

## TRUSTS AND ESTATES UPDATE

# From Season to Season, Decisions Abound for Trusts and Estates Field

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Monday, June 5, 2023

**A**s the summer months approach, and the winter and spring seasons leave their trail behind, we consider the many instructive opinions rendered by the Surrogate and Appellate courts affecting the field of trusts and estates. Discussion of some of these opinions follows.

## Appellate Division Affirms Respondent's Lack of Standing Based on In Terrorem Clause

In *In re Biondo*, the Appellate Division affirmed an order of the Surrogate's Court, dismissing the objections to the accounting of the preliminary executor for lack of standing. The record revealed that pursuant to the decedent's will, the assets of his estate were to be distributed in accordance with an inter vivos trust agreement to each of his two sons, one of whom was the petitioner and one of whom was the objectant. The trust agreement contained an in terrorem clause providing that the "gifts in the trust" were made on the condition that none of the beneficiaries "shall oppose or contest the validity of the trust in any manner."

The petitioner, as preliminary executor of the estate, commenced a proceeding for the judicial settlement of his account, and his brother filed objections to the petition. Thereafter, the petitioner moved to



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dismiss the objections for lack of standing, arguing that the objectant had forfeited his interest by contesting the validity of the trust in violation of the trust's in terrorem clause. The Surrogate's Court granted the motion, and the objectant appealed.

The court found that during the probate proceeding, objectant's counsel made an oral application to amend the objections to probate so as to add objections to the trust, which application was denied. The court held that by making such request the objectant contested the validity of the trust in violation of the provisions of the in terrorem clause which prohibited a beneficiary from contesting the trust "in any manner." See *In re Biondo*, 2023 N.Y. App. Div. LEXIS 1808 (2d Dep't 2023).

## **Relief From Default in Exercising Right Of Election Granted**

Before the Surrogate's Court, Queens County, in *In re Yoon*, was a motion by the petitioner for summary judgment granting him an extension of time to file a notice of election against the decedent's estate, pursuant to EPTL 5-1-1-A(d)(2). The record reflected that the decedent died, testate, on Oct. 27, 2020, survived by her spouse, and two children. The pertinent provisions of her will devised each child one of two parcels of realty she owned at death, subject to a life estate in one of the parcels for the benefit of her spouse, and devised and bequeathed the residue of her estate in equal shares to her spouse and children.

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The will was admitted to probate and letters testamentary issued to the named executor thereunder on June 30, 2021. Although a written notice of election should have been filed within six months from the issuance of said letters, i.e., Dec. 30, 2021, the petitioner defaulted in doing so. Accordingly, on Feb. 16, 2022, the petitioner filed an application with the court requesting relief from her default. Nevertheless, the petition was not processed through NYSCEF until March 2022, after which time, the petitioner was informed by the court on May 11, 2022, that an amended petition was required. The amended petition was filed the following day.

In view of the foregoing, and more particularly, the fact that the petitioner's application was filed within twelve months from the issuance of letters, and no more than two years from the decedent's date of death, the court concluded that the requested relief was timely. Moreover, with respect to the issue of reasonable cause, the court found the default to be minimal, that no prejudice resulted from the delay, and that a portion of the delay could be ascribed to law office failure and the court's own inability to more timely process the application.

The court found the respondent's opposition to petitioner's application to be unavailing. More specifically, despite respondent's contentions that the decedent left petitioner with sufficient life insurance and testamentary assets, that he was aware of his right of election and that his execution of a waiver in the probate proceeding should preclude him from the requested relief, the court concluded that a waiver in the probate proceeding did not constitute a waiver of the elective share, and the fact that the petitioner may have received sufficient assets or been aware of his elective share were not issues to be decided upon an application for relief from a default, but rather in a proceeding for the judicial settlement of the fiduciary's account, or in a separate proceeding to determine the issue. Accordingly, petitioner's motion was granted. See *In re Yoon*, 2023 NY Slip Op 50144 (Sur. Ct., Queens County).

## **Admissibility of Prenuptial Agreement Considered on the Issue of Standing**

Before the Surrogate's Court, Kings County, in *In re Kevelson*, was a contested probate proceeding in which the court scheduled a hearing to determine the validity of a prenuptial agreement in which the objectant, the decedent's surviving spouse, had purportedly waived her rights in intestacy, to elect

against the will, and to serve as a fiduciary of the decedent's estate.

On the day of the hearing, the proponent produced the original agreement, rather than a copy that had been previously produced, and the objectant moved in limine for its exclusion from evidence, on the grounds that it was revoked and unenforceable.

