

**Matter of Kotler Family Trust (Nadler)**

2017 NY Slip Op 31132(U)

April 21, 2017

Surrogate's Court, Nassau County

Docket Number: 2016-388589

Judge: Margaret C. Reilly

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

**In the Matter of the Petition of Rita Nadler and  
Harvey Kotler for a Construction Pursuant to  
SCPA § 1420 of Various Provisions of the**

**DECISION**

**File No. 2016-388589  
Dec. No. 32222**

**GERTRUDE KOTLER FAMILY TRUST,**

**Established by Instrument, dated October 26, 2005,  
by Gertrude Kotler, Settlor.**

**PRESENT: HON. MARGARET C. REILLY**

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

Petition For Construction, filed by Rita Nadler and Harvey Kotler. ....	1
Affidavit to Amend Petition. ....	2
Memorandum of Law in Support of Application for Construction. ....	3
Answer, filed by Joan S. Franck. ....	4
Answer and Counterclaims, filed by Cindy Soshnick. ....	5
Petitioners’ Reply to Answers and Counterclaims. ....	6

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Rita Nadler and Harvey Kotler, beneficiaries under the Gertrude Kotler Family Trust (the Kotler Trust), an irrevocable living trust, and beneficiaries of a continuing trust provision created under Article III of the Kotler Trust, titled Trusts to Hold Reisko Realty Corp. (the Reisko Trusts), have petitioned the court for a judicial construction to provide that as a result of the sale of the underlying assets and dissolution of Reisko Realty Corp., the need for the Reisko Trusts has ended, and the trustees must distribute all of the income and principal contained therein to the children of the settlor of the Kotler Trust, who are the beneficiaries of trust income and the permissible beneficiaries of trust principal.

## **BACKGROUND**

Gertrude Kotler (the Settlor) died on January 29, 2009, survived by her three adult children, Rita Nader, Harvey Kotler (collectively, the Petitioners), and Joan S. Franck, and by the issue of her predeceased son, Jerome Kotler. The Settlor created the Kotler Trust on October 26, 2005. The current trustees of the Kotler Trust are Joan S. Franck and her daughter, Elana Savader (collectively, the Trustees).

The Kotler Trust was primarily funded with shares of Reisko Realty Corp. (Reisko Realty). The primary asset of Reisko Realty was a parcel of real property located in Queens County, New York. On July 30, 2014, the real estate was sold for \$8,450,000.00, and on April 23, 2015, a Certificate of Dissolution of Reisko Realty was filed with the New York Department of State. The present petition followed.

## **PETITION FOR CONSTRUCTION AND MEMORANDUM OF LAW**

Petitioners assert that the Reisko Trusts were designed to hold the Settlor's shares of Reisko Realty to enable the Trustees to manage the ownership interests in Reisko Realty while providing income and discretionary distributions of principal to the Settlor's children. The Petitioners claim that the dissolution of Reisko Realty, following the sale of the underlying assets, triggers the termination of the Reisko Trusts. They argue that the need for the Reisko Trusts has ended and that the Trustees must now distribute all of the income and principal to the Settlor's children. They note that the Reisko Trusts have no directions concerning the dissolution of Reisko Realty, creating an ambiguity requiring judicial construction. Specifically, the Petitioners seek a construction that would direct the

termination of the Reisko Trusts and the distribution of the assets outright to the current beneficiaries in the same manner as directed by the Settlor with respect to the distribution of the Kotler Trust, as set forth in Article II (B) (2) of the Kotler Trust, rather than in the manner directed by the Settlor with respect to the distribution of the Reisko Trusts, as set forth in Article III (B) (iii) of the Kotler Trust.

The Petitioners filed a memorandum of law in support of the application for construction of provisions related to the Kotler Trust, in which the following points are addressed:

(1) If a trust instrument includes vague or ambiguous language about the trust termination date, the court may examine the settlor's underlying purpose in creating the trust to aid in construing the trust's termination provisions. Counsel for the Petitioners argues that the ambiguity lies in the fact that the Reisko Trusts contain no provisions that address the dissolution of Reisko Realty.

(2) The Settlor's intent in establishing the Reisko Trusts was to provide for the management of a particular asset, not to prevent the ultimate vesting of the trust principal in the name of the beneficiaries. The petitioners maintain that based upon the entirety of the Kotler Trust, including the distribution of the remainder other than the shares of Reisko Realty, it was the Settlor's intent to pass the Kotler Trust principal to her children.

