



Case Notes— New York State Surrogate's and Supreme Court Decisions

By Ilene Sherwyn Cooper

Abandonment

In *Matter of Yengle*, appeal was taken to the Appellate Division, Third Department, from an order of the Surrogate's Court, Sullivan County (McQuire, S.), which granted the respondent's motion for summary judgment dismissing a petition seeking to disqualify the respondent as the decedent's surviving spouse.

The decedent died intestate, survived by his spouse and his sister. Although letters of administration had issued to the decedent's spouse, his sister commenced a proceeding to revoke her appointment on the grounds that she had abandoned the decedent prior to his death, and was thus disqualified from serving as fiduciary of his estate.

The record revealed that the respondent and the decedent resided together at the inception of their marriage, but that the decedent drank heavily, and abused the respondent, both physically and mentally, during this time to such an extent that police intervention was sometimes required. Ultimately, given the circumstances, the decedent, at the respondent's suggestion, began living at his vacation home, although he lived with the respondent on weekends. This arrangement continued until approximately 10 years before the decedent's death, when the parties no longer resided together at all. Thereafter, they communicated with each other occasionally, until several months before the decedent's death. Although respondent acknowledged that she had two affairs during the marriage, she claimed that the decedent knew of the relationships, and seemingly consented to them. Based upon the foregoing, the Appellate Division found that the respondent had met her burden of establishing that she did not abandon the decedent, that she lived apart from him with his consent, and that her absence was justified by his drinking and related abusive behavior.

However, the Court determined that petitioner had met her burden of raising a question of fact regarding the foregoing circumstances, thus precluding summary relief in respondent's favor. Specifically, the Court found that petitioner's testimony, as well as the testimony of several disinterested witnesses, was sufficient to create a triable issue with respect to the respondent's allegations that the decedent had an alcohol problem and that he was abusive. Indeed, the Court found it significant that respondent never pursued criminal

charges against the decedent, or sought an order of protection against him as a result of his alleged abuse. Equally significant was the petitioner's testimony that she knew, through conversations with the decedent, that he wanted to be with the respondent, and respondent's admission that the decedent had asked her to return to him. In fact, the record contained cards from the decedent to respondent in which he expressed his love for her. Based upon this evidence, the Court found it could reasonably be inferred that the decedent did not consent to the respondent's absence from their home.

Accordingly, in view of the foregoing, and considering the evidence in a light most favorable to petitioner, the Court held that respondent's motion for summary judgment should have been denied on the grounds that material questions of fact existed with respect to whether it was the respondent who left the decedent, and if so, whether her leaving was justified and without the decedent's consent.

Matter of Yengle, 113 AD3d 918, 979 NYS2d 410 (3d Dep't 2014).

Motion to Quash

In a contested discovery proceeding pending in the Surrogate's Court, Queens County, the respondent, who was the decedent's former attorney-in-fact, moved to quash a subpoena served upon a non-party bank requesting the production of his personal banking information. The court held that although personal banking records are generally not subject to disclosure, where the information sought is material and necessary, and cannot be obtained from another source, disclosure will be warranted. The court opined that such a showing of necessity may be found in cases where a fiduciary is accused of self-dealing.

Accordingly, based upon the petitioner's unrefuted proffering of strong evidence that the respondent had breached his fiduciary duty to the decedent by engaging in acts of self-dealing, the court found that petitioner was entitled to the disclosures sought, and given the personal nature of the information, that they could not be obtained from any other source. The motion to quash was, therefore, denied.

In re Koch, N.Y.L.J., Oct. 4, 2013, p. 38 (Sur. Ct., Queens Co.).

Disclosure of Personal Income Tax Returns

Before the Appellate Division, Fourth Department, in *In re Monaco*, was an appeal of an order of the Surrogate's Court, Erie County (Howe, S.), which denied the motion of the decedent's estate to compel the petitioner to supply his personal income tax returns for the period 1980 to 1995, or alternatively, for authorization to obtain such records from the New York State Department of Taxation and Finance. Notably, the petitioner had voluntarily produced State records of his earnings for the period 1996 to 2009.

Pursuant to his Will, the decedent devised all of his real property to his daughter, while he left the petitioner, his son, a cemetery plot, a compressor, and a roll of electrical wire. At issue before the Surrogate's Court was whether the decedent had entered a verbal agreement with the petitioner that title to a single family residence, in which the petitioner had resided since the decedent purchased the residence in 1996, would be transferred to him when the mortgage was paid off, upon the petitioner's demand or decedent's death. In support of his claim, petitioner alleged that in reliance upon the decedent's promise, he gave the decedent \$20,000 towards the down payment for the property, and paid all of the expenses attendant to its upkeep, including the mortgage, insurance, taxes and costs for its improvement. In order to determine whether petitioner had accumulated sufficient savings to satisfy the down payment in 1996, the estate sought an order requiring the petitioner to supply his income tax returns for the years in question.

