

Trusts and Estates Update

Expert Analysis

Year in Review: Highlights From the Four Appellate Departments

This past year, the appellate courts have addressed a myriad of issues impacting the field of trusts and estates. This month's column will highlight several of these opinions.

Undue Influence

In *Matter of MacGuigan*, 140 A.D.3d 625 (1st Dep't 2016), the Appellate Division, First Department, affirmed an order of the Surrogate's Court, New York County (Mella, S.), which granted proponent's motion for summary judgment dismissing the objection based on undue influence. Citing *Children's Aid Socy. of City of N.Y. v. Loveridge*, 70 N.Y. 387, 394-95 (1877), the court opined that the kind of influence sufficient to invalidate a will was not the result of "affection; the desire of gratifying the wishes of another; the ties of attachment arising from

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consanguinity, or the memory of kind acts and friendly offices" but rather, amounted to coercion, or the exercise of power over the testator in the making of the will and its provisions.

In *Matter of Batlas*, the power of attorney was invalid and could not be used to effect a change in the designated beneficiary of the annuity account.

Within this context, the First Department found that the Surrogate had properly determined, based on the testimony of the decedent's financial advisor and his treating physician, that the proponent, the decedent's long-

term girlfriend, did not exert undue influence over him in the making of the propounded instrument. The court observed that the financial advisor had stated that the decedent's girlfriend was reluctant to affect his investment decisions or to receive a power of attorney on his behalf, and his physician had indicated that he suffered only mild memory loss at the time the will was executed. Further, the record reflected that the attorney who prepared the will, as well as the attesting witnesses, believed that the decedent's testamentary plan was the result of his own free will. The court noted that the objectant, the decedent's sister, conceded that she had limited contact with him over the years, that their relationship was distant, and that she did not challenge the decedent's decision to provide proponent with his power of attorney and health care proxy.

Finally, the court held that the Surrogate's Court properly rejected objectant's claim that the proponent

and decedent were in a confidential relationship, opining that there was no showing that the proponent had control over the decedent, and concluding, in any event, that the bequest to her was explained by the evidence of “longstanding ties of affection” between her and the decedent.

Power of Attorney

In *Matter of Batlas*, 144 A.D.3d 791 (2d Dep’t 2016), the Appellate Division, Second Department, affirmed an order of the Surrogate’s Court, Queens County (Kelly, S.), which granted the petitioner’s renewed motion for summary judgment finding that the power of attorney executed by the decedent was invalid.

The decedent had executed a short form power of attorney many years before his death in favor of the appellant. Two months before the decedent’s death, the appellant used the power of attorney to designate herself as the sole beneficiary of the decedent’s annuity account, which was later distributed to her.

Following the decedent’s death, the petitioner, the ancillary administrator of the decedent’s estate, commenced a turnover proceeding against the appellant seeking recovery of the funds in the account. The fiduciary moved for summary judgment on the petition, contending that the subject power of attorney was invalid because it had not been properly acknowledged. The motion was opposed by the appellant, who

argued that it was premature, to the extent that the sole distributee of the estate had not yet been deposed. The Surrogate’s Court granted the petitioner’s motion, determining that the power of attorney had been improperly executed, and therefore, could not be utilized to effect a change of beneficiary of the decedent’s annuity.

The Second Department found that the petitioner had established his prima facie entitlement to judgment as a matter of law by demonstrating that the power of attorney was not duly acknowledged in the manner prescribed for the acknowledgment of a conveyance of real property. Although the power of attorney contained what purported to be the decedent’s signature, the court noted that the notary simply applied his stamp to a space beneath the decedent’s signature on the “Affidavit as to Power of Attorney Being in Full Force,” which was dated one month after the decedent allegedly signed the power of attorney, and failed to provide any affirmation or confirmation that the decedent came before him and demonstrated that he was who he purported to be. Accordingly, the power of attorney was invalid and could not be used to effect a change in the designated beneficiary of the annuity account.

The court held that the appellant had failed to raise a triable issue of fact in opposition to petitioner’s

motion, and determined, further, that petitioner’s motion was not premature, as appellant had failed to demonstrate that discovery requested might lead to relevant evidence or that the facts essential to oppose the motion were exclusively within the knowledge and control of the party sought to be deposed.

Gift by Implication

In *Matter of Warren*, 143 A.D.3d 1110 (3d Dep’t 2016), the Appellate Division, Third Department, affirmed an order of the Surrogate’s Court, Greene County (Wilhelm, S.), which granted an application to construe the decedent’s will in favor of her children and stepchildren.

The decedent died survived by eight children, and two stepchildren, who were the children her spouse’s prior marriage. Her spouse predeceased her. Pursuant to the pertinent provisions of her will, the decedent bequeathed \$2,000 to each of the 10 children who survived her, and created a credit shelter trust for her spouse, for life, and upon his death, directed that the trust principal be divided among “those of his 10 children” who survive him or their descendants. The will further devised and bequeathed the decedent’s residuary estate to her spouse, and named him the executor. The instrument failed to address the disposition of the residue in the event that the decedent’s spouse failed to survive her.

Upon admission of the decedent's will to probate, the decedent's son, who had been appointed fiduciary of her estate, claimed that, given the lack of an alternate residuary beneficiary under the instrument, the residue of the decedent's estate passed in intestacy to her eight biological children. (Notably, there were no assets remaining with which to fund the credit shelter trust due to inter vivos gifts made prior to death.) As a result, a construction proceeding was instituted by the one of the decedent's two stepchildren seeking a determination that she intended to leave her residuary estate to them *and* her biological children. The fiduciary answered and moved for summary judgment dismissing the petition for lack of standing. The Surrogate's Court, inter alia, granted the petition, finding that the decedent intended to bequeath her residuary estate to all 10 children. The fiduciary appealed.

In affirming the order of the Surrogate's Court, the Third Department held that the petitioner had standing to institute the proceeding, concluding that petitioner had a colorable argument that he was entitled to share in the property affected by the construction of the will. Moreover, the court found that the circumstances required implying a gift of the residue to the decedent's 10 children. In reaching this result, the court noted that while the doc-

trine of gift by implication was rarely invoked, it was pertinent in cases where a reading of the entire will revealed that the testator intended to dispose of his (or her) property in a certain manner, but through error or omission failed to do so. To this extent, the court concluded that while the residuary clause of the decedent's will was silent as to what would happen if the decedent survived her spouse, all of her other testamentary provisions evinced a

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desire to equally divide her assets among her 10 children, whether or not her spouse survived her.

Gift of Investment Account

In *Matter of Jordan*, 144 A.D.3d 1630 (4th Dep't 2016), the Appellate Division, Fourth Department, reversed an order of the Surrogate's Court, Jefferson County, denying the motion of the respondent for summary judgment in a proceeding for recovery of the proceeds in an investment account, of which she

was the sole beneficiary.

Upon review of the record, which consisted of sworn statements of two disinterested witnesses, who stated, inter alia, that they were close friends of the decedent, that he was of sound mind, and that he fully intended to transfer the subject account to respondent, as well as an envelope from the investment firm, with the words "Happy Birthday" on it and the respondent's name, the court held that the respondent had established, as a matter of law, that the decedent had made a gift of the account to her. The court found petitioners' opposition unavailing, finding that the affidavit submitted by their counsel was based on nothing but conjecture and surmise, and the report of their expert had no probative value, since he did not examine the decedent prior to his death, did not reference any medical records during the relevant time period, and relied to a great extent on hearsay statements from unspecified witnesses for his conclusion.