

TRUSTS AND ESTATES UPDATE

Expert Analysis

Revisiting 2014: Cases That Shaped Surrogate's Court Practice

As the year 2014 hastens to a close, it is worth reflecting on the myriad of decisions over the past 12 months that have helped shape Surrogate's Court practice.

Although many have been the subject of articles by the undersigned, there remain other significant opinions that are deserving of mention. Consider the following.

Fees of Multiple Fiduciaries

In a contested accounting proceeding, the court addressed the reasonableness of legal fees incurred by the three fiduciaries, two of whom were objectants. The record revealed that the value of the decedent's estate at death was approximately \$1.85 million.

The Surrogate's Court, Kings County, opined that counsel representing the fiduciary of an estate is allowed "such compensation for [their] legal services as appear to the court to be just and reasonable." SCPA §2307(1). While counsel has the burden of proof on the issue of compensation, the court noted that the surrogate bears the ultimate responsibility to decide the reasonableness of fees for legal services rendered to an estate.

To this extent, the court observed that the fees requested by counsel amounted to 117 percent of the gross value of the estate or a combined sum of \$2.2 million. Nevertheless, the court opined that while the size of an estate is a permissible factor in calculation

tion of fees, it is only one of a number of factors to be considered in the analysis. Indeed, where an estate is particularly complicated or bitterly contested, substantial legal fees have been found to be appropriate.

Further, the court noted that while the time spent on estate matters is the least important factor to be considered in fixing legal compensation, contemporaneous time records are important to the court's determination of whether the time spent was reasonable for the various tasks performed. To this extent, the court found that while it was not unreasonable for each of the co-executors to retain separate counsel, where the practice of retaining separate counsel leads to duplication of legal services and excessive fees, it is appropriate for the court to limit the fees awarded to an amount that might reasonably be paid to a single attorney. Moreover, if the services rendered by counsel separately employed were of benefit to the estate as a whole, rather than to the fiduciary in his individual capacity, the legal fees incurred are usually justified as a charge against the estate.

Nonetheless, the court recognized that an exception to the "single fee" rule has been made when the adversarial positions taken by the co-fiduciaries necessitate

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separate counsel and additional fees. Review of the voluminous time records submitted by counsel revealed that at each stage of the estate's administration, the parties were unable and unwilling to agree on even the most mundane issues. In addition, the court found that at least with respect to two of the firms there was a significant amount of duplication and overlap of activities, as well as impermissible charges by counsel for services that were secretarial in nature, and attributable to the preparation of affirmations of legal services.

Accordingly, upon consideration of the foregoing, as well as the professional standing of counsel, the court reduced counsel fees to a combined sum of 31 percent of the gross estate, and directed that the fees awarded objectants' counsel be paid from estate funds based upon the financial benefits derived by the estate as a result of their efforts.

In Re Heimo, NYLJ, 1202639807252, Jan. 28, 2014, (Sur. Ct. Kings County)

Due Execution

In *In re Sanger*, the Surrogate's Court, Nassau County, had occasion to examine the presumption of due execution accorded an attorney-supervised will execution. Before the court was a contested probate proceeding, in which the petitioner, the decedent's surviving spouse and primary legatee of his estate, moved for summary judgment dismissing the objections that alleged lack of due execution, lack of testamentary capacity, undue influence and fraud.

The execution of the propounded instrument was supervised by an attorney. In addition, an attestation clause preceded the signatures of the witnesses, and a self-proving affidavit was affixed to the end of the document. In pertinent part, the court noted that there is an inference of due execution when the execution of a will is supervised by an attorney.

The objectants nevertheless maintained that because the attorney who supervised the execution of the propounded will was not admitted to practice law in New York at the time the will was signed, the inference of due execution did not arise. The record reflected that counsel had over 30 years of legal experience, and his practice primarily focused on trusts and estates and related tax issues. At the time the propounded will was executed, he was associated with a New York City law firm, and worked with attorneys at the firm on the will and other estate-related documents. Paralegals at the firm were witnesses to the execution of the instrument.

Based on the foregoing, the court found that the petitioner was entitled to an inference of due execution. In reaching this result, the court relied on the opinions in *Matter of Kindberg*, 207 N.Y. 220, 228 (1912) and *Matter of Cottrel*, 95 N.Y. 329, 330 (1884), in which the Court of Appeals indicated that the presumption of due execution is based upon an attorney's years of experience and knowledge of the statutory requirements, and not upon whether the attorney is admitted to practice law in the state of New York.

