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TRUSTS AND ESTATES UPDATE

Year-End Review: Fourth-Quarter Decisions Affecting the Trusts and Estates Field

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As 2023 draws to a close, we consider some of the decisions in the fourth quarter affecting the field of trusts and estates. Of particular note are the opinions discussed below addressed to such issues as contracts to make a will, in terrorem clauses and termination of trusts.

Claim Based on Oral Promise Rejected

In *Padilla v. Estate of Larmett,* the Surrogate's Court, New York County, granted summary judgment dismissing a proceeding based on an alleged promise to make a testamentary disposition. Plaintiff initially commenced an action by summons and complaint in the Supreme Court seeking one-third of the decedent's estate, based on alleged oral promises made to him by the decedent, as well as two "will questionnaires." The executor of the decedent's estate served and filed an answer, and moved to dismiss the complaint.

In an order denying the defendant's motion and transferring the matter to the Surrogate's Court, the Supreme Court noted that a breach of an oral promise to make a will or testamentary provision was not a viable cause of action, as it would be barred by the statute of frauds. The court further observed that even if the statute of frauds defect was remedied by the will questionnaires, the claim would be dismissed if the writings failed to "evince a clear and unambiguous manifestation of the testator's intention to renounce the future power of testamentary disposition" (*Padilla v. Estate of Larmett,* 2023 N.Y.Misc. LEXIS 9395 (Sur. Ct. New York County)*, citing Nonnon v. City of New York*, 9 NY3d 825, 827 (2007)).

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The court found that that issue could not be resolved on the motion to dismiss.

Following the completion of discovery, the executor moved for summary judgment alleging that neither of the will questionnaires relied upon by the plaintiff included a surrender of the decedent's rights to subsequently revoke any testamentary bequests. Plaintiff, on the other hand, alleged that the will questionnaires, along with parol evidence, satisfied the requirements of an oral contract.

Citing the provisions of EPTL 13-2.1 and other relevant case law, the court found that plaintiff's only written evidence of decedent's alleged promise to make him a bequest were two will questionnaires signed by the decedent, dated within eight months of each other. In the earlier questionnaire, the decedent indicated that he wanted the plaintiff to receive one-fourth of his estate, while in the later questionnaire, created

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seventeen days before the decedent's death, he indicated that he wanted plaintiff to receive one-third of his estate. Further, plaintiff stated that the decedent told him he wanted to make further changes to his testamentary dispositions.

Nevertheless, the court noted, and plaintiff conceded, that neither questionnaire could be probated as a will, and the decedent never executed a will to reflect the information in either questionnaire. Moreover, the court observed that neither questionnaire reflected a clear and unambiguous manifestation that the decedent intended to renounce his future power of testamentary disposition.

Accordingly, the court held the proffered writings were insufficient to support plaintiff's claim or overcome the statute of frauds, and granted summary judgment dismissing plaintiff's claims.

Padilla v. Estate of Larmett, 2023 N.Y. Misc. LEXIS 9395 (Sur. Ct. New York County).

Requested Construction of In Terrorem Clauses Denied

In a proceeding seeking the construction of three inter vivos trusts allegedly established by the decedent and his wife, the Surrogate's Court, Queens County, in *In re Follman,* was confronted by a motion for summary judgment by the petitioner requesting a determination that the filing of a petition seeking information and/or accountings concerning the assets of the trusts would not trigger the in terrorem clauses contained in the instruments. More specifically, the petitioner alleged that such a petition would request an inquiry pursuant to SCPA 2013 regarding the assets of the subject trusts, a compulsory accounting of the respondent as attorney-in-fact, and a compulsory accounting of various limited liability companies of which the decedent was a member.

The motion was opposed by the respondent, who cross-moved for summary judgment contending that the petition should be denied as essentially seeking advice and direction without satisfying the prerequsites of SCPA 2107(2), but also requesting a ruling that the in terrorem clause of the instruments had been triggered.

The court observed that in terrorem clauses are enforceable, and their interpretation is dependent upon the intent of the testator. To that extent, the instrument must be examined as a whole, with particular attention to the decedent's testamentary plan. Where the language and meaning of the will or trust instrument is clear and unambiguous, the court will not engage in a construction of the instrument or turn to extrinsic evidence to determine the testator's intent.