The Surrogate's Court denied the application, and the Appellate Division affirmed, concluding that the estate had not made a sufficiently strong showing that the information contained in petitioner's income tax returns were indispensable to the litigation and unavailable from other sources, such as financial or business records. Indeed, the Court held that the respondent had failed to make any factual showing in this regard, finding, *inter alia*, the affirmation and exhibit in support of the motion were vague and conclusory, and respondent did not establish that it had sought the information from any alternate source.

In re Monaco, 117 AD3d 1593, 985 NYS2d 795 (4th Dep't 2014).

Discovery

In *In re Bernfeld*, the court defined the obligations of a party who fails to produce documents on the grounds that they are not within the party's possession, custody or control. The court acknowledged that a party cannot be compelled to produce information and documents which do not exist or which are not in the party's possession. However, relying upon the opinion in *WMC Mortgage Corp. v. Vandermulen*, 2011 WL 2586411 (Sup. Ct., Suffolk Co. 2011), the court held

when a party claims that he does not have requested documents that he should otherwise have in his possession, an affidavit must be submitted stating the efforts made to search for the demanded documents, as well as to and from whom the party, or someone acting on his behalf, ever transferred possession, custody or control, directly or indirectly, of the documents. In other words, the affidavit must provide the court with a basis to find that the search conducted was a thorough one, or that it was conducted in a good faith effort to provide the records requested.

In re Bernfeld, N.Y.L.J., Apr. 10, 2014, p. 31 (Sur. Ct., Nassau Co.).

Discovery

In *In re Modell*, a contested accounting proceeding with respect to the trust created under the decedent's will, the decedent's surviving spouse, who was a co-trustee, income beneficiary and discretionary principal beneficiary of the trust, sought an order, *inter alia*, limiting the scope of her examination pursuant to SCPA 2211, and compelling the production of documents relating to the decedent's business, the primary asset of the trust estate.

With respect to that part of the motion that sought an order compelling the production of documents, the court directed production of information pertaining to the compensation of her co-trustee from the decedent's business, finding that the information was relevant, and was not ascertainable from other documents that had been produced to date. Further, the court directed production of documents relating to charitable donations made by the business, including but not limited to the amount of the donation, substantiation for the donation made, and the name of each donee. Finally, despite arguments to the contrary by the spouse's co-trustees, the court held that her motion to compel production in response to her Third Notice of Discovery and Inspection was not premature, and that an affirmation of good faith, otherwise required in the Supreme and County Courts, was not a prerequisite to seeking court intervention in the Surrogate's Court on an issue of discovery. Accordingly, the court granted the application of the spouse to the extent of directing the production of documents responsive to her Third Notice of Discovery and Inspection.

In re Modell, N.Y.L.J., Oct. 11, 2013, p. 44 (Sur. Ct., N.Y. Co.) (Surr. Anderson).

Motion to Dismiss

In a proceeding seeking the removal of the decedent's spouse as one of the three trustees of the testamentary trusts created under the decedent's will, the respondent moved the Surrogate's Court, New York County, for an order dismissing the petition for failure to state a cause of action.

The decedent died testate in 2002, survived by his spouse and an infant daughter. His will established several trusts for his benefit, and named his spouse, his attorney and his accountant and trustees. At his death, the decedent had an 89% ownership interest in a luxury car dealership on Long Island, which interest was to fund two of the trusts established under Article VI of the instrument. The trusts were not funded until 2009, and in the interim, the attorney-trustee resigned and was ultimately replaced by the petitioner.

Ongoing disagreements among the fiduciaries regarding administration of the trusts provoked the removal proceeding *sub judice*, which was joined in by the trustee/accountant, as well as a proceeding for removal by the decedent's spouse, and a request by her for a determination that the corporation's amended operating agreement removing her as sole managing member of the company was void *ab initio*. All three trustees were directed to account.

Before addressing the merits of the motion, the court noted that the movant failed to annex a copy of the petition to her pleadings. While recognizing that this defect could serve as a basis to deny the motion, the court held it would consider the motion nonetheless, instructing that the filing of a motion which requires the court to search its records for a pleading was not an advisable litigation strategy.

As to the merits, the court opined that on a motion to dismiss for failure to state a claim, the court must accept the facts as alleged in the pleading as true, accord petitioners every benefit of every favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory. Whether a petitioner can ultimately establish his allegations is not part of the calculus.

