

**Matter of Vizzini**

2020 NY Slip Op 32145(U)

July 1, 2020

Supreme Court, Kings County

Docket Number: 522761/17

Judge: Larry D. Martin

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At an IAS Term, Comm-12 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 1<sup>st</sup> day of July, 2020.

P R E S E N T:

HON. LARRY D. MARTIN,  
Justice.

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IN THE MATTER OF THE PETITION OF **TINA M. VIZZINI**, INDIVIDUALLY, AS EXECUTOR OF THE ESTATE OF ELEONORA M. VIZZINI, AS TRUSTEE OF THE VIZZINI FAMILY TRUST AND MEMBER OF CELLUZZIELE LLC, TO AUTHORIZE THE SALE OF THE PROPERTY HELD BY THE VIZZINI FAMILY TRUST.

Index No. 522761/17

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IN THE MATTER OF THE PETITION OF **TINA M. VIZZINI**, INDIVIDUALLY, AS EXECUTOR OF THE ESTATE OF ELEONORA M. VIZZINI, AND AS CO-TRUSTEE OF THE ELEONORA MARIA VIZZINI LIVING TRUST, TO AUTHORIZE THE SALE OF THE PROPERTY HELD BY THE ELEONORA MARIA VIZZINI LIVING TRUST.

Index No. 522762/17

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IN THE MATTER OF THE PETITION OF **TINA M. VIZZINI**, INDIVIDUALLY, AS EXECUTOR OF THE ESTATE OF ELEONORA M. VIZZINI, AND AS CO-TRUSTEE OF THE ELEONORA MARIA VIZZINI LIVING TRUST, TO AUTHORIZE THE SALE OF THE PROPERTY HELD BY THE ELEONORA MARIA VIZZINI LIVING TRUST.

Index No. 522763/17

The following e-filed papers read herein:

NYSCEF Doc. Nos.

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed\_\_\_\_\_

1-7      1-5                      1-6

Opposing Affidavits (Affirmations)\_\_\_\_\_

10, 19, 27    8, 17, 25    9, 18,

19-25

On November 22, 2017, Petitioner Tina M. Vizzini (Tina), individually, as Executor of the Estate of Eleonora M. Vizzini and as Trustee/Co-Trustee of the two trusts at issue herein, filed three separate petitions against respondents Gina Vizzini-Oswald (Gina), Charles Vizzini (Charlie), St. Jude Children's Research Hospital (St. Jude's), and the Attorney General of the State of New York. Tina's three petitions under Kings County Index Numbers 522761/2017, 522762/2017 and 522763/2017 are joined herein for disposition.

Under Index Number 522761/2017, Tina seeks an order, pursuant to CPLR 7701, for: (1) construction of the Vizzini Family Trust, confirming her authority to sell to a bona fide purchaser for value the trust property located at 8015 21st Avenue in Brooklyn (21st Avenue Property) free and clear of any interest described in the trust instrument, including rights to occupancy by named trust beneficiaries, and (2) to terminate the Vizzini Family Trust and to distribute the Vizzini Family Trust corpus to the beneficiaries. Alternatively, Tina seeks an order, pursuant to RPAPL §§ 1601 and 1602, authorizing her, as trustee, to sell the 21st Avenue Property.

Under Index Number 522762/2017, Tina seeks an order, pursuant to CPLR 7701, for construction of the Eleonora Maria Vizzini Living Trust (EMVL Trust), confirming that the trust property located at 1618 15th Street in Brooklyn (15th Street Property) can be sold and authorizing the appointed receiver, Douglas Rosenberg (Receiver Rosenberg), to sell it. Alternatively, Tina seeks an order, pursuant to RPAPL §§ 1601 and 1602, authorizing and/or directing Receiver Rosenberg to sell the 15th Street Property. Alternatively, Tina seeks an order, pursuant to Surrogate's Court Procedure Act (SCPA) §§ 1902 and 702 (10), directing the sale of the 15th Street Property and appointing Receiver Rosenberg as a special fiduciary, and granting him limited authority to sell the 15th Street Property and to administer the proceeds, pay the debts, expenses

and tax liabilities of the estate and the EMVL Trust, including administration expenses, and to distribute the balance of said trust to “the Trustees of the Article Four Trusts.”

