

TRUSTS AND ESTATES UPDATE

A Wintery Mix

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May 9, 2025

As winter has left its mark over the past three months, so, too, did the Court of Appeals and the Surrogate's Courts throughout the state, as they examined important issues affecting the practice of trusts and estates. Consider the following decisions of interest.

Court of Appeals Examines In Terrorem Clause

In *Carlson v. Colangelo*, the Court of Appeals addressed, *inter alia*, the issue of whether the plaintiff triggered the in terrorem clause in the decedent's revocable trust when she commenced the underlying action against the trustee, and thereby forfeited her bequests.

The decedent had a pour over will that directed that all of his assets be disposed of pursuant to the terms of his revocable trust. Pursuant to the terms of the trust, the grantor directed that the trustee thereof distribute to the respondent all of his interest or the trust's interest in Dempsaco LLC.

The trust further provided that it was the grantor's wish that the respondent provide a stream of income not to exceed the sum of \$350,000 to the plaintiff when the real property owned by the LLC was sold.

Finally, after satisfying the aforesaid provisions, the trustee was directed to distribute to the plaintiff the grantor's interest or the trust's interest in and to certain real property located in Cortlandt Manor, New York. In the event that the trust was deemed invalid or otherwise not in existence, the will contained similar dispositive provisions as the trust.

Both the will and the trust had in terrorem clauses, which provided in relevant part, that "in the event that any...beneficiary...or other individual (challenger) shall contest any aspect of this Trust, or the distribution of the grantor's assets pursuant to his Last Will, *inter vivos* Trust Agreement, beneficiary designations or non-probate beneficiary designations, or shall attempt to set aside, nullify, contest or void the distribution thereof in any way, then the grantor directs that such rights of such challenger shall be ascertained as they would have been determined had that challenger predeceased the execution of this instrument and the grantor, without living issue."

Two and a half years after the decedent's death, the trustee's counsel corresponded with plaintiff



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and informed her of the premises in Cortlandt Manor and the stream of income bequests. The letter explained that the trustee had decided that the decedent used precatory language regarding the stream of income; that the decedent overestimated his estate; and that there were no funds or assets to pay anything to plaintiff.

The correspondence included a demand that plaintiff release the trustee and waive all rights to the stream of income, in exchange for the transfer of the real property to plaintiff.

Plaintiff refused to sign the release and requested a transfer of the property, cash and a copy of the trust document.

In determining whether to accept late objections for filing, the court observed that consideration must be given to the reason for the delay, the extent of the delay, the deliberateness of the default, the prejudice which might result, and the merits of the objections

The trustee failed to satisfy any of the plaintiff's requests. Thereafter, plaintiff commenced an action in Supreme Court against the trustee, individually and as fiduciary, alleging that she had invested in Dempsaco LLC prior to the decedent's death, and thereby became a 50% owner of the company.

Plaintiff also made claims of breach of fiduciary duty, and demanded relief that included a request that the subject property be transferred to her, and that she be declared entitled to the income stream.

Ultimately, defendants moved for summary judgment arguing that plaintiff's claim to a 50% interest in the LLC triggered the in terrorem clause. Plaintiff opposed, contending that her action was meant to construe and enforce the trust and not to contest it.

Plaintiff also moved for summary judgment, and the Supreme Court granted defendant's motion, concluding that the "clear intent of the grantor...was to prevent...conduct that would delay or dilute the dispositions under the trust, place the grantor's game plan in jeopardy, and threaten the defendant's clear right to Dempsaco, LLC..."

Plaintiff appealed, and the Appellate Division granted a stay of the order. On the merits, the Appellate Division modified the Supreme Court's order by denying the defendants' motion for legal fees, and otherwise affirmed, finding that plaintiff's conduct had violated the in terrorem clause. The Court of Appeals granted plaintiff leave to appeal.

The court held that because plaintiff did not seek to challenge the trust, but merely sought to enforce its provisions as the grantor wrote and intended them, she did not violate the in terrorem clause.

Specifically, the court found that none of the causes of action and demands for relief by plaintiff contested the legality of the trust instrument. Nor did plaintiff challenge any of the trust's bequests.

To the contrary, the court noted that plaintiff sought distribution of her bequests in full accord with the trust and in satisfaction of the grantor's intent. Further, the court found that plaintiff's action to recognize her alleged 50% membership interest in Dempsaco was not a challenge to the trust's distribution of any part of the decedent's interest in the company.

Plaintiff merely sought what she asserted was hers and nothing more. The fact that plaintiff did not ultimately establish that she held any interest in the company did not trigger the clause – the court finding that the triggering event of an in terrorem clause depends on the nature, and not the merits, of the plaintiff's claim. **Carlson v. Colangelo, 2025 NY Slip Op -2264.**

Late Filing of Objections Allowed

Before the Surrogate's Court, Columbia County, was a contested probate proceeding in which the petitioner moved to dismiss the objections filed by the respondents on the grounds that they were untimely, and otherwise without merit.