Within this context, the court held that the petitioner had established a claim for relief pursuant to SCPA 711. In significant part, the petition alleged that the respondent engaged in acts of self-dealing and interference with the operations of the business, which included paying her "personal" staff from the company, hiring her former husband as a marketing director at a salary of \$300,000 per year when he had no marketing experience, and hiring an "unqualified friend" to oversee an \$8,000,000 renovation to the dealership. The petition alleged that because of these acts and others, the trustees amended the company's operating agreement in order to remove the respondent as its sole managing member, and establish a Board of Managers to operate the business. Nevertheless, the respondent continued to interfere with the company, by refusing to recognize the agreement, and continuing to refer to herself to manufacturers and others as the company chairman. Other acts of improvidence alleged in the petition included claims that respondent had stated at a trustees'

meeting that she viewed all the money in the company as hers, and hiring an accountant, who purportedly had a conflict of interest with the company, to sit on the company's Board of Directors and Audit Committee.

The court found that respondent's contentions that the petition failed to support a claim for breach of trust and fiduciary duty to be based on a "selective and self-serving characterization of the allegations" and unavailing. The court held that the petition clearly informed the respondent of the specific acts of misconduct that were at issue, which it deemed true for purposes of the motion.

Accordingly, the motion to dismiss was denied.

In re Terian, N.Y.L.J., Feb. 27, 2014, p. 25, col. 1 (Sur. Ct., N.Y. Co.) (Surr. Anderson).

Revocation of Letters

In *In re Clark*, the court issued an order revoking the letters testamentary of the estate executor, without a hearing, on the grounds that he had failed to account within the time and manner directed. The court held that the circumstances requiring removal were exacerbated by the executor's acknowledged statements and actions which demonstrated an apparent indifference to his fiduciary obligations and improper management of the estate.

In re Clark, N.Y.L.J., Jan. 31, 2014, p. 36 (Sur. Ct., N.Y. Co.) (Surr. Anderson).

Standing

Before the court in *In re Moloney* was a proceeding by the decedent's grandson against the trustee of a revocable trust and irrevocable life insurance trust created by the decedent seeking, *inter alia*, breach of fiduciary duty, negligence, fraud, tortious interference with trust benefits and an accounting. The trusts in issue held the decedent's business interests and life insurance, respectively. The respondents, the trustee of the trusts and officers and directors of the decedent's businesses, moved, by way of two separate motions, to dismiss the petition on the grounds that it failed to state a cause of action, the petitioner's lack of standing, and the documentary evidence required dismissal as a matter of law.

The petition before the court alleged that the trustee acquiesced in certain conduct by the officers and directors of the decedent's businesses which interfered with his obtaining a license as a funeral director and prevented him from becoming a full-time employee of the decedent's business. Further, the petitioner alleged that the subject trust instruments entitled a full-time employee of the decedent's business, who was also one

of the decedent's issue, to, *inter alia*, distributions of income during the business' operation.

In support of his motion to dismiss, the respondents alleged that the complaint was essentially one for wrongful termination of employment, and thus was outside the scope of the court's subject matter jurisdiction. Further, the respondents maintained, based upon a reading of the terms of the trust instruments, that the petitioner lacked standing to seek the relief requested. Additionally, they claimed that the petitioner's interest in the subject trusts was too remote and indeterminate to accord him with a sufficient basis to compel an accounting.

The petitioner opposed the motions, arguing that the language of the trust instruments provided him with the requisite standing, and that regardless, he was entitled to an accounting.

Based upon a review of the record, and the documentary evidence, the court determined that the petitioner lacked standing to institute the proceeding, and that absent petitioner having a present interest in the trusts, the remaining claim for relief sounding in wrongful termination constituted a dispute between living persons that was beyond the purview of the court's jurisdiction.

Although the court found that the petitioner had a contingent, albeit remote, interest in both trusts, it noted that the occurrence of several layers of contingencies had to occur before his interest could vest. The court opined that while such an interest would theoretically provide petitioner with the requisite standing to compel an accounting, it concluded that it would not be in the best interests of the trusts to compel one at the present time, particularly given its determination with respect to the remaining relief requested by the petitioner. Significantly, in reaching this result, the court determined that the language of the trust instruments indicated that the trustee was not required to account unless specifically ordered to do so on the application of the trustee or a beneficiary of the trust or on the court's own motion. Finding that the term "beneficiary" meant current beneficiary, and therefore, did not include the petitioner, the court held that petitioner lacked standing to request an accounting.

Accordingly, the motions to dismiss were granted.

In re Moloney, N.Y.L.J., May 13, 2014, p. 27, col. 1 (Surr. Ct., Suffolk Co.).

Summary Judgment

In re Newbold

In *In re Newbold*, the court was confronted with a motion for summary judgment in the context of a probate proceeding.