Under Index Number 522763/2017, Tina seeks an order granting her, or her designated representative, the right to access the 21st Avenue Property in the company of a contractor in order to obtain estimates of the repairs to be made to the Property for the purpose of serving Charlie with a notice to cure, and in the event that Charlie fails to cure, upon written notice to the court and the parties confirming Charlie’s default, that the court issue a warrant, pursuant to RPAPL § 749(a), evicting Charlie from the 21st Avenue Property.

### ***Background***

Tina, Gina and Charlie are siblings and the beneficiaries of two trusts established by their mother, Eleonora Maria Vizzini (Eleonora), prior to her death in August 2012. The Vizzini Family Trust was created on or around May 22, 2003. Its sole asset is Celluzziele LLC, which owns the 21st Avenue Property, the ancestral family home of the Vizzini family. Tina is the sole trustee of the Vizzini Family Trust. Currently, Charlie is the only resident of the family home and has been the sole resident since Eleonora’s 2012 death.

The EMVL Trust was created on or around May 2, 2012. The EMVL Trust’s sole asset is 1618 East 15th Street Realty LLC (1618 LLC), which owns the 15th Street Property, a 23-unit residential apartment building. During her lifetime, Eleonora served as the sole trustee of the EMVL Trust. Upon Eleonora’s death, the siblings Tina, Gina and Charlie became successor co-trustees.

### *The 2014 Action*

Prior to filing the instant petitions, on February 10, 2014, Tina, in her capacity as executor of Eleonora's estate, co-trustee of the EMVL Trust and sole member of Celluzziele LLC, commenced an action against Gina, Charlie and Charles Joseph Vizzini (Charles Joseph), the siblings' father and the managing agent of 1618 LLC (the 2014 Action). In the 2014 Action, Tina alleged, among other things, that defendants barred her from accessing 1618 LLC's records and financials and misappropriated 1618 LLC's assets by using its rental income to pay for personal expenses rather than pay for expenses related to the building or the outstanding liabilities of Eleonora's estate. Tina also alleged that Charlie, as the sole resident of the 21st Avenue Property, failed to assume his responsibility under the Vizzini Family Trust by paying for the Property's maintenance, including full payment of taxes and insurance premiums, and by barring Tina from accessing the Property despite her rights as trustee.

The 2014 Action sought, among other things: (1) damages for the conversion of funds; (2) the turnover of documents and information regarding 1618 LLC; (3) the appointment of a receiver for 1618 LLC; (4) an accounting of 1618 LLC's assets and disbursements; (5) damages for defendants' physical and financial waste of the 15th Street and 21st Avenue Properties; and (6) judicial dissolution of 1618 LLC.

Tina moved for the appointment of a receiver based on defendants' alleged mismanagement of the 15th Street Property. By an April 7, 2015 order, the court appointed Douglas Rosenberg as receiver, who has been managing the 15th Street Property ever since.

On August 9, 2016, Tina moved for an order, pursuant to CPLR 7701, seeking the same relief sought by way of the instant petitions, namely: (1) construction of the Vizzini Family Trust

“confirming Tina’s authority to sell, to a bona fide purchaser for value, the [21st Avenue Property] free and clear of any interests described in the trust agreement, including rights to occupancy by named trust beneficiaries; to terminate the [Family] Trust, in her discretion, and to distribute the trust corpus to the beneficiaries,” and (2) construction of the EMVL Trust “confirming that the [15th Street Property] can be sold and authorizing the appointed receiver, Douglas Rosenberg . . . to sell it or, in the alternative, appointing [him], pursuant to SCPA § 702 (10) as a special fiduciary and granting him limited restricted authority to sell the 15th Street Property, administer the proceeds, pay the debts, expenses and estate tax liabilities of the Estate and Trust, including administration expenses, and distribute the balance of the trust to the Trustees of the Continuing Trusts under Article Four of the trust instrument . . .”