(3) In the absence of a provision providing for the dissolution of Reisko Realty, the Reisko Trusts should be terminated, having accomplished their stated purpose. In support of this argument, counsel for the Petitioners cites EPTL §7-2.2, which states, in its entirety:

“When the purpose for which an express trust is created ceases, the estate of the trustee also ceases.” Counsel also cites *Matter of Farrell*, in which the court stated that “[a]lthough the trust is silent [with] respect to termination, it is well established that a trust must terminate when its purposes are accomplished” (*Matter of Farrell*, 2006 NY Misc LEXIS 6090 at \*4, [Sur Ct, New York County] [citation omitted]).

### **RELIEF REQUESTED**

The petitioners seek a decree construing that the Reisko Trusts have terminated, and directing the Trustees to provide an accounting to the beneficiaries, and to distribute outright to each beneficiary his or her respective share of the accumulated income and principal of such trust.

### **ANSWER OF JOAN S. FRANCK**

Joan S. Franck filed an Answer to the Petition, in which she argues that the Reisko Trusts did not terminate upon the dissolution of Reisko Realty. She argues that the Kotler Trust contains the Settlor’s plan for distribution of the Reisko Trusts, which the petitioners’ construction petition seeks to undermine, and that the construction advanced by the Petitioners relies upon speculative, self-serving assumptions about the Settlor’s intent.

The Answer includes a counterclaim asserting that the Petitioners have forfeited their rights and interests under the Kotler Trust, which provides, in Article IX (F), in relevant part, as follows:

“F. No Contest. If any beneficiary under this trust, or rider hereto, shall, in any manner, directly or indirectly, attempt to contest or oppose the directions or validity of this trust, or rider hereto, in any court or commence or prosecute

any legal proceeding of any kind in any court to set aside this trust, or rider hereto, or seeks to prevent any term or provision thereof from being given effect according to its express terms, then and in that event such beneficiary shall forfeit and cease to have any right or interest whatsoever under this trust, or rider hereto. In such an event, this trust, and rider hereto, shall be interpreted in all respects as if such beneficiary had predeceased the Settlor.”

The answer concludes with a request that the court enter a decree: (1) construing the Kotler Trust to provide that the Reisko Trusts did not terminate upon the dissolution of Reisko Realty, and that the Trustees are to continue administering the assets of the Reisko Trusts pursuant to the terms contained in the Kotler Trust; and (2) holding that the Petitioners have forfeited their rights and interests under the Kotler Trust and that the Kotler Trust shall be interpreted in all respects as though the Petitioners had predeceased the Settlor. In addition, Joan S. Franck asks the court to charge the Reisko Trusts created for the benefit of the Petitioners with her costs and attorneys’ fees incurred in connection with this proceeding.

#### **ANSWER AND COUNTERCLAIMS OF CINDY SOSHNICK**

An Answer and Counterclaims were filed by Cindy Soshnick, a daughter of Joan S. Franck, who seeks the dismissal of the petition and also seeks costs. She raises 12 affirmative defenses and counterclaims: (1) the Petition fails to state a cause of action; (2) The Petitioners lack personal and subject matter jurisdiction; (3) the Petition reads terms into the Kotler Trust that are absent, lacks specificity, contains conclusory assumptions and relies upon speculative assumptions; (4) the Kotler Trust is unambiguous and doesn’t provide for the Reisko Trusts to terminate upon the dissolution of Reisko Realty; (5) the action is arbitrary and capricious and without merit or foundation; (6) the Settlor did not intend for the

Resiko Trusts to terminate upon the sale of Reisko Realty, and it was the Settlor's intention to restrict monies to the Petitioners; (7) the Kotler Trust included a clause limiting the power of the court to order the distribution of income or principal contrary to the terms of the trust agreement; (8) in addition to the Petitioners, the Kotler Trust has eight other beneficiaries, all of whom oppose the relief requested by the Petitioners; (9) the Trustees were given the power to sell trust assets; (10) the Petitioners misinterpret written statements upon which they rely; (11) the Settlor intended to provide the beneficiaries of the Kotler Trust with lifetime support, and there is no contrary language indicating any intent by the Settlor to abridge the Reisko Trusts,; and (12) Cindy Soshnick reserves the right to assert further affirmative defenses. Finally, Cindy Soshnick argues that the Petition violates the terms of the no-contest clause found in Article IX (F) of the Kotler Trust and that the petitioners have thereby forfeited all of their rights under the Kotler Trust. She asks the court to dismiss the Petition in its entirety and to grant her fees, costs and expenses in an amount no less than \$15,000.00.

