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Expert Analysis

Highlights and Notable Decisions From Summer 2018

By
Ilene
Sherwyn
Cooper

The summer months have seen decisions as variable as the weather, addressed to claims against an estate, fiduciary bonds, and the statute of limitations. The issues were novel and instructive, and are discussed below.

Determining the Validity of Claims Under SCPA Article 18. In *In re Estate of Persing, Sr.*, NYLJ, Aug. 17, 2018, at p. 36 (Sur. Ct. Richmond County), the Surrogate's Court, Richmond County, was confronted with the issue of whether an accounting or a proceeding pursuant to SCPA 1809 was the best alternative to determine the validity of creditors' claims against the decedent's estate.

The decedent died, testate, on Feb. 25, 2009. Following his death, his estate was embroiled in years of litigation, which ultimately resulted in a global settlement on Nov. 14, 2017, and the admission of the decedent's Will to probate. Thereafter, the respondents, creditors of the estate, sought a compulsory accounting in order to have their claims adjudicated. These claims consisted of personal loans allegedly made to the decedent amounting to $154,800. The executrix opposed the application, and instead filed a petition pursuant to SCPA 1809 requesting a determination of the validity of the claims.

In support of her position, the executrix maintained that as creditors, the respondents were not entitled to a beneficial interest in the estate, and therefore, their claims could be determined without the time and expense of an accounting proceeding. Indeed, the Surrogate noted that in *In re Estate of Perry*, 123 Misc.2d 273 (1984), the court refused to direct an accounting under similar circumstances, and instead relied on SCPA 1809(1) as a better alternative than the costly and time-consuming procedures involved in an accounting.

Thus, the court concluded that, while respondents were entitled to an accounting, a proceeding pursuant to SCPA 1809(1) provided a more efficient means of determining the validity of their claims. Accordingly, the respondents' request for an accounting was denied. Nevertheless, in order to safeguard respondents' claims, the fiduciary was directed to post a bond in the sum of $160,000.

Court Directs Fiduciary to Post Bond and Sua Sponte Schedules a Hearing on the Issue of Her Suspension or Removal. Before the Surrogate's Court, Suffolk County, in *In re Estate of Pagliughi*, NYLJ, Aug. 17, 2018, at p. 38 (Sur. Ct. Suffolk County), was a proceeding by the residuary beneficiaries of the

ILENE SHERWYN COOPER *is a partner with Farrell Fritz, P.C. in Uniondale, where she concentrates in the area of trusts and estates. She is the past-chair of the New York State Bar Association's Trusts and Estates Law Section.*

decedent's estate (petitioners) requesting, inter alia, that the executrix post a bond pursuant to SCPA 710(3) and (4), and return to New York all estate property that she removed from the State. The application was opposed by the executrix, who alleged that although she sold her home in New York and moved to Vermont, the Will of the decedent dispensed with a bond "in any jurisdiction."

The court, nevertheless, found that it had the discretion, pursuant to the provisions of SCPA 710(3), to direct a fiduciary, who has become a non-domiciliary, to post a bond. To this extent, the actions of the fiduciary as it related to the administration of estate assets was relevant.

In this regard, the record revealed that the executrix had admittedly removed the decedent's gun collection from New York to Vermont, although she had since returned the assets to the State. The court found this conduct to be in clear violation of the provisions of SCPA 710(4), which forbid a fiduciary from removing estate property from the State without prior court approval and the posting of a bond. In view thereof, and the fiduciary's status as a non-domiciliary, the court directed that she post a bond in the sum of $132,000, and return any estate property to New York that she had removed from the jurisdiction.

Further, the court expressed concern about a myriad of other acts of misconduct committed by the executrix, which she admitted to be true, including her apparent conflict of interest in a Supreme Court action that she commenced for the decedent's wrongful death, and her commingling of estate and trust funds with her own. As such, the court, on its own motion, directed the parties to appear for a hearing regarding the fiduciary's suspension and removal.

> In 'In re Estate of Persing, Sr.' the court concluded that, while respondents were entitled to an accounting, a proceeding pursuant to SCPA 1809(1) provided a more efficient means of determining the validity of their claims.

