

## TRUSTS AND ESTATES UPDATE

## Expert Analysis

# The Inside Pages: Two Recent Decisions Worth Noting

The past few months have seen the inside pages of the law journal abound with decisions of interest. Indeed, while cover stories surely make their mark, opinions under cover are no less significant, and are worthy of reporting. The decisions in *In re Berk* and *In re Smith* are cases in point.

### Wrongful Conduct Results In Forfeiture of Elective Share

In *In re Berk*, NYLJ, July 2, 2018, at 31 (Sur. Ct. Kings County), the Surrogate's Court, Kings County, held, after trial, that by virtue of her wrongdoing, the decedent's surviving spouse had forfeited her right of election against his estate. Prior to this result, the Berk estate had been the subject of two opinions by the Appellate Division, Second Department. In the first,

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the court reversed an order of the Surrogate's Court, Kings County (Johnson, S.) granting summary judgment to the petitioner, finding that there was an issue of fact as to whether the petitioner had forfeited her right of election by her alleged wrongdoing; that is, by marrying the decedent knowing that he was mentally incapable of consenting to a marriage for the purpose of obtaining pecuniary benefits from his estate. The court further ruled that the appellants' counterclaims alleging undue influence were improperly dismissed. In the second opinion, the court modified an order of the same court by adding as an issue of fact to be tried the question of whether the petitioner, the decedent's surviving spouse, exercised undue influence

upon the decedent to induce him to marry her for the purpose of obtaining pecuniary benefits from his estate, and replacing so much of the order, as imposed the burden of proof on appellants, the executors of the estate, by clear and convincing evidence, with a provision that placed the burden of proof on appellants by a preponderance of the credible evidence.

At the trial of the matter that followed, the Surrogate's Court framed three issues to be heard, lodged principally in whether the decedent possessed the requisite mental capacity to marry the petitioner, or alternatively, whether the petitioner unduly influenced the decedent to marry her for her own pecuniary benefit.

On the issue of capacity, the court found the record replete with credible evidence that the decedent suffered from both physical and mental impairments, resulting in several hospitalizations, and manifested significant hearing loss, and periods of confusion. Additionally, the

court noted that on the day prior to his purported marriage to the petitioner, the decedent was unable to accurately complete the marriage license application, and made critical mistakes in the listing of his address, his place of birth, and his mother's maiden name. Moreover, the court noted that in a photograph taken on his wedding day, the decedent appeared dazed and confused.

The court opined that the standard of capacity for marriage is whether each party to the contract was able to understand the nature, effect, and consequences of his or her actions. Within this context, and based on the "plethora" of credible evidence presented, the court concluded that the decedent was incapable of understanding or consenting to his marriage to the petitioner, and that the petitioner was well aware of his incapacity at the time the marriage was entered. Indeed, in view of the fact that the petitioner was the decedent's primary caretaker, and had ample opportunity to observe him in his daily routine, as well as the fact that she had experience in the medical field, the court found "it impossible to believe that the petitioner did not know of the decedent's mental incapacity."

Moreover, after considering the indicia of undue influence, including the decedent's physical and mental condition, the secrecy in which the marriage was entered, the petitioner's control over the decedent's

daily needs, and her direction over his lifetime affairs, as evidenced by handwritten notes of the decedent that apparently the petitioner had dictated, the court held that the petitioner had the motive and opportunity to influence the decedent's actions, and that she actually exercised undue influence over him in procuring their marriage.

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Relying on the opinion by the Appellate Division, Second Department, in *Campbell v. Thomas*, 73 AD3d 103 (2d Dept 2010), the court observed that where a marriage has been wrongfully procured, the statutory right of election which would have emanated from such marriage will be forfeited. Accordingly, based on the record, the court denied petitioner's request for an elective share of the decedent's estate.

### **Fiduciary Found Guilty of Self-Dealing and Surcharged**

Before the Surrogate's Court, Albany County, in *In re Smith*, was a motion by the petitioner, the public

administrator, as temporary administrator of the estate, for, inter alia, summary judgment finding that the respondent engaged in unlawful self-dealing.

The decedent died, testate, on May 19, 2003. The principal asset of his estate at death consisted of a 90 percent interest in a closely held company, Quailman Investors, Inc. (Quailman Investors). The remaining 10 percent interest was owned by the respondent. Pursuant to the pertinent provisions of his will, the decedent directed that 70 percent of his interest in Quailman Investors be held, in trust, together with the remainder of his estate, for the benefit of a group of individuals, some of whom were minors. The remaining 20 percent of the decedent's interest in the company was bequeathed to the respondent (15 percent) and to another named individual (5 percent). Preliminary letters testamentary were issued to respondent, who served as preliminary executor of the estate until the will was admitted to probate, at which time he received letters testamentary. Although the respondent was also the nominated trustee of the trust created under the instrument, he never received letters of trusteeship.

Thereafter, in a proceeding instituted by the respondent to terminate the trust as uneconomical, the guardian ad litem, appointed by the court to represent the interests of

the minor beneficiaries, revealed a corporate resolution of Quailman Investors, which had been adopted by the board of directors, and signed by the respondent, as secretary, authorizing the respondent, without prior court approval, to pay himself the sum of \$725,453, consisting of \$435,000 in deferred compensation for the years 1973 through 2002, and a salary of \$290,453 for the year 2003. In addition, the report of the guardian ad litem noted that the net value of real estate sales by the company from October 2003 through May 2004 amounted to approximately \$960,181. Notably, at the time of each of these transactions, the respondent remained a minority shareholder of 10 percent of the company, and was acting as preliminary executor of the estate, through which he controlled the remaining 90 percent interest held by the decedent.

The respondent was subsequently removed as executor of the estate due to his failure to comply with numerous court orders directing him to account, and the public administrator was appointed temporary administrator in his place and stead. Upon his appointment, the public administrator requested information from the respondent pertinent to the valuation of Quailman Investors, and instituted a discovery proceeding against him seeking recovery of

\$960,184, i.e., the alleged profits derived from the sale of assets by Quailman Investors, and subsequently paid by respondent to himself. After a series of motions and appeals, the public administrator moved for summary relief.

The court observed that one of the most sacred duties of a fiduciary is to avoid self-dealing. Once self-dealing is disclosed, the “no further inquiry

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rule” is triggered, which will result in the transaction being set aside regardless of its fairness. The court further noted that in cases where a fiduciary places himself in a position where his interest is in conflict with his duty of loyalty, the fiduciary may be surcharged.

Based on the foregoing, and the undisputed record reflecting the improper payments the respondent made to himself, without prior court authorization, at a time when he was serving as preliminary executor of the estate, and was in full control of Quailman Investors, the court held that his conduct was an act of self-dealing in violation of his fiduciary duty of undivided

loyalty to the estate beneficiaries. As such, the court set aside the payments, and directed the respondent to restore the sum of \$725,453 to the estate.

In addition, the record revealed that the respondent, also, without prior court approval, paid himself a personal claim he had against the estate. As in the case of self-dealing, when a fiduciary pays himself a claim without leave of court, he subjects himself to a surcharge, which can include, among other things, costs, attorney fees and interest. Noting that attorney fees may generally not be collected by a prevailing litigant in the absence of statute or agreement, or where the losing party has not acted maliciously or in bad faith, the court, nevertheless, found based on respondent’s conduct, that an award of attorney fees, to be paid by respondent personally, was warranted. Accordingly, the court scheduled a hearing to determine the surcharge and fees in connection with the improper payment of the claim.