In view thereof, together with the unchallenged sworn statements and testimony of the attorney draftsman and the attesting witnesses regarding compliance with the requirements of EPTL 3-2.1, the court granted summary judgment to the petitioner on the issue of due execution, and dismissed this objection to probate.

In re Sanger, NYLJ, July 21, 2014, at 27 (Sur. Ct. Nassau County).

Removal of a Fiduciary

This past year, the removal of a fiduciary was the subject of an opinion by the Appellate Division, Second Department, in *In re Mercer*.

Before the court was an appeal from

an order of the Surrogate's Court, Suffolk County (Czygier, J.), which denied that branch of an application by the objectants in a contested probate and accounting proceeding to immediately suspend the petitioners' letters testamentary and letters of trusteeship. Specifically, the Surrogate denied the motion pending the conclusion of the trial in the accounting proceeding, but continued a temporary restraining order against one of the fiduciaries which barred her from making any disbursements from the estate or testamentary trusts.

In 'Sanger,' the Surrogate's Court, Nassau County, had occasion to examine the presumption of due execution accorded an attorney-supervised will execution.

In affirming the Surrogate's decision, the Appellate Division found, contrary to the appellants' contentions, that the allegations of the parties were sharply in dispute, and gave rise to conflicting inferences regarding the fiduciaries' alleged misconduct. Furthermore, the court noted that the claims asserted against the fiduciaries largely addressed issues raised by the objections in the contested accounting proceeding, and that the Surrogate's continuance of the temporary restraining order was sufficient to protect the rights of the parties.

In re Mercer, 119 A.D.3d 990 (2d Dept. 2014)

Tangible Personal Property

Before the Surrogate's Court, Bronx County, in *In re Rothschild*, was a motion for summary judgment determining that the decedent's collections of stamps and coins constitute tangible personal property specifically bequeathed pursuant to Article Two of the decedent's will to the petitioner. The motion was opposed by the executor of the estate, who maintained that the items were part of the residuary estate that passed to an irrevocable trust for the benefit of numerous beneficiaries, including the petitioner.

The decedent's wife predeceased him,

and he had no children at the time of his death. The decedent was a successful commodities trader, and his wife was a scientist and professor at Columbia University. His will and trust disposed of 70 percent of his net estate to charities, and the remaining 30 percent in trust for designated individuals, with the remainder passing to charities upon their deaths.

Pursuant to the pertinent provisions of his will, the decedent gave "all of my tangible personal property (other than currency) including without limitation, wearing apparel, personal effects, jewelry, furniture, furnishings, pictures, paintings and other objects of art, silver, china, glassware and other household effects, books and automobiles" to his wife, or if his wife failed to survive him, to the petitioner.

In support of her motion for summary judgment, the petitioner asserted that the "tangible personal property" should be construed broadly so as to encompass "all property that can be measured, felt or touched, or is in any other way perceptible to the sense." See Black's Law Dictionary, pp. 1337-1338 (9th ed. 2009), noting that New York Tax Law §951-a(c) defines the term "tangible personal property" as corporeal personal property, including money held for numismatic purposes.

In opposition to the motion, the executor argued that there were issues of fact as to what the decedent intended by the use of the phrase "tangible personal property" in his will. Toward this end, the executor further maintained that Article Two of the decedent's will did not include stamps or coins in the list of tangible personal property bequeathed to the petitioner, and that the decedent's estate plan, as evidenced by the terms of his will and trust, was to have his assets at death pass to charity. Finally, the executor contended that the stamp and coin collections were investment property, and were not intended by the decedent to fall within the category of household and personal effects described in the bequest to the petitioner.

The court noted that the term "tangible personal property" embracing the word "personal effects" is generally construed as being limited to tangible property having an

intimate relation to and used by the testator. To this extent, the court observed that in Article Two of his will, the decedent specifically listed items presumably used by him on a daily basis, such as wearing apparel, furniture, silver, china and glassware.

The court found that this language was not all encompassing, as the petitioner urged, but was designed to encompass only household effects. In fact, there was no mention of the stamps or coins; and currency was excluded from the disposition. Moreover, the record indicated that the decedent and his wife secreted the subject coins and stamps from view, supporting the inference that the collections were not openly displayed or enjoyed on a daily or frequent basis.

