

<b>Matter of Sirol v Heintz</b>
2021 NY Slip Op 30267(U)
January 28, 2021
Supreme Court, New York County
Docket Number: 151448/2020
Judge: Debra A. James
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM**

*Justice*

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INDEX NO. 151448/2020

In the Matter of the Application of

MOTION DATE 03/12/2020

ESTHER SIROL, as Grantor of the ESTHER SIROL  
IRREVOCABLE TRUST dated May 21, 2019,

MOTION SEQ. NO. 001

Petitioner,

For a Judgment pursuant to Article 77 of the New York  
Civil Practice Law and Rules,

**DECISION + ORDER ON  
MOTION**

- v -

CARLOS HEINTZ,

Respondent.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 16, 17, 18, 19  
were read on this motion to/for MISC. SPECIAL PROCEEDING

ORDER

Upon the foregoing documents, it is

ORDERED that the petition is granted, as follows: it is

ORDERED and ADJUDGED that respondent CARLOS HEINZ is removed  
as trustee and, it is further

ORDERED and ADUDGED that, in place and stead of respondent  
CARLOS HEINZ, non-parties SONIA SIROL and ALEJANDRO JAIMES are  
appointed as co-trustees of the ESTHER SIROL IRREVOCABLE TRUST  
created by and in accordance with the Irrevocable Trust Agreement  
dated May 21, 2019, effective upon approval by the court of the  
final accounting submitted by respondent CARLOS HEINZ; and it is  
further

ORDERED that, within fourteen (14) days of entry of this order, petitioner shall submit an affidavit of SONIA SIROL and an affidavit of ALEJANDRO JAIMES, wherein each states that she or he accepts the foregoing appointment as co-trustee, and setting forth address(es) for service of papers upon each of them; and it is further

ORDERED that, within forty-five (45) days of service of a copy of this order and judgment with notice of entry, respondent CARLOS HEINZ shall prepare and settle his final accounting of the ESTHER SIROL IRREVOCABLE TRUST, wherein he shall account for all of the assets, trust property and effects of the estate in his hand, or at any time received by him or disbursed by him, or by any other person or corporation for their order or to their use, or for their account, from the date of the receipt by respondent trustee of the assets constituting the trust to the date of such accounting and, by NYSCEF, serve and file such final accounting, accompanied by a show cause order seeking court approval of the final settlement of such accounting; and it is further

ORDERED that petitioner shall file objections, if any, to such final accounting, within thirty (30) days of such filing with the court; and it is further

ORDERED that respondent CARLOS HEINZ is permanently restrained and enjoined from any further interference with the estate of such trust, or from selling disposing, encumbering, or

pledging any of the goods, effects, or assets of such trust, or from paying out of any of the moneys or assets thereof, or disposing of, concealing, altering, mutilating, or to otherwise interfering with the books, records, vouchers, papers, and documents having reference to such trust; and it is further

ORDERED that, within twenty-one (21) days of service of a copy of an order approving the final accounting, respondent CARLOS HEINZ, by overnight courier, shall deliver each and every one of the goods, effects, assets, books, records, vouchers, papers, and documents having reference to such trust to the first named trustee SONIA SIROL, and with respect to any bank or investment accounts, assist and facilitate the assignment of such accounts, and any change of accountholder in the names of SONIA SIROL and ALEJANDRO JAIMES and the execution of signature cards for SONIA SIROL and ALEJANDRO JAIMES, each trustee, jointly; and it is further

ORDERED that co-trustee SONIA SIROL shall provide copies of any and all records and papers, including for any accounts, to her co-trustee ALEJANDRO JAIMES, within ten days of her receipt thereof, from respondent.

#### DECISION

The petition at bar is verified, i.e. signed before a notary public by petitioner herself, and therefore it constitutes admissible evidence with respect to petitioner's claims that respondent has violated the Irrevocable Trust

Agreement dated May 21, 2019, and most importantly, that in accordance with such Agreement, she has removed respondent, as trustee. However, in response to such verified petition, respondent submits an unverified answer, i.e., his signature was not made before a notary public. Such unverified answer does not constitute admissible evidence, and is therefore insufficient to raise any issue of fact with respect to the petition. See Metro Envelope Corp v Westvaco, 72 AD2d 695, 696 (1<sup>st</sup> Dept. 1979).

Nevertheless, this court would allow respondent to re-serve his answer, with his signature made before a notary public, as such defect is a curable. See Application of Smith, 2 AD2d 67 (1<sup>st</sup> Dept. 1956). However, Agreement § 2.02(d) provides that petitioner, as beneficiary of the trust, has the power to remove respondent, as trustee, with or without cause, and appoint a successor trustee or trustees. In accordance with Agreement § 2.03, petitioner has delivered a written notice, in the form of the Removal Letter dated January 21, 2020, to respondent, which constitutes proper notice removing respondent.

The evidence, such as the Default Notice dated July 11, 2019, which is attached to the petition to support the claims that respondent wasted and misappropriated assets of the trust, is insufficient to establish to what extent respondent has done so. Petitioner, however, is entitled to a final accounting of

the trust by respondent, and such final accounting must be approved by the court. Upon respondent filing a motion to approve such final accounting, petitioner may serve objections thereto, accompanied by any evidence that the respondent owes damages to the trust. See In re Judicial Settlement of the Final Accounting of Rudin and Rudin, as Successor Trustees for the Trust for the benefit of Heimlich, under the Last Will and Testament of Rudi v Heimlich, 34 AD3d 371 (1<sup>st</sup> Dept 2006).

1/28/2021  
DATE

Debra A. James  
DEBRA A. JAMES, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER  
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: