

TRUSTS AND ESTATES UPDATE

Expert Analysis

Lessons in Estate Administration

The administration of an estate brings with it issues related to the distribution of assets, construction of a dispositive instrument, and the exercise of fiduciary discretion that are critical to the skill set of practitioners. Though decisions addressed to these issues are not often the focal point of this column, this month's discussion considers significant lessons to be learned in the administration of an estate.

Charitable Intent and Cy Pres

Before the Surrogate's Court, Bronx County, in *In re Mayer* was an application by the decedent's two sons, successor trustees of an inter vivos trust, to substitute one charitable beneficiary thereunder for another pursuant to the cy pres doctrine.

The record revealed that the decedent, a Holocaust survivor, was the grantor, trustee, and income beneficiary of the subject trust, consisting of funds derived from the German government as restitution for Nazi persecution. Upon the death of the grantor, 35 percent of the remaining principal and income of the trust was to be paid in various percentages to 12 named individuals and six charities having Jewish charitable purposes, and the remaining 65 percent was to be paid to the petitioners. According to the petition, one of the named charitable beneficiaries, entitled to 1 percent of the trust corpus, although previously a nonprofit entity supporting a German language Jewish newspaper, no longer operated as a charitable organization in New York, and had not made filings with the Attorney General's Charities Bureau since 2003. As such, the petitioners requested the court exercise its cy pres powers in order to substitute another charitable

By
**Ilene
Sherwyn
Cooper**



organization with purposes comparable to the charity named in the trust.

The court noted that application of the cy pres doctrine required consideration of the following factors: (1) whether the disposition was charitable in nature; (2) whether the language of the instrument evinced a general, rather than a specific charitable intent; and (3) whether the donor's purpose in making the disposition had failed or become impracticable. Applying this criteria to the record, the court found that the trust instrument evinced a general charitable intent of benefitting only charities with Jewish charitable purposes and/or charities that provided access to Holocaust survivors, and that the grantor did not intend a forfeiture of any charitable bequest to an individual or the remaindermen of the trust in the event the bequest failed.

Accordingly, based upon the foregoing, and the nature and focus of the substitute charity proffered by the petitioners, the application was granted.

In re Mayer, NYLJ, Aug. 30, 2013, at p. 31 (Sur. Ct. Bronx County).

Sale to Pay Debts

In *Morreale v. Morreale*, the Surrogate's Court, Nassau County, addressed the issue of whether the decedent's real property, which had been devised under his will, could be sold in order to satisfy the debts of the estate.

Before the court was an application by the Public Administrator, as administrator cta of the estate, to sell the subject realty in accordance with the provisions of SCPA 1902 and EPTL 11-1.1(b)(5). Pursuant to the

pertinent provisions of his will, the decedent devised "the right to reside" in the property to his son "for the rest of his life," subject to the son's duty to pay the real estate taxes, and all other expenses, repairs, and maintenance thereon, in lieu of rent.

The petitioner argued that the will granted the decedent's son a right of occupancy in the premises, which was subject to termination by the fiduciary. The son moved to dismiss the petition on the grounds, inter alia, that the documentary evidence, i.e. the decedent's will, granted him a life estate in the property incapable of being sold.

In analyzing the issue, the court reviewed the relevant authorities on the subject, opining that use of the words "use and occupancy" in the context of a devise of real property generally signified a life estate rather than a right of occupancy, which is a personal privilege only. Further, the court noted that the intent to grant a life estate may also be gleaned where the dispositive instrument contains language setting forth the rights and responsibilities of the recipient of the property, including the right to collect rent or the duty to maintain the premises.

In *Mayer*, the petitioners requested the court exercise its cy pres powers in order to substitute another charitable organization with purposes comparable to the charity named in the trust.

Based upon the foregoing, the court concluded that the decedent's son had a life estate in the real property and not merely a right of occupancy. Nevertheless, despite arguments by the son that the property thereby passed to him by operation of law on the death of the decedent, it held that the property, albeit a specific devise, could

be sold if necessary to pay the debts and obligations of the estate.

Accordingly, the court denied the motion to dismiss the petition, and directed that objections, if any, be filed by a date certain.

Morreale v. Morreale, NYLJ, Sept. 27, 2013, at p. 37 (Sur. Ct. Nassau County).