Accordingly, based on the foregoing, the court denied the petitioner's motion for summary judgment, and construed the will such that the stamps and coin collections in issue passed pursuant to the residuary clause of the decedent's will.

In re Rothschild, NYLJ, Oct. 28, 2014, at 22 (Sur. Ct. Bronx County)

Deed Held a Forgery

Before the Surrogate's Court, Suffolk County, in *In re Glynn*, was a proceeding commenced pursuant to SCPA 2103, by one of the fiduciaries of the estate, to declare a deed allegedly executed by the decedent and his post-deceased wife invalid.

The record at the non-jury trial of the matter revealed that the decedent and his wife died within a few weeks of each other, survived by nine children. Their respective wills were admitted to probate and letters cta issued to the petitioner, one of their daughters. Thereafter, petitioner instituted the subject proceeding claiming that a deed executed by the decedents, as tenants by the entirety, in November 2007, which conveyed a life estate to another daughter—the respondent—contained the forged signature of the decedent's wife.

Respondent answered, maintaining that the deed was valid, that she had nothing to do with its preparation and execution, that the signatures on the document were notarized, and that, as a duly acknowledged instrument, it was presumptively valid. Moreover, respondent claimed that

even if the signature of decedent's wife was a forgery, the life estate conveyed to her was effective since the signature of the decedent on the deed was not in dispute.

At the trial of the matter, the notary identified her signature on the deed, but stated that despite the date on the document, she must have notarized the signatures several weeks later. Moreover, while she testified that she would not customarily notarize a document without the individuals being present or having a familiarity with their signatures, she could not recall anything specifically about the execution of the deed, except that the decedent and his wife were not in good health at the time.

The court in 'Heimo' found that where the practice of retaining separate counsel leads to duplication of legal services and excessive fees, it is appropriate for the court to limit the fees awarded to an amount that might reasonably be paid to a single attorney.

The decedents' son next testified that he was familiar with both his mother's signature and the respondent's signature, having witnessed them sign many documents over the years. He then proceeded to identify his mother's signature on several photocopies of checks and other documents, including a DNI (Do Not Intubate) form and her will.

The last witness to testify at the trial was a handwriting expert, employed by the Suffolk County Crime Laboratory. The court noted that in reaching his conclusion, the expert used handwriting magnification to compare the signature on the deed with known exemplars. Based on his analysis of letter formations, pen strokes, and distance between letters, the expert concluded that the decedent's wife did not sign her name to the instrument.

Finally, based on the stipulation of the parties, the court considered the anticipated testimony of a fourth witness, an attorney, who prepared the deed, and whose office

was adjacent to the office of respondent's counsel. Although he never met with the decedent or his wife, and was never retained by them, he indicated that he prepared the deed at the request of respondent or her counsel, and gave the unexecuted document to respondent's counsel once it was drafted. He stated that he did not participate in the execution of the deed or its recording.

The court opined that when a certificate of acknowledgment is attached to an instrument such as a deed, there is a presumption of due execution, which can only be overcome by proof "so clear and convincing so as to amount to a moral certainty." *John Deere Ins. Co. v. GBE Alaska Corp.*, 57 AD3d 620, 621. Based upon the testimony adduced at trial, the court held that the petitioner had satisfied this burden of proof and rebutted the presumption of validity accorded the deed.

Specifically, the court noted that the deed was drafted by an attorney who was not retained or even known to the decedent or his spouse, at the request of respondent's counsel. Moreover, although the notary testified that she would not customarily notarize a document without the individuals being present or having a familiarity with their signatures, she could not recall anything in particular about the event, except that the document had been presented to her solely by the respondent at the teller's window, and that she notarized it as an accommodation.

Accordingly, in view of the foregoing proof, the court concluded that the signature of the decedent's wife on the subject deed was a forgery. As to the effectiveness of the respondent's life estate, the court held that while the respondent's interest was enforceable during the lifetime of the decedent, whose signature had not been questioned, that interest ceased upon his death, when the entire interest in the property passed to his wife, unencumbered by respondent's life estate.

In re Glynn, NYLJ, Oct. 7, 2014, at 28 (Sur. Ct. New York County).