



## TRUSTS AND ESTATES UPDATE

## Expert Analysis

# Multifaceted Opinions As Summer Came to a Close

The close of summer brought with it multi-faceted opinions addressed to a variety of issues affecting Surrogate's Court practice. One such opinion was rendered by the Surrogate's Court, New York County, in *In re Brown*. In addition, in passing upon a party's standing in a contested probate proceeding, the Albany County Surrogate's Court considered such issues as lost wills and the revocation of wills. Finally, this month's column revisits the importance of carefully crafted pleadings, a subject that was discussed in the February, 2019 column.

### A Comprehensive Discussion Of Multiple Issues

In *In re Brown*, NYLJ, July 23, 2019, at 23 (Sur. Ct. New York County), the New York County Surrogate's Court was confronted with questions related to jurisdiction, tortious interference with a prospective inheritance, fraud and fraudulent concealment,

By  
Ilene  
Sherwyn  
Cooper



Judiciary Law §487, undue influence, constructive trust, the statute of limitations, and injunctive relief. The opinion presents a comprehensive discussion of each of these issues; the more salient features are discussed below.

The miscellaneous proceeding before the court was commenced by Radio Drama Network (Radio Drama or petitioner), a charitable corporation established by the decedent, as Grantor, requesting, *inter alia*, (1) invalidation of specific portions of instruments amending a revocable trust; (2) imposition of a constructive trust for petitioner's benefit on the assets of a subsequently created charitable trust (Charitable Trust); and (3) removal of the decedent's long-time lawyer (respondent) from his position as director of Radio Drama. Respondent moved

to dismiss the petition pursuant to CPLR 3211(a)(2), (5), and (7), and Radio Drama moved for a preliminary injunction suspending respondent from his position as director of the company and enjoining him as trustee of the Charitable Trust from making distributions from the trust in excess of the minimum amount set forth in the Internal Revenue Code.

The deceased grantor was a successful producer of radio programs who died on June 4, 2010 with an estate valued at approximately \$850,000. Prior to his death, he created a Revocable Trust into which he transferred millions of dollars. The decedent was the sole trustee and primary beneficiary of the trust, and the petitioner received the bulk of the trust remainder. In a first restatement of the Revocable Trust, the grantor provided that the respondent, as successor trustee of the trust, would be entitled to commissions in an amount which petitioner alleged resulted in his receipt of an additional \$1.7 million in compensation. A further restatement eliminated petitioner as beneficiary of the trust, and named the Charitable Trust as Revocable Trust in its place. On the same date,

the decedent executed a new Will in which he left his then relatively modest estate to petitioner. Respondent, or a member of his firm, drafted the trust amendments and Will, and was the sole executor and trustee of the Revocable and Charitable Trusts.

Based on the foregoing, petitioner alleged that respondent carried out a fraudulent scheme to divert virtually all of the Grantor's assets from Radio Drama to the Charitable Trust, over which respondent had complete control, as trustee, and to respondent, individually, through the increased commissions provided for. Towards this end, petitioner argued that respondent took undue advantage of and misled the decedent who was elderly and hearing impaired at the time the instruments were prepared and executed.

Respondent's motion pursuant to CPLR 3211(a)(2) sought dismissal of the proceeding on the grounds that the court lacked subject matter jurisdiction over petitioner's request that he be removed as a director of its Board of Directors based on an alleged breach of fiduciary duty. The court agreed finding that, despite its expansive power, the claim was a dispute between living persons, with only a nominal relationship to the affairs of the decedent or the Revocable Trust. Indeed, the court found it significant that a recovery on this claim would only affect the corporation's internal governance, a matter in which neither the estate of the decedent nor the Revocable Trust had an interest. The fact that an estate and trust were part of the narra-

tive underlying the claim did not alter the result.

Equally so, the court refused to find jurisdiction over the claim despite the fact that it had jurisdiction over the other claims asserted by petitioner. Although the court recognized the importance of avoiding fragmented litigation among the same parties, it noted that, unlike the proceeding sub

---

The New York County Surrogate's Court was confronted with questions related to jurisdiction, tortious interference with a prospective inheritance, fraud and fraudulent concealment, Judiciary Law §487, undue influence, constructive trust, the statute of limitations, and injunctive relief.

judice, cases in which jurisdiction over multiple claims was found, even those concerning corporations and partnerships, involved prayers for relief that clearly affected an estate or trust. Accordingly, petitioner's breach of fiduciary duty claim was dismissed.