By a July 14, 2017 order (July 2017 Order), the court granted Tina’s motion: (1) confirming her “authority to sell [the 21st Avenue Property] to a bona fide buyer . . . free and clear of any interests described in the [Family] trust agreement including rights to occupy by named trust beneficiaries . . .”; (2) “confirming that the [15th Street Property] can be sold and authorizing the appointed receiver, Douglas Rosenberg to sell the property...”; and (3) authorizing Douglas Rosenberg “to select and retain a real estate broker to list the [15th Street Property] for sale in an open market transaction.”

However, subsequently, upon ensuing motion practice by Tina, Gina and Receiver Rosenberg, the court, upon discovering that Charles Joseph had died on May 20, 2017, and letters of administration had not been issued, ordered that “all orders issued after the death of Charles Joseph - including the court’s July 2017 Order . . . are deemed to be nullities” as “the court lacked jurisdiction to issue those orders” and vacated said orders in its decision dated June 28, 2018 (June

2018 Decision). Due to the stay, the June 2018 Decision also denied as moot the motions by Tina, Gina and Receiver Rosenberg.

On April 17, 2019, the Public Administrator of Kings County was substituted as the Limited Administrator of the Estate of Charles Joseph in place of the late Charles Joseph. Charles Joseph is not a party to the three petitions at issue herein, which were commenced after his death. St. Jude's is named as a respondent to the three instant petitions, and is a contingent remainderman under both trust documents. St. Jude's, however, was not served or otherwise made a party to the 2014 Action.

Under the instant three petitions, by so-ordered stipulation dated October 30, 2019, Tina, Gina, Charlie and St. Jude's agreed that the pending motions in the 2014 Action would be withdrawn and that, in the event that the parties failed to reach a global settlement by November 13, 2019, the instant petitions "will be decided on the merits . . ." The parties having failed to settle by said deadline, and thus, the three petitions have been submitted for a decision on the merits.

### ***The Vizzini Family Trust Petition***

It is undisputed that the Vizzini Family Trust grants Eleonora, referred to as the "Lifetime Beneficiary," a life estate in the 21st Avenue Property, conferring upon her "the right to the exclusive use and enjoyment of the Trust premises" (Vizzini Family Trust Document, Article First Section A [1]). The trust provides that, upon Eleonora's death, Tina, Gina and Charlie, referred to as "remaindermen":

"shall have the right to reside in the real property located at 8015  
21st Avenue, Brooklyn, New York, for their lifetimes provided they

reside in the real property and pay any and all taxes and assessments which may be, from time to time, lawfully levied on such property; all interest and amortization of principal charge and costs of any mortgage or other encumbrance on such property; all costs of repair (and improvements) thereon and/or other expenses/costs essential to the property. The *life tenants* shall carry such fire and liability insurance on said real property as shall be sufficient to protect the interest of the life tenant and remaindermen” (*Id.* at Article First Section I) (emphasis added).

Tina contends that the foregoing trust language grants the remaindermen the right to reside in the 21st Avenue Property, but that such language does not confer life estates. According to Tina, whatever rights the remaindermen have to occupy the Property are subject to divestment should the Property be sold, or the trust terminated.

Tina, in support of her interpretation that the trust authorizes the sale of the 21st Avenue Property free and clear of any interest described in the trust document, points to the difference in language used to describe Eleonora’s interest (“exclusive use and enjoyment”) versus the interest held by the remaindermen (“the right to reside in the real property”). In addition, Tina asserts that various trust provisions are incompatible with an interpretation that the remaindermen possess life estates. Specifically, the trust provides that the interests of the remainder beneficiaries “shall not vest until the sale of the [21st Avenue Property]” (Vizzini Family Trust Document, Article First Section H); the trust document vests Tina with “complete authority to alienate, withdraw, transfer funds and/or real property held by this trust” (*id.* at Article Tenth) and to terminate the trust after the death of Eleonora and distribute the trust corpus in three equal, per stirpital, shares to the siblings (*id.* at Article First Section E); and that the trust document defines a “sale” as “a transfer to a bona fide purchaser for fair market value and not intended to include a transfer in form of ownership, i.e., from LLC to a trust” (*id.* at Article First Section F). According to Tina, these



provisions granting her the power to sell, distribute and terminate the trust, coupled with the remainder beneficiaries' limited rights of occupancy completely belie any contention that the 21st Avenue Property can only be sold subject to the rights of the remainder beneficiaries.

