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TRUSTS AND ESTATES UPDATE

Expert Analysis

Roundup of Decisions by the Four Appellate Division Departments

By **Ilene Sherwyn Cooper**

During the past year, the appellate courts have rendered decisions of interest to the field of trusts and estates. The opinions discussed in this month's column should provide valuable instruction to the Surrogate's Court practitioner.

Use of Power of Attorney To Make Gift Affirmed by The First Department

In *Matter of Argondizza*, 168 A.D.3d 426 (1st Dep't 2019), the Appellate Division, First Department, affirmed an Order of the Surrogate's Court, New York County (Mella, S.), which denied the petitioners' cross-motion for summary judgment directing a turnover of assets, and granted respondent's motion for summary judgment dismissing the petition.

The underlying proceeding, which had been commenced by the decedent's children against their stepfather, the decedent's surviving spouse, involved ownership of shares of stock in a cooperative apartment. The apartment had been owned by the decedent and the respondent, as tenants in common, until a year before her death. At that time, the respondent, utilizing a durable power of attorney, which had been signed by the decedent in the presence of one of the petitioners, transferred the decedent's one-half interest in the residence to himself.

The power of attorney had been granted by the decedent to the respondent two years before she passed away in contemplation of her future medical and financial needs. Petitioners acknowledged that they were aware of the power of attorney, and its intended use. The record further reflected that the decedent and respondent had signed a letter to the managing agent of the cooperative housing corporation directing the transfer of the share certificate from her and the respondent's name to the respondent's name alone. Petitioners' maintained that the transaction constituted a breach of fiduciary duty by the respondent, as attorney in fact, and required a return of the share certificate to the decedent's estate. Respondent claimed that the transfer comported with the decedent's wishes.

The Surrogate observed that when an agent acting under a power of attorney transfers an asset of the principal to himself or herself, a presumption of breach of fiduciary duty by the agent arises. However, the court recognized that his presumption may be rebutted by a showing that the principal intended for the transfer to be made, or that it was in the best interests of

> In 'Matter of Brier', the Appellate Division, Second Department, affirmed a Decree of the Surrogate's Court, Kings County, which limited executor's commissions to one-half statutory commissions pursuant to the provisions of SCPA 2307-a.

ILENE SHERWYN COOPER *is a partner with Farrell Fritz, P.C. in Uniondale, where she concentrates in the area of trusts and estates. She is the past-chair of the New York State Bar Association's Trusts and Estates Law Section.*

the principal. Towards this end, the respondent submitted the power of attorney, which provided him with the authority to make gifts to himself, together with the said letter to the managing agent, and the deposition testimony of the decedent's physician, who stated that the decedent, despite her declining health, was capable of expressing her wishes, and had always indicated her desire that the respondent have the apartment. Moreover, respondent maintained that the transfer was in the best interest of the principal for Medicaid planning purposes.

In opposition to respondent's motion and in support of their cross-motion, the court found that petitioners' had provided nothing but bare conclusory allegations in support of their claim that the transfer was the result of fraud, or any lack of capacity by the decedent. Indeed, in addition to her treating physician, the decedent's brother, who was also doctor, testified that he had found the decedent to be lucid and aware until her death. Based upon this record, the Surrogate denied the petitioners' motion for summary relief, and granted the respondent's motion.

The Appellate Division agreed, concluding that the Surrogate had properly found that the respondent had overcome the presumption of self-dealing, and that the petitioners had offered no evidence to contradict respondent's contention that the decedent had wanted him to absolute ownership of the premises.

SCPA 2307-a Examined by The Second Department

In *Matter of Brier*, 2019 NY Slip Op 02519 (2d Dep't), the Appellate Division, Second Department, affirmed a Decree of the Surrogate's Court, Kings County (Ingram, A.S.), which limited executor's commissions to one-half statutory commissions pursuant to the provisions of SCPA 2307-a.

The record reflected that the decedent executed his will on Dec. 12, 2005. Simultaneously therewith, he executed an Attorney/Executor Acknowledgment, which failed to contain an acknowledgment by the testator that he had been advised that in the event the required disclosures set forth in SCPA 2307-a were not made, the attorney-executor named in the instrument would only be entitled to one-half of the statutory executor's commissions. The Appellate Division observed that while this requirement of disclosure was added to the model form of disclosure in 2004, it was not made a part of the statutory dictates of SCPA 2307-a until the legislature corrected the oversight in 2007, two years after the subject Will nominating the attorney-executor was executed. In view thereof, the appellant argued that the Surrogate's Court erred in denying him commissions at the full statutory rate.

