)(3) of the . . . Code” as the Board of Directors of Aid for Children might authorize. Several purported amendments were made by the Trustees, but none of them appears to have constituted an amendment within the meaning of Article Fifth of the Trust, although Klebe maintains otherwise. Under subparagraph (f) of Article First of the Trust, upon termination of the Trust, all remaining Trust assets, after the payment of necessary expenses, must be distributed to such organizations as qualified under 501(c)(3) of the Code and as determined by the Trustees.

On June 1, 2015, Marguerite Mangin (“Mangin”), as President of Aid for Children, executed a Revocation of Trust instrument which was delivered to Klebe and Ackerman as co-Trustees of the Trust. In that instrument, Mangin demanded the turnover of all Trust assets to Aid for Children as well as a Trust accounting. Klebe refused to turn over assets upon advice of counsel that the “termination” was not effective. The revocation instrument bears the written consent of the New York State Attorney General (“Attorney General”) to the Trust’s revocation, such consent having been provided on October 15, 2015.<sup>3</sup>

Aid for Children now moves for a summary determination that the Trust is invalid, on the ground that the Trust was funded with substantially all of Aid for Children’s assets and the transfer of those assets to the Trust was therefore subject to, but failed to satisfy, the notice and approval requirements of sections 510 and 511 of the Not-for-Profit Corporation Law. In the

<sup>3</sup> In this proceeding, the Attorney General takes the position that the Trust can be revoked under EPTL 7-1.9(a) and that any assets in the name of the Trust would revert to Aid for Children.

alternative, Aid for Children argues that the Trust was revoked in accordance with EPTL 7-1.9(a). Under either argument, Aid for Children seeks the immediate return of all Trust assets to Aid for Children.

Summary judgment may be granted only when it is clear that no triable issue of fact exists (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Because summary judgment is in derogation of the parties' right to a trial, it should not be granted "where there is any doubt as to the existence of [material] issues [of fact]" (*Stillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Therefore, it is incumbent on the movant to make a prima facie showing that he is entitled to summary judgment as a matter of law (CPLR 3212[b]; see *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067 [1979]). The papers submitted in connection with a motion for summary judgment are always viewed in the light most favorable to the non-moving party (*Marine Midland Bank v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610, 610 [2d Dept 1990]). If there is any doubt as to the existence of a triable issue, then the motion must be denied (*Hantz v Fishman*, 155 AD2d 415, 416 [2d Dept 1989]).

A trust may cease to exist either by revocation or by termination. Revocation is the resumption by the trust's creator of possession and title to the trust property. By contrast, termination occurs either pursuant to the terms of the trust instrument or when a person, other than the settlor or the court, has the power to cause the trust to cease and the trust property to become distributable to the trust's creator, the beneficiaries or others (Bogert's Trusts and Trustees § 998 [2015] [Note: online treatise] [hereinafter "Bogert's"]). Under the common law, a creator of a trust has no power to revoke or modify a trust, unless the creator reserved such a power (*id.*; Bogert's §§ 999 *et seq.*). But, even if a trust is irrevocable by its terms and in

derogation of the common law, certain statutes allow a creator to revoke the trust with the consent of all beneficiaries (Bogert's §§ 998, 999; *see* EPTL 7-1.9[a]).

One such statute, EPTL 7-1.9 (a), permits the creator of a trust, upon the duly acknowledged written consent of all persons beneficially interested in such trust, to revoke or amend the trust, in whole or in part. When the designated beneficiaries of a trust are charities, the creator must obtain the consent of the beneficiaries in the same manner she would be required to obtain the consent of an individual beneficiary (12 Warren's Heaton, Surrogate's Court Practice § 209.09[4][c][v] [7th ed 2015]), with the Attorney General statutorily designated to represent any indefinite charitable beneficiaries of the trust (*see* EPTL 8-1.1 [f]; *Matter of Schlüssel*, 195 Misc 1008 [Sup Ct, New York County 1949], *rev'd on other grounds* 284 App Div 68 [1st Dept 1954], *mod* 284 App Div 876 [1st Dept 1954]).