In support of his contention that petitioner failed to state a cause of action, respondent argued that dismissal was warranted because petitioner's claims essentially sought recovery for tortious interference with a prospective inheritance, a cause of action not recognized in New York. Nevertheless, the court opined that while respondent was correct to the extent an action predicated on such a claim requested damages,

where equitable relief, such as the imposition of a constructive trust, was sought, as in the case before it, such a claim would lie. Accordingly, respondent's motion to dismiss on this ground was denied.

Further, the court found that petitioner had stated a claim for fraud and fraudulent concealment against the respondent. The court observed that underlying the claim for fraud were allegations that respondent had inserted "misleading revisions" into the amendments and restatement of trust in order to deceive the grantor into significantly increasing his commissions, and changing the remainder beneficiary. In light of these allegations, the court found that petitioner's contentions that respondent, as the grantor's lawyer, had a duty to disclose and failed to disclose the impact of these revisions stated a claim for fraud and fraudulent concealment. Similarly, the court concluded that petitioner had stated claims for undue influence, unjust enrichment, and the imposition of a constructive trust.

Finally, the court rejected respondent's motion to the extent that it sought dismissal of respondent's claims on the basis of the statute of limitations. While petitioner and respondent both acknowledged that a six-year statute of limitations applied, the court rejected respondent's contention that the statutory period began to run on the effective date of each of the trust amendments in issue. Rather, the court concluded that the statute of limitations with respect to claims concerning a revocable trust begins to run on

the death of the grantor. Inasmuch as petitioner had commenced its proceeding within six years of the grantor's death, the court held that petitioner's claims were timely.

### Standing Found Despite Missing Prior Will

Before the Surrogate's Court, Albany County, in *In re Wilke*, NYLJ, Aug. 6, 2019, at 28 (Sur. Ct. Albany County) was a motion for standing to appear as a person adversely affected by the admission of the propounded Will to probate, and for permission to conduct SCPA 1404 examinations and file objections.

The record revealed that prior to his death the decedent filed a Will, dated May 20, 2016, with the Surrogate's Court for safekeeping. Pursuant to the terms of this instrument, he bequeathed his entire estate to the movant, whom he described as his "caretaker, friend, and godson", and nominated him as the executor. On Jan. 23, 2019, the decedent retrieved that instrument from the court.

Shortly thereafter, the decedent died from injuries suffered from an accident at his home. One week later, a Will, dated Jan. 7, 2019, was filed with the court, which instrument made no provision for the movant. On the return date of citation, the movant appeared with a copy of the 2016 Will and requested permission to participate in the proceeding.

Although the 2016 Will had not been filed with the court, and thus the movant did not receive citation at the commencement of the proceeding, the court nevertheless observed

that the movant could be entitled to participate pursuant to the provisions of S CPA 1410. To this extent, the movant argued that he had standing to appear as a person adversely affected by the propounded Will inasmuch as the 2016 Will left him the decedent's entire estate. Conversely, the movant argued that a determination that the 2019 Will was invalid would invalidate the clause revoking all prior wills, and thus revive the 2016 Will of which he was the sole beneficiary.

---

The opinion in '*In re Caridi*' ... serves as a reminder of the importance of a well-crafted pleading, when it dismissed the amended objections to an accounting on the grounds that they were vague and incomprehensible, and thus failed to give the fiduciary fair notice of the claims against him.

In opposition to the motion, the petitioner argued that the 2019 Will was valid, and that the 2016 instrument had been destroyed by the decedent when it was removed by him from safekeeping prior to his death.

Initially, the court noted that the provisions of the 2016 Will conferred standing upon the movant as a person adversely affected by the propounded instrument, and that the existence of only a copy thereof did not serve as an impediment to the movant's status. Indeed, the court

observed that a copy of the Will could be admitted to probate pursuant to S CPA 1407, governing the probate of a lost will.

Further, although the petitioner claimed that the 2016 Will had been destroyed by the decedent, the court concluded that it would be premature to assess whether movant could rebut the presumption of revocation that arose as a result of the decedent's possession of the original instrument prior to death. Rather, the court held that the movant had presented sufficient facts surrounding the propounded Will to raise questions surrounding its validity. In view thereof, and its authority pursuant to S CPA 201(3), the court found that the movant had standing to appear as a party in the probate proceeding, to request S CPA 1404 examinations therein, and to file objections.

### The Importance of Pleading With Specificity

The February 2019 column cautioned practitioners of the need to plead with specificity or risk dismissal. The opinion in *In re Caridi*, NYLJ, July 19, 2019, at 24 (Sur. Ct. New York County) again serves as a reminder of the importance of a well-crafted pleading, when it dismissed the amended objections to an accounting on the grounds that they were vague and incomprehensible, and thus failed to give the fiduciary fair notice of the claims against him.