

TRUSTS AND ESTATES UPDATE

Expert Analysis

Weathering the Storm: Court System Stays the Course

Two massive storms and a hotly contested election have certainly kept New York in a whirlwind over the past two months, distracting many of us from our routines. Indeed, for some, the onslaught has been daunting. As we are now attempting to regain some normalcy to our days, so, too, is the court system, which continues to promote justice in what has proven to be an all too difficult time for New Yorkers. Indeed, like most New Yorkers, the court system remains resilient and stays the course. Consider the following.

Asbestos Exposure

In a proceeding by the petitioner, the decedent's son, for construction of the decedent's will, respondent, Weitz & Luxemburg, moved to amend its pleadings in order to assert the affirmative defenses of statute of limitations, laches, waiver and estoppel based upon facts discovered after the filing of its original answer. Respondent also moved for summary judgment on the construction of the decedent's will. Both motions were opposed by the petitioner, who maintained that leave to amend would be prejudicial, untimely and meritless, and that triable issues of fact existed precluding summary relief.

The record revealed that the decedent executed a will on Sept. 28, 1988 which provided, inter alia, as follows:

All of my property, both real and personal, tangible and intangible, ...is bequeathed to my spouse, and should my spouse predecease me, then to my children...per stirpes, except that: (a) All jewelry belonging to my

By
**Ilene
Sherwyn
Cooper**



wife is bequeathed to my daughter, and all jewelry belonging to me shall be divided between my three children per stirpes; and (b) any interest that I might have in any ongoing lawsuit, action at law, or in equity or any chose, chose in action or settlement thereof shall be bequeathed to my three children, per stirpes...(Article Third).

The decedent's will was admitted to probate upon the waivers and consents of his surviving spouse and children, and letters testamentary issued on June 20, 1989. Following the decedent's death, respondent instituted a wrongful death action in Supreme Court based upon decedent's asbestos exposure. The action was settled, and the funds were made available for distribution commencing in April 1991. A Supreme Court order entered in 1998 provided that all future settlements be allocated 60 percent of the proceeds to conscious pain and suffering, 20 percent to wrongful death and 20 percent to loss of consortium. Thereafter, for a period of over 20 years, distributions were made by the respondent to the decedent's surviving spouse.

In December 2010, the decedent's son petitioned the court for a construction of his will claiming that the provisions thereof entitled him to a share of the settlement proceeds. An answer to the proceeding was filed and discovery ensued. During the deposition of the decedent's son, testimony was elicited pertaining to the asbestos

litigation. That testimony prompted the motion to amend, albeit after a note of issue had been filed.

The Surrogate's Court, Richmond County, opined that leave to amend should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit, or unless prejudice or surprise to the opposing party results from the delay. In view thereof, the court held that respondent's affirmative defenses could potentially be dispositive of the construction proceeding, and therefore were not without merit.

Moreover, the court found that the affirmative defenses were not waived and could be included in an amended answer. Further, the court determined that the petitioner had not met his burden in demonstrating some change in position or hindrance in the preparation of his case. Finally, although respondent's motion had been filed after the filing of a note of issue, the court concluded there was no hard and fast rule regarding filing a note of issue and amending a pleading.

In support of its motion for summary judgment, respondent claimed that the provisions of the decedent's will clearly intended that his wife be the beneficiary of his entire estate, including the proceeds of any litigation, and that the interest of the decedent's son in those proceeds was only triggered in the event his wife predeceased him. Inasmuch as that contingency never occurred, the respondent maintained that the settlement proceeds had been properly distributed. The petitioner, on the other hand, argued that the decedent's will did not create a contin-

The court in 'In re Pinto' concluded there was no hard and fast rule regarding filing a note of issue and amending a pleading.

C. EVAN STEWART is a partner in the New York office of Zuckerman Spaeder. He is an adjunct professor at Fordham University School of Law and a visiting professor at Cornell University.

gency, but rather an exception to his general dispositive plan, and therefore, his entitlement to the settlement proceeds was not dependent on the decedent's spouse predeceasing him.

Based upon the facts and circumstances, the court held that the testator's intent regarding the provisions of his will was not clear and required a hearing at which extrinsic evidence could be considered to determine the issue. Although the respondent argued that the construction proceeding was barred by the statute of limitations, laches, estoppel and waiver, the court concluded that there were issues of fact regarding the petitioner's understanding of his rights as a distributee, and more specifically, his entitlement to a share in the settlement proceeds.

Accordingly, respondent's motion to amend its pleadings was granted and its motion for summary judgment was denied.

***In re Pinto*, NYLJ, Nov. 15, 2012, at 21 (Sur. Ct. Richmond County).**

Attorney Fees Denied

Before the Surrogate's Court, Suffolk County, in *In re Adams*, was a contested accounting in which the parties settled their differences and agreed, inter alia, to submit the issue of whether respondent's attorney fees should be an expense of the estate.

