

**SURROGATE'S COURT: STATE OF NEW YORK  
COUNTY OF WESTCHESTER**

\*\*\*\*\*

Petition to Compel Distributions from Frank Rich  
and Pamela Chiesa as Co-Trustees of an  
Irrevocable Trust dated October 12, 2011 created  
by

**DECISION & ORDER**  
**File No. 2021-2603**

**ELIZABETH R. SALERNO  
a/k/a LISETTA SALERNO,**

Deceased.

\*\*\*\*\*

**SALL - S.**

This is a miscellaneous proceeding to compel distribution of one-third of the remainder of an inter vivos trust created by Elizabeth Salerno (grantor) to petitioner Beverly Rich (Beverly), a daughter of the grantor.<sup>1</sup> The co-trustees, respondents Frank Rich (Frank) and Pamela Chiesa (Pamela) (collectively, respondents), the grantor's two other children, contest the petition and filed a "counterclaim" for reformation of the trust instrument. They ask the court to add a provision to the trust instrument, allegedly omitted inadvertently, which they believe would result in distribution of the entire trust remainder to themselves in equal shares. The parties have agreed to have the court determine their claims based on the papers. The applications are decided as set forth below.

---

<sup>1</sup> Beverly has not identified a statutory or other basis upon which she seeks relief. Nevertheless, in effect, her application is made pursuant to SCPA 2102(4), which provides that a "proceeding may be commenced to require a fiduciary . . . to pay a[n] . . . interest in a trust . . ."

**MATTER OF ELIZABETH SALERNO**

**File No. 2021-2603**

**Background and Procedural History**

**The Trust Terms**

On October 12, 2011, the grantor entered into an agreement between her, as grantor, and Beverly, as trustee (original trust agreement), drafted by attorney Barbara Diehl, creating a trust named "The Salerno Irrevocable Trust" (trust). The grantor transferred all her assets to the trust, which is currently valued at about \$1.5 million. The trust was created for the lifetime benefit of the grantor, and, pursuant to paragraph 2(b) of the original trust agreement, on the grantor's death, the remainder was to be distributed in equal shares to Beverly, Frank, and Pamela.

With respect to the irrevocability of the trust, paragraph 12 of the original trust agreement states: "Amendment and revocation. The Grantor does not reserve the right to revoke or amend this trust; the trust shall be irrevocable." With respect to trustee appointments, the original trust agreement provides, in paragraph 8(a), that the trustee may be removed "by delivery to him of a written instrument signed and acknowledged by the Grantor," and that the grantor "shall appoint ta [sic] Substitute Trustee to replace the Trustee removed . . . ." In paragraph 9, the grantor appoints Frank as successor trustee.

On January 15, 2013, the grantor, Frank, and Pamela (but not Beverly) executed a document, drafted by Attorney Diehl, entitled "Amendment To The Salerno Irrevocable Trust" (2013 document). The 2013 document states in relevant part that "[p]ursuant to the power given to the Grantor in paragraph 8(a) [of the original trust agreement], the Grantor hereby removes Beverly . . . as Trustee of the Trust and appoints Frank . . . and Pamela . . . as Substitute Co-Trustees."

**MATTER OF ELIZABETH SALERNO**

**File No. 2021-2603**

On March 4, 2016, the grantor, Frank, and Pamela (but not Beverly) executed another document, drafted by Attorney Diehl, entitled "Second Amendment To The Salerno Irrevocable Trust" (2016 document). The 2016 document states in relevant part that paragraph 2(b) of the original trust agreement is amended, such that on the death of the grantor, after distribution of the "Silver (Lion face) candlesticks and the 8 green and gold Cauldon dishes" to Beverly, the trust remainder is to be distributed in equal shares to Frank and Pamela.

On February 21, 2017, the grantor, Frank, and Pamela (but not Beverly) executed yet another document, drafted by Attorney Diehl, also entitled "Second Amendment To The Salerno Irrevocable Trust" (2017 document). The 2017 document states in relevant part that paragraph 2(b) of the original trust agreement is amended, such that on the death of the grantor, the trust remainder is to be distributed in equal shares to Frank and Pamela.