Tina asserts that termination of the trust and sale of the 21st Avenue Property is necessitated by the fact that the relationship among the siblings has become toxic and irreconcilable. Tina contends that Charlie has ignored the terms of the trust, subjecting the 21st Avenue Property to waste and causing it to be in need of significant repairs. Tina also notes that Celluzziele LLC has been fined by the Department of Sanitation for the accumulation of trash in front of the Property. Tina further argues that Charlie has denied her access to the Property and that, upon information and belief, Charlie previously attempted to apply for a mortgage solely for his benefit.

In addition, Tina contends that Gina has been attempting to exercise her right under the trust to reside at the 21st Avenue Property, but Gina's relationship with Charlie is such that it is impossible for them to cohabitate and maintain a peaceful co-existence. Both Gina and Charlie insist upon occupying the first floor of the Property, due to alleged disabilities, to the exclusion of the other, even though the trust does not entitle any party to the exclusive use of any portion of the Property to the exclusion of another. Tina submits that the intractable dispute between Gina and Charlie has made the trust's terms impossible to implement.

Charles, in his answer, denies Tina's allegations regarding his conduct and stewardship over the Property. However, Charlie asserts that the court should grant Tina's petition, subject to his right to remain in the family home until it is sold, and granting him the opportunity to purchase the home at fair market value.

Gina, in her answer, asserts that the petition should be denied. According to Gina, the trust document grants her, as well as her siblings, a life estate in the family home, since the purpose of the Vizzini Family Trust is to keep the home in the family by conferring life estates to the children, and their issue, if any. Gina seeks: (1) a declaration that she has the right to reside in the family home for her lifetime, and (2) an injunction barring Tina from selling the 21st Avenue Property and interfering with Gina's right to exercise her life estate.

Gina, in support of her position that the siblings are conferred life estates, asserts that Article Sixth of the trust provides that "the premises may not be alienated, transferred, mortgaged or sold without the express written consent by [Eleonora]." Since Eleonora did not give such consent during her lifetime, Gina contends that the trust document provides the siblings with the absolute right to occupy the family home for their lifetimes, so long as they are able to pay the expenses and maintain the home.

In addition, Gina relies on the explicit language in Article First Section I of the trust, which refers to the siblings as "life tenants" and states that each sibling, upon their mother's death, "shall have the right to reside in the [family home] for their *lifetimes* . . ." and specifying that "[i]n the event that a remainder beneficiary is a permanent resident of a nursing home or similar institution, then that remainder beneficiary's *life estate* shall lapse" (emphasis added).

Gina further contends that Article Tenth of the trust, which gives the trustee "complete authority to alienate, withdraw, *transfer funds and/or real property* held by this trust" (emphasis added), does not permit the sale of the family home or the extinguishment of the siblings' life estates because LLC interests are neither "funds" nor "real property." Since the only asset of the

trust is Celluzziele LLC, Gina argues that Article Tenth does not permit the trustee to sell the trust's sole asset.

Gina also contends that Article First Section E of the trust permits Tina to terminate the Vizzini Family Trust after the death of their mother and distribute the corpus in per stirpes shares to the siblings, but that the "corpus" constitutes interests in Celluzziele LLC. Tina argues that if she were to terminate the trust and distribute the LLC interests, the disposition of the family home would be subject to the provisions of the LLC law for the sale of an LLC's primary asset, and any such disposition would be subject to the siblings' life estates.

Lastly, Gina argues that RPAPL §§ 1601 and 1602 do not apply because the trust asset is not real property but a limited liability company. Gina contends that, even assuming that the RPAPL were applicable, under the holding in *In Re Talmage*, 64 AD3d 662, 663-664 (2009), a sale cannot be ordered because it would violate the intent of the trust and would negate the very rights granted to the siblings and to St. Jude's.

