

TRUSTS AND ESTATES UPDATE

Expert Analysis

Appellate Review of Matters Impacting Surrogate's Court Practice

While the Surrogate's Courts have been busy the past several months addressing trusts and estates-related matters, the Appellate Divisions of each of the judicial departments have also been active in their review of issues affecting decedent's estates. From the validity of releases, to spousal status, to the discovery of personal income tax returns, the appellate courts have provided useful instruction on matters impacting Surrogate's Court practice.

Validity of Decedent's Release

In *Matter of Aoki*, the Appellate Division, First Department, reversed a decree of the Surrogate's Court, New York County (Mella, S.), which invalidated two partial releases of a power of appointment executed by the decedent and denied the motion of the decedent's children for summary judgment declaring said releases valid.

The record revealed that in 1998, the decedent, the founder of the Benihana restaurant chain, created a trust to hold stock and other assets pertaining to the enterprise. The agreement gave the decedent the power to appoint the beneficiaries of the trust through his will. The trustees of the trust were two of his six children, and his long-time attorney.

Several years after the creation of the subject trust, the decedent married the respondent. Concerned with the fact that

By
**Ilene
Sherwyn
Cooper**



he did not have a prenuptial agreement protecting the trust assets, the decedent, at the urging of the trustees of the trust, requested that the respondent sign a postnuptial agreement. When she refused to do so, the decedent was advised by counsel (the partner of the attorney-trustee) that he could partially release his power of appointment under the trust so as to limit the exercise of his power of appointment to only his descendants or trusts for their benefit, and thereby restrict the disposition of Benihana assets to members of his direct family. Thereafter, the decedent met with the trustees to discuss a draft of the release, and the following day, again met with the three of them to sign the one-page document.

Subsequently, the decedent's relationship with the trustees deteriorated, and ultimately culminated in litigation between them. Discovery during the course of that litigation revealed that counsel informed the decedent of the effect of the release, and more specifically, the limitation that he could only exercise his power of appointment in favor of his descendants. In addition, the record indicated that the decedent had the opportunity to

read the release, and that, because of a change in the tax law, later signed a second release, which again restricted his power to appoint to only his descendants.

Approximately eight months after signing the second release, the decedent met with the respondent's attorney and executed a codicil to his will which, inter alia, purported to exercise his power of appointment in favor of the respondent. In response to a request from the draftsman of the codicil, decedent's counsel opined that this provision of the codicil was invalid as a result of the decedent's partial release, which made the respondent an impermissible appointee of the trust. Although the decedent signed an affidavit stating that he did not understand the import of the release, the court noted that he took no steps prior to his death to declare the document invalid.

The court further noted that almost four years after signing the affidavit the decedent executed a new will, which again purported to exercise the power of appointment in favor of the respondent, but added that in the event that such exercise of the power was found invalid as a result of the partial releases that were signed, the power was instead exercised in favor of two of his children.

Following the decedent's death, the trustees of his trust commenced a proceeding to determine the validity of the partial releases. The decedent's wife, and the two children who were named as default takers of the power, filed answers, and upon completion of discovery, the children moved for summary judgment.

The motion was denied, and a nonjury trial was held, which resulted in a determination that the releases were invalid.

The Appellate Division reversed, concluding that the releases should have been given effect. In reaching this result, the court found that the Surrogate's Court had erred when it shifted the burden to the decedent's children to prove that the releases had not been procured by fraud. Indeed, the Appellate Division held that there was no basis in the record for according the respondent the benefit of the fiduciary exception, since neither one of the decedent's attorneys, who had been charged with constructive fraud, had an interest in or benefitted from the subject transaction.

Further, the court found the record established that the decedent understood the releases, notwithstanding his claims to the contrary, and that the respondent had failed to demonstrate that his attorneys had misled him regarding their effect. Instead, the court noted that counsel had made all reasonable efforts to apprise the decedent of the effect of what he was signing, and the decedent had ample opportunity to review and ask questions about the documents before doing so.

