

TRUSTS AND ESTATES

Expert Analysis

Appellate Court Update: Fiduciary Removal, Lack of Jurisdiction, Claim Not Time Barred

Over the past several months, Appellate Division departments have considered a wide range of issues affecting the field of trusts and estates. The opinions discussed below provide valuable instruction to the estate practitioner.

Court Directs Removal Of Co-Fiduciary on Grounds of Hostility

In *Matter of Epstein*, 2022 WL 302684 (2d Dep't), the Appellate Division, Second Department, reversed a decree of the Surrogate's Court, Suffolk County (Braslow, S.) which, after a nonjury trial, inter alia, denied the petitioner's request to revoke the letters testamentary issued to her co-fiduciary, and modified the decree of the same court, which denied the petitioner's request to revoke the letters of trusteeship issued to her co-trustee, and substituted therefor a provision that the application be granted.

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The decedent died, testate, on Aug. 17, 2008, survived by two daughters (the petitioner and the respondent, respectively), and three grandchildren. Pursuant to the pertinent provisions of his will, the decedent created generation skipping trusts (GST) for the benefit of his grandchildren and devised and bequeathed the residue of his estate in equal shares to his daughters. Upon admission of the decedent's will to probate, letters testamentary and of trusteeship issued to the petitioner and the respondent, as the nominated executors and trustees thereunder.

Among the decedent's assets at death were two LLCs. Within a year after his death, a 10% interest in the entities was distributed to the petitioner

and respondent, as beneficiaries, and \$150,000 was deposited into each of the GST trusts in partial satisfaction of the bequests to the grandchildren. Thereafter, disagreements arose between the co-fiduciaries regarding distribution of the estate, which resulted in a July 2011 agreement signed by all the beneficiaries, and the co-fiduciaries in their roles as trustees.

Nevertheless, the disputes between the co-fiduciaries continued. A little over a year after the agreement was signed, one of the LLCs sold its primary asset, and the petitioner, over objection by the respondent, instructed the managing member to allocate and distribute the estate's shares in the company in accordance with the agreement. Further, the respondent refused to make distributions from the GST trusts to the grandchildren, and to create additional GST trust accounts for the grandchildren in order to comport with the FDIC limit. Additionally, the co-fiduciaries disagreed with respect to the filing of the estate tax return and payment of estate taxes, causing the petitioner to

seek an order of the court to permit the payment of taxes.

Thereafter, proceedings were instituted by the petitioner to revoke the letters testamentary and of trusteeship issued to the respondent, amongst other things, and the respondent filed proceedings seeking petitioner's removal, as well as an order compelling the grandchildren to return estate assets representing alleged overfunding of the respective GST trusts and excess cash distributions. The Surrogate's Court denied both petitions, and the petitioner appealed.

The court opined that the removal of a fiduciary pursuant to SCPA 711 and 719 must be exercised sparingly, and only where the record demonstrates a danger to the estate or trust administration. To this extent, removal will be ordered when conflict and hostility between co-fiduciaries impedes their stewardship.

The court noted that the respondent repeatedly refused to countersign the estate tax return and checks in order to avoid penalties and interest being incurred by the decedent's estate, claiming that the taxes were improperly calculated. To this end, she threatened to sue the estate's bank for honoring checks for tax payments written by the petitioner, prompting the bank to freeze the estate accounts, and causing the petitioner to seek a court order to have the funds released in an amount sufficient to cover the estate's tax liabilities.

The court found that irrespective of her claims that the GST trusts were

overfunded, the respondent's conduct endangered the assets of the estate, and directed her removal as executor.

Further, with respect to her role as co-trustee, the court found that the respondent placed her own interest above her fiduciary duty to act in the best interests of the GST trusts and their beneficiaries. Indeed, even accepting the respondent's protestations that her only goal was to fund the

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trusts properly, the court concluded that she was required to pursue this goal consistent with her stewardship by distributing funds to the grandchildren, and acceding to the creation of accounts to insure balances were less than the FDIC limits. In view thereof, the court concluded that the respondent's conduct thwarted the administration of the trusts, and held that the Surrogate's Court improvidently exercised its discretion in denying petitioner's application for her removal.

Proceeding Dismissed for Lack of Personal Jurisdiction

In *Matter of Murad Irrevocable Trust*, 2021 NY Slip Op 04823 (4th Dep't), the Appellate Division, Fourth Department, reversed an order of the Surrogate's

Court, Onondaga County (Smith, S.) which denied respondent's motion to dismiss the proceeding for lack of personal jurisdiction pursuant to CPLR 3211(a)(8).