St. Jude's, in its answer, contends that all prior orders of the court in the 2014 Action must be rescinded because neither the New York Attorney General nor St. Jude's were given any notice of the prior proceeding and, therefore, the court lacked jurisdiction over a statutory party and an interested party to the proceedings. In addition, St. Jude's argues that the trust document describes the siblings' interests in the 21st Avenue Property as life estates, and that the trust may only terminate upon the unanimous agreement of the siblings. St. Jude's asserts that, without a unanimous agreement to sell the Property, the trust continues with each sibling having a life estate in the Property, and the Property would pass to St. Jude's upon the death of the last of the siblings to die without issue.

### *The Access Order Petition*

Tina seeks an order granting her or her representative access to the 21st Avenue Property to obtain estimates for repair costs so she can serve Charlie with a notice to cure. According to Tina, the 21st Avenue Property is in need of repairs, however Charlie will not allow anyone access to the Property. Tina contends that Charlie has been acting volatile and in a threatening manner, and has failed to fulfill the conditions of his right to reside at the Property. If Charlie fails to cure by making the necessary repairs, Tina seeks his eviction, pursuant to RPAPL §749 [a].

Gina, in her answer, similarly contends that Charlie is committing waste to the family home by allowing it to fall into a state of disrepair. In addition to seeking Charlie's ejectment for his failure to abide by the trust's terms, Gina seeks to hold Tina, as trustee, responsible for the waste and needed repairs to the family home. Gina also contends that Tina and Charlie have improperly denied her the right to inspect and access the home and therefore seeks injunctive relief enjoining Tina and Charlie from interfering with her right to inspect and access the Property at reasonable times with architects, engineers, contractors or other professionals.

Charlie, in his answer, denies that portion of the petition and Gina's answer alleging that he has committed waste to the Property. Charlie points out that, in the 2014 Action, by an October 10, 2017 order, Receiver Rosenberg examined the 21st Avenue Property with a contractor and provided a written report. According to Charlie, the report stated that the family home should be emptied before repairs could be completed, repairs to the damaged ceiling is "minimal" and that the condition of the home is not dangerous. Thus, it is Charlie's position that both Tina and Gina's application for inspection and access has already been fulfilled, and that their instant request is

redundant and a wasteful dissipation of trust assets, a waste of judicial resources and constitutes harassment.

In addition, Charlie contends that both Tina and Gina have used the family home to store their furniture and personal belongings, and that their late parents' personal effects remain in the home. As such, Charlie seeks damages from Tina and Gina for their use of the family home and their failure to remove their parents' personal items. Charlie also contends that the failure to remove personal effects has prevented the upper floor of the family home from being used to generate rental income. Charlie contends that Tina, as trustee, is obligated to maximize the income for the trust but has failed to do so since the death of Eleonora, and that neither Tina or Gina have any interest in renting out the space. Charlie seeks injunctive relief directing that he be permitted to remove all items that are not his and to make all necessary repairs to the family home at the expense of Gina and Tina and/or the trust.

### ***The EMVL Trust Petition***

For the same reasons outlined in the Vizzini Family Trust petition, namely, the irreconcilable relationship among the siblings, Tina seeks to terminate the EMVL Trust and sell its sole asset, the 15th Street Property. In addition, because debts and administration expenses associated with Eleonora's death remain unpaid and accruing, it is Tina's position that the only source for paying off these liabilities is through the sale of the 15th Street Property.

According to Tina, the EMVL Trust document specifically contemplates and provides for the sale of the 15th Street Property. Specifically, Tina relies on Article 15 Section A, which

enumerates the powers conferred upon the trustee, and provides that the trustee shall have the following powers, authorities and discretions:

“(4) to sell, exchange, lease for any period...or otherwise dispose of all or any part of the property, of whatsoever kind and wheresoever situated, at any time held hereunder, at such times, upon such terms, for cash or on credit, without security, at such prices, in such manner and at public or private sale, as to the Trustee shall seem[sic] advisable;

“(5) to hold, manage and dispose of any real property or interest therein in such manner as to the Trustee shall seem[sic] advisable...to subdivide and sell or lease the same subject to any covenants, to partition and to pay any sums necessary for partition, to perfect title thereof, to demolish any buildings or improvements thereon, to grant easements thereon, to expend, from time to time, such amounts as the Trustee shall seem[sic] advisable . . .” (EMVL Trust Document, Article 15 Section A [4] and [5]).