Within this context, the court found that the in terrorem clauses in each of the instruments were clear and unambiguous, and thus there appeared no reason for the court's opinion regarding their effect. Nevertheless, the movant argued that he was not seeking a construction of the terms of the clauses, but rather a determination from the court that the filing of a "proposed" petition would not trigger the clauses. To that extent, the court opined that the petitioner was seeking a judicial opinion on a hypothetical question regarding a proposed and unfiled proceeding.

As a result thereof, the court denied the petitioner's application, and granted the cross-motion for summary judgment solely to the extent of dismissing the petition in its entirety. The court found that the mere consideration of taking legal action cannot be a basis for triggering an in terrorem clause.

The court noted, and plaintiff conceded, that neither questionnaire could be probated as a will, and the decedent never executed a will to reflect the information in either questionnaire.

In re Follman, 2023 N.Y. Misc. LEXIS 5695 (Sur. Ct. Queens County).

Application to Reform or Terminate Trust Dismissed

Before the Surrogate's Court, Ulster County, in *Loza v. Jaiven,* was a proceeding to terminate a testamentary trust pursuant to the provisions of EPTL 7-1.19 on the grounds that it was uneconomical to continue, or alternatively, to reform the trust or permit equitable deviation from its express terms. Pursuant to the pertinent provisions of the trust, the trustee was directed

to hold, manage, and invest the testator's residuary estate, and to distribute $25,000 therefrom annually to the testator's sister for life, and thereafter $10,000 annually to the testator's niece, during her lifetime, and upon her death, to pay the principal and accumulated income to her children in equal shares per stirpes. The value of the subject trust at the inception of the proceeding was approximately $3.7 million.

The petitioners, including the testator's sister, her niece, and her siblings, contend that creating a remainder interest in the Will for the issue of the testator's niece, was a "material mistake" contrary to the testator's intent, inasmuch as the testator's niece was presently 53 and unlikely to bear or adopt children. Thus, if the testator's niece died without issue, distribution of the trust remainder would be pursuant to the laws of intestacy. Moreover, if the testator's niece was to live to her mid-80s, as the actuarial tables suggested, the testator's distributees would have to wait 30 years to receive their interest.

In view of the foregoing, the petitioners sought an order reforming the trust or a finding that it could be terminated, so that a distribution of its assets could be made to the current income beneficiary, the decedent's sister. The respondent trustee opposed the relief and sought an order dismissing the petition on the grounds, inter alia, that the petition failed to state a cause of action.

The court opined that when a testamentary instrument is sought to be reformed, the petitioner must establish that the modification sought will better effectuate the testator's intent, or a mistake in the terms of the instrument is apparent on its face. Where courts have granted reformation, it is often because changed circumstances threaten to undermine a testator's presumed intent to maximize available tax benefits or available public benefits. The court otherwise noted a general reluctance to allow reformation under other circumstances based on the notion that "courts have not the right to annul or pervert [the purpose of the testator]" when that purpose is reasonably clear (*Loza v. Jaiven,* 2023 NYLJ LEXIS 2814, *citing Matter of Dickinson,* 273 AD2d 89 (1st Dept 2000)).

Within this context, the court found that the language of the subject trust was clear and unambiguous, and that petitioners failed to offer any evidence that the testamentary plan was defective by reason of a mutual mistake, or any mistake for that matter. Accordingly, in view of the petitioners' failure to offer evidence establishing a mistake or other grounds for reformation by clear and convincing evidence, the court granted the trustee's motion to dismiss the claim.

Moreover, the court found no basis for granting the petitioners' request for equitable deviation, which generally permits altering or amending administrative provisions of an instrument, such as investment restrictions, income tax avoidance, or specific conditions to distributions, due to an unforeseen change in circumstances that if left unaddressed would frustrate the testator's intent. Indeed, the court noted that the proposed plan to terminate the trust was not a mere administrative change, and would frustrate the testator's goal to provide a long-term source of income for his sister and niece.

Where courts have granted reformation, it is often because changed circumstances threaten to undermine a testator's presumed intent to maximize available tax benefits or available public benefits.

Finally, the court observed that the prospect that the balance of the trust would pass by intestacy was not, in and of itself, grounds for termination or reformation. Certainly, termination pursuant to EPTL 7-1.19 would not be available without a showing that continuation of the trust would be economically impracticable. In view of the fact that the subject trust was valued at approximately $3.7 million, the court found that its assets were more than sufficient to satisfy its obligations going forward.

Accordingly, the respondent's motion to dismiss the proceeding for failure to state a cause of action was granted.

Loza v. Jaiven, 2023 NYLJ LEXIS 2814 (Sur. Ct. Ulster County).