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TRUSTS AND ESTATES UPDATE

The Spring Semester: Blooming With Opinions of Interest

BY ILENE SHERWYN COOPER

The months of March, April and May were blooming with issues relevant to the field of trusts and estates; not your garden variety issues, but the variegated head-turners, resulting in significant opinions to the practice.

Finality of Accounting Decrees

When the Surrogate's Court decision in *Matter of Hunter*, 194 Misc2d 364 (2002) was rendered, the procedural world of trusts and estates, as most of us knew it, was turned on its head. Essentially, the opinion carried with it the proposition that despite notice and an opportunity to be heard, a beneficiary may invoke principles attendant to fiduciary duty, in order to have another bite at the apple and seek redress for alleged negligence and estate mismanagement.

It came as no surprise that the Order of the Surrogate's Court in *Hunter* was appealed. It also came as no surprise that it received little support from the appellate



bench. In a well-reasoned, analytic opinion, the Appellate Division, Second Department, indeed, made it all too clear that the lower court's opinion could not be sustained.

The factual record of *Hunter* revealed that pursuant to the Last Will and Testament of the decedent, Chase Manhattan Bank (previously Lincoln Rochester Trust Co.) and an individual were appointed co-executors and co-trustees of two equal residuary trusts — the Eighth (A) Trust and the Eighth (B) Trust — created for the benefit of each of her granddaughters. According to the terms of these trusts, the trustees were to pay income to each granddaughter for life, and upon the granddaughter's death, the remainder as the granddaughter appointed, or in default thereof. And, in the event the

granddaughter had no issue then living, to the trust created for the benefit of the surviving granddaughter.

The co-executors of the decedent's estate accounted in 1976. Because the co-executors were also co-trustees of the residuary trusts, a citation was issued pursuant to the provisions of SCPA 2210(10) to the trust beneficiaries, including the granddaughter/beneficiary of the (B) Trust. This granddaughter appeared in the proceeding and filed objections to the legal fees of the co-executors. The objections were subsequently resolved, and a decree in the executors' accounting was issued.

Subsequent thereto, the decedent's granddaughter, who was the beneficiary of the (A) Trust, passed away. Because she had no issue and had failed to exercise her power of appointment, the assets of the (A) Trust poured over into the (B) Trust. An accounting for the (A) Trust was filed. Because the trustees were again accounting to themselves as co-trustees of the (B) Trust, citation was served pursuant to SCPA 2210 upon, among others, the granddaughter/beneficiary of the (B) Trust, who executed a waiver and consent. The court issued a decree with respect to the accounting on Dec. 10, 1981.

Upon the death of the individual

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co-trustee of the (B) Trust in August 1996, an intermediate accounting was filed by the corporate fiduciary. Objections to the accounting were filed by the granddaughter/beneficiary based, inter alia, upon the corporate fiduciary's alleged failure to diversify the assets in the Trust which consisted principally of Eastman Kodak stock that had declined in value. As a consequence, the objectant sought a surcharge against the corporate fiduciary for breaching its duties in this, as well as several other respects, including its failure to object, in its capacity as co-trustee of the (B) Trust, to the prior accountings for the estate and the (A) Trust. The corporate fiduciary moved to dismiss these objections contending that the decrees entered in the estate accounting and (A) Trust accounting conclusively resolved all matters relating to its administration of the decedent's estate, its funding of the Trusts, and its retention of the Kodak shares as co-executor and co-trustee of the (A) Trust. More specifically, the corporate fiduciary argued that since the objectant appeared in both of the prior accountings and failed to raise any of the allegations set forth in the objections at issue, she was precluded from doing so in the (B) accounting.

Second Department Ruling

The Surrogate's Court denied the motion finding, inter alia, that the doctrine of res judicata did not bar the objections to the fiduciary's actions as co-trustee of the (B) Trust since those actions were not subject to judicial scrutiny in the prior accounting proceedings. The court reasoned that a fiduciary serving in multi-capacities owes a special duty to its beneficiaries, and that the provisions of SCPA 2210(10) did not

exonerate a fiduciary for failing to scrutinize its actions simply because process issued to the beneficiary in prior accountings.

On appeal, a majority of the appellate bench, led by the Presiding Justice A. Gail Prudenti, disagreed, concluding that reversal of the Surrogate's order on this issue was essential to the preservation of long-established principles of res judicata and its procedural components contained in SCPA 2210. The court opined: "To negate the operation of the doctrine of res judicata in the case at hand is to render meaningless the provisions of SCPA 2210(10)."

The court found that the provisions of the Restatement relied upon by the Surrogate's Court in support of its result (see Restatement 2d, Trusts, Secs. 177, 223(2)) were inapposite inasmuch as neither section addressed the issue of whether a beneficiary was bound by prior decrees discharging an executor and trustee where the beneficiary had a fair opportunity, prior to the entry of those decrees, to raise the same issues sought to be litigated in a subsequent accounting.