Before the Surrogate's Court was a proceeding instituted by the executor of the settlor and trust beneficiary's estate seeking an accounting and removal of the respondent as trustee, who was a Virginia resident. The trust was created in 1996 in New Jersey, at which time the deceased settlor was a resident of Illinois, and the trustee was a resident of Georgia. Respondent administered the trust from Georgia until he relocated to Virginia, and administered the trust from Virginia thereafter. Notably, when the settlor relocated to New York in 2016, he received five or six distribution checks from the trust at his New York address.

The Appellate Division observed that due process requires that a non-domiciliary have certain "minimum contacts" with the forum state before suit in that state can be brought. To that extent, the court held that minimum contacts with New York will be found if a non-domiciliary "purposefully avails" himself or herself of the privilege of conducting activities in New York.

Based on the foregoing, the court held that the respondent lacked the requisite minimum contacts with New York for personal jurisdiction to exist. Specifically, the court noted that respondent did not live, own property, or conduct business in New York. The court was unpersuaded by the fact that

trust distribution checks were sent to the settlor while a resident of New York 20 years after the trust was created, noting that this was the first and only relationship New York had to the trust.

Accordingly, respondent's motion was granted and the proceeding was dismissed.

Statute of Limitations Not a Bar To Claim For Constructive Trust

In *Matter of Gordon*, 194 A.D.3d 1290 (3d Dep't 2021), the Appellate Division, Third Department, modified an Order of the Surrogate's Court, Saratoga County (Kupferman, S.), by reversing so much thereof as dismissed the petitioner's claim for the imposition of a constructive trust as time-barred.

Before the Surrogate's Court was an accounting proceeding by the Public Administrator, as administrator c.t.a. of the decedent's estate, for the judicial settlement of his account and the imposition of a constructive trust on a residence that the decedent had contracted to purchase prior to his death. The record revealed that the subject contract required a down payment towards the purchase price, and 13 consecutive monthly payments thereafter, with the transfer of title to take place when the decedent paid the remaining balance of the contract price on or before Aug. 23, 2009. The decedent tendered the down payment, and he and his family resided at the property until June 14, 2009, when the decedent died. Shortly thereafter, and prior to the decedent's will being admitted

to probate, his surviving spouse terminated the decedent's contract to purchase the premises, and instead, on behalf of an LLC of which she was the managing member, entered a new contract for the purchase of same for the remaining contract price due by the decedent at death. The property was thereafter deeded to the LLC.

Approximately one month later, the decedent's will was admitted to probate, and letters testamentary issued to the decedent's surviving spouse. Subsequent thereto, the decedent's brother filed a petition for a compulsory accounting and the removal of the surviving spouse as executor.

Although the action was seemingly time-barred, the court applied the fiduciary tolling rule in order to find otherwise.

Following a trial of the matter, the Surrogate's Court removed the executor and revoked her letters testamentary, finding that she violated her fiduciary duty to the estate by, among other things, engaging in self-dealing and commingling the estate's assets with her personal assets. Letters testamentary issued to the decedent's brother as successor executor, but he was also removed and his letters testamentary were revoked after he failed to file an undertaking or otherwise secure sufficient security to protect the assets of the estate. As a result, letters of administration c.t.a. issued to the Public Administrator.

The Public Administrator subsequently accounted and requested the imposition of a constructive trust on the premises that the decedent had contracted to purchase. Objections to the relief were filed by, inter alia, the LLC that had purchased the premises contending that the constructive trust claim was time-barred.

The court observed that a cause of action to impose a constructive trust is subject to a six-year statute of limitations which accrues upon the occurrence of the allegedly wrongful act giving rise to the duty of restitution. Within this context, the cause of action for a constructive trust accrued on Oct. 23, 2009, the date when the executor cancelled the decedent's contract and the LLC purchased the subject premises. Nevertheless, although the action was seemingly time-barred, the court applied the fiduciary tolling rule in order to find otherwise.

Pursuant to this rule, the statute of limitations is tolled until such time as the fiduciary openly repudiates his stewardship or the fiduciary relationship is terminated. Accordingly, the court found that the statute of limitations was tolled until April 30, 2014, the date when the decedent's brother was appointed to succeed the executor as fiduciary of the estate, and thus the claim asserted by the petitioner on Jan. 28, 2019 was timely.