

TRUSTS AND ESTATES UPDATE

Exit Spring, Enter Summer

By Ilene Sherwyn Cooper

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As the summer days pass us by, we examine the decisions of the past several months that impacted the field of trusts and estates. Addressing such issues as the statute of limitations and constructive trust, dismissal of a removal proceeding and choice of law, and lifetime transfers by an attorney-in-fact, the following opinions of interest are worth noting.

Appellate Division Weighs In on Issues of Statute of Limitations and Constructive Trust

Before the Appellate Division, First Department, in *In re Newman*, 2024 NY Slip Op 03544 (1st Dept 2024), was an appeal from a decree of the Surrogate's Court, New York County, which, inter alia, dismissed the petitions for a turnover and the imposition of a constructive trust. The subject petitions were filed by the preliminary executor of the decedent's estate against the estate of the decedent's predeceased daughter based on decedent's allegations in an affidavit, filed by her

in support of a pre-death claim against her daughter's estate, that she had transferred her life savings to her daughter in reliance upon her daughter's promise to invest the funds for decedent's benefit and, ultimately, divide same in equal thirds among the daughter and decedent's two sons.

The daughter's executor moved to dismiss the petitions on the grounds that the claims were time barred, or in the alternative, for summary judgment arguing that all of the preliminary executor's potential evidence in support of the petitions was inadmissible hearsay or barred by the Dead Man's Statute. Decedent's executor, inter alia, opposed the motion arguing, in pertinent part, that both of his claims were in the nature of fraud, and thus were not time barred. The Surrogate granted the motion for summary judgment finding, inter alia, that the principal evidence adduced by the preliminary executor in support of his claims was based on inadmis-



Ilene Sherwyn Cooper.

sible hearsay. In view thereof, the court found it unnecessary to determine the motion to dismiss. The preliminary executor appealed.

Before addressing the summary judgment motion, the Appellate Division addressed the issue of whether the proceedings were barred by the statute of limitations. The court determined that while the turnover petition was time-barred, it found that the constructive trust claim was not. The court opined that the accrual of a cause of action for a constructive trust is the date of the wrongful withholding of the transferred property, rather than the date of the original transfer. Since the wrongful withholding did not occur until after

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the decedent's death in 2017, the court found that the proceeding commenced in 2019 for the imposition of a constructive trust was timely.

With respect to the Surrogate's dismissal of the proceedings on evidentiary grounds, the court found, when viewing the facts in a light most favorable to the non-moving party, that the decedent's estate had presented sufficient admissible evidence to raise a triable issue of fact as to whether the decedent's daughter had made the promise alleged by the decedent. More specifically, the court found that the supporting affidavits submitted by the preliminary executor in opposition to the motion related what could be considered admissions by the decedent's daughter that were admissible against her as an exception to the hearsay rule.

Further, the court opined that the statement by the Surrogate discrediting the possible significance of the notes of counsel, who represented the decedent and her daughter with respect to estate planning, as to the existence of a promise between the parties was inconsistent with the court's role on a motion for summary judgment. Rather, the court observed that a factfinder could reasonably infer from the notes that there had been an understanding between the decedent and her daughter with respect to the transferred funds.

Accordingly, the court determined, *inter alia*, that the decree of the Surrogate's Court should be modified insofar as it dismissed the petition for a constructive trust.

Motion to Dismiss Removal Proceeding Denied

Before the Surrogate's Court, Queens County, in *In re Bismout (Mosheyev)*, 82 Misc3d 1230(A) (Sur. Ct., Queens County 2024), was a proceeding instituted by the guardian of the property of the decedent's infant son seeking, *inter alia*, removal of the respondents as successor co-trustees of the decedent's *inter vivos* trust, disqualification of the contingent successor trustee, and the appointment of a successor trustee. Respondents moved to dismiss the petition pursuant to CPLR 3211 (a)(1), (2), (3), and (7).

The record revealed that the decedent died, a domiciliary of Pennsylvania, survived by three children, one of whom was an infant. The subject trust was created by him for the sole benefit of his children after his divorce. Simultaneously with the execution of the trust, the decedent executed a pour-over will leaving his entire estate to the trust. It was unknown whether the will was ever admitted to probate.

The trust was executed in Pennsylvania and contained a choice of law provision that required the instrument to be construed in accordance with the laws of the state of Pennsylvania. The court noted that while New York courts will enforce a clear and unambiguous choice of law provision contained in an agreement, this rule applies only to matters of substantive law, and matters of procedural law will be governed by the law of the forum.