Tina also points to Article 3 Section A, which concerns the “Disposition of Property Upon the Grantor’s Death” and provides that:

“[s]ubsequent to the death of the Grantor . . . the Trust Property shall be disposed of as follows: (A) If any issue of the Grantor shall be then living, such property shall be allocated among the Grantor’s issue who shall be then living, per stirpes, and the share allocated to each person shall be disposed of as follows: (1) If such person shall be a child of the Grantor, such share shall be held in a separate trust in respect of such child to be managed and disposed of as provided in Article 4 hereof.” Article 4 then provides that each sibling serve as trustee of his or her respective trust and that each “Trustee shall pay or apply to the Beneficiary [that is, himself or herself] so much or all of the net income and/or principal of the trust as is necessary for the health, education, maintenance and/or support of the Beneficiary, after taking into account the other resources available to the Beneficiary and the legal obligation of anyone to support the Beneficiary” (EMVL Trust Document, Article 4 Section A).

Article 4 further provides that:

“[u]nless earlier terminated by the distribution by the Trustee of all the principal of the trust under the forgoing provisions of this

Article, this trust shall terminate upon the death of the Beneficiary, and the Trustee shall dispose of then principal of the trust, if any, and any accrued income and any undistributed income, in such manner as the Beneficiary may appoint...in the Beneficiary's Will . . ." (*id.* at Article 4 Section C).

According to Tina, as successor co-trustees of the EMVL Trust, the siblings cannot agree to the sale of the 15th Street Property and are incapable of cooperating, even when it would be in their personal and financial interests to do so. Because the beneficiaries of the Article 4 trusts cannot agree on the management or disposition of the 15th Street Property, it is Tina's position that Receiver Rosenberg should sell the Property and distribute the proceeds equally among the beneficiaries after the payment of the estate and trust's debts, expenses and liabilities. Charlie supports Tina's petition.

Gina opposes and seeks dismissal of Tina's petition and a declaration that sale of the 15th Street Property is not permitted. According to Gina, the trust's intent is that the siblings obtain, upon their mother's death, an equal share of the apartment building to be held in separate trusts for each sibling, with each sibling serving as trustee of his or her respective trust. Gina further argues that, pursuant to Article 4, the corpus of such trusts are inalienable, and cannot be disposed of by the siblings except to other siblings or issue of the mother (or to the siblings' father).

Alternatively, Gina contends that sale of the 15th Street Property would be an improper disposition of trust assets. Gina argues that the petition is devoid of any financial analysis of the value or operation of the apartment building. Gina further argues that Tina ignores practical alternatives to selling the building, such as payment of the relatively modest estate debts out of the income from the apartment building or by refinancing the lightly leveraged building to cover the estate debts. Gina, based on the foregoing, contends that the petition should be denied.

St. Jude's, in its answer, contends that the EMVL Trust was created for the lifetime benefit of Eleonora and her children. St. Jude's asserts that, upon the death of the last of Eleonora's children to die without issue, the trust is to terminate and the remainder is to be paid to St. Jude's. Thus, St. Jude's contends that it is the presumptive remainderman subject to divestment.

### *Discussion*

It is well established that the object of a construction proceeding is to ascertain the intention of the testator or settlor (*see Matter of Larkin*, 9 NY2d 88, 91 [1961]). “The intent . . . 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 will were framed” (*In re Fabbri's Will*, 2 NY2d 236, 240 [1957]). “In resolving any question of construction, the first step in the judicial process is to consider closely whether or not there is any ambiguity to be resolved” (*In re Mangan's Will*, 100 NYS2d 65, 67 [Sur Ct, Broome County, 1950]). If there is no ambiguity, there is then no occasion to take any further step (*id.*). “The usual and ordinary signification of the words found in the instrument govern the only conclusion that may properly be determined” (*id.*).