#### **VERIFIED REPLY TO ANSWERS AND COUNTERCLAIMS**

In response to the answers and counterclaims to the petition, the Petitioners claim that: there is ambiguity in the Kotler Trust; that Article II of the Kotler Trust places no restrictions on the residuary distributions being made to the children of the Settlor; that any argument made that the Reisko Trusts were for the lifetime support of the Settlor's children is contradicted by the outright distribution payable to the Petitioner who survives the other Petitioner; and the argument that the Kotler Trust is designed to primarily benefit the

Trustee's children reveals the Trustee's conflict of interest. The Petitioner's argue that "it can be inferred that the Reisko Trusts are for a limited purpose which has been fulfilled upon the sale of Reisko Realty" based upon the fact that there were no limitations placed on any of the proceeds resulting from a sale of the shares of Reisko Realty that might have occurred during the lifetime of the Settlor.

The Petitioners deny that the filing of their petition triggered the no-contest clause contained in Article IX (F), and that, in any event, New York disfavors no-contest clauses. In support of this argument, the Petitioners cite this court's decision in *Matter of Stralem* (181 Misc 2d 715 [Sur Ct, Nassau County 1999]), which addressed whether a proceeding to construe the terms of an inter vivos trust is protected from any forfeiture under a no-contest clause. The Petitioners state that the court found that as with wills, in *terrorem* clauses in inter vivos instruments should be disfavored and strictly construed. According to the Petitioners, the court in *Stralem* refused to allow the clause to take effect.

## **ANALYSIS**

### **Construction**

"In a construction proceeding to determine the effect of the provisions of an instrument, whether by will or trust, the court's principal concern is the testator's intent. The instrument must be examined as a whole, with particular attention to the decedent's testamentary plan" (*Matter of Tyner*, NYLJ, Jul. 13, 1989, at 28, col 3 [2d Dept] [citations omitted]). At the same time, "[w]here the language and meaning of a will or trust agreement is clear and unambiguous, the courts will not seek the assistance of the principles of

construction or extrinsic evidence to determine the testator's intent” (*Matter of Coudert*, NYLJ, Jan. 6, 2010, at 28, col 1 [Sur Ct, Nassau County] [citation omitted]).

The Settlor specifically authorized the Trustees to sell and reinvest trust assets in their discretion. Despite assertions otherwise by the Petitioners, the Settlor never stated that the sole purpose of the Reisko Trusts is to hold shares of Reisko Realty, or that the Reisko Trusts were to terminate upon the sale of the Reisko Realty shares.

What the Settlor did state, in Article III (B) (iii) of the Kotler Trust, is that the termination of each of the three Reisko Trusts would occur upon the death of each respective lifetime beneficiary, Harvey Kotler, Rita Nadler and Joan S. Franck, and that the principal, together with any accumulated income, would then be distributed in the following manner:

(1) Upon the death of Rita Nadler, 50% to the issue of Joan S. Franck, per stirpes, and 50% to Harvey Kotler, if living, or if not living, then to the issue of Joan S. Franck, per stirpes.

(2) Upon the death of Joan S. Franck, the Trustee was to continue to pay income only to the husband of Joan S. Franck, Herbert S. Franck, if he survived her. If he did not survive her, then all to the issue of Joan S. Franck, per stirpes.

(3) Upon the death of Harvey Kotler, 50% to the issue of Joan S. Franck, per stirpes, and 50% to Rita Nadler, if living, or if not living, then to the issue of Joan S. Franck, per stirpes.

Thus, under Article III (B) (iii), the first of the Petitioners to die will receive no outright distribution, unless a discretionary payment of principal had been made by the

Trustee during the Petitioner's lifetime. The surviving Petitioner will receive one-sixth of the total Reisko Trust assets upon the death of the first Petitioner.

The language and meaning of this subparagraph, read alone or in conjunction with the entirety of the instrument (*see, Matter of Fabbri*, 2 NY2d 236 [1957]), is clear and unambiguous. The construction sought by the Petitioners in the instant petition would accelerate the termination of the Reisko Trusts and immediately provide each of the Petitioners with one-third of the total assets, in direct contradiction of the Settlor's directions. This court will not, indeed may not, seek the assistance of the principles of construction or extrinsic evidence to determine the Settlor's intent, as requested by the Petitioners, when there is no ambiguity. "Extrinsic evidence is inadmissible to vary the terms of [an instrument] where, as here, the intent of the decedent is unambiguously expressed . . . (*Matter of Wickwire*, 270 AD2d 659, 661 [3d Dept] [citation omitted]).