With this in mind, the court addressed the threshold issue raised by the respondents regarding the court's subject matter jurisdiction over the pending proceeding. Finding that the trustees resided in New York, and the trust had assets in New York, the court held that SCPA 207 (1) conferred jurisdiction upon the court to entertain the proceeding, and dismissed that portion of the motion to dismiss based on SCPA 3211(a)(2).

As to respondents' claim that the petitioner lacked standing to institute the proceeding, the court opined that the issue of standing was procedural in nature and thus was to be determined in accordance with New York law. That said, the court found that petitioner's standing was derived from her status as guardian of the property of her infant son, who was a beneficiary of the trust, and, therefore, denied that branch of the motion.

Further, the court denied the respondents' motion to the extent it sought dismissal of the petition for failure to state a cause of action. Relying on Pennsylvania law for its result, the court found that petitioner's allegations, though sparse, regarding misappropriation of funds, self-dealing, withholding distributions, and failing to account, sufficiently set forth grounds

for removal of the respondents as successor trustees of the trust. This conclusion was further buttressed by supporting documentation offered by the guardian-ad-litem, which the court noted it was not inclined to ignore.

Finally, the court denied the request for dismissal based on documentary evidence, i.e., the trust instrument, concluding that the respondents failed to demonstrate that the trust provisions conclusively established a defense as a matter of law to the allegations set forth in the petition.

Validity of Lifetime Transfers by Attorney-in-Fact

In *Goldstein v. JP Morgan Chase Bank*, NYLJ, Apr. 16, 2024, at p. 5 (Sur. Ct., New York County), the Surrogate's Court, New York County was confronted with an action transferred from the Supreme Court, New York County, concerning disputed transfers from decedent's bank accounts. The decedent's son, who was the preliminary executor of the decedent's estate, moved for summary judgment on the estate's claims against the decedent's daughter (Goldstein) and JP Morgan Chase (Chase). Chase opposed the motion and cross-moved seeking a discharge from liability. Goldstein also opposed the motion and cross-moved to amend her complaint.

The record revealed that the decedent died testate survived by a son and a daughter. Pursuant to her will, she left her entire estate to her son, and named her son and her sister as co-executors. The instrument was offered for probate and preliminary letters issued to the decedent's son in 2017. Several months prior to the decedent's death, her son attempted to withdraw funds from her Chase accounts by using a power of attorney executed by the decedent in 2006. Upon doing

so, he learned that Goldstein had transferred all the funds in the decedent's accounts into her own account at Chase by using a power of attorney executed by the decedent in 2013. The decedent's son contacted Chase, informing them that the 2013 power of attorney was invalid, and Chase responded by placing a hold on the decedent's and Goldstein's accounts with the bank.

Goldstein then commenced an action in the Supreme Court against Chase seeking the release of her funds, and the decedent's son, individually and as preliminary executor of the decedent's estate, intervened asserting claims against Goldstein for, inter alia, breach of fiduciary duty, conversion, unjust enrichment, and money had and received, and against Chase for negligence and breach of contract. The matter was ultimately transferred to the Surrogate's Court, at which time the subject motion and cross-motions were filed. At a conference of the matter, the parties stipulated to discontinue all claims against Chase.

With respect to the breach of fiduciary duty claim, the court found that the preliminary executor had established his prima facie entitlement to summary relief based upon bank statements of the decedent's account showing transfers to Goldstein's accounts, and the power of attorney appointing Goldstein, which omitted any provision authorizing gifts. The court found that Goldstein's opposition predicated on claims that the subject funds were not gifts but were used to pay the decedent's expenses to be unavailing.

Moreover, the court found that Goldstein's reliance on her deposition testimony and conversations between herself and the decedent to support her argument that the decedent authorized the use of the subject funds so that Goldstein could take care of herself and her family was barred by the Dead Man's Statute. Although Goldstein also submitted a purported holographic will of the decedent executed in 2013, in which she was the beneficiary of the entire estate, the court determined that it failed to show decedent's intention to make a gift of her assets prior to death. Accordingly, since the only evidence submitted by Goldstein in opposition to the motion was barred by the Dead Man's Statute, the court granted summary judgment on this issue.

Similarly, the court granted the preliminary executor's motion on the issues of conversion, unjust enrichment, and money had and received, finding that Goldstein failed to create an issue of fact as to these issues in the face of the preliminary executor's evidence that she had transferred the decedent's funds into her own account pursuant to a power of attorney which did not include a specific provision authorizing gifts.

Summary relief was denied as to the balance of the causes of action asserted by the preliminary executor due to his failure to make any arguments or offer any evidence with respect to those claims.

Ilene Sherwyn Cooper is a partner with *Farrell Fritz in Uniondale*, where she concentrates in the area of trusts and estates.