

**Matter of Scimeca**

2018 NY Slip Op 32624(U)

September 28, 2018

Surrogate's Court, Nassau County

Docket Number: 2017-1181/A

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 Cynthia Indelicato for  
Construction of the**

**DECISION & ORDER**

**JOHN SCIMECA, JR., SOLE BENEFIT TRUST,  
REGINA SCIMECA, CREATOR.**

**File No. 2017-1181/A  
Dec. No. 34837**

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

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

Amended Petition and Exhibits . . . . .	1
Consents . . . . .	2

This is a proceeding for the construction of an irrevocable lifetime trust. The settlor, Regina Scimeca, died on February 4, 2016. She was survived by her son John Scimeca, Jr. and her grandson Joseph Scimeca (a/k/a Joseph Scimeca Guttierrez), the child of a predeceased son Robert. The petition seeks to construe the trust to provide for the distribution of the remainder of the trust to the estate of John Scimeca, Jr.

The subject supplemental needs trust is entitled the “John Scimeca, Jr. Sole Benefit Trust.” It was executed on June 24, 2015 by the settlor, Regina Scimeca and the trustee Cynthia Indelicato (petitioner).

“Article I” subdivision (3) of the trust provides in part:

1. This Trust is created expressly for the sole benefit of JOHN SCIMECA, JR. This Trust is to enable JOHN SCIMECA, JR. to qualify or continue to qualify for medical assistance under the Medicaid program as provided for by the Omnibus Budget Reconciliation Act of 1993 (“OBRA 1993”). In the administration of the Trust, the Trustees shall undertake all acts necessary to establish and maintain JOHN SCIMECA, JR’s eligibility for medical assistance under the Medicaid program.

2. It is also intended that the funding of this Trust will not subject the Creator to a period of ineligibility under Medicaid law pursuant to the regulations of N.Y.S. Department of Social Services (18 NYCRR § 360-4.4 [c] [2] [iii] [c] [1] [iii]).”

“Article II” of the trust provides for the distribution of income and principal during the lifetime of the income beneficiary.

“Article III” of the trust provides that “Upon the demise of JOHN SCIMECA, JR., if he predeceases the [settlor], the Trustee shall pay and distribute the remaining Trust Estate to JOHN SCIMECA JR’s estate.”

There is no provision in the trust for disposition of the remainder in the event John Scimeca, Jr. post-deceased the settlor, which is what occurred.

Title to real property was conveyed to the trust by Regina Scimeca. Petitioner states that it is valued at approximately \$330,000.00. The Nassau County Department of Social Services has appeared in this proceeding and asserts a claim in the amount of \$26,215.88 against the proceeds of the sale of the real property. The claim represents reimbursement for Medicaid benefits received by Regina Scimeca.

In the construction of a lifetime trust, the intention of the settlor is determined from the language of the instrument within the context of the background facts and circumstances existing at the time of execution of the instrument (*Matter of Day*, 10 AD2d 220 [1st Dept 1960]).

The circumstances at the time of the execution of this instrument are that the settlor resided with her son, who was disabled. She was in declining health and anticipated the

necessity of moving into a nursing home.

The settlor's intention to avail herself of the exemption provided in § 366 of the Social Services Law and 18 NYCRR § 360-4.4 (c) (2) (iii) (c) (1) (iii), is clearly expressed in "Article I" subdivision (3) of the trust. The regulations referenced by the settlor provide that an applicant is not deemed ineligible for Medicaid by reason of the transfer of her homestead to a trust for the sole benefit of her disabled child.

The attorney-draftsperson has submitted an affirmation in support of this petition. The attorney, relying on a practice treatise, states the law requires the trust to make a direct distribution of the remainder to the estate of John Scimeca, Jr. if he post-deceases the settlor. The attorney attributes the failure to include this provision in the drafting of the trust to her reliance on a standard form, which she did not realize was incorrect. The attorney proposes modification of the trust on the basis of a "scrivener's error."

The Social Services Law and accompanying New York Code of Rules and Regulations conform with 42 USCA § 1396p, which governs Medicaid exemptions. The Manual of the Center for Medicare and Medicaid Services, states that an exempt trust for the benefit of a disabled child requires that no person except the disabled child "can benefit from the assets transferred in any way, whether at the time of the transfer or at any time in the future" (CMS § 3257 [b] [6]). The manual is entitled to consideration in interpreting the technical requirements of the Medicaid program (*Wong v Doar*, 571 F3d 247 [2d Cir. 2009]).

If the trust remainder is not distributed to the estate of John Scimeca, Jr., but to another person or persons, the settlor's intent to avail herself of the aforementioned homestead exemption would be in jeopardy. The courts have shown a willingness to reform supplemental needs trusts for disabled individuals to meet their technical requirements (*see e.g. Matter of Kamp*, 7 Misc 3d 615 [Sur Ct, Broome County 2005]; *Matter of Rubin*, 4 Misc 3d 634 [Sur Ct, Nassau County 2004]).

Furthermore, the doctrine of a gift by implication may be applied in the construction of an instrument where there is an inadvertent failure to provide for the exact contingency which occurred (*see Matter of Thall*, 18 NY2d 186 (1966)). The doctrine may be applied in the construction of a lifetime trust (*First Natl. Bank & Trust Co. v Palmer*, 261 NY 13 [1933]). The trust must permit no other reasonable inference but that the settlor intended to provide for the unmentioned contingency (*see Matter of Kronen*, 67 NY2d 587 [1986]).

Where the doctrine is utilized, the beneficiary who would receive the gift in a stated contingency, receives the gift in a contingency not provided for (*see e.g. Matter of Reichstein*, 78 Misc 2d 787 [Sur Ct, Nassau County 1974]; *Matter of Nield*, 42 Misc 2d 1010 [Sur Ct, Westchester County 1964]).

The court concludes that the failure to include a provision for the remainder to the estate of John Scimeca, Jr., in the event he post-deceased the settlor, was inadvertent and that it may be implied that the settlor intended the remainder to pass to the beneficiary's estate in that event.

For all of the foregoing reasons, the petition is **GRANTED**. The court determines that the estate of John Scimeca, Jr., is the beneficiary of the remainder of the trust.

Settle decree on notice.

Dated: September 28, 2018  
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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