The court opined that a prenuptial agreement is presumptively valid, and therefore, the burden rests with the challenging party, in this case, the surviving spouse, to come forward with proof that it was rescinded and/or revoked. Upon review of pertinent case law, the court concluded that the objectant's claim of rescission failed. Moreover,

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The court found no basis for objectant's claim that the petitioner stood in a confidential relationship with the decedent, opining that even if it did exist, the circumstances surrounding the rationality and voluntariness of the propounded instrument was apparent throughout the record.

contrary to objectant's contentions, the court found that pursuant to the plain language of the agreement, a party's failure to fulfill its terms did not result in its invalidity. Further, citing the provisions of EPTL 5-1.1-A (e)(3), the court noted that the agreement did not fail for lack of consideration.

Additionally, despite the objectant's contentions that the agreement was orally revoked, the court held that the provisions of the agreement required that any modification of its terms be in writing.

The court found the objectant's remaining arguments unavailing, and thus held that the

proponent could offer the prenuptial agreement into evidence, subject to its authentication.

See *In re Kevelson*, 2023 NYLJ LEXIS 884 (Sur. Ct. Kings County).

### **Summary Judgment Admitting Will to Probate Granted to Petitioner**

In a case in which the petitioner/attorney was a beneficiary under the propounded will, the court, in *In re Couake*, granted summary judgment dismissing the objections to probate. The decedent died at the age of 61 leaving an attorney-drafted will and the objectant, her brother, as her sole distributee. The instrument made a number of specific bequests, and devised and bequeathed the residue of the decedent's estate to her first cousins, her Rabbis, and the petitioner, who, though an attorney, was, notably, not the draftsman. Additionally, the will specifically made no provision for the decedent's brother, or his issue, stating that "for many reasons, including but not limited to his unkind and destructive actions following my mother's demise ... under no circumstances shall he or his issue inherit anything from my estate."

Relative to the foregoing provision, the record revealed that the decedent and her brother were adversaries in a hotly contested litigation spanning years pertaining to their mother's estate. The end-result was a non-existent relationship between them following the resolution of the matter, so much so that the objectant testified that he did not expect to inherit anything personally from the decedent's estate.

Notwithstanding the foregoing, objections were filed to the decedent's will alleging lack of due execution, lack of testamentary capacity, and fraud and undue influence practiced upon the decedent by the petitioner. At the conclusion of discovery, the petitioner moved for summary judgment dismissing the objections, and admitting

the propounded instrument to probate, and the objectant opposed.

With respect to the issue of due execution, the court noted that the instrument included an attestation clause and a contemporaneous self-proving affidavit, and its' execution was supervised by an attorney, thereby creating a presumption of compliance with the statutory formalities. Additionally, aside from the presumptions, the SCPA 1404 examinations of the attorney-draftsperson and the attesting witnesses buttressed the documentary evidence of compliance with the provisions of EPTL 3-2.1. Based on this proof, the court found that the petitioner had established a prima facie that the will was duly executed. The court rejected the objectant's technical arguments, and found, otherwise, that he had failed to raise any issues of fact regarding the execution of the instrument.

As to the issue of testamentary capacity, the court also found that the self-proving affidavit satisfied the petitioner's initial burden. Again, this was buttressed by the testimony during the course of the SCPA 1404 examinations, which demonstrated that the decedent made herself clear as to her wishes, as well as her explicit written communications to the attorney-draftsperson. The court found the objectant's opposition, which included portions of the medical records regarding the decedent's condition seven days prior to the execution of the will, and contained his observations of the decedent, and his opinion that she was perhaps bipolar/schizophrenic, to be unsupported by any foundational evidence, and therefore unavailing.

In support of his undue influence claim, the objectant maintained that the propounded will was contrary to the decedent's long-standing plan that her estate pass by intestacy, which plan, he claimed, was thwarted by the petitioner. The court found objectant's argument to border on "fantasy," particularly given the undisputed evidence of the antagonistic relationship between the decedent. The objectant's claim that the decedent did not have the benefit of independent counsel in connection with the will was also found without merit, given the record which revealed, inter alia, that the decedent independently selected the attorney-draftsperson, who testified that the will was prepared pursuant to telephone conversations with the decedent and multiple emails from her containing lengthy directives regarding its provisions, that it was the decedent who drew the petitioner into the process, and placed him into communications with the draftsperson, as well as asked him his opinion of counsel's work product, that the instrument was executed outside of petitioner's presence, and that it was procured and paid for by the decedent. Further, the court found no basis for objectant's claim that the petitioner stood in a confidential relationship with the decedent, opining that even if it did exist, the circumstances surrounding the rationality and voluntariness of the propounded instrument was apparent throughout the record.

Finally, the court noted that the objectant had not opposed petitioner's arguments that the instrument had not been procured by fraud. See *In re Chouake*, 2023 NYLJ LEXIS 952 (Sur. Ct. Queens County).