

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

IN RE: ESTATE OF : **ORPHAN’S COURT DIVISION**
VIRGINIA ROGERS, :
Deceased : **No. 41-10-0476**
: **Decision regarding Motion for Declaratory**
: **Judgment**

OPINION AND ORDER

Before the Court is the motion for Declaratory Judgment filed by Petitioner, Harry L. Rogers, Jr. The declaratory judgment motion involves the interpretation of the trust agreements that placed the assets of Petitioner and Virginia Rogers (hereinafter “Decedent”) into a revocable living trust and, upon the death of Virginia Rogers, divided the trust into two shares, Trust A and Trust B. The issue involves a determination of the appropriate property percentage and/or funding to be allocated to Trust A and Trust B. The relevant facts follow.

On June 24, 1991, Petitioner and Decedent executed a revocable living trust agreement, which created the Rogers Family Trust. The trust was funded with Petitioner’s and Decedent’s real and personal property as set forth in Exhibit “A” of the trust agreement.

The Trust Agreement provided in relevant part:

1.04 STATUS OF TITLE IN TRUST ASSETS. HARRY L. ROGERS and VIRGINIA C. ROGERS, although husband and wife, agree that they shall each hold their interest in the ROGERS FAMILY TRUST as tenants in common in the trust assets, and not as tenants by the entireties.

2.04 IRREVOCABILITY OF TRUST ON DEATH OF ONE OF SETTLORS. Upon the death of one of the Settlers the trust estate shall be distributed to the ROGERS FAMILY TRUST SHARE A TRUST and the ROGERS FAMILY TRUST SHARE B TRUST as set forth hereinafter and the ROGERS FAMILY TRUST SHARE B TRUST shall be irrevocable and shall not be altered or amended.

4.01 DIVISION OF TRUST ESTATE INTO TWO TRUSTS. On the death of the first Settlor to die (the “deceased Settlor”), the trust estate shall be divided into two separate trusts, THE ROGERS FAMILY TRUST SHARE A (hereinafter referred to as “Trust A”) and THE ROGERS FAMILY TRUST SHARE B (hereinafter referred to as “Trust B”). Trust A shall consist of (1) the surviving Settlor’s interest in all property in the trust estate and (2) all other assets in the trust estate other than those allocated to Trust B.

Trust B shall be funded from the deceased Settlor’s tenancy in common interest in all property of the Trust estate and shall consist of assets equal in value to the maximum amount, if any, that can pass free of federal estate tax by reason of the unified credit available to the estate of the deceased Settlor after considering any adjusted taxable gifts and bequests by Will or other dispositions which do not qualify for the marital deduction made by the deceased Settlor and all charges to principal of the estate which are not deducted in computing the federal estate tax of the estate of the deceased Settlor; provided, however, that the allocation to Trust B shall be satisfied with assets valued as of the date of allocation or distribution; and provided further that any assets which do not qualify for the federal estate marital deduction shall be used first to satisfy the allocation to Trust B.

On June 24, 1999, Petitioner and Decedent executed a Second Amendment of Living Trust Agreement (hereinafter Second Trust Agreement).¹ The Second Trust Agreement includes the following provisions:

Article 1.04 of the Trust Agreement is deleted in its entirety and restated to read as follows:

1.04. STATUS OF TITLE IN TRUST ASSETS. HARRY L. ROGERS and VIRGINIA C. ROGERS, although husband and wife, agree and acknowledge that each holds a one-half (½) interest in the assets of the **ROGERS FAMILY TRUST** as tenants in common.

Article 2.03 of the Trust Agreement is deleted in its entirety and restated to read as follows:

¹ Petitioner and Decedent entered a First Amendment on February 12, 1999, but that document is not at issue, because it was deleted in its entirety by the Second Trust Agreement executed on June 24, 1999.

2.03 TRUSTEE’S DUTIES ON REVOCATION. If the entire Trust is revoked by the Settlor, or by the unilateral act of either Settlor, the Trustee shall transfer an undivided one-half interest in the Trust assets to each of the Settlor as tenants in common. The Trustee shall execute and deliver to the Settlor all instruments which are necessary or appropriate to release all interests of the Trustee in the Trust.

Virginia Rogers died on November 12, 2009

On August 8, 2010, and March 10, 2011 Pennsylvania estate tax returns were filed for the Decedent’s Estate, which were signed by Petitioner and the Estate attorney, James Malee. These tax returns reflected 100% of the assets placed in the Rogers Family Trust by Petitioner and Decedent.

On March 29, 2011, Petitioner, as Trustee and Settlor, executed a document entitled “Third Amendment Rogers Family Trust,” and a document exercising his Special Power of Appointment under paragraph 6.03 of the Second Trust Agreement.