The propounded instrument was dated Sept. 9, 2020. On the return date of citation, the parties by their respective counsel entered a

Within this context, the court noted that the beneficiary's primary concerns with the nominated executor were lodged with the Supreme Court litigation pertaining to the Citibank proceeds.

scheduling order requiring that written discovery be completed by Sept. 30, 2024, and depositions be completed by Oct. 31, 2024.

SCPA 1404 examinations were conducted and completed on Nov. 21, 2024, and the transcripts thereof were served on respondents' counsel on Nov. 27, 2024.

Pursuant to the terms of the scheduling order, objections were to be filed within ten days of the receipt of the transcripts, i.e. on or before Dec. 9, 2024. However, instead, respondents filed their objections on Dec. 13, 2024.

Upon the filing of the motion to dismiss, respondents' counsel sent a letter to the court containing certain representations, and on the basis of same, requested that the court accept the untimely objections for filing. In response, the court "so ordered" the letter, and accepted the objections subject to the petitioner's motion to dismiss.

In determining whether to accept late objections for filing, the court observed that consideration must be given to the reason for the delay, the extent of the delay, the deliberateness of the default, the prejudice which might result, and the merits of the objections.

In seeking to explain respondents' four-day delay in filing their objections to probate, counsel explained, *inter alia*, that he had left the office for the day before he received the SCPA 1404 transcripts, that the office was closed for two days thereafter for the Thanksgiving holiday, that all of the respondents lived out of state, and that he failed to calendar the due date of the objections, which was inadvertent.

Finding that these reasons were acceptable "realities" in the practice of law, and recognizing that the petitioner asserted no prejudice arising from the delay, the court, in the exercise of discretion, found sufficient basis to accept the late objections.

In reaching this result, the court rejected petitioner's contentions that an affidavit of merit by the respondents' counsel was a prerequisite to granting respondents relief under the circumstances.

Towards that end, the court relied on the decision in *In re Seusing*, 1998 WL 35421035 (Sur. Ct. Nassau County), in order to hold that it would not require the respondents to demonstrate entitlement to judgment as a matter of law to overcome their four-day default.

The court reasoned that it would potentially be a monumental task presented to an objectant if he or she was forced to present a meritorious challenge to a will immediately after the date objections should have been filed.

On the other hand, the court held that its decision did not relieve respondents of the need to show some merit to their claims regarding the propounded will. Under the circumstances, the court held that this required, at the very least, an examination of the facial sufficiency of the objections.

To this extent, the court found that respondents' objections to probate on the grounds of duress and undue influence were of sufficient merit to permit their late filing. However, the court concluded that the circumstances alleged by

the respondents were insufficient to support their alternate claim for the imposition of a constructive trust with respect to the sale proceeds of decedent's interest in a closely-held corporation.

Specifically, the court determined that respondents failed to allege a promise that had been made by the decedent relative to the subject proceeds, or demonstrate that a transfer of the proceeds had been made in reliance on any such promise.

Respondents' contention that the decedent had wanted to give the sale proceeds to them was also found unavailing to sustain a claim for a constructive trust.

Accordingly, the court granted petitioner's motion to dismiss those objections to probate predicated on a theory of constructive trust, and in all other respects, denied the relief requested.

***In re Ingleburger*, 85 Misc3d 1220 (A) (Sur. Ct., Columbia County 2025).**

Nominated Executor Found Eligible to Serve

In *In re Murrell*, the Surrogate's Court, New York County, was confronted with an application by a beneficiary of the estate requesting a determination that the nominated executor under the propounded will was ineligible to serve as fiduciary, pursuant to the provisions of SCPA 707 (1)(d), and that she be appointed in her place and stead.

Specifically, the beneficiary alleged that the nominated executor had engaged in self-serving conduct, including the conversion of the decedent's assets at Citibank prior to the decedent's death.

The ownership of these proceeds, which were held in a joint account between the decedent and

the nominated executor, was the subject of a Supreme Court action that had been commenced by the decedent prior to her death.

While the court recognized that the testator's selection of a fiduciary was to be accorded deference, it equally noted that it had the authority to limit the authority of a fiduciary in order to best protect the estate and its beneficiaries, which could include a requirement that a bond be posted even where the will dispensed with one.

Within this context, the court noted that the beneficiary's primary concerns with the nominated executor were lodged with the Supreme Court litigation pertaining to the Citibank proceeds.

Indeed, to this extent, the court opined that if the nominated executor were appointed fiduciary, she would at once become a plaintiff in the action, as well as a defendant, and thereby be placed in a conflicted role.

Nevertheless, the court found that disqualification of the nominated executor was not warranted, and could be accommodated by limitations in the letters precluding her from representing the estate in the Supreme Court action, and the posting of a bond.

Accordingly, preliminary letters testamentary were issued to the nominated executor within these parameters.

Further, the court held that it was authorized to appoint a temporary administrator of the estate in order to conserve its assets. Therefore, in view of the circumstances, the court appointed the beneficiary the temporary administrator of the estate with authority limited to representing the estate in the Supreme Court action. ***In re Murrell*, 2025 NYLJ LEXIS 663 (Sur. Ct., New York County).**