

<b>Matter of Crocitto Family Trust</b>
2016 NY Slip Op 32642(U)
November 29, 2016
Surrogate's Court, Nassau County
Docket Number: 2014-382297
Judge: Margaret C. Reilly
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**SURROGATE’S COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU**

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**Accounting of Michael Crocitto as Trustee of the                    DECISION**  
**CROCITTO Family Trust, dated July 2, 2009.                    File No. 2014-382297**  
**Dec. No. 31959**

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

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

Petitioner’s Notice of Motion for Partial Summary Judgment . . . . .	1
Petitioner’s Amended Notice of Motion for Partial Summary Judgment . . . . .	2
Affirmation of Petitioner’s Counsel in Support of Motion with Exhibits . . . . .	3
Affidavit of Petitioner in Support of Motion for Partial Summary Judgment. . . . .	4
Affirmation of Charles Baron in Support of Motion for Partial Summary Judgment. . . . .	5
Affirmation of Deanna M. Eble in Support of Motion for Partial Summary Judgment. . . . .	6
Affidavit of Marie Sailer Crocitto in Support of Motion for Partial Summary Judgment. . . . .	7
Petitioner’s Memorandum of Law in Support of Motion for Partial Summary Judgment. . . . .	8
Objectants’ Notice of Cross Motion for Partial Summary Judgment. . . . .	9
Affirmation of Objectants’ Counsel in Opposition to Motion and in Support of Cross Motion with Exhibit. . . . .	10
Objectants’ Memorandum of Law in Opposition to Motion and in Support of Cross Motion. . . . .	11
Affirmation of Petitioner’s Counsel in Further Support of Motion and in Opposition to Cross Motion. . . . .	12
Affirmation of Objectants’ Counsel in Further Opposition to Motion and in Support of Cross Motion <sup>1</sup> . . . . .	13

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<sup>1</sup>The court has not considered the Sur-Reply Affirmation submitted by petitioner’s counsel.

In this contested accounting proceeding, the petitioner moves the court for an order granting him partial summary judgment dismissing General Objections numbered 1, 2, 3, and 4 and Specific Objections numbered 7, 9, and 11. The objectants have opposed the motion and cross-move for an order granting partial summary judgment in their favor sustaining General Objections numbered 1, 2, 3, and 4 and Specific Objections numbered 7, 9, and 11.

This is the accounting of Michael Crocitto as trustee of the Crocitto Family Trust, an irrevocable lifetime trust, dated July 2, 2009 (the 2009 Trust). The trust was created by Marie Crocitto, who died on December 25, 2012. Marie Crocitto had three children: the petitioner Michael Crocitto, and the objectants Madeline Gavencak and Claire Anne Nemec. The 2009 Trust provided that the remainder after the death of the settlor was to be divided equally between the three children.

On November 22, 2011, the Michael Crocitto Family Trust (the 2011 Trust) was created, ostensibly with Michael's wife as the settlor. On December 16, 2011, Michael transferred the sum of \$433,000.00 from the 2009 Trust to the 2011 Trust, leaving approximately \$140,000.00 in the 2009 Trust. Unlike the 2009 Trust that provided for equal distribution of the remainder, the 2011 Trust provides that the remainder after the death of Marie Crocitto is to be divided as follows: 13% to Madeline; 11% to Claire; and 76% to the petitioner. The objections that are the subject of the motion and cross motion for summary judgment are addressed to validity of the transfer from the 2009 Trust to the 2011 Trust and to Michael's alleged breach of his fiduciary obligations to the objectants in making that

transfer which enhances his interest in the trust assets to the detriment of the objectants.

Section 3.01 (b) of the 2009 Trust regarding income and principal distributions to the beneficiaries during the settlor's lifetime provides, in part, as follows:

“My Trustee may distribute to the lifetime beneficiaries (other than me or my spouse) as much of the income and principal of the trust property as my Trustee may determine advisable for any purpose. MICHAEL CROCITTO, while serving alone as my Trustee, is expressly empowered and authorized to make discretionary distributions of income and/or principal to or for his own benefit, notwithstanding the provisions of EPTL 10-10.1 or any common law or statutory rule prohibiting Trustee self-dealing. In making distributions under this Section, my Trustee may, but need not, take into consideration any income or other resources that are available to the lifetime beneficiaries outside of the trust and are known to my Trustee.”

EPTL § 10-10.1 provides, in pertinent part:

“A power held by a person as trustee of an express trust to make a discretionary distribution of either principal or income to such person as a beneficiary . . . cannot be exercised by such person unless (1) such person is the grantor of the trust and the trust is revocable by such person during such person's lifetime, or (2) the power is a power to provide for such person's health, education, maintenance or support within the meaning of sections 2041 and 2514 of the Internal Revenue Code, or 3) the trust instrument, by express reference to this section, provides otherwise.”

