

## TRUSTS AND ESTATES UPDATE

## Expert Analysis

# A Little Bit of This And a Little Bit of That

**T**his month's column brings the variety that has typified decisions over the past several months. From issues involving domicile, summary judgment, and claims against an estate, April's article is a little bit of this and a little bit of that. Consider the following:

### Validity of Claim and Apportionment of Taxes Examined

In *In re Fisher*, N.Y.L.J., Dec. 11, 2018, at 25 (Sur. Ct., Westchester County), the petitioners, two of the decedent's five children, moved before the Surrogate's Court, Westchester County, for partial summary judgment determining that they were entitled to 1/3 of the decedent's net estate and his coin collection, and that they were not liable for their aliquot share of estate taxes. The motion was opposed by the executors of the estate, who cross-moved for partial summary judgment denying petitioners' claim and finding that the petitioners were liable for the estate taxes attributable to their recovery, if any.

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The petitioners' claim was predicated on the terms of a Separation Agreement entered by the decedent and his first wife prior to their divorce. Specifically, the petitioners alleged that the terms of that Agreement required the decedent to bequeath them 1/3 of his net estate, as defined in the Agreement, as well as his coin collection. The Agreement further provided that in the event the decedent failed to comply with its terms, the obligations thereunder would be a first charge and lien against his estate and its assets.

The decedent died survived by his second wife, three children of his first marriage, two of whom were the petitioners, and two children of his second marriage. Pursuant to the pertinent provisions of his will, the decedent bequeathed \$2,000,000 to each of the petitioners, and directed that the balance of his estate be paid to two marital trusts for the benefit

of his spouse during her lifetime, and upon her death, outright and free of trust, in equal shares per stirpes, to the petitioners' sibling, and the two children of his second marriage. Further, Article First of the instrument contained a tax apportionment clause requiring that a beneficiary of the estate, other than a marital or charitable beneficiary, contribute his or her pro rata share to the estate tax liability. The nominated and appointed executors of the estate were the decedent's surviving spouse, his three children/remaindermen of the residuary trusts under his will, and a friend.

In 'In re Fisher', as to the issue of estate tax apportionment, the court concluded that since the petitioners' claim was lodged in a promise to make a testamentary disposition, any recovery thereunder was subject to their pro rata share of estate tax.

Following probate of the decedent's will, the petitioner's sibling executed a waiver of his interest under the Separation Agreement, but subsequently withdrew and retracted that waiver.

Although the petitioners claimed that the waiver was irrevocable, the court found otherwise, and determined that their sibling was entitled to share in any recovery derived by the petitioners pursuant to the terms of the Separation Agreement.

In support of their motion for summary relief, the petitioners alleged that the Separation Agreement was a valid contract, which the decedent breached by failing to provide them with 1/3 of his net estate, as well as his coin collection. To this extent, they maintained that the residuary provision in the will to their sibling was insufficient to satisfy the decedent's obligations to them, and moreover, the will made no mention of the decedent's coins.

In opposition to the motion, the executors alleged, inter alia, that nothing in the Separation Agreement required that the decedent provide equally for the three children of his first marriage, and that as such, the bequest of cash and the remainder interest in the marital trusts fully satisfied his obligations thereunder. Further, the executors maintained that the provision in the Agreement to make a testamentary provision was unenforceable for lack of consideration.

In this latter regard, the court found the executors argument to be without merit. The court held that the terms of the Agreement specifically provided that it was "in consideration of the promises and of the mutual covenants and undertakings set forth [t]herein", regardless of whether in hindsight, adequate consideration was exchanged. Further, the court

found that the decedent's obligation, pursuant to the terms of the Agreement, to keep in full force and effect a will that made a certain bequest to his children constituted sufficient consideration for his commitment to bequeath them 1/3 of his estate.

Turning to the issue of whether the decedent breached the Agreement, the court noted that this necessarily required it to determine (1) whether the decedent was required to make an outright bequest of one-third of his net estate to his children, or whether he could satisfy that requirement by making one or more of them remaindermen of a trust; and (2) whether the decedent was required, by the terms of the Separation Agreement, to bequeath one-third of his net estate equally to his children.

With respect to the first question posed, the court found that there was nothing in the Separation Agreement that required the decedent to make an outright bequest of his estate to his children, and that an interest as a trust remainderperson would suffice. Moreover, the court held that the Separation Agreement was silent as to whether the decedent was required to bequeath 1/3 of his estate equally to his three children. In view thereof, the court denied that branch of the petitioners' motion for summary judgment determining that the decedent breached the Separation Agreement to that extent.

