

**SURROGATE’S COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU**

**In the Matter of the Application of Edwin E. Johnson,  
Individually and as Trustee of the JOHNSON FAMILY  
TRUST by Edwin H. Johnson and Jean D. Johnson,  
under Agreement, dated November 2, 2006, and  
William K. Johnson, Individually, for a Judgment  
Declaring that the Alleged Amendment thereto, dated  
August 10, 2014, is Invalid.**

**DECISION & ORDER**

**File No. 2015-383093/A  
Dec. No. 39617**

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

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

Notice of Motion .....	1
Affirmation in Support of Motion with Exhibits .....	2
Letter from Attorney General .....	3

Before the court in this miscellaneous proceeding to declare the alleged trust amendment, dated August 10, 2014 invalid, is a motion by Edwin E. Johnson (also known as Eric) and William K. Johnson (also known as Kurt), (collectively, the petitioners) for an order *nunc pro tunc* reforming the trust agreement dated November 2, 2006 creating the Johnson Family Trust (Trust) to provide that the interest of Kris Ann Johnson (respondent) in the Trust shall be held in a continuing supplemental needs trust (SNT) established for the respondent’s benefit. There is no opposition to the motion.

**BACKGROUND**

Edwin H. Johnson (decedent) and Jean D. Johnson (collectively, the grantors) were married and had four children: the petitioners, the respondent, and Herbert D. Johnson.<sup>1</sup> By

---

<sup>1</sup> Herbert D. Johnson (also known as Daiker) died on March 8, 2018 and William Kurt Johnson was appointed as the limited administrator of his estate (File No. 2018-3604). By decision and order, dated June 28, 2019, this court substituted William Johnson into this proceeding as the limited administrator of Herbert’s estate.

agreement, dated November 2, 2006, the grantors created the Trust, and appointed the decedent and Eric as co-trustees. The Trust provides that after the death of the grantors, the Trust assets shall be divided equally among their four children.

Jean D. Johnson died on October 11, 2010. On August 10, 2014, the decedent and Eric, as co-trustees, executed an instrument titled "First Amendment to Johnson Family Trust" (Trust Amendment). The Trust Amendment states that upon the death of the decedent, the real property titled to the Trust at 620 Clinton Street, Westbury, New York, the vacant lots fronting on Big Moose Lake in Webb, New York and 117 Big Moose Lake, Eagle Bay, New York, together with the motor vehicle and equipment located on those properties shall be conveyed to the respondent.

The decedent died four months later on December 30, 2014. He did not exercise his limited power of appointment in his will, which was executed on November 2, 2006, the same date as the Trust. The decedent's will was admitted to probate on March 12, 2015. Letters testamentary issued to Eric that same date.

Eric, as the surviving trustee of the Trust, informed the respondent, who is his sister, and his two brothers, that he intended to distribute all of the Trust assets in four equal shares. He took the position that the Trust Amendment was null and void, asserting that after Jean D. Johnson's death in 2010, the decedent lacked the power to amend or revoke the Trust and had only a limited right to exercise a power of appointment in his will, which power the decedent failed to exercise.

Eric filed a petition on July 7, 2016, seeking a judgment declaring that the Trust Amendment, dated August 10, 2014 is invalid, and declaring that the assets of the Trust be

distributed in accordance with the terms of the Trust. The petition was subsequently amended. After issue was joined, petitioner Eric moved for summary judgment and the respondent cross-moved for summary judgment. By decision and order dated July 5, 2017, this court denied both the motion and cross motion for summary judgment, finding that at the time the original motion and cross motion for summary judgment were made, the responses to the respondent's discovery demands were incomplete.

Petitioners filed a second amended petition on September 8, 2017, which merely added Kurt as a petitioner, but is otherwise identical to the first amended petition. Discovery was completed and a note of issue was filed on August 28, 2020. Petitioners made another motion for summary judgment declaring that the Trust Amendment is null and void as a matter of law on the ground that the decedent lacked the legal right, under the terms of the Trust, to amend the Trust after the death of Jean D. Johnson. In response to the petitioners' motion for summary judgment, the respondent cross-moved for summary judgment seeking denial of the petitioners' motion; dismissal of the relief sought in the second amended petition; judgment compelling distribution of the Trust real properties to her, along with a one-quarter share of the Trust remainder; and directing that the petitioners pay her attorneys' fees and disbursements in this proceeding. By decision and order dated September 30, 2021, this court held that since it was unable to determine the intent of the grantors as a matter of law, it could not determine whether the Trust Amendment is void or valid and both the petitioners' motion for summary judgment and the respondent's cross motion for summary judgment were denied and the matter was set down for a hearing.

At the hearing conducted by the court, the parties entered into a global settlement, subject to the condition that the court reform the Trust to provide that the respondent's share of the Trust would pass to the trustees of a SNT established for the respondent's benefit.