If, based upon a perusal of the whole document, “a general scheme can be found to have been intended and provided for in the instrument, and such general scheme is consistent with the rules of law . . . it is the duty of courts to effectuate the main purpose of the testatrix” (*Roe v Vingut*, 117 NY 204, 212 [1889]). “This is true despite the fact that a literal reading of the portion under construction might yield an inconsistent or contradictory meaning because of the use of awkward language inadvertently or carelessly chosen” (*In re Fabbri's Will*, 2 NY2d at 240 [*citation*



omitted]). “If [the court] can see that the inapt, or careless, use of language by the testator has created the difficulty in ascertaining his intention, but, nevertheless, feel certain as to what he meant, from reading the whole instrument in connection with the clause in question, [the court] may subordinate the language to that meaning” (*Matter of Miner*, 146 NY 121, 130-131 [1895]).

### ***The Vizzini Family Trust Petition***

Here, with the foregoing principles in mind, an analysis of the Vizzini Family Trust document discloses that: (1) the trustee is granted broad authority to terminate the trust at any time after the death of Eleonora and distribute the trust corpus, and (2) the siblings are granted a right to occupy the Property during their lifetimes, subject to certain conditions, but that such right is subject to divestment.

The authority of the trustee to sell the Property is reflected in the following provisions:

(1) Article First Section D provides that “[t]he Trustee is authorized to continue to hold real property or personal property held by the trust *until such time as the property is sold and/or transferred*” (emphasis added).

(2) Article First Section F provides that “[a] sale is intended to be defined as a transfer to a bonafide purchaser for fair market value and not intended to include a transfer in form of ownership, i.e., from LLC to a trust.”

(3) Article First, Section H provides that “[t]he trust shall terminate upon the death of the survivor of the remaindermen...or upon the mutual consent of the surviving remaindermen which consent shall be in writing and duly executed by all the surviving remaindermen and the trust shall then terminate. *Interest in the trust corpus shall not*

*otherwise vest until the eventual sale of the real property located at 8015 21st Avenue . . .”*

(emphasis added).

(4) Article Tenth provides that “[t]he Trustee shall have complete authority to *alienate, withdraw, transfer funds and/or real property* held by this trust” (emphasis added).

(5) Article Eleventh provides that “[t]he Trustee shall also have the authority to appoint an investment manager or managers to manage all or any part of the assets of the trust, and to delegate to said manager investment discretion. Such appointment shall include *the power to acquire and dispose of such assets*” (emphasis added).

The foregoing provisions would be rendered meaningless if, as contended by Gina, the trustee lacked authority to sell and dispose of the Property, the only asset of the Vizzini Family Trust.

Although the trust document refers to the siblings as “life tenants” and utilizes the term “life estate” to refer to their interest, there can be no doubt that Eleonora did not intend to grant actual life estates to her children. This is evident, first, by comparing the language used to refer to her own interest in the Property, that of “exclusive use and enjoyment,” and the absence of such language for the siblings’ interest. The trust also prohibits the sale or transfer of the Property without written consent from Eleonora. After the death of Eleonora, there is no provision prohibiting the sale or transfer of the Property without the siblings’ consent. Rather, the trust provides for the sale of the Property by the trustee, as mentioned in the provisions above.

In addition, interpreting Article First Section I as conferring a life estate to each of the siblings produces incompatible, if not impossible, scenarios. Such discordance is already reflected in Charlie and Gina’s respective insistence before the court that each be permitted to reside in the family home but that only the first-floor apartment would be suitable because of claimed physical

disabilities. All three siblings could not exercise their “life estates,” since the 21st Avenue Property is merely a two-family structure. The trust document does not confer priority on any sibling, nor does it confer priority based on a sibling’s situational circumstance such as finances. The court can only conclude that having failed to provide any such guidance, the trust’s use of the term “life estate” with regards to each siblings’ interest was inadvertent, and that Eleonora did not intend to confer actual life estates to each of her children. Rather, it is clear, viewing the trust as a whole, Eleonora intended to grant herself a life estate, while her children were granted the right to reside in the Property, provided they met certain conditions, and that such right was subject to termination if the Property was sold.