The decedent died survived by five siblings. Pursuant to the pertinent provisions of her will, the decedent directed that the residue of her estate pour over into a revocable trust that had been executed simultaneously with the instrument. Prior to her death, the decedent amended the instrument twice. Objections to probate were filed by four of the decedent's siblings, who alleged that the will had not been duly executed, that the decedent lacked testamentary capacity on the date of its execution and that it had been procured by undue influence and fraud.

With respect to the issue of due execution, the court noted that when an attorney supervises the execution of a Will there is a presumption of due execution. Additionally, when a will contains an attestation clause and a self-proving affidavit, there is a presumption of compliance with the statutory requirements. In support of her motion for summary judgment, the petitioner submitted an affidavit of the attorney-drafter, together with his deposition testimony and the testimony of the attesting witnesses. From this proof, the court concluded that the petitioner had established a prima facie case of due execution, causing the burden to shift to the objectants to raise a triable issue of fact. Towards this end, the objectants submitted an unsworn report from a handwriting expert, who concluded, upon examination of the decedent's known signature, that the signatures of the decedent on certain "questioned documents" were not genuine.

However, the court noted that, in addition to the report of the expert being unsworn, it failed to identify the "questioned documents," or the documents relied upon for proof of the decedent's signature. The court opined that although an expert's opinion is not required to establish a triable issue of fact regarding a forgery allegation, where an expert is used to oppose a proponent's prima facie case, the opinion must be in admissible form and state with reasonable particularity that the signature at issue is not authentic. While evidence otherwise excludable at trial may be considered as a basis for denying a motion for summary judgment, the court found that because this was the sole evidence provided by the objectant in support of the request, it could not, standing alone, serve to raise a triable issue of fact. Indeed, the court noted that the objectants had failed to provide any particulars regarding their claim of forgery. Accordingly, the court held that there was no issue of fact regarding the due execution of the Will.

As to the issues of testamentary capacity, undue influence and fraud, the court found that the objectants had failed to submit any evidence to refute the petitioner's proof that the decedent had testamentary capacity, or in support of their claims that the Will had been procured by undue influence and fraud.

Accordingly, the court dismissed the objections to probate and granted judgment in the petitioner's favor.

In re Newbold, N.Y.L.J., Oct. 31, 2013, p. 32 (Sur. Ct., Kings Co.).

In re Mele

In *In re Mele*, the Appellate Division, Second Department, affirmed a decree of the Surrogate's Court, Westchester County, dismissing the objections to probate. The decedent died survived by four daughters and two sons. Two of the decedent's daughters commenced the proceeding for probate of his will, which left his entire estate to them and disinherited his remaining children. The will execution was supervised by the attorney who drafted it, and the instrument was witnessed by the attorney's secretary and a businessman who occupied the office next door. Three of the decedent's four children who had been disinherited under the instrument filed objections to probate alleging lack of due execution, lack of testamentary capacity, undue influence and fraud. After the completion of discovery, the petitioners moved for summary judgment, and the application was granted. On appeal, the Court found that the petitioners had established prima facie that the decedent possessed testamentary capacity and that the will had been duly executed. Specifically, the Court noted that the petitioners had satisfied their burden of proof on the issue of due execution through the deposition testimony of the attorney who drafted and supervised the execution of the will, together with the testimony of the attesting witnesses. Moreover, the Court opined that the instrument had an attestation clause and a self-proving affidavit which gave rise to a presumption of compliance with the statutory requirements. Finally, the Court held that the objectants had

failed to submit any evidence, beyond conclusory allegations and speculation, that the will had been the product of undue influence or fraud.

In re Mele, 113 AD3d 858, 979 NYS2d 403 (2d Dep't 2014).

In re Congedo

In *In re Congedo*, the court denied the petitioner's motion requesting summary judgment on the issues of undue influence, but granted summary relief on the issue of due execution. The will execution was supervised by an attorney and therefore the petitioner was accorded a presumption of regularity that the will was properly executed in all respects. The court found that the objectant had offered nothing but conjecture that the will execution did not comport with the statutory formalities.

However, on the issue of undue influence, the record revealed that the petitioner had a fiduciary relationship with the decedent; that she or her husband made an appointment for the revision of the decedent's will; that the petitioner or her husband had paid for the revised will and that they accompanied the decedent to the draftsman's office; and that the new will represented a significant change from the decedent's longstanding testamentary plan. In view thereof, the court held that there were factual issues presented precluding judgment in the petitioner's favor.

In re Congedo, N.Y.L.J., Feb. 28, 2014, p.25, col. 3 (Sur. Ct. Suffolk Co.).

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