The grantor died on October 6, 2020.

**This Proceeding**

On September 3, 2021, Beverly instituted this proceeding asserting that, since the original trust agreement states that the trust is irrevocable, the 2017 document, which purports to amend the trust to remove Beverly as a beneficiary, is ineffective, and one-third of the trust remainder should be distributed to her pursuant to the terms of the original trust agreement.

Beverly also sought a preliminary injunction enjoining Frank and Pamela from distributing trust assets to themselves pending the court's determination of the proceeding, and on September 17, 2021, an order to show cause was issued, which

**MATTER OF ELIZABETH SALERNO**

**File No. 2021-2603**

enjoined Frank and Pamela "from transferring, assigning or in any way distributing any assets or income of the [trust] to themselves as sole remainder persons under the Purported Amendment to the [trust] dated February 21, 2017." On October 6, 2021, the court continued the injunction pending a final decision on the petition. To date, the injunction remains in effect.

**The Objections**

Frank and Pamela ask the court to reform paragraph 12 of the original trust agreement to add a provision, so that, as reformed, in its entirety, paragraph 12 would read:

"Amendment and revocation. The Grantor does not reserve the right to revoke or amend this trust in any way which would affect the irrevocable nature of the trust; the trust shall be irrevocable."

According to Frank, Pamela, and Attorney Diehl, reformation of the trust agreement to add the language "in any way which would affect the irrevocable nature of the trust" would allow the grantor to have changed the beneficiary designation without affecting the irrevocability of the trust and that, it was the grantor's intent, at the time she created the original trust agreement, to reserve the right to amend the trust to change the designated beneficiaries. Lastly, they contend that the omission of this language was the result of a drafting mistake on the part of Attorney Diehl.

To support these contentions, Attorney Diehl has submitted an affirmation (and certain documents in support) in which she avers the following, among other things: (1) at the time of the creation of the original trust agreement, the grantor advised Attorney Diehl that she desired that the trust remainder be divided equally among her three children; (2) the grantor asked Attorney Diehl if it would be possible to change the

**MATTER OF ELIZABETH SALERNO**

**File No. 2021-2603**

beneficiary and trustee designations in the future, and she responded that her standard irrevocable trust agreement would allow the grantor to make these changes to the trust agreement, but that she would not be able to remove assets from the trust; (3) based on this explanation, the grantor established the trust; (4) it was her custom and practice to include language in otherwise irrevocable trust agreements that would allow a grantor to change the beneficiary designation;<sup>2</sup> (5) omission of such language from the original trust agreement was a drafting mistake on her part; (6) with respect to the 2013, 2016, and 2017 documents, Attorney Diehl made the revisions at the oral and written requests of the grantor;<sup>3</sup> (7) several months after the 2017 document was executed, the grantor called Attorney Diehl two different times and asked her to make yet another change to the trust agreement to make a provision for Beverly, but then subsequently changed her mind and directed that the 2017 document stand; and (8) the grantor expressed to her that she wished to remove Beverly as a beneficiary because she had provided for Beverly during her lifetime and because her relationship with Beverly had deteriorated.

**Discussion**

In general, the remedy of reformation is to be applied sparingly (*Matter of Snide*, 52 NY2d 193 [1981]; *Matter of Patrick*, 188 Misc 2d 295 [Sur Ct, Onondaga County 2001]). However, courts may reform a trust to correct a mistake where the claimed mistake appears “on the face of the instrument itself” (*Matter of Dickinson*, 273 AD2d

---

<sup>2</sup> As support for her contentions, Attorney Diehl annexed two irrevocable trust agreements she prepared for other clients which include such language.

<sup>3</sup> As support for these contentions, Attorney Diehl annexed two handwritten letters from the grantor purportedly outlining changes to the grantor’s wishes, which resulted in the 2016 and 2017 documents.

