

TRUSTS AND ESTATES UPDATE

Expert Analysis

Winter's Roar: Surrogates Tackle Good Faith, Post-Nuptial Waiver, Capacity

With below-freezing temperatures, snow, sleet, hail, and just about every frigid mixture one could imagine, mother nature entered the year 2015 with a roar. As we busied ourselves at work and at home, with the hope for warmer weather, so did the Surrogate's Courts, as evidenced by the multitude of wide-ranging decisions affecting the field of trusts and estates.

Contested Accounting Results

Before the Surrogate's Court, Suffolk County, was a contested trustee's accounting proceeding, in which the objectants, the decedent's nieces, moved for summary judgment, inter alia, denying approval of the petitioner's account, directing petitioner to pay to them the amounts due them as a result of non-pro rata distributions of trust funds petitioner made to herself, surcharging the petitioner, directing that interest be paid at the rate of 9 percent per annum, and denying petitioner commissions.

The record revealed that the decedent had created the subject trust in 1995, and named himself and his brother as co-trustees. By an amendment to the trust in 2007, following the death of his brother, the decedent named his friend, the petitioner, as his co-trustee, and directed that the trust funds be distributed upon his death 40 percent to the petitioner, and 30 percent each to his two nieces.

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The decedent died intestate in 2012, and one of his two nieces was appointed the administrator of his estate. Thereafter, pursuant to court order, the petitioner filed her accounting as trustee. In pertinent part, the accounting reflected that the petitioner had made distributions of trust funds to herself in excess of her 40 percent share of the estate. Objections to the accounting were filed by the decedent's two nieces, who claimed, inter alia, that the petitioner had overpaid herself trust funds, that she had failed and delayed in making payments to them in accordance with their pro rata share of the trust, that petitioner had made improper payments out of the trust assets, that she should be denied commissions and surcharged. Upon completion of discovery, the objectants moved for summary judgment.

In opposition to the motion, the petitioner maintained that it was her belief, based upon conversations with the decedent, that she was the sole beneficiary of the trust. She acknowledged that though she ultimately became aware that her belief was incorrect, she was not sophisticated in financial matters, had a limited educational background, and did not consult an attorney in connection with her management of the trust until she realized there were problems

raised in connection with its administration. Petitioner claimed that she made the distributions in error, but in good faith, and requested that any surcharges or interest charges be mitigated. Further, petitioner indicated that she was actively seeking a loan in order to repay the trust for the overpayments to herself.

The court held that every fiduciary has a duty to deal impartially with the beneficiaries. As such, when a distribution is made to one residuary beneficiary, an equal distribution should also be made to the other residuary beneficiaries. The court found that petitioner's claim of good faith in making the payments to herself was belied by the record, that ignorance of the law was no excuse, and that although petitioner had been aware of her overpayments, she had not yet made the trust whole despite representations by her counsel that she was making every effort to do so. Accordingly, summary judgment on this issue in objectants' favor was granted.

As to the rate of interest to be charged, the court held that a decision to award pre-judgment interest and at what rate, for surcharges based on breach of fiduciary duty rests within the discretion of the court. Pursuant to that power, the court may properly impose interest on surcharges when necessary to fully compensate a beneficiary for any losses that may have been suffered or gains that may not have been fully realized due to the fiduciary's negligence. As such, based on the facts and circumstances, the court imposed interest at the rate of 9 percent per annum, to be surcharged against the petitioner and paid directly to the objectants.

Further, the petitioner was denied commissions. The court held that statutory commissions must be awarded to a fiduciary in the absence of bad faith, breach of trust or mismanagement, neglect of duty, misconduct, disregard of fiduciary duties or other comparable acts of malfeasance or nonfeasance. Based upon the record, the court found that petitioner acted in bad faith, that, despite her claims to the contrary, she was familiar enough with her authority as trustee to be able to make significant payments to herself of trust funds, and that, as such, she had neglected and disregarded her fiduciary duties.

In re Wennagel Family Trust, NYLJ, Jan. 22, 2015, at p. 34 (Sur. Ct. Suffolk Co.)

Right of Election Waived

In *In re Estate of Mason*, the Surrogate's Court, Kings County, was confronted with a proceeding instituted by the decedent's surviving spouse to determine the validity of her exercise of her right of election against his estate. The executor of the estate moved for summary judgment dismissing the petition on the grounds that the spouse had waived her right of election pursuant to a post-nuptial agreement with the decedent, and for an award of sanctions, costs and fees pursuant to 22 NYCRR §130-1(c).