However, the court denied the executors' motion for summary judgment as well, concluding that they had failed to establish a prima facie case that the testamentary provisions for the decedent's children amounted

to 1/3 of his net estate. The court held that the determination of that issue would have to await a final accounting. Further, while the court held that the decedent had breached his Agreement to bequeath his coin collection to his children, it found that a question of fact existed as to the composition of the collection and the division of same among the petitioners and their sibling.

Finally, as to the issue of estate tax apportionment, the court concluded that since the petitioners' claim was lodged in a promise to make a testamentary disposition, any recovery thereunder was subject to their pro rata share of estate tax.

### Hearing Directed on the Issue of Domicile

In *In re Grunwald*, N.Y.L.J., Jan. 28, 2019, at 33 (Sur. Ct., Richmond County), the Surrogate's Court, Richmond County, was confronted with the issue of the decedent's domicile at death. An instrument purporting to be the will of the decedent was filed with the Surrogate's Court, Richmond County, by her son, who was the nominated executor. Subsequently, the decedent's granddaughter, who was a child of a predeceased son, filed an Order to Show Cause requesting that the matter be transferred to Kings County Surrogate's Court, pursuant to the provisions of SCPA 206 (1)(a) and SCPA 206 (3). More specifically, the movant alleged that the decedent had died domiciled in Poland, and as such, the proper venue for proceedings related to her will was the county where she left property. In opposition to the application, the

petitioner alleged that the decedent had been a domiciliary of Richmond County for over two decades prior to her death.

The court opined that while every Surrogate's Court has subject matter jurisdiction over the estates of domiciliary and non-domiciliary decedents who left property in New York, the proper venue of a proceeding related to a domiciliary decedent is the place of his/her domicile. To this extent, while a person can have multiple homes, there can only be one domicile. Under such circumstances, the issue of domicile is a mixed question of law and fact based upon such circumstances as where the decedent voted, registered his or her car, or filed income tax returns.

When there are conflicting claims as to the domicile of the decedent at death, a hearing may be required to resolve the issue. The burden of proof rests with the party alleging a change of domicile by clear and convincing evidence.

In view of the foregoing, the court directed that a hearing be held to determine whether the decedent died a domiciliary or non-domiciliary of New York at death, and, upon such determination, the proper venue for proceedings related to her estate.

### **Summary Judgment Granted/ Objections to Probate Dismissed**

Before the Surrogate's Court, New York County in *In re Levick*, N.Y.L.J., Nov. 9, 2018, at 23 (Sur. Ct., New York County), was a contested probate proceeding, inter alia, in which the proponent moved for summary judgment dismissing the objections of the

decedent's son alleging lack of due execution and undue influence. The decedent, a real estate attorney, was survived by the proponent, who was his surviving spouse, and two adult children from a prior marriage.

The record revealed that the propounded will was executed by the decedent shortly after being diagnosed with pancreatic cancer. The instrument provided cash bequests to his two children, and created a

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In 'In re Levick', the proponent's motion for summary judgment was granted, and the objections to probate of the propounded will were dismissed.

trust for the benefit of his spouse which granted her the power to appoint the remainder thereof to a class limited to her children and their issue. Further, the will contained an in terrorem clause. In comparison to this instrument, the decedent's penultimate will provided his children with a 50 percent remainder interest of a credit shelter trust created for the benefit of his spouse.

In support of her motion for summary judgment, the proponent submitted the testimony of the attesting witnesses and the attorney-draftsperson of the instrument, who oversaw its execution, all of which established that the requisite statutory formalities of due execution had been satisfied. Based upon the foregoing, as well as the presumption of regularity that arises from an attorney-supervised execution, the court determined

that the proponent had established a prima facie case of due execution. The court found that the objectant failed to submit evidence to demonstrate any irregularity in the execution ceremony.

With respect to the issue of undue influence, the objectant relied on the fact that the proponent attended the initial meeting between the attorney-draftsperson and the decedent at their home, and may have commented on the will provisions. Further, the objectant referenced some discrepancies between the attorney-draftsperson's notes and the will provisions, and alleged that the proponent accompanied the decedent to counsel's office on the date the will was executed. Nevertheless, the court held that the evidence was insufficient to raise questions of fact, finding that it provided no basis from which to conclude that undue influence was actually exercised. Indeed, while the objectant alleged that the proponent or her son had stood in a confidential relationship with the decedent, the court determined that he had failed to provide any evidence that the decedent had reposed his trust in them to handle his affairs.

Accordingly, the proponent's motion for summary judgment was granted, and the objections to probate of the propounded will were dismissed.