Petitioners request that the Trust agreement be reformed *nunc pro tunc* to include an Article ELEVENTH that provides as follows:

“Notwithstanding anything herein to the contrary, as to any property which would otherwise be distributed to or held IN TRUST hereunder for the benefit of KRIS ANN JOHNSON, a daughter of the Grantors, or any person with a severe and chronic or persistent disability as defined by Section 7-1.12 of the Estates, Powers and Trust Law of the State of New York, or any successor statute thereto (hereinafter referred to in this Section as “Recipient”), such property shall not be distributed to the Recipient, but shall be separately held by the Trustee, hereinafter named, IN TRUST, for the following uses and purposes:

(A) The Trustee shall manage, invest and reinvest such Trust property, collect the income therefrom and, after deducting all charges and expenses properly attributable thereto, shall at anytime and from time to time, apply for the benefit of the Recipient, so much (even to the extent of the whole) of the net income and/or principal of this Trust as the Trustee shall deem advisable, in the Trustee's sole and absolute discretion, subject to the limitations set forth below. The Trustee shall add to the principal of the Trust the balance of net income not so paid or applied.

(B) It is the Grantors' intent to create a supplemental needs trust which conforms to the provisions of Section 7-1.12 of the Estates, Powers and Trust Law of the State of New York, or any successor statute thereto. The Grantors intend that the Trust assets be used to supplement, not supplant, impair or diminish, any benefits or assistance of any federal, state, county, city or other governmental entity for which the Recipient may otherwise be eligible or may be receiving. Consistent with that intent, it is the Grantors' desire that, before expending any amounts from the net income and/or principal of this Trust, the Trustee consider the availability of all benefits from government or private assistance programs for which the Recipient maybe eligible and that, where appropriate and to the extent possible, the Trustee endeavors to maximize the collection of such benefits and to facilitate the distribution of such benefits for the benefit of the Recipient.

(C) None of the income or principal of this Trust shall be applied in such a manner as to supplant, impair or diminish benefits or assistance of any federal, state, county, city or other governmental entity for which the Recipient may otherwise be eligible or which the Recipient may be receiving.

(D) The Grantors direct that the provisions of Section 7-1.6 of the Estates, Powers and Trust Law of the State of New York, or any successor statute thereto, shall not be available to require any invasion of principal by the Trustee or any court.

(E) No Recipient shall have the power to assign, encumber, direct, distribute or authorize distributions from this Trust.

(F) Notwithstanding the provisions of Paragraphs C and D of this Section above, the Trustee may make distributions to meet the Recipient's need for food, clothing, shelter or health care even if such distributions may result in an impairment or diminution of the Recipient's receipt or eligibility for government benefits or assistance but only if the Trustee determines that (i) the Recipient's needs will be better met if such distribution is made, and (ii) it is in the Recipient's best interests to suffer the consequent effect, if any, on the Recipient's eligibility for or receipt of government benefits or assistance; provided, however, that if the mere existence of the Trustee's authority to make distributions pursuant to this Paragraph shall result in the Recipient's loss of government benefits or assistance, regardless of whether such authority is actually exercised, this Paragraph shall be null and void and the Trustee's authority to make such distributions shall cease and shall be limited as provided in Paragraphs C and D above, without exception.

(G) Upon the Recipient's death, the Trustee shall terminate the Trust and distribute the balance of the Trust property, in equal shares, to the Grantors' sons, Edwin E. Johnson, per stirpes (or to or for the benefit of such one or more members of a class consisting of any person or persons, in such amounts or proportions, and in such lawful interests or estates, whether absolute or in trust, as Edwin E. Johnson may by his last will and testament, appoint by specific reference to this power); Herbert D. Johnson, per stirpes; and William K. Johnson, per stirpes. As to any property which would otherwise be distributed to another individual for whom a Trust has been or may be established hereunder, such property shall not be distributed to such individual, but shall instead be added to the principal of his or her trust and disposed of in accordance with the terms and conditions therein.

(H) To the extent that a Trust created under this Article consists of the real property located at 620 Clinton Street, Westbury, New York, and Kris Ann Johnson resides at such property, the Trustee of such Trust shall retain

ownership of the property for as long as is reasonably practicable for Kris Ann Johnson to continue to reside there.

(I) Edwin E. Johnson and Timothy G. Preston are appointed as Co-Trustees of the Trust created under this Article. In addition to the powers and authority granted to a Trustee under the laws of the State of New York, a Trustee of the Trust created under this Article shall have all of the powers and authority granted to a Trustee under the terms of the Johnson Family Trust.”

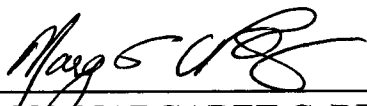
The addition to the Trust agreed to by the parties to settle their dispute is consistent with the intent of the grantors of the Trust and the court hereby approves the reformation of the Trust to resolve this proceeding (*Matter of Beckley*, 63 AD2d 855 [4th Dept 1978]).

The motion is **GRANTED**. The Trust is deemed reformed to include Article ELEVENTH as set forth herein.

This constitutes the decision and order of the court.

Dated: June 29, 2022  
Mineola, New York

**E N T E R:**

  
\_\_\_\_\_  
**HON. MARGARET C. REILLY**  
Judge of the Surrogate's Court

cc: Robert M. Harper, Esq.  
Edward D. Baker, Esq.  
Farrell Fritz, P.C.  
*Attorneys for Petitioners*  
400 RXR Plaza  
Uniondale, New York 11556

David A. Smith, Esq.  
Law Office of David A. Smith, PLLC  
*Attorney for Respondent*  
500 Old Country Road, Suite 109  
Garden City, New York 11530

Jennifer L. Principe, Esq.  
Office of the Attorney General of  
the State of New York  
Mental Hygiene Unit  
The Capitol  
Albany, New York 12224-0341