The decedent died on March 7, 2011, survived by his spouse, the petitioner, and two adult daughters. His will was admitted to probate in January 2012, and two years later, the subject proceeding was instituted. The record revealed that the decedent and the petitioner were married on July 21, 2005, and in June 2006, they entered into a post-nuptial agreement. Each of the parties signed the document before a notary public, and both signatures were accompanied by a written acknowledgment by each notary. Both parties were represented by separate counsel.

The court concluded, upon the record presented, that the executor had met her burden of proving that, as a matter of law, the agreement was in writing, subscribed by the parties, and properly acknowledged in compliance with the statutory requirements of EPTL 5-1.1-A(e)(2). Nevertheless, the petitioner maintained that the agreement was defective because the language referring to the waiver of the elective share was ambiguous, the agree-

ment was not "certified," the decedent did not initial the exhibit page containing the list of the petitioner's assets, and the list of the parties' assets appeared after the signature page, instead of before the signature page.

In 'Mason,' the court found the post-nuptial agreement clearly manifested the unambiguous purpose and intent of the parties to mutually waive their right to marital property and their spousal right of election.

The court found, despite petitioner's characterization, that the agreement clearly manifested the unambiguous purpose and intent of the parties to mutually waive their right to marital property and their spousal right of election. Further, the court opined that the agreement was not legally defective because the word "certification" did not appear in the acknowledgment by the notaries. Indeed, the court noted that the subject acknowledgment contained the required elements endorsed by the Court of Appeals, to wit, (1) that the signor made an oral declaration to the notary public that he or she in fact signed the document; and (2) that the notary or other official either actually knew the identity of the signor or secured satisfactory evidence of identity ensuring that the signor was the person described in the document. Accordingly, the court granted summary judgment in the executor's favor, and dismissed the petition.

With respect to the executor's request for sanctions, the court observed that it had the discretion to award costs or sanctions against a party or an attorney who engages in frivolous conduct. Pursuant to the provisions of 22 NYCRR 130-1(c)(1), conduct is frivolous if "it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law." Considered in this regard is whether the conduct at issue was continued when its lack of legal or factual basis was apparent, should have been apparent,

or was brought to the attention of counsel.

Notably, to this extent, the executor maintained that although she had informed petitioner's counsel that his claims regarding the post-nuptial agreement were incorrect and misinformed, he nevertheless had instituted the subject proceeding. The executor further maintained that the petitioner's position in the proceeding was baseless. The court agreed, finding the petitioner's arguments to be wholly without merit or basis in law. Accordingly, under the circumstances, the court awarded attorney fees to the executor in the sum of \$500.

In re Mason, NYLJ, March 9, 2015, at p. 26 (Sur. Ct. Kings Co.)

Estranged Wife

Before the Surrogate's Court, Dutchess County, in *In re Terzani Jr.*, was an application by the decedent's parents to remove his estranged spouse as limited administrator of his estate on the grounds that she had neglected her fiduciary duties and was hostile.

The decedent died as a result of gunshot wounds suffered during a standoff with the state police, who had been called to the marital residence by his spouse after an altercation with him. The decedent was estranged from his spouse and in the midst of divorcing her at the time of his death.

Following the decedent's death, the decedent's parents filed a notice of claim with the New York State Police and Office of the Attorney General, and advised the decedent's spouse of their intention to pursue a cause of action for his wrongful death. However, the decedent's spouse refused to sign a waiver and consent to the issuance of limited letters of administration to the decedent's parents, which would have allowed them to pursue this claim, and stated, at the time, that she was disinclined to proceed with the claim herself. Nevertheless, several weeks later, the decedent's spouse petitioned for limited letters of administration, listing, inter alia, as an asset of the estate, a possible action for wrongful death against the New York State Police. Limited letters were subsequently issued to the decedent's spouse.

According to the record, upon assuming her stewardship, the decedent's spouse did not inventory the marital residence

for months after the decedent's death, and while she had an itemized list of the items from each of the rooms, she claimed to have lost it. She conceded that she had been informed of her responsibility to protect and preserve the decedent's property, but did not understand the import of that role. She supervised the job of retaining and disposing of the decedent's personal property, but never contacted the decedent's parents to ask them if they were interested in retrieving any of his personal belongings. Indeed, they were required to search through a dumpster located on the grounds of a carting company in order to retrieve, *inter alia*, the decedent's prized items from his service in the Marine Corps, and his jewelry.