Had the trust granted each sibling a life estate in the family home, Tina’s petition would still be granted under RPAPL §§ 1601 and 1602.<sup>1</sup> Section 1602 of the RPAPL provides that “when the ownership of real property is divided into one or more possessory interests and one or more future interests, the owner of any interest in such real property . . . may apply to the court designated in section 1603 for an order directing that said real property . . . be . . . sold.” An application may be granted if the court is satisfied that the “act to be authorized is expedient” (RPAPL § 1604). “Expedient is defined as ‘characterized by suitability, practicality, and efficiency in achieving a particular end; fit, proper or advantageous under the circumstances’” (*In re Estate of Sauer*, 194 Misc 2d 634, 638 [Sur Ct, Nassau County, 2002] [citation omitted]).

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<sup>1</sup> RPAPL §1601 [1] provides that “[w]hen the assets of a trust include *an interest in real property*, the trustee may apply . . . for an order authorizing such trustee to mortgage, to lease or to sell such real property or a part thereof . . .” (emphasis added). Here, the sole asset of the Vizzini Family Trust is an LLC that owns real property, which constitutes an “interest in real property.” Thus, Gina’s assertion that RPAPL §§ 1601 and 1602 is inapplicable to the circumstances herein is without merit.

Here, granting Tina's petition to sell the home would be expedient as the siblings have made it clear that they cannot simultaneously exercise their right to occupy the family home. In addition, in order to utilize the second-floor apartment of the family home, significant renovations would need to be completed, however, the siblings cannot agree on a manner of financing or how to execute such an undertaking. Finally, a sale of the 21st Avenue Property and distribution of the sale proceeds would carry out Eleonora's intent to provide for her children after her death.

For the reasons above, Tina's petition is granted. Gina's contentions are deemed to be without merit, and her application to dismiss the petition and for injunctive relief is denied. To the extent that any of the siblings seek to pursue claims of waste to the 21st Avenue Property or other claims against another sibling(s) regarding the Property, such claims must be pursued upon proper proof and a hearing. It is not possible to determine the merits of such claims on the record currently before the court.

### ***The Access Order Petition***

Tina's petition seeking access to the 21st Avenue Property is granted. Tina, or her representative, shall provide Charlie with reasonable notice regarding any required access to the family home.

Charlie's answer fails to offer any basis to deny Tina access to the Property, especially in her role as trustee. That someone has inspected the home before does not render Tina's instant application redundant or a waste of trust assets. In light of this decision confirming Tina's authority to sell the family home, access to the Property will be necessary to prepare the Property

for sale. Accordingly, Tina's petition seeking access is granted. To the extent that Tina wishes to pursue Charlie's eviction hereafter, Tina must seek such relief by order to show cause.

### *The EMVL Trust Petition*

Tina's petition seeking confirmation that the 15th Street Property can be sold and authorizing Receiver Rosenberg to sell it is granted.

According to the EMVL trust document, upon Eleonora's death, the EMVL trust was to terminate and the trust was to be divided into three separate trusts for each sibling, with each sibling serving as trustee of his or her own trust. However, this never happened. Notwithstanding the foregoing, the trust is clear that the trustees (the siblings) are authorized to sell the 15th Street Property, pursuant to Article 15 Section A [4]. There is no restriction against the sale of the Property, such as a requirement that the sale constitute a "proper" disposition of trust assets. In any case, the sale of the Property constitutes a proper and desirable outcome. The relationship among the siblings has deteriorated to the point that co-management of the 15th Street Property is impossible. The siblings' distrust of each other and inability to agree on even simple matters has necessitated the appointment of a receiver for the building, thereby draining the rental income generated by the building. Under these circumstances, and absent any restriction in the trust, the court finds that the sale of the Property constitutes an ideal disposition of the trust's asset. The sale would also be "expedient" under RPAPL §§ 1601 and 1602.

To the extent that Gina and St. Jude's contend that all three siblings, as co-trustees, must agree in order to sell the premises, as opposed to a majority, as is the case herein, Gina and St. Jude's fail to establish same. Tina's petition is therefore granted. Accordingly, it is

**ORDERED** that Tina's petition under Index Number 522761/2017 is granted; and it is further

**ORDERED** that Tina's petition under Index Number 522762/2017 is granted; and it is further

**ORDERED** that Tina's petition under Index Number 522763/2017 is granted.

This constitutes the decision and order of the court.

E N T E R,

*LDM*

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J. S. C.