

TRUSTS AND ESTATES UPDATE

Expert Analysis

End of Blockbuster Year In Shaping Trusts and Estates Law

The year 2013 was an important one for trusts and estates, with legislative proposals moving forward, and significant judicial opinions affecting the practice being issued. As the year came to a close, and the new year began, practitioners continued to benefit from instructive decisions from the Surrogate's Court bench. Consider the following.

Fiduciary Ordered Removed

In a bitterly contested estate pending before the Surrogate's Court, Richmond County, the decedent's granddaughter petitioned to have her father removed as trustee of the trust created for her benefit, on the grounds of maladministration and self-dealing. The principal asset of the trust was a parcel of realty consisting of four rental units that the fiduciary managed.

At a hearing of the matter, the respondent/trustee admitted that he commingled trust funds with his own personal accounts, stating that he was unaware that he was forbidden to do so. The respondent further admitted that although he was a plumber by trade, he performed various home improvements, unrelated to plumbing, on the real property belonging to the trust, for which he was compensated less than the going rate. He claimed that

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he performed this work in an effort to save the trust money. Additionally, when questioned about the kinds of services he rendered, as well as the financial transactions of the trust that took place during his stewardship, the respondent conceded that he failed to maintain any such records, albeit he did have some receipts for materials purchased by him for the upkeep of the premises.

The court opined that it was the respondent's responsibility to protect the corpus of the trust for the benefit of his daughter, and to provide her with a substantiated explanation of the numerous questionable transactions he had engaged as trustee. Based on the foregoing testimony, and the many other admissions of wrongdoing made by the respondent on the record, the court concluded that he had failed to fulfill his role as fiduciary, by commingling trust funds with his own, failing to keep accurate records, and self-dealing.

Accordingly, the respondent was removed as trustee, and ordered to account.

In re DeSantis, NYLJ, Nov. 26, 2013, at p. 25 (Sur. Ct. Richmond County)

Late Filing of Objections

In *In re Pisacano*, the Surrogate's Court, Nassau County, authorized the decedent's son to file objections to the probate of the decedent's will despite petitioner's claims that they were untimely.

The record revealed that in response to the submission of a decree by the petitioner, the decedent's son filed objections to probate alleging, in support thereof, that the decree was premature. The petitioner requested that the objections be rejected and the decree signed.

It appeared that following the completion of Surrogate's Court Procedure Act (SCPA) 1404 examinations, and following a discussion with counsel for the petitioner, counsel for the decedent's son "understood" that the deadline for the filing of objections would be 10 days from the receipt of the transcripts. This understanding was never reduced to writing or a stipulation between counsel. Moreover, counsel for the petitioner maintained that neither he nor his associate "recalled" there being any such understanding or discussion with his adversary. At the time the objections were submitted for filing by the decedent's son, the transcripts of the SCPA 1404 examinations had not yet been received.

The court noted that SCPA 1410 requires that objections be filed 10 days after completion of examinations under SCPA 1404 unless there is a stipulation otherwise between the parties, or the

court fixes a different date. Nevertheless, it observed that pursuant to CPLR 3012(d) the court was given the discretion to relieve a party from a default in pleading or appearance upon a showing of a reasonable excuse. Moreover, the court noted that pursuant to the provisions of CPLR 2004 it had the discretion to “extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown.”

Accordingly, based upon the foregoing, and recognizing that the surrogate’s overriding concern is that only valid wills be admitted to probate, the court, in the exercise of discretion, authorized the late filing of the objections.

In re Pisacano, NYLJ, Dec. 13, 2013, at p. 47 (Sur. Ct. Nassau County)

Summary Judgment Granted

In a contested probate proceeding pending in the Surrogate’s Court, New York County (Mella, S.), the petitioner moved for summary judgment dismissing the objections to probate alleging lack of due execution, lack of testamentary capacity, undue influence, duress and fraud.

The decedent died at the age of 89, survived by a brother, the objectant, and 10 nieces and nephews, children of predeceased siblings, one of whom was the petitioner and beneficiary of the entire estate.