Further, the court aptly distinguished foreign case law cited by the Surrogate, in pertinent part, on the grounds that the decisions were based on application of the rule set forth in the Restatement 2d, Judgments, Sec.36(2) stating that "[a] party appearing in an action in one capacity, individual or representative, is not thereby bound by or entitled to the benefits of the rules of res judicata in a subsequent action in which he appears in another capacity." The court held that this rule, even if it were assumed valid as a general matter in New York, was preempted by the terms of SCPA 2210(10) which were designed to afford fiduciaries who serve in multiple capacities with the protection and preclusive effect of

a decree finally settling their account. The court opined that to hold otherwise, would have the chilling effect of "discouraging persons or institutions from functioning in multiple fiduciary capacities, albeit specifically chosen by the testator for their qualifications and expertise."

Accordingly, the court modified the order of the surrogate's court by directing that the objections to the fiduciary's failure to contest its own voluntary accountings as executor of the estate and as trustee of the (A) Trust be dismissed.

Matter of Hunter, New York Law Journal, April 6, 2004, p.18 (App. Div. 2d Dept.).

Joint Bank Accounts

In a contested discovery proceeding instituted by the fiduciary, the court was confronted, inter alia, with the issue regarding ownership of the proceeds in three joint bank accounts. The respondent, joint tenant with the decedent on the accounts, argued she had a survivorship interest in the accounts and that the remaining proceeds at death belonged to her.

The banking institution at which the funds were held was unable to produce the signature cards for the accounts because they were maintained at the World Trade Center and were destroyed in the Sept. 11, 2001 attacks. Nevertheless, the bank acknowledged, and so testified, that on the decedent's date of death the accounts were owned by the decedent and respondent as joint tenants with right of survivorship. Despite this, the fiduciary argued that because the original signature cards could not be located, respondent was not entitled to the presumption afforded by the New York Banking Law

Sec. 675(b). Respondent countered this contention based upon the holding in *Matter of Butta*, 770 NYS2d 343 (1st Dept. 2004), which held that the testimony of a bank employee that the signature cards used by the bank when the subject account was opened contained right of survivorship language constituted sufficient proof that such language appeared on the signature card when the account was opened.

In view thereof, the court concluded that the statutory presumption applied to the three accounts in issue and that the fiduciary failed to rebut that presumption. The court rejected the fiduciary's allegation that the accounts were established as a matter of convenience, concluding that the decedent was a bright, educated man who was in no need to have convenience accounts created on his behalf. Finally, the court held that the petitioner had presented absolutely no evidence to establish fraud, undue influence or lack of capacity sufficient to rebut the statutory presumption.

On a separate note, the court determined that the sum of \$58,264.73, deposited into one of the three joint accounts, a direct deposit checking account, three days after death belonged to the estate rather than the joint account holder. Although respondent claimed that these funds were a gift to her by the decedent of his future earnings, the court concluded that because the decedent retained the right to change the direct deposit scheme during his lifetime, an irrevocable transfer of the earnings had not taken place.

In re Estate of Slavin, NYLJ, April 1, 2004, p. 20 (Surrogate's Court, Queens County, Surrogate Robert L. Nahman).

New Medical Discovery Rules

In a contested proceeding to determine the validity of the surviving spouse's right of election, a respondent/beneficiary of the estate moved for an order compelling the surviving spouse to execute a consent authorizing the deposition of her physician and the production of her medical records. The surviving spouse opposed the motion. Prior to the motion being made, the attorney for the fiduciary served the spouse's physician with a subpoena and subpoena duces tecum requesting his testimony and the production of all medical and/or psychiatric records in his custody pertaining to the surviving spouse. The doctor responded by letter indicating that because of the rules of confidentiality he could not discuss anything about his patient without her consent. Accordingly, he did not appear for his deposition or produce any medical records.

The court noted that the provisions of CPLR 3120 permit a party to serve a subpoena duces tecum to produce and permit inspection of documents in the possession of a non-party without court order, but that recent amendments to CPLR 3122(a) affect discovery of protected health information in the context of a subpoena duces tecum served upon a health care provider. In addition to the statutory provisions of the CPLR, courts have also required that the subpoena comply with the HIPAA rules and the regulations promulgated thereunder.

Finding that the subpoena duces tecum did not comply with these standards, the court determined that the doctor properly ignored it.

The court further found that under circumstances where a patient refuses to

execute a consent or authorization for the release of medical records, the party seeking the records must obtain a court order. The question of whether a court order should be issued necessarily depends on the parties' claim of privilege.

The discovery requested from the doctor pertained to three areas: (1) deposition testimony regarding conversations between the doctor and the decedent; (2) deposition testimony regarding conversations between the doctor and the surviving spouse to the effect that she did not want to see the decedent again; and (3) all medical and psychiatric records pertaining to the doctor's treatment of the surviving spouse.

The court opined that while the physician-patient privilege may be waived by the patient, as in the case where the patient affirmatively places his/her medical condition in issue, the court concluded that a proceeding for the determination of an elective share did not fall into that category. Accordingly, the motion, insofar as it sought the medical records of the surviving spouse and the deposition of the doctor regarding privileged conversations with his patient was denied. On the other hand, the doctor was required to testify regarding all non-privileged conversations with the decedent and with the surviving spouse, and was cautioned that his failure to respond could result in remedies being sought pursuant to CPLR 2308(b).

In re Estate of Carella, NYLJ, April 2, 2004 p. 37 (Surrogate's Court, Nassau County, Surrogate John B. Riordan).

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