As a result of the foregoing, the decedent's parents petitioned the court for a decree revoking the limited letters of administration issued to his spouse, claiming that she had been delinquent in her duties as fiduciary, and that her hostility toward them impeded the smooth administration of his estate. Notably, one week before the hearing of the matter, the decedent's spouse filed a notice of claim on behalf of the estate for purposes of pursuing a wrongful death action.

The court opined that the burden of proof for removal of a fiduciary rests upon the petitioner. While a potential conflict between the fiduciary and a party interested in the estate does not necessarily mandate removal, or require a finding of ineligibility, when such animosity interferes with the proper administration of an estate, removal is warranted. Moreover, a fiduciary's dereliction in dealing with pending litigation, or resisting or failing to commence litigation on behalf of the estate without adequate explanation, can be evidence of misconduct or impassable hostility between the parties.

Against this backdrop, the court found that the decedent's spouse had failed to completely inventory the decedent's assets, had failed to keep a record of the estate property she had discarded, had been cavalier in her attitude regarding the disposal of the decedent's personal effects, and had unduly delayed in filing a notice of claim for or pursuing a cause of action for the decedent's death. Moreover, given the separation and impending divorce between the decedent and his spouse, and the circumstances sur-

rounding the decedent's death, the court found the relationship between her and the decedent's parents was hostile, and that such hostility impeded the administration of the estate.

Accordingly, the court ordered that the decedent's spouse be removed as fiduciary.

In re Terzani Jr., 45 Misc.3d 1221(A) (Sur. Ct. Dutchess Co.)

In '*In re Wennagel Family Trust*,' the court found that petitioner's claim of good faith in making payments to herself was belied by the record, and that ignorance of the law was no excuse.

Testamentary Capacity

In *In re Johnson*, the Surrogate's Court, Broome County, was confronted with a renewed motion for summary judgment dismissing the objections to probate on the grounds of lack of testamentary capacity and undue influence. The proponent, the decedent's daughter, had previously moved for summary relief, resulting in a decision that dismissed the objection as to due execution and denied the motion as to the issues of testamentary capacity and undue influence pending the completion of discovery. Following discovery, the proponent renewed her motion with respect to these two issues.

In support of their objection on the grounds of capacity, the objectants, the decedent's two sons, alleged that the decedent was inexperienced in financial affairs and lacked knowledge of her assets. The court opined that a testator need only have a general awareness of the nature and extent of her assets in order to possess the requisite capacity to execute a will. Nevertheless, the court noted that while the decedent's real estate, *i.e.* her family farm and homestead, may have been the most important assets to her and to the rest of her family, it was not her only asset. In fact, it appeared that the decedent died with bank accounts

which approximated the value of her real estate; yet, the draftsman of the will made no inquiry of her about her non-real estate holdings.

Further, the court noted that the decedent's husband handled her financial affairs, and that the proponent had assumed complete control of the decedent's finances after her husband's death. In view thereof, the court held that a question of fact existed as to whether the decedent was generally aware of her substantial cash assets at the time of the preparation and execution of her will, and denied summary judgment on the issue of capacity.

With respect to the claim of undue influence, the court opined that proof of this objection required a showing that the propounded will was not the result of the independent action of the decedent. In addition to the decedent's financial inexperience, the objectants alleged that the decedent relied on the proponent for her financial affairs, that she had designated the proponent her attorney-in-fact, that the proponent was of modest means, and that she was the decedent's caregiver, and resided with her during the three-month period before the will was executed.

Based on these circumstances, the court concluded that the relationship between the proponent and the decedent provided the proponent with the motive and opportunity to exercise undue influence, and may have given rise to a confidential relationship between them and an inference of undue influence. The court found it significant that the proponent had received substantial financial benefits from the decedent, through her use of the power of attorney, which were in contravention to her prior testamentary plan. Accordingly, the court held that the issue of undue influence, and the proponent's conduct relative to the decedent's financial affairs, were best left for a jury, and denied the motion for summary judgment.

In re Johnson, 2015 NY Slip Op 50051(U) (Sur. Ct. Broome Co.)