The court noted that generally, a party is not entitled to recover attorney fees from an opposing party as the same are considered incidents of litigation. Nevertheless, an exception to the general rule exists when it is demonstrated that the services performed by counsel benefitted the estate as a whole, not merely the objectant. To prevail, the objectant must establish the benefit inuring to the estate by clear and convincing evidence.

The record revealed that the parties were engaged in settlement discussions prior to the commencement of the litigation. As such, the court concluded that while the litigation may have propelled those discussions to fruition, it did not benefit the estate as a whole. Specifically, the court found that the estate was not enlarged in any significant way, but rather, the litigation diminished the estate by the legal fees incurred in the defense of the action. While the court noted that fees could be awarded in a proper case where a matter is settled prior to trial, there had been no factual showing of any wrongdoing or conversion of assets by the fiduciary.

***In re Adams*, NYLJ, Nov. 27, 2012, at 35 (Sur. Ct. Suffolk County).**

Claim Against Estate

In *Matter of Eshaghian*, the Appellate Division, Second Department, affirmed an order of the Surrogate's Court, Queens County (Kelly,

S.), which denied petitioners' motion for summary judgment dismissing a claim against the estate. In support of their motion, the petitioners alleged that a certain written agreement forming the basis of the claim was not genuine or was procured through improper means and was void, or was legally unenforceable.

The court found that petitioners impermissibly attempted to establish their entitlement to judgment as a matter of law principally pointing to deficiencies in the respondent's proof. Further, the court found that petitioners failed to establish, as a matter of law, that a copy of the subject agreement would be inadmissible at trial under the best evidence rule. Finally, the court concluded that none of the other evidence submitted by the petitioners in support of their motion established that the subject agreement was not genuine, was procured by improper means, was void and/or was unenforceable. Thus, the court held that the Surrogate's Court properly denied the petitioners' motion, regardless of the sufficiency of the opposing papers.

***Matter of Eshaghian*, NYLJ, Nov. 16, 2012, at 27 (2d Dept.).**

Sealing of Court File Denied

Before the court in *In re Rappa* was an ex parte application for an order confirming the confidentiality condition of a Release and Stipulation to Dismiss, and sealing the records of the estate, including any proceeding to compromise the cause of action for the decedent's wrongful death.

In support of the application, the petitioners asserted that the cause of action for wrongful death had been resolved, and that the confidentiality provisions of the release agreement were a "vital component" of the settlement.

The Surrogate's Court, Kings County, opined that the sealing of court records can only be ordered upon a showing of good cause. Such a determination must be assessed against the backdrop of the broad presumption that the public is entitled to access to judicial proceedings and court records. Accordingly, because confidentiality is the exception and not the rule, a party seeking an order to seal bears the burden of demonstrating compelling circumstances which justify restricting the public's right to open court proceedings.

Considered within this context, the court found no basis for sealing the court record. The court found that the petitioners had not demonstrated that a failure to seal the court record would inhibit the resolution of concurrently pending or related proceedings, nor had petitioners shown that the parties' reliance on the confidentiality of the file had induced changes of their position, and was essential to the settlement. Although petitioners maintained

that certain aspects of the terms of settlement could disclose some unspecified strategic path to defendants in future actions, the court found this claim insufficient to sustain sealing of the record. Therefore, the petitioners' application was denied.

***In re Rappa*, NYLJ, Oct. 23, 2012, at 23 (Sur. Ct. Kings County).**

Addendum

My last article addressed, in part, the decision in *In re Lohausen*, NYLJ, July 20, 2012, at 38, which held that the Surrogate's Court had jurisdiction to fix legal fees, pursuant to SCPA 2110, in a proceeding instituted by the sole distributee, residuary beneficiary and executor of the decedent's estate, who claimed, inter alia, that counsel had taken advantage of her in connection with their fee arrangement.

Since the writing of that article, it has been brought to my attention that the Surrogate's Court, New York County, had also addressed the issue in *In re Weiss*, NYLJ, July 13, 2009, at 30 (Sur. Ct. New York County). Before the court in *Weiss* was an accounting proceeding and an application pursuant to SCPA 2110 by one of the law firms retained by the fiduciary for the fixation of the unpaid balance of its fees sought pursuant to its retainer agreement. By virtue of a stipulation of settlement, the accounting was uncontested. Nevertheless, the fiduciary requested the court to review the legal fees she paid to three law firms that had represented her over the course of the estate administration. In addition, she opposed the SCPA 2110 application.

The court declined to exercise jurisdiction over the matter concluding that it lacked the authority to review legal fees that were voluntarily paid and charged against the fiduciary's individual interest in the estate. In reaching this result, the court relied, in part, on *Matter of Rosenberg*, 263 NY 357, which held that the court's power to fix fees is lodged in its duty to protect an estate, rather than to supervise personal contracts made by an individual who is not otherwise a ward of the court. Further, the court held that while it had the authority to fix the reasonableness of legal fees even despite the existence of a retainer between the fiduciary and her attorney, absent fraud, mistake or overreaching, it would decline such review to the extent the amounts owed under the retainer affected the fiduciary's own share of the estate. The court opined that under such circumstances, the dispute was one between living persons and did not affect the administration of a decedent's estate.