

Trusts & Estates

Expert Analysis

Closing Bell: Three Year-End Decisions From the Surrogate's Courts

As the year 2017 came to a close, Surrogate's Courts throughout the state continued to address a multitude of issues affecting trusts and estates. The past year was, indeed, prolific, as evidenced by opinions related to discovery proceedings, receipts and releases, and the construction of wills. The year's end was no less abundant in its topics and teachings. Consider the following:

Examination of Additional Witness Authorized

Before the Surrogate's Court, Nassau County, in *In re Biondo*, N.Y.L.J., Dec. 11, 2017, at p. 31 (Sur. Ct. Nassau County), was a probate proceeding in which the respondent sought the examination of an attorney who purportedly assisted

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the attorney draftsman in the preparation of the propounded Will. Prior to making the motion, the respondent had engaged in the examination of the attorney draftsman and the two attesting witnesses to the instrument.

The decedent died survived by two sons, one of whom was the proponent of the Will, and the other, who was the respondent. In pertinent part, the instrument contained an in terrorem clause directing the forfeiture of the bequests thereunder in the event a beneficiary opposed or contested its validity.

In support of his motion, the respondent attached excerpts from the SCPA 1404 transcripts of the draftsman, who stated, inter alia, that another attorney in his firm

had been involved in the drafting of the Will, had prepared multiple memorandums and emails regarding the decedent's estate plan, and went over proposed changes to the instrument with her. In view thereof, the respondent, citing SCPA 1404(4), argued that the attorney had information of substantial importance or relevance to his decision to file objections to probate. Further, relying on the provisions

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of SCPA 1404(6), the respondent maintained that the attorney was a person with whom the testator communicated regarding the provisions of her Will.

The court noted that, pursuant to SCPA 1404(4), where a will contains an in terrorem or no contest clause, any party to the proceeding

may, upon application to the court based upon special circumstances, examine any person whose examination the court determines may provide information with respect to the validity of the will that is of substantial importance or relevance to a decision to file objections. Further, the court observed that SCPA 1404(6) additionally provides, inter alia, that “if more than one person shall have been involved in the preparation of the will, the term ‘person who prepared the will’ shall mean the person so involved to whom the testator’s instructions for preparing the will were communicated by the testator.”

With the foregoing in mind, the court concluded that the attorney whose examination was sought was intimately involved in discussions pertaining to the decedent’s estate plan, and changes thereto, and thus, could have information of substantial importance to the respondent’s decision to file objections. Accordingly, respondent’s motion was granted.

Motion to Strike and for a Protective Order Denied

Before the Surrogate’s Court, Richmond County in *In re Asch*, N.Y.L.J., Dec. 1, 2017, at p. 45 (Sur. Ct. Richmond County), was a contested discovery proceeding between the decedent’s two daughters, both of whom were co-executors of the decedent’s

estate, and shared his residuary estate equally.

Following the admission of the decedent’s Will to probate, one of the executors (the petitioner) commenced a proceeding, pursuant to SCPA 2103, against the other executor (the respondent) for the purpose of discovering information pertaining to the change in title of several bank accounts from the decedent’s name alone to the decedent’s name jointly with the respondent. During the course of that proceeding, the petitioner moved, inter alia, for an order striking the

In ‘*In re Argondizza*’, the court concluded that the respondent had successfully rebutted the presumption that he violated his fiduciary duties in making the subject transfer.

respondent’s answer, precluding her from offering any documentary evidence at trial, and for sanctions. The respondent opposed the motion and cross-moved for a protective order as to all improper questions posed to her during the course of her examination.

The record revealed that since the inception of the litigation, the parties had been immersed in motion practice, and disputes regarding the course of discovery, involving, inter alia, deposition dates and dates for the production of documents. Assessed in this context,

the court noted that there was no clear directive to respondent to provide responses to the petitioner’s discovery demands until a date much later than petitioner had contemplated. Moreover, the court found that respondent’s withholding of discovery pending its decision on a motion and cross-motion for summary judgment did not constitute a “willful” failure to disclose as contemplated by the provisions of CPLR 3126. Accordingly, petitioner’s motion to strike and for an order of preclusion was denied.

With respect to the issue of sanctions, petitioner claimed, inter alia, that respondent’s counsel engaged in excessive speaking objections, and directed his client not to answer at least 200 questions during the course of her deposition, all of which severely hampered her examination. In response, respondent cross-moved for a protective order that would effectively strike the questions that she was directed not to answer or that were found improper by her counsel. Concluding that it would be error to unconditionally direct respondent to answer all questions asked of her during her deposition, the court held that a more balanced approach would be to rule on the propriety of the questions posed on a question by question basis, and that such questions should be

submitted for review in the form of a motion. Accordingly, the motion for sanctions and the cross-motion were denied.

Gift by Attorney-in-Fact To Himself Upheld

In *In re Argondizza*, N.Y.L.J., Oct. 19, 2017, at p. 27 (Sur. Ct. New York County), the Surrogate's Court, New York County, was confronted with competing motions for summary judgment addressed to the issue of whether the decedent's surviving spouse breached his fiduciary duty to the decedent when he, as agent under a power of attorney, transferred to himself the decedent's one-half interest in a cooperative apartment that he and the decedent had owned as tenants in common. The petitioners, in the underlying turnover proceeding, were the decedent's two children from a prior marriage, and Limited Administrators of her estate.

The record revealed that the decedent and her spouse owned the apartment as tenants in common until the year before she died. For several years beforehand, the decedent's health was failing, causing her to execute a power of attorney naming her spouse as her agent. In particular, the power was intended to enable her husband to take care of her affairs in anticipation of her long-term medical needs, including the preservation of her assets from exposure to liens and

encumbrances. Consistent with the plan, the decedent and respondent wrote a joint letter to the managing agent of the coop directing the transfer of the stock certificate for the apartment from both of their names to the respondent's name alone. In furtherance thereof, the respondent, acting as the decedent's attorney-in-fact, transferred the decedent's interest to himself.

Based on the foregoing, the court opined that a presumption of breach of fiduciary duty arises when it is shown that the agent, using his authority pursuant to a power of attorney, transfers assets of the principal to himself. This presumption may be rebutted by a showing that the principal intended for the transfer to take place, or, under certain circumstances, that the transfer was in the best interests of the principal.

Within the foregoing context, the court found that the evidence in the record was sufficient to establish a prima facie case of breach of fiduciary duty. Nevertheless, respondent maintained that the gift-giving authority granted to him in the power of attorney executed by the decedent, in combination with the joint letter to the managing agent of the coop, and the deposition testimony of the decedent's treating physician, in which he testified, inter alia, that the decedent told him about her decision to transfer her interest in the apartment to the

respondent and that she wanted him to have it, was sufficient to refute any claimed wrongdoing. To this extent, the respondent further alleged that the transfer was typical of the Medicaid planning that takes place when one spouse requires long-term care, and was, indeed, in her best interest.

In view of these assertions, the court concluded that the respondent had successfully rebutted the presumption that he violated his fiduciary duties in making the subject transfer. The court further found that the petitioners' attempt to create an issue of fact, by alleging that the decedent lacked capacity to direct the transfer of her interest in the apartment, and, alternatively, that the transfer was the result of fraud by the respondent, was unavailing. Notably, the court held that entries in the decedent's medical records indicating some dementia were insufficient to raise an issue as to the decedent's capacity, in light of the testimony of two disinterested physicians, one of whom was the decedent's physician, indicating that there was nothing about her mental condition that interfered with her ability to enter the transaction. The court held that the allegations of fraud were unsupported by the record.