In support of her motion for summary judgment, the petitioner relied on the affidavit of the attesting witnesses stating, inter alia, that at the time of the execution of the propounded will, the decedent was free from restraint. However, the court found that the affidavit was insufficient to establish that the instrument was not the product of undue influence, fraud or duress, and therefore, denied summary judgment as to these issues, without prejudice to renewal upon the completion of discovery.

On the other hand, with respect to the issues of testamentary capacity and due execution, the petitioner relied on the fact that the execution of the

instrument had been supervised by an attorney, the instrument contained an attestation clause, and the attesting witnesses had averred in an affidavit that at the time the decedent executed his will he “was suffering from no...mental impairment” that would affect his ability to make a valid will. Within this context, the court held that the petitioner had made a prima facie showing that the decedent had testamentary capacity and that the propounded instrument was duly executed.

In ‘Pisacano,’ the Surrogate’s Court, Nassau County, authorized the decedent’s son to file objections to the probate of the decedent’s will despite petitioner’s claims that they were untimely.

In opposition, the objectant submitted two documents; a photograph of the decedent at the age of 85, and a copy of the will of the decedent’s mother. Although the petitioner claimed that the documents had not been authenticated and therefore could not be considered on the motion, the court held that regardless of this fact, the objectant’s proof was insufficient to defeat the motion. Accordingly, the objections as to due execution and testamentary capacity were dismissed.

In re Marotty, NYLJ, Dec. 9, 2012, at p. 22 (Sur. Ct. New York County)

Petition Denied

Before the Surrogate’s Court, New York County (Anderson, S.) was a petition by the corporate fiduciary for advice and direction and construction of the decedent’s will under which it was named as donee of a power in trust for the benefit of her twin great-grandchildren. The proceeding was provoked by well-documented disagreements between the petitioner, the great-grandchildren, and their mother.

Although the petitioner couched its application as one seeking the assistance of the court to enable it to appropriately meet its fiduciary obligations, the court concluded that the requested relief could not be granted. More specifically, the court held that the petitioner’s request for a determination as to whether a successor trustee would automatically succeed to the power in trust could not properly be raised within the context of a proceeding for advice and direction. The court found that there were no unusual circumstances that would warrant advice and direction (SCPA 2107(2)), nor a basis for providing the petitioner with a determination in advance of an appropriate application for relief being filed.

Further, the court denied petitioner’s request for instructions as to the scope of its power and authority under the will to make income and principal distributions that incidentally benefit persons other than the principal beneficiaries under the will, finding, as before, that the request was not within the purview of SCPA 2107. Moreover, the court noted that the language of the will regarding the scope of the specific powers conferred upon the petitioner was clear. The fact that the petitioner was seeking the court’s intervention in order to avoid future disagreements with the beneficiaries and their mother was insufficient grounds for the court’s substituting its judgment for the petitioner’s in routine, albeit, difficult matters of administration.

Similarly, the court determined that the petitioner’s request for a construction of the will, and more specifically, whether it had the power and authority to compromise claims, was answered by the terms of the instrument. Furthermore, the court held that the issue of whether to compromise a claim was a matter of discretion for the fiduciary, and not the proper subject of a proceeding for advice and direction.

Finally, with regard to the petitioner’s request for a direction that as a donee of a power in trust it was entitled to the commissions of a corporate trustee,

the court held that it was not the function of the court, under the guise of a proceeding for advice and direction, to spare the fiduciary of the need to do legal research.

In re Duke, NYLJ, Jan. 3, 2014, at p. 29 (Sur. Ct. New York County)

Lapsed Bequest

In *In re O'Brien*, the administrators of the estate requested the Surrogate's Court, Bronx County, to apply the anti-lapse statute (EPTL 3-3.3) to the residuary clause of the decedent's will.

