

TRUSTS AND ESTATES UPDATE

Mid-Year Developments: Stipulations Of Settlements, Situs, Digital Assets

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The spring season brought with it decisions from around the state that were of interest to Surrogate's Court practice. Addressed to such issues as stipulations of settlement, transfer of situs, and digital assets, these opinions are discussed below.

Enforcement of Settlement Agreement

Before the Appellate Division, Third Department, in *Matter of Eckert*, was an appeal from an order of the Surrogate's Court, Broome County, which, inter alia, granted petitioner's motion to enforce a settlement agreement.

The decedent died, intestate, survived by his wife and daughter. Approximately one and a half years after his death, his daughter petitioned for letters of administration with respect to his estate, and his wife cross-petitioned seeking the same relief. Thereafter, the decedent's daughter commenced a proceeding in the Surrogate's Court requesting an order declaring the decedent's marriage null and void on the grounds of incapacity, and an action in the Supreme Court against the wife alleging conversion, undue influence, mental incapacity, unjust enrichment, and constructive trust in relation to certain retirement accounts. The action was transferred to Surrogate's Court and referred to ADR.

The day after the ADR session, the daughter's counsel sent counsel for the wife an email to follow up on the settlement reached during mediation. Specifically, the email set forth an outline of the terms of the alleged agreement, which included payment

of \$515,000 by the wife to the daughter, and indicated that counsel would prepare a draft of the agreement. The following day, the wife's counsel responded by requesting that the timing of payment by the wife be left open, and that additional terms be included in the agreement. A week later, a draft of the agreement was sent to the wife's counsel, who responded by asserting that the wife could not settle on terms that would effectively require that she liquidate the retirement accounts, due to the "enormous" tax consequences of doing so. Soon after receiving this response, the daughter moved to enforce the settlement that she claimed was memorialized in the parties' email exchange. The wife opposed. Following argument on the motion, the Surrogate's Court granted the daughter's motion and determined that the parties had entered into a binding settlement. The wife appealed.



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The Third Department reversed, opining that while stipulations of settlement are judicially favored, to form a binding settlement “there must be a meeting of the minds, and a manifestation of mutual assent that is sufficiently definite to assure that the parties are truly in agreement with respect to all the material terms.” Importantly, the court noted, that to ensure that an agreement is enforceable, its terms must either be placed on the record in open court, reduced to a court order and entered, or reduced to a writing subscribed by the parties or their attorneys.

Within this context, the court found that the Surrogate’s Court erred in finding that a binding agreement was formed, as the parties did not consent to all the material terms. The court rejected the daughter’s argument that the initial email between counsel set forth all the material terms agreed to during the ADR session, finding that verbal out of court agreements are insufficient to form the basis for a stipulation of settlement. Indeed, following the initial email, the wife’s counsel responded with additional terms, and requested that the timing of payment be left open.

On this basis, the court concluded that the wife’s counsel had not assented to the material terms of the agreement outlined in the initial email or in the subsequent draft settlement agreement, and held that a binding agreement between the parties had never been reached.

Matter of Eckert, 2023 WL 4002660 (App. Div. 3d Dep’t, 2023).

Transfer of Trust Situs

In *Matter of the Article VI Trust*, the Surrogate’s Court, Erie County, was confronted with an uncontested application by the testamentary trustee under the decedent’s Will to transfer situs of the trust to South Dakota.

The record revealed that pursuant to his will, the decedent divided his residuary estate into separate trusts for the benefit of each child of his brother Walter, of which there were five, living at the time of the decedent’s death. Notably, these beneficiaries resided in New York, Massachusetts and Florida. In pertinent part, the trust terms provided that the net income of each such trust was to be paid or applied for the support, education and main-

tenance of the child until he/she attained the age of 21, at which time all the net income of such child’s trust was to be paid to the child in quarter-annual installments for life. Upon a child’s death, the remaining principal of his/her trust was to be transferred and paid over to the then-living issue of such child per stirpes, or if none, to such child’s siblings, per stirpes.

In connection with the application, the court noted that although certain of the current income beneficiaries considered requesting that the trust be converted to a unitrust, they expressed concern that a 4% mandatory distribution of income would be excessive based on their current needs, and would be potentially detrimental to the trust remainderpersons. As such, the income beneficiaries suggested that a 3% income distribution would be more appropriate, and in accord with the testator’s intent

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as purportedly expressed in other provisions of his will.

Consequently, the trustee of the trust petitioned for a transfer of the trust situs to the state of South Dakota, alleging that the state offered more flexible unitrust rules than New York by authorizing a unitrust distribution of 3%-5% annually.

The court opined that a court has the authority to change the situs of a trust subject to its jurisdiction, if the trust situs specifically authorizes a change in situs, or does not specifically prohibit it, provided however, that the requested change is beneficial to the trust. The court noted that it was without authority to grant a requested change in situs simply on consent of the parties.

Within this context, the court observed that no compelling reason to transfer the situs of the trust had been

advanced by the petitioner. There was no asserted family connection to the transferee state, and most of the trust beneficiaries were New York based. Moreover, the court reasoned that there was nothing in the papers that indicated that the courts of South Dakota would permit conversion of the subject trust to a unitrust at a more preferable rate of return than New York. Further, and as an aside without adjudicating the issue, the court pointed to the in terrorem clause of the Will directing a forfeiture of all benefits provided to a beneficiary who sought to prevent any provision thereof from being carried out according to its terms.

Accordingly, under all the circumstances, the court denied the petition and the request to transfer the trust situs.

The petitioner's request to reset the password in the account, change the affiliated email and password was also denied without prejudice subject to petitioner identifying the nature and extent of the information that such actions would disclose, as well as demonstrating the need to take such actions.

Matter of the Article VI Trust, 78 Misc3d 1240(A) (Sur. Ct. Erie County 2023).

Digital Assets

Before the Surrogate's Court, New York County, in *In re Moran*, was an uncontested application by the executor of the decedent's estate for an order directing Apple, Inc. to assist in the recovery of the decedent's personal digital assets or data, and more specifically, to provide access to the decedent's personal information, including music, photographs, text messages, email correspondence and

password. Additionally, the petitioner requested a court order authorizing her to reset the decedent's password, to change the email affiliated with the account, and the security questions associated with the account.

Based on the uncontroverted record, the court found that the decedent's Apple user ID was correctly identified in the petition, that the petitioner was the fiduciary of the decedent's estate, and that the decedent was the sole owner associated with the Apple ID provided. Accordingly, the court directed Apple to assist in the recovery of the decedent's personal digital data, including third party personally identifiable information/data from decedent's account. More specifically, Apple was required to provide the petitioner with access to the decedent's digital assets, other than the content of electronic communications, including but not limited to photographs, notes, and music, as well as a catalogue of electronic communications sent or received by decedent's user ID.

To the extent that the petitioner sought the content of electronic communications sent or received by the decedent, the request was denied without prejudice to the petitioner's amending the petition by affidavit following Apple's compliance with its directives in order to identify the specific digital assets or information she was seeking; explain how disclosure of this data was reasonably necessary to the administration of the decedent's estate; describe where the petitioner believed such information was stored; and state whether decedent provided any direction for disclosure of his digital assets or consent for the petitioner to access the data.

Finally, the petitioner's request to reset the password in the account, change the affiliated email and password was also denied without prejudice subject to the petitioner identifying the nature and extent of the information that such actions would disclose, as well as demonstrating the need to take such actions.

In re Moran, 2023 NY Slip Op 32004(U) (Sur. Ct. New York County 2023).