The court concluded that no valid excuse was offered for the claim that the decedent did not read the release before signing it, and that the decedent's purported unfamiliarity with the English language was insufficient to support a claim of fraud given the failure to demonstrate that any efforts were made to have someone read and explain the document to him in advance of its execution.

Most significantly, the court found that despite the decedent's awareness that he had signed irrevocable releases for years prior to his death, he had made no attempt to have the releases declared invalid, thereby calling into question the veracity of his claims that they were contrary to his intentions.

Matter of Aoki, 2014 NY Slip Op 03433, 1st Dept., May 13, 2014.

Turnover of Assets

In a turnover proceeding pursuant to SCPA 2103 to recover property on behalf of the decedent's estate, the respondent

appealed to the Appellate Division, Second Department, from so much of a decree of the Surrogate's Court, Kings County (Lopez Torres, S.), as determined that certain real property was not an estate asset, and that certain bank accounts were assets of the estate.

In *'Matter of Aoki'*, the First Department reversed a decree of the Surrogate's Court, which invalidated two partial releases of a power of appointment executed by the decedent.

The decedent died, testate, survived by two children, a daughter and a son, who, pursuant to her will, were each entitled to 50 percent of her estate. The decedent's son was granted limited letters of administration and commenced a discovery proceeding against his sister, seeking the turnover of two bank accounts, and a parcel of real property. The daughter answered the petition alleging inter alia, that her brother had executed a general release, as well as a renunciation on the same day, in which he relinquished any claim to the real property. After a hearing on this portion of the son's claim, the Surrogate's Court determined that the release was valid.

The Appellate Division affirmed, opining that a valid release constituted a complete bar to an action on a claim that is the subject of the release. The court further noted that while a release may be invalidated on grounds of duress, fraud or mutual mistake, the record revealed that the decedent's son had negotiated the terms of the release and knowingly and voluntarily relinquished any claim to the subject property in exchange for consideration. The court held that his failure to consult with an attorney did not preclude enforcement of the release.

The son's claims to the two bank accounts were also tried before the Surrogate's Court, which determined that the disputed bank accounts were rightfully estate assets, and directed that one-half of

the funds be turned over to him, individually. The son and daughter each appealed, and the Appellate Division modified the Surrogate's Court decree, by directing that the full amount of the funds be restored to the decedent's estate.

In reaching this result, the court addressed the nature of the relationship between decedent and her daughter. The court opined that if a confidential relationship exists between the decedent and beneficiary, the burden is shifted to the beneficiary of the transaction to prove by clear and convincing evidence that the transaction was fair and voluntary, and well understood. The court found that the decedent's daughter stood in a fiduciary relationship with her by virtue of the fact that she held powers of attorney with respect to the subject bank accounts. As such, it held that a presumption of impropriety attached when the daughter withdrew funds from one of those accounts, and deposited the funds into her own account.

Moreover, the court held that a confidential relationship existed between the decedent and her daughter at the time she deposited funds inherited by the decedent into a totten trust account for her benefit. The existence of this relationship, combined with the nature of the deposit, and the fact that it was made shortly before the decedent's death, also gave rise to a presumption of impropriety surrounding the transaction.

The court deferred to the Surrogate Court's finding that the explanation offered by the decedent's daughter of the subject transactions was evasive and incredible. Accordingly, the court concluded that the decedent's daughter had failed to meet her burden of establishing by clear and convincing evidence that the decedent had intended to make a gift or loan to her of the subject funds, and that the transactions were fair, voluntary, and understood.

In re Boatwright, 114 AD3d 856 (2d Dept. 2014).

Issue of Abandonment

In *Matter of Yengle*, appeal was taken to the Appellate Division, Third Department, from an order of the Surrogate's Court, Sullivan County (McQuire, S.),

which granted the respondent's motion for summary judgment dismissing the petition seeking to disqualify the respondent as the decedent's surviving spouse.

The decedent died intestate, survived by his spouse, and his sister. Although letters of administration had issued to the decedent's spouse, his sister commenced a proceeding to revoke her appointment on the grounds that she had abandoned the decedent prior to his death, and was thus disqualified from serving as fiduciary of his estate.