#### No-Contest Clause

The court must next address the counterclaim that the Petitioners' request for construction of the Kotler Trust is a violation of the no-contest clause contained in the trust agreement. In connection with wills,

"[i]t is settled law that proceedings to construe the validity, effect and construction of a will do not violate 'in terrorem' benefits prohibiting action on penalty of forfeiture. By present law, EPTL 3-3.5 spells out with particularity the conduct by the beneficiary which does not, as a matter of substantive law, constitute a breach of a no-contest condition occasioning a forfeiture of a benefit under the will"(*Matter of Lang*, 60 Misc 2d 232, 233 [Sur Ct, Erie County 1969] [citation omitted]).

In *Matter of Stralem*, decided by this court in 1999, the movant asked the court for a determination as to whether the filing of a petition to construe language contained in a trust triggered a no-contest clause (*Matter of Stralem*, 181 Misc 2d 715, 718 [Sur Ct, Nassau County 1999]). The court recognized that while there is no statute specifically protecting a proceeding to construe an inter vivos trust that is equivalent to EPTL § 3-3.5, which prevents a forfeiture that might otherwise result from the filing of a construction proceeding for a will, no-contest clauses in “inter vivos instruments should be equally disfavored. If they exist, they must be strictly construed” (*id.* at 721).<sup>1</sup>

In order for the court to determine whether the Petitioners’ commencement of a construction proceeding violated the no-contest clause found in Article IX (F) of the Kotler Trust, the court must consider both the conduct of the Petitioners and the pertinent section of the instrument (*see, Matter of Ellis*, 252 AD2d 118 [2d Dept 1998]). The instant petition was brought for the construction of language contained in the Kotler Trust. The Petitioners asserted that the terms of the trust agreement were ambiguous and unclear concerning the administration of the Reisko Trusts in the event that Reisko Realty was dissolved. Article IX (F) of the Kotler Trust directs forfeiture by a trust beneficiary in the event that a beneficiary “shall . . . attempt to contest or oppose the directions or validity of this trust . . . , in any court or commence or prosecute any legal proceeding of any kind in any court to set aside this trust” or in the event that a beneficiary “seeks to prevent any term or provision

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<sup>1</sup>In *Matter of Stralem*, the court found that the trust did not contain language that could be construed as requiring the forfeiture of the interest of a party who filed a petition for the construction of the trust.

thereof from being given effect according to its express terms . . . .” While this court has found that the trust language was not ambiguous, it does not find that the filing of the petition to construe the trust constituted a violation of the no-contest clause contained in Article IX (F) of the Kotler Trust.

### Fees

Joan S. Franck has asked the court to charge the Reisko Trusts created for the benefit of the Petitioners with her costs and attorneys’ fees incurred in connection with this proceeding. Cindy Soshnick has asked the court to grant her fees, costs and expenses in an amount no less than \$15,000.00 in connection with her responsive papers. SCPA 2301 (2) provides, in relevant part: "Any award for costs or an allowance is in all instances discretionary with the court." In exercising discretionary powers, a court must “take into account the various factors entitled to consideration” (*H & J Blits, Inc. v Blits*, 65 NY2d 1014, 1015 [1985].)

The costs and fees of Joan S. Franck, the trustee, may be paid out of the Kotler Trust, subject to the review of the court, upon the filing of judicial accountings by the trustees. The court denies the request of Cindy Soshnick for fees of no less than \$15,000.00.

### **CONCLUSION**

The petition for a decree construing that the Reisko Trusts has terminated, and directing the Trustees to provide an accounting to the beneficiaries, and to distribute outright to each beneficiary his or her respective share of the accumulated income and principal of such trust, is **DENIED**.

The counterclaim for a determination that the Petitioners have forfeited their rights and interests under the Kotler Trust, and that the Kotler Trust shall be interpreted in all respects as though the Petitioners had predeceased the Settlor, is **DENIED**.

The request by Joan S. Franck that the Reisko Trusts created for the benefit of the Petitioners be charged with the costs and attorneys' fees incurred by Joan S. Franck in connection with this proceeding is **DENIED**. The costs and legal fees may be paid out of the Kotler Trust, subject to the review of the court.

The request by Cindy Soshnick for her fees, costs and expenses to be charged against the Petitioners in an amount no less than \$15,000.00 is **DENIED**.

Settle decree.

Dated: April 21, 2017  
Mineola, New York

**E N T E R:**

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

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