The Appellate Division disagreed. Noting that the Surrogate's Courts have divided on this point, the Appellate Division found that the 2004 amendment to SCPA 2307-a was intended to require the subject acknowledgment by the testator, and that, as evidenced by the 2007 amendment and its legislative history, the omission of this language from the statute in 2004 was not by design. Further, the court opined that limitation of executor's commissions under the circumstances comported with the underlying policy of the statute, which is to ensure that a testator is fully informed of the financial consequences of appointing an attorney-draftsperson as executor. Indeed, the court remarked that if the 2004 amendment to the model form was only construed as adding suggested language to the model form, rather than a mandate to the required disclosure, the amendment would be rendered superfluous, as it would enable nominated attorney-executors to simply delete the provision, without consequence, and leave a testator uninformed, a result clearly unintended by the legislature.

Third Department Upholds Waiver of Spousal Right of Election

Before the Appellate Division, Third Department, in *Matter of Bordell*, 162 A.D.3d 1262 (3d Dep't 2018), was an appeal from an Order of the Surrogate's Court, Madison County (McDermott, S.), which granted the executor's motion for summary judgment declaring the surviving spouse's waiver of her elective share to be valid and enforceable. The guardian ad litem, appointed to represent the interests of the spouse, argued that issues of fact existed as to whether the spouse was incompetent and/or suffered from impaired vision at the time she executed the waiver.

In affirming the Surrogate Court's Order, the Appellate Division opined that because a person's competency to engage in a transaction is presumed, the guardian ad litem was required to demonstrate that the spouse's mind was "'so affected as to render [her] wholly and absolutely incompetent

to comprehend and understand the nature of the [waiver].'" Id. at 1263 (citations omitted). Within this context, the court noted that in support of his motion for summary judgment, the executor submitted the deposition testimony of the spouse's long time attorney, who testified that while he did not meet with her at the time she executed the subject waiver, he had met with her more than once thereafter for the purpose of her executing documents, and found her to be lucid, rational, and competent. The court found that this proof, coupled with the presumption of capacity, was sufficient to shift the burden to the guardian ad litem to produce evidence creating a triable issue of fact. Nevertheless, the guardian ad litem countered only with an attorney's affidavit stating that the spouse had been diagnosed with dementia nine months after executing the waiver, and had undergone cataract surgery more than one year after the document was signed.

The court found that neither one of these circumstances created a factual issue as to whether the spouse possessed the ability to comprehend the nature of the subject waiver. Indeed, the court held that even if the wife had been diagnosed with dementia at the time the waiver was executed, it would not, in itself, be sufficient to defeat summary relief. Accordingly, the court concluded that summary judgment in the executor's favor had been properly awarded.

Fourth Department Affirms Admission of Will to Probate

In *Matter of Lewis*, 158 A.D.3d 1247 (4th Dep't 2018), the Appellate Division, Fourth Department, affirmed a Decree of the Surrogate's Court, Jefferson County (Schwerzmann, S.), finding that the propounded Will of the decedent dated July 15, 1996, was the only original will executed on that date, and admitted the instrument to probate.

Prior to her divorce, the decedent and her ex-husband executed several estate planning documents, including but not limited to the subject will. Pursuant to the pertinent provisions of the instrument, the decedent appointed her former husband the executor and sole beneficiary of her estate, or in the event he predeceased her, her former father in law as alternate executor and beneficiary in his place and stead. It was not clear that when the couple left their attorney's office following execution of the will whether they had in their possession four original instruments, or one original thereof, and three copies. After the decedent's death, one of the purported duplicates to her Will, which she had retained at her residence, could not be located. Following a hearing by the Surrogate's Court, and an appeal to the Appellate Division and Court of Appeals, the matter was remitted for a determination of whether the decedent had revoked her will. The Surrogate's Court concluded that the decedent had executed only one original Will and admitted that instrument to probate.

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The Appellate Division agreed, noting that while there is a presumption of revocation where an original will is last in the possession of the testator and cannot be found after death, that presumption does not arise where it is established that the testator executed only one original instrument, and that instrument is propounded for probate. Although objectants' maintained that the Surrogate erred in believing the testimony of the decedent's former husband that only one original of each of the estate planning documents was executed in 1996, the court saw no reason to disturb the Surrogate's findings and assessment of credibility.