The record revealed that the respondent and the decedent resided together at the inception of their marriage, but that the decedent drank heavily, and abused the respondent, both physically and mentally, during this time to such an extent that police intervention was sometimes required. Ultimately, given the circumstances, the decedent, at the respondent's suggestion, began living at his vacation home, although he lived with the respondent on weekends. This arrangement continued until approximately 10 years before the decedent's death, when the parties no longer resided together at all. Thereafter, they communicated with each other occasionally, until several months before the decedent's death. Although respondent acknowledged that she had two affairs during the marriage, she claimed that the decedent knew of the relationships, and seemingly consented to them.

Based upon the foregoing, the Appellate Division found that the respondent had met her burden of establishing that she did not abandon the decedent, that she lived apart from him with his consent, and that her absence was justified by his drinking and related abusive behavior.

However, the court determined that petitioner had met her burden of raising a question of fact regarding the foregoing circumstances, thus precluding summary relief in respondent's favor. Specifically, the court found that petitioner's testimony, as well as the testimony of several disinterested witnesses, was sufficient to create a triable issue with respect to the respondent's allegations that the decedent had an alcohol problem and that he was abusive. Indeed, the court found it significant that respondent

never pursued criminal charges against the decedent, or sought an order of protection against him as a result of his alleged abuse.

Equally significant was the petitioner's testimony that she knew, through conversations with the decedent, that he wanted to be with the respondent, and respondent's admission that the decedent had asked her to return to him. In fact, the record contained cards from the decedent to respondent in which he expressed his love for her. Based upon this evidence, the court found it could reasonably be inferred that the decedent did not consent to the respondent's absence from their home.

In 'Yengle,' appeal was taken to the Third Department from an order of the Surrogate's Court, Sullivan County, which granted the respondent's motion for summary judgment dismissing the petition seeking to disqualify the respondent as the decedent's surviving spouse.

Accordingly, in view of the foregoing, and considering the evidence in a light most favorable to petitioner, the court held that respondent's motion for summary judgment should have been denied on the grounds that material questions of fact existed with respect to whether it was the respondent who left the decedent, and if so, whether her leaving was justified and without the decedent's consent.

Matter of Yengle, 113 AD3d 918 (3d Dept. 2014).

Disclosure of Tax Returns

Before the Appellate Division, Fourth Department, in *In re Monaco*, was an appeal of an order of the Surrogate's Court, Erie County (Howe, S.), which denied the motion of the decedent's estate to compel the petitioner to supply his personal income tax returns for the period 1980 to 1995, or alternatively, for authorization to obtain such records from the New York

State Department of Taxation and Finance. Notably, the petitioner had voluntarily produced state records of his earnings for the period 1996 to 2009.

Pursuant to his will, the decedent devised all of his real property to his daughter, while he left the petitioner, his son, a cemetery plot, a compressor, and a roll of electrical wire. At issue before the Surrogate's Court was whether the decedent had entered a verbal agreement with the petitioner that title to a single family residence, in which the petitioner had resided since the decedent purchased the residence in 1996, would be transferred to him when the mortgage was paid off, upon the petitioner's demand or decedent's death.

In support of his claim, petitioner alleged that in reliance upon the decedent's promise, he gave the decedent \$20,000 toward the down payment for the property, and paid all of the expenses attendant to its upkeep, including the mortgage, insurance, taxes and costs for its improvement. In order to determine whether petitioner had accumulated sufficient savings to satisfy the down payment in 1996, the estate sought an order requiring the petitioner to supply his income tax returns for the years in question.

The Surrogate's Court denied the application, and the Appellate Division affirmed, concluding that the estate had not made a sufficiently strong showing that the information contained in petitioner's income tax returns were indispensable to the litigation and unavailable from other sources, such as financial or business records. Indeed, the court held that the respondent had failed to make any factual showing in this regard, finding, *inter alia*, the affirmation and exhibit in support of the motion were vague and conclusory, and respondent did not establish that it had sought the information from any alternate source.

In re Monaco, 2014 NY Slip Op 03423, App Div 4th Dept., May 9, 2014.