In opposition to the motion, Klebe argues that subparagraph (a) of EPTL 7-1.9 is not the controlling statutory provision for the revocation of lifetime irrevocable charitable trusts, which, according to Klebe, may only be terminated pursuant to EPTL 8-1.1(c). As basis for this assertion, Klebe relies on subparagraph (c) of EPTL 7-1.9, which provides that a lifetime trust wholly benefiting one or more charities may be terminated pursuant to subdivision (c) (2) of EPTL 8-1.1. Under that section, the Attorney General or (on notice to the Attorney General) a trustee or a beneficiary of a testamentary or lifetime trust with assets valued at \$100,000 or less and which wholly benefits one or more charities may petition the court for permission to terminate such a trust. Klebe argues that because the value of the Trust exceeded the dollar limit set by section 8-1.1(c)(2)(i), Aid for Children's attempt to revoke the Trust was ineffective. Klebe further argues that if the Legislature had determined that the public interest would be

served by allowing charitable trusts with a value in excess of \$100,000 to be terminated on consent of the settlor and beneficiaries, it could have so provided, by cross-referencing EPTL 7-1.9 in EPTL 8-1.1.

Contrary to Klebe's argument, the provisions currently embodied in subparagraph (a) of EPTL 7-1.9 have been held to be applicable to inter vivos trusts wholly benefiting charities (*Hanover Bank v United Brethren's Church on Staten Island*, 134 NYS2d 356 [Sup Ct, NY County 1954]; *Matter of Gustavus Adolphus Evangelical Lutheran Church's Trust*, 26 Misc 2d 644 [Sup Ct, NY County 1960]; *Matter of Lazarus Charitable Trust*, NYLJ, July 11, 1996, at 24, col 4 [Sur Ct, NY County] [granting petition to amend an inter vivos trust agreement creating a charitable foundation pursuant to EPTL 7-1.9(a)]). In *Hanover Bank*, United Brethren Church ("the Church") was bequeathed property which the Church subsequently transferred to Union Trust Company of New York, as trustee, pursuant to the terms of a trust indenture that the Church had executed. The indenture provided that income and principal from the trust would be paid to the Church to be used for specified purposes. Claiming to be the only beneficiary of the trust and relying on the provisions of Section 23 of the Personal Property Law, a predecessor to EPTL 7-1.9, the Church later served the trustee with written notice of revocation. The trustee argued that the Church's revocation was ineffective because, according to the trustee, the statutory revocation allowed under Section 23 of the Personal Property Law was inapplicable to charitable trusts. The court disagreed and concluded that the Church, as grantor, validly exercised its statutory right to revoke a trust created by it for its own sole benefit (*Hanover Bank*, 134 NYS2d at 362).

This court agrees with the precedents that EPTL 7-1.9(a) may be invoked by the creator


of a charitable trust, which Aid for Children indisputably is. The statute being applicable, the revocation was valid only if consent was obtained from all the beneficiaries. The court finds that the consent requirements have been met here, the named organization benefiting from the Trust having consented for itself and the Attorney General having provided consent on behalf of the indefinite beneficiaries (*Matter of Schluskel*, 195 Misc 1008, *supra*). Therefore, the Trust was validly revoked.

In light of this finding, the court declines to address movant's argument that the transfer of more than \$4 million in assets from Aid for Children to the Trust was invalid for failure to comply with the provisions of Sections 510 and 511 of the Not-for-Profit Corporation Law.

Accordingly, Aid for Children's motion for summary judgment is granted. Klebe and Ackerman, as co-Trustees, are directed to return all Trust property (including accrued income) to Aid for Children.

Settle Decree.

Dated: April 14, 2016

  
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SURROGATE