It is indisputable that the 2009 Trust provides the trustee with broad authority to make principal and income distributions to any beneficiary, including himself, and that the 2009 Trust makes express reference to EPTL § 10-10.1. However, the \$433,000.00 transfer to the 2011 Trust was not a distribution to any one of the beneficiaries; it was a transfer to a new trust with the same beneficiaries, but with different interests in the remainder. The petitioner argues that the transfer is nevertheless valid, citing a line of cases holding that an absolute

power of invasion in a trustee is the equivalent of a special power of appointment. The issue for summary determination is whether this language created an absolute power of invasion in the trustee.

While, as indicated, Section 3.01 (b) of the 2009 Trust provides the trustee with broad authority to make principal and income distributions to any beneficiary, including the trustee himself, the same Section 3.01 (b) goes on to provide as follows:

“Any distributions made pursuant to the provisions herein shall be considered as advancements in determining the beneficiary’s respective share as provided for hereinafter, unless waived in writing by my living children who are not incapacitated and if incapacitated, then by such child’s guardian of the property or agent under a legally valid Durable Power of Attorney.”

Pursuant to Section 4.01 of the 2009 Trust, the remainder is to be divided equally among the settlor’s three children. The objectants contend that reading the instrument as a whole, the invasion power set forth in Section 3.01 (b) does not constitute an absolute power of invasion because it is tempered by the language requiring that any such principal invasion be treated as an advancement against that child’s one-third share of the remainder.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). Once this showing has been made, the burden shifts to the party opposing the

motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Among the papers submitted in support of the petitioner's motion for partial summary judgment is the affirmation of Charles Baron, an attorney who was associated with the firm that drafted both the 2009 Trust and the 2011 Trust. Mr. Baron avers that he was involved in the drafting of the 2011 Trust, but does not make that claim regarding the 2009 Trust. Regarding the advancements clause, he posits that, "the advancements clause was a boilerplate provision used at [the firm] under different circumstances and probably should not have been included in the 2009 trust at all."

Also submitted in support of the petitioner's motion for partial summary judgment is the affirmation of Deanna M. Eble, an attorney at the firm that created both trusts but she was not involved in the drafting of the 2009 Trust either. Ms. Eble avers that in 2011 the settlor wanted to change her estate plan to lessen the amount that would pass to her daughters upon her death.

Neither of the attorneys were involved in drafting the 2009 Trust and neither, therefore, can speak to what the settlor intended when the 2009 Trust was executed. It is axiomatic that the primary purpose of a construction proceeding is to ascertain and give effect to the intent of the testator or settlor (*Matter of Bieley*, 91 NY2d 520, 525 [1998]). The intention of the testator or settlor must be "gleaned not from a single word or phrase but from

a sympathetic reading of the will as an entirety and in view of all the facts and circumstances under which the provisions of the [instrument] were framed” (*Matter of Fabbri*, 2 NY2d 236, 240 [1957]).

Here, there has been almost no discovery taken and the court is therefore unable to consider all of the facts and circumstances under which the provisions of the 2009 Trust were framed. The petitioner would have the court simply ignore the entire advancements clause based on the attorney’s supposition that it “probably should not have been included.” However, in the construction of a will or trust instrument “words are never to be rejected as meaningless or repugnant if by any reasonable construction they may be made consistent and significant” (*Matter of Gulbenkian*, 9 NY2d 363, 370 [1961], quoting *Matter of Buechner*, 226 NY 440, 443 [1919]).

Here, the language of the 2009 Trust creates an ambiguity as to whether the seemingly broad invasion power afforded to the trustee was or was not intended by the settlor to be tempered by the language contained in the advancements clause. An issue of fact therefore exists requiring denial of both the motion and the cross motion for summary judgment.

This matter will appear on the court’s calendar for conference on January 25, 2017, at 9:30 a.m. to enter a discovery schedule.

This is the decision and order of the court.

Dated: November 29, 2016  
Mineola, New York

**E N T E R :**

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

cc: Ruskin Moscou Faltischek, P.C  
Att: John G. Farinacci, Esq.  
*Attorneys for Petitioner*  
1425 RXR Plaza, 14<sup>th</sup> Plaza  
Uniondale, NY 11556

Farrell Fritz, P.C.  
Att: Spencer L. Reames, Esq.  
Eric W. Penzer, Esq.  
1320 RXR Plaza  
Uniondale, NY 11556