**MATTER OF ELIZABETH SALERNO**

**File No. 2021-2603**

89 [1<sup>st</sup> Dept 2000] [quoting *Union Trust Co. v Boardman*, 215 AD 73, *affd* 246 NY 627]), involves Medicaid planning (*Matter of Spillane*, 2007 NY Misc Lexis 8311 [Sur Ct, Westchester County 2007]; *Matter of Scheib*, 14 Misc 3d 1222[A] [Sur Ct, Nassau County 2007]), or where “the reformation effectuates the [grantor’s] intent to take maximum advantage of the available tax exemptions and deductions” (*Matter of Hicks*, 10 Misc 3d 1078[A] [Sur Ct, Nassau County 2006]). Here, it is undisputed that none of these circumstances is present.

As a preliminary matter, a request for reformation requires a petition, and process issues only if the court entertains the application (see SCPA 1420[1]). On this basis alone, the relief could be denied. However, the court will consider respondents’ request for reformation on this record (see *Matter of Kassover*, NYLJ, Feb. 11, 1991, at 22, col 6 [Sur Ct, Nassau County]).

To support their request for reformation, Frank and Pamela rely on the affirmation of Attorney Diehl, along with the documents attached to it, which purport to show that the omission of the subject provision was a drafting mistake and that the grantor intended to reserve the right to amend the trust to change the trust beneficiaries in the original trust agreement. However, courts do not consider extrinsic evidence of intent where, as is the case here, the trust instrument itself is unambiguous (see *Matter of Piel*, 10 NY3d 163 [2008]; *Matter of Hanlon*, 169 AD3d 1039 [2d Dept 2019]; *Matter of Vogel*, NYLJ, Aug. 11, 2008, at 31, col 6 [Sur Ct, NY County]; *Matter of Kenney*, NYLJ, Jul. 1, 2004, at 27, col 4 [Sur Ct, NY County]).

Moreover, Frank and Pamela do not dispute that, based solely on the plain terms of the original trust agreement (which states that the trust is irrevocable), the trust could

**MATTER OF ELIZABETH SALERNO**  
**File No. 2021-2603**

not have been effectively amended by the 2017 document. Nor do Frank and Pamela claim (and nor could they claim) that the 2017 document is an effective trust amendment based on the consent of all parties beneficially interested in the trust (EPTL 7-1.9), since it is undisputed that Beverly did not consent to the 2017 document.

The court has considered Frank and Pamela's remaining arguments and finds them to be without merit.

Accordingly, the court declines to reform the original trust agreement. The 2017 document was ineffective as an amendment to the original trust agreement, and the terms of the original trust agreement govern the trust.

Based on the foregoing, the petition is granted, the counterclaim asserted for reformation is denied, and Frank and Pamela are directed to distribute one-third of the trust remainder to Beverly. The preliminary injunction previously issued is hereby vacated.

The separate proceeding commenced by Beverly to compel Frank and Pamela to account for their proceedings as co-trustees of the trust (File No. 2021-2603/A) is no longer held in abeyance. The new control date for that proceeding is November 29, 2023. All parties are directed to appear in person at the calendar at 9:30 a.m. on that day.

This is the decision and order of the court.

The papers relied on are as follows:

1. Verified petition filed September 3, 2021, with exhibits;
2. Affirmation of Frank W. Streng, Esq. filed on September 3, 2021;
3. Verified answer with counterclaim filed October 5, 2021, with exhibits;

**MATTER OF ELIZABETH SALERNO**

**File No. 2021-2603**

4. Affirmation of Barbara R. Diehl, Esq. filed October 5, 2021, with exhibits;
5. Memorandum of law filed October 5, 2021; and
6. Reply memorandum of law filed November 10, 2021.

Dated: White Plains, New York  
September 27, 2023



---

**HON. BRANDON R. SALL**  
**Westchester County Surrogate**

To: McCarthy Fingar LLP  
711 Westchester Avenue  
White Plains, New York 10604

Law Offices of Barbara R. Diehl, Esq.  
2074 Crompond Road  
Yorktown Heights, NY 10598