Statute of Limitations Bars Compulsory Accounting Proceedings. Before the Surrogate's Court, Kings County (Torres, S.) in *In re Estate of Eisdorfer*, NYLJ, July 6, 2018, at p. 25 (Sur. Ct. Kings County) were motions made by four of the decedent's children to dismiss the petitions of the decedent's grandchildren ("petitioners") seeking to compel the executors and testamentary trustees of the estate to account.

The decedent died on May 26, 1984, survived by his spouse, and five children. Upon admission of his Will to probate, letters testamentary and letters of trusteeship were issued to the decedent's spouse, a rabbi, and one of his five children. Pursuant to the pertinent provisions of the instrument, the decedent created a residuary trust for the benefit of his spouse during her lifetime, and upon her death, directed that the principal thereof be transferred and paid over to his then lawful issue, per stirpes.

Notwithstanding the foregoing provisions, over a two-year period commencing after death, but prior to the Will's probate, the decedent's spouse and his five children agreed not to fund the subject trust. Instead, they entered into eight separate agreements ("Agav Suder" agreements") governing the distribution of the decedent's personal and real property. Each agreement was executed in accordance with the Torah Law/Halakhah, and in the presence of the rabbi/ co-fiduciary. After these agreements were finalized, the executors and trustees did not retain control of any of the decedent's assets, and the residuary trust was never funded. Thirty-three years later, the subject petitions were filed by children of the decedent's post-deceased son, Samuel, seeking to compel two of the three fiduciaries to account. At the time the petitions were filed, the decedent's spouse was deceased.

The fiduciaries moved to dismiss the petitions, arguing that the Agav

Suder agreements precluded the petitioners from compelling an account. In addition, they maintained that the proceedings were barred by the statute of limitations and the doctrine of laches. More specifically, the fiduciaries claimed that the Agav Suder agreements constituted a repudiation of trust sufficient to trigger the running of the statute of limitations long before the proceedings were commenced. Moreover, the fiduciaries maintained that given the passage of time, and the destruction of the estate and trust records by their attorney, the proceedings were barred by the doctrine of laches.

In opposition, the petitioners argued that the Agav Suder agreements, of which they had no knowledge, did not constitute a repudiation by the fiduciaries of their duties, and did not deprive them of their right to compel an accounting. Moreover, they maintained that since the class of beneficiaries of the residuary trust did not close until the death of the decedent's spouse, the agreement was not binding as to them. Further, the petitioners claimed that their father could not have virtually represented their interests under the circumstances.

The court observed that when dismissal is sought on the basis of the statute of limitations, the respondent bears the burden of establishing prima facie the time within which to sue has expired. To this extent, the fiduciaries contended that the agreements were entered into and observed for over 33 years, and that the decedent's Will and estate tax return were a matter of public record since 1984. The petitioners, on the other hand, argued that they did not first become aware of the decedent's Will or the trust for their benefit until 2016.

In 'In re Estate of Eisdorfer' the court found that the fiduciaries' relinquishment of control over the decedent's property to the decedent's spouse and children constituted a repudiation of trust sufficient to trigger the statute of limitations over 30 years prior to the commencement of the proceedings.

Given this backdrop, the court found that the fiduciaries' relinquishment of control over the decedent's property to the decedent's spouse and children constituted a repudiation of trust sufficient to trigger the statute of limitations over 30 years prior to the commencement of the proceedings. Indeed, the court concluded that the fiduciaries affirmatively negotiated eight agreements whereby they abdicated their stewardship with respect to the assets of the estate and trust to all of the persons who would be entitled to a distribution at that time. The record failed to indicate that the petitioners were even alive when the agreements were entered. Moreover, the court questioned why petitioners never inquired as to their possible interest in the decedent's estate, when they were able to do so upon the death of their father over 14 years ago, or why decades had passed without any investigation ever being undertaken on their part concerning the estate. Finally, the court rejected the notion that knowledge of the contents of the public record pertaining to the estate and its status should not be imputed to them.

Further, the court found that as a result of the inordinate delay in instituting the proceedings, the lack of any knowledge by the fiduciaries that there was dissatisfaction with the distributions made pursuant to the agreements, the absence of any records with which accountings could, if at all be prepared, and the death of important witnesses to the agreements, not the least of which was the petitioners' father, the proceedings were also barred by the doctrine of laches.

Accordingly, the proceedings for a compulsory accounting were dismissed.