

A Review of Notable Decisions as the Year Ends

As 2022 comes to a close, we look back on a year marked by numerous decisions of interest impacting trusts and estates. The last several months of 2022 have been no exception, as Surrogate's and Appellate courts throughout the state weighed in on issues significant to the estate practitioner.

Standing To File Objections to Estate Accounting Denied

In *In re Delaney*, N.Y.L.J., Oct. 20, 2022, at 55, col. 4, 2022 NYLJ LEXIS 1905 (Sur. Ct. Ulster County), the court addressed the standing of a cash legatee under the decedent's will, and the voluntary administrator of the estate of a post-deceased residuary beneficiary and devisee to file objections to an estate accounting. The court held that the cash legatee lacked standing, finding that the bequest to which he was entitled vested as of the decedent's death, and that the subject accounting acknowledged and provided for its full payment, free of any liability for administration expenses. Moreover, the court held that the voluntary administrator lacked standing to file objections inasmuch as the

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interest in the estate of the post-deceased beneficiary exceeded the statutory amount of \$50,000 that he was authorized to collect. The court therefore dismissed his objections, without prejudice, to refile same at such time as full letters of administration were issued, subject to the time constraints found in CPLR 205(a). Finally, the court dismissed the objections of the specific devisee, concluding that title to the subject property vested in him upon the decedent's death, and thus he was personally responsible for the expenses attendant thereto.

Third-Party Suit Based on Contract To Make a Will Denied

In *In re Pannella*, N.Y.L.J., Sept. 23, 2022, at 17 (Sur. Ct. Oneida County), the decedent and his first wife executed identical wills leaving 100% of their estates to each other and the remainder to their children. They divorced shortly thereafter,

incorporating a provision in their divorce decree (the Agreement) stating that they each would irrevocably leave 100% of their estates to their children. Both parents remarried and executed new wills. The decedent's will left his entire estate to the respondent, and was admitted to probate on consent of his children. Thereafter, the decedent's children commenced a proceeding to recover their interest in the decedent's estate. After petitioners and respondent unsuccessfully moved for summary judgment, a bench trial was held, at which the petitioners argued that the decedent breached the terms of the Agreement by executing a new will in violation of its terms.

The court opined that in addition to proving the elements of a contract claim, the petitioners, as purported third-party beneficiaries of the Agreement, had the burden of proving that the obligation thereunder was intended for their benefit. To this extent, the court observed that "[a] person not a party to the contract acquires the status of donee beneficiary, and is entitled to enforcement of the contract, if and only if the promise is *particularly exacted by the promisee* for the benefit of such third person." *In re Conay*, 29 Misc.2d 1090, 1092-93 (Sur. Ct. New York County 1953).

Thus, the court held that in order to recover on this theory, the petitioners would have had to establish that their mother procured the undertaking by their father (the decedent) on their behalf. Although the petitioners' mother testified at the trial of the matter, she claimed that she had no recollection of who requested inclusion of the provision regarding the parties' wills in the Agreement, but knew that it was not her. Moreover, and in any event, she testified that it was her understanding that the provision was only intended to benefit the petitioners while they were minors, and therefore did not change her will in order to include others in her testamentary plan until after that time. The court noted that in cases where a third party was permitted to enforce the terms of an agreement, the promisee had negotiated its terms for the express purpose of benefitting the third party. See *Ferro v. Bologna*, 31 N.Y.2d 30, 35 (1972); *Van de Walle v. Van de Walle*, 68 Misc.3d 1224 [A] (Sup. Ct. New York County 2018). The court held that this was not the case sub judice.

Additionally, the court held that even if the petitioners' mother did act with the requisite intent when entering the Agreement, the petitioners' claim failed for lack of performance by both parties, which suggested that neither the decedent nor the petitioners' mother was cognizant of the subject obligation under the Agreement.

Further, the court declined equitable relief to the petitioners, noting that children have no right of inheritance in New York and neither one of the petitioners' parents acted in a manner following their divorce to suggest they considered themselves bound by the Agreement.

Accordingly, the petition was dismissed.

Fourth Department Reinstates Claim for Legal Malpractice

In *Alford v. Katz*, 2022 N.Y. App. Div. LEXIS 5266 (4th Dept. 2022), plaintiff, as executor of the decedent's estate, instituted a legal malpractice action on behalf of the estate of her father, alleging that the defendants were negligent in the drafting of the decedent's will. In 2006, the decedent and his soon to be wife entered into a prenuptial agreement that provided that the decedent's wife waived her rights to decedent's retirement and deferred compensation accounts, in return for a \$1 million QTIP trust to be included under the decedent's will for the wife's benefit. In 2007, the decedent executed a will that included the QTIP trust bequest. In 2015, the decedent changed the designation on his retirement accounts to that of his wife as primary beneficiary of contributions made after the date of the marriage, and in 2017, he signed a will that was prepared by the defendants, in which he bequeathed his wife \$1 million reduced by the value of testamentary substitutes for her benefit, and without mention of the QTIP trust.

Following the decedent's death, the decedent's wife filed a claim against his estate, alleging that she was entitled to, inter alia, \$1 million to fund the QTIP trust, and when that claim was rejected, she commenced an action against the plaintiff as executor. Plaintiff then commenced an action for legal malpractice, claiming that defendants negligently drafted the 2017 will. More specifically, plaintiff alleged that the decedent changed the beneficiary designation on his retirement accounts in exchange for his wife's waiver of her right under the prenuptial agreement

to a QTIP trust, but that, thereafter, defendants negligently failed to have the decedent's wife execute a written amendment to and/or waiver to the prenuptial agreement.

Before any discovery was conducted, defendants moved for summary judgment dismissing the complaint on the grounds that it was premature because the action by the decedent's wife against the plaintiff had not as yet been decided. The wife also moved for summary judgment with respect to her claim against the plaintiff. Though the two actions were not consolidated, the Supreme Court rendered an opinion that granted the wife's motion for summary judgment and ordered plaintiff to fund a QTIP trust with \$1 million, and also granted defendants' motion to dismiss plaintiff's complaint.

On appeal, the Appellate Division, Fourth Department, reversed the Supreme Court's order dismissing the complaint, finding that plaintiff's action was no longer premature once the court granted the motion of the decedent's wife for summary judgment. The court further found that contrary to the defendant's contention, the personal representative of a decedent's estate may bring a claim for legal malpractice alleging that the defendants' were negligent in the estate planning for the decedent, and that the defendants had failed to sustain their initial burden of establishing that the decedent's estate did not sustain any damages or that damages were speculative.