On April 14, 2011, a Petition to Appoint Trustee was filed because the named trustee and alternate trustee for Trust Share B renounced and Petitioner was unable to secure a corporate trustee or a trustee that was agreeable to all the beneficiaries of the Trust. The petition sought the appointment of Christine Kondon, who is a beneficiary and one of Petitioner’s daughters, because all the beneficiaries except Harry L. Rogers, III (hereinafter Son) agreed to this individual being named Trustee of Trust Share B. In his response to the Petition to Appoint Trustee, Son not only opposed the request to appoint Christine Kondon as Trustee of Trust Share B, but he also requested that the Third Amendment and the Exercise of Power of Appointment be set aside due to undue influence on the part of Christine Kondon

and a lack of testamentary capacity on the part of Petitioner.

In various conferences with the Court regarding scheduling of the trial/hearing with respect to the issues raised in the Petition for Appointment and responses thereto, it became apparent to the Court that there also was a dispute regarding the appropriate funding of Trust Share A and Trust Share B. The parties represented that this issue involved solely a legal argument based on the interpretation of the various trust agreements and amendments and the impact, if any, of the tax returns filed on behalf of the Decedent's Estate. Therefore, Petitioner filed a Motion for Declaratory Judgment to resolve this issue.

In his petition and his brief filed in support thereof, Petitioner argues that one-half ($\frac{1}{2}$) of the trust assets should be placed in Trust Share A and the other half ($\frac{1}{2}$) of the assets should be placed in Trust Share B. Petitioner also relies on an affidavit from Attorney James Malee that he erroneously included 100% of the assets when he prepared the tax returns for Decedent's estate.

Son, on the other hand, argues that 100% of the assets should be placed in Trust Share B, and Petitioner is judicially estopped from arguing otherwise, because 100% of the assets were included on the Estate tax return that Petitioner signed and filed. Son relies on the case of Morris v. South Coventry Township Board of Supervision, 898 A.2d 1213 (Pa. Commw. 2006) for his judicial estoppel argument.

After reviewing the various trust agreements and amendments, the briefs of the parties and the Morris case, the Court finds that 50% of the assets shall be placed in Trust Share A and 50% of the assets shall be placed in Trust Share B. The language in paragraph

4.01 “shall consist of assets equal in value to the maximum amount, if any” must not be taken out of context and must be interpreted in conjunction with the other provisions in the trust agreement and amendments thereto, specifically the provisions stating that each settlor has an undivided one-half (1/2) interest in the assets of the trust and that Trust Share B shall be funded from the deceased Settlor’s tenancy in common interest. The Court finds that, when the documents are viewed as a whole, it was the intention of the parties that the amount of assets placed in Share B would be one-half (1/2) of the assets unless the deceased Settlor’s tenancy in common interest was of such a value that it would be subject to federal estate tax. In such an event, the amount transferred to Trust Share B would be equal to the amount that could pass free of estate tax liability and any excess would be added to Trust Share A. Finally, if Son’s position prevailed, it would result in Trust Share A being completely unfunded, with no assets available for Petitioner’s needs during his lifetime as was contemplated by Article 5 of the Trust Agreement. Clearly, this was not the intent of Petitioner and Decedent when they executed the trust documents.

The Court also rejects Son’s judicial estoppel argument. Judicial estoppel is described in Morris as follows:

As a general rule, a party to an action is judicially estopped from assuming a position inconsistent with his or her assertion in a previous action if his or her contention was successfully maintained. The purpose of judicial estoppel is to uphold the integrity of the courts by preventing litigants from ‘playing fast and loose’ with the judicial system by changing positions to suit their legal needs. Judicial estoppel is unlike *res judicata* in that it depends on the relationship of a party to one or more tribunals, rather than on relationships between parties.

Morris, 898 A.2d at 1218.

Initially, the Court notes that the “party” who filed the tax return was Decedent’s estate, not Petitioner in his individual capacity or in his role as trustee for Trust Share A. Moreover, no previous litigation determined the amount of assets that should be included on the estate tax return or placed into the two trust shares. Rather, the estate attorney was the individual who provided the information on the tax returns, and he has filed an affidavit indicating he erroneously included all the trust assets on those returns and he intends to correct this error by filing a supplemental return after a new trustee is appointed. Quite simply, even if the Court considers the tax return as an inconsistent position of Petitioner, as opposed to an inconsistent position by Decedent’s Estate, the Court cannot say Petitioner’s allegedly inconsistent position has been “successfully maintained” when there has never been a previous judicial determination.

Accordingly, the following Order is entered:

ORDER

AND NOW, this ___ day of March 2012, it is ORDERED and DIRECTED as follows:

1. 50% of the trust assets shall be placed in Trust Share A and 50% of the assets shall be placed in Trust Share B.
2. A supplemental or amended estate tax return shall be filed within thirty (30) days. The Estate and any other appropriate party shall take any measures necessary to get a refund of any overpayment of Pennsylvania estate taxes.

By The Court,

Marc F. Lovecchio, Judge

cc: J. Howard Langdon, Esquire
Norman L. Lubin, Esquire
James Malee, Esquire
C. Edward S. Mitchell, Esquire