The decedent died at the age of 93 survived by 13 nieces and nephews, a grandnephew, and three grand-nieces, all of whom were children or grandchildren of three predeceased brothers and a predeceased sister. Pursuant to the terms of the residuary clause of her will, the decedent devised and bequeathed the residue of her estate to her sister, and one of her nephews, or the survivor of them, in equal shares. The will did not name alternate residuary beneficiaries.

The record revealed that the named residuary beneficiaries predeceased the decedent, provoking a request by the fiduciaries that the residue of the estate be paid, pursuant to the anti-lapse statute, to the children of the decedent's sister, i.e. the decedent's three grandnieces.

The court noted that, pursuant to the provisions of EPTL 3-3.3(a)(1), applicable to wills executed prior to Sept. 1, 1992, where a testator makes a bequest to a named beneficiary, without making an alternate disposition in the event the beneficiary should fail to survive, there is an inference that the testator intended to benefit the issue of the named beneficiary, who are to receive the named beneficiary's legacy. Nevertheless, because the eligible beneficiary class contemplated by the statute is limited to the issue, brothers and sisters of the decedent, the court determined that the residuary bequest to the decedent's sister passed to her issue, but that the bequest to the decedent's nephew lapsed. Under such circumstances, pursuant to the applicable statute, EPTL 3-3.4, the interest

of the decedent's predeceased nephew reverted to the decedent's sister, and, because she predeceased the decedent, her issue.

Accordingly, based on the foregoing, the court determined that the decedent's residuary estate passed to the issue of the decedent's sister, per stirpes.

In re O'Brien, NYLJ, Jan. 17, 2014, at p. 23 (Sur. Ct. Bronx County).

Refusal to Vacate Default

In *In re Dorfsman*, the Surrogate's Court, Nassau County, denied the request by a co-executor and beneficiary of the decedent's estate to vacate her default in pleading.

The court in 'Duke' denied petitioner's request for instructions as to the scope of its power and authority under the will to make income and principal distributions that incidentally benefit persons other than the principal beneficiaries under the will, finding that the request was not within the purview of SCPA 2107.

The decedent died survived by his wife and three children, two sons and a daughter, and named his three children as the executors of his estate. Several years after the decedent's death, his two sons filed their account as co-executors, and petitioned to compel their sister to file her account. The respondent, co-executor, failed to appear on the return date of citation of her brothers' account, or their compulsory accounting petition. Accordingly, the court directed her to file her account and to cause citation to issue thereon within 10 days of personal service upon her of a copy of the court's order.

Two months following the return dates of citation, the respondent, co-executor appeared by counsel. Thereafter, her two brothers filed an order to show cause to enforce the order direct-

ing her to account and to punish her for contempt by revoking her letters testamentary. In response, the respondent filed a motion to be relieved of her default, and allow her to file objections to her brothers' account, as well as to file her own account.

The court set the matter down for conference, noting that a notice of appearance had been filed on behalf of the respondent. Subsequent thereto, the respondent filed her account.

In support of her motion to file late objections to her brothers' account, the decedent's daughter argued that her default was not willful, intentional or dilatory, and that she was unaware that the matter was on the court's calendar. Further, she alleged that there was no prejudice in allowing her to file late objections given the short delay, and that she had meritorious claims to pursue. In opposition to the motion, the decedent's sons claimed that their sister's default was intended to delay the administration of their father's estate, and that as an attorney, herself, she was fully aware of the significance of the citation and the return date.

The court opined that to be relieved of a default in pleading, a party must show a reasonable excuse for the default, and a meritorious claim in the underlying proceeding. In concluding that the decedent's daughter had failed to present a reasonable excuse for her default, the court noted that the decedent's daughter was a practicing elder law attorney, and that she did not first reach out to counsel to represent her until two days after the return date of citation. Moreover, the court found that there was no merit to the proposed objections she sought to file to her brothers' account.

Accordingly, the motion by the decedent's daughter to be relieved of her default was denied.

In re Dorfsman, NYLJ, Jan. 10, 2014, at p. 37 (Sur. Ct. Nassau County)