Reformation of Will Denied

Before the Surrogate's Court, New York County, in *In re Knapp* was an application by the co-trustees of a testamentary trust to reform the provisions of the instrument so as to, inter alia, allow the trustees a limited power to invade trust principal, reduce the ages for distribution of the trust corpus, so as to effectively accelerate the termination date of the trust, create a mechanism for the appointment of successor trustees without the need to resort to the court, and require that the trustees invest in accordance with the prudent investor standard set forth in EPTL §11-2.3.

The subject trust was created under the decedent's will for the benefit of her grandnieces and grandnephews, of which there were 11 on the decedent's date of death. The terms of the trust contained specific directions for its administration and termination, requiring, in pertinent part, that each share set aside in trust for the decedent's grandnieces and grandnephews be paid outright to them only upon their attaining the age of 25. Significantly, the provisions of the will explicitly denied the trustees the right to terminate the trust prior to the stated age for distribution, and directed payment of trust principal to the surviving grandnieces and grandnephews should any one of them die prior to the age of 25. Moreover, the terms of the trust stated that in the event a trustee failed to act, that the survivor could act alone without the need to fill the vacancy.

The petitioners indicated that the requested reformation was provoked by the failure of the trustees to agree as to the administration of the trust, and an agreement among the trust beneficiaries, seven of whom had already attained the age of 25, and four of whom had not, but who were purportedly represented by their respective parents, to resolve the issue. In support of the application, the petitioners relied on *Matter of Kern*, 159 Misc. 682, for the proposition that agreements among the interested parties can serve as a basis for a court's reforming the terms of a testamentary trust.

The court disagreed, finding *Matter of Kern*, supra., distinguishable, and conclud-

ing that the opinion did not support a result that was contrary to the intent of the testator. The court opined that when the intent of the testator is clearly expressed, resort to principles of construction are not required. To this extent, the court noted that the trust provisions clearly evidenced the testator's intent to preclude the beneficiaries from having any access to the assets in the trust until they attained the age of 25. Accordingly, the court denied the request to reform the trust in order to permit limited invasion of corpus and to reduce the age of termination.

Moreover, the court denied the petitioners' request for a plan providing for the appointment of successor trustees, finding that it was not in accord with the testator's testamentary scheme.

Finally, the court held that the request to hold the trustees to a prudent investor standard was a moot point inasmuch as the fiduciaries were already held to that obligation pursuant to the provisions of the statute, which had been enacted in 1995.

In re Knapp, NYLJ, Sept. 30, 2013, at p.

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29 (Sur. Ct. New York County)(Sur. Mella).

Conversion to Unitrust

Before the Surrogate's Court, Nassau County, was an unopposed application by the income beneficiary of the trust created under the decedent's will that it be converted retroactively to a unitrust pursuant to the provisions of EPTL §11-2.4.

The record revealed that the subject trust was created under the will of the decedent for the benefit of her daughter, the petitioner, with the direction that the trustees pay or apply the net income thereof to or for the benefit of her daughter for her lifetime. Upon the death of the decedent's daughter, the trustees were directed

to pay the income to the daughter's issue, per stirpes, and upon the death of the survivor of the decedent's daughter and her children living on the date of the decedent's death, to pay the principal, to the daughter's then living issue per stirpes, or if none, to the decedent's then living issue, per stirpes.

In support of her request, the petitioner claimed that the distributions to her from the trust had decreased steadily over the years, and that given her advanced age, the increasing cost of her health care, and her living expenses, it was difficult for her to maintain herself. The petitioner further alleged that when she questioned the trustee about her reduced income stream, it indicated that its current policy was to utilize its power to adjust in order to provide her with a rate of return of 2.75 percent, though it would be willing to increase the rate to 3 percent, upon the consent of the petitioner's daughters.

In assessing the issue, the court noted that the provisions of EPTL 11-2.4 supply a nonexclusive list of relevant factors to be considered in determining whether the statute should apply. These factors include the intent of the creator of the trust, the nature, purpose, and expected duration of the trust, the identity and circumstances of the beneficiaries, including needs for liquidity, regularity of payment and preservation and appreciation of capital, and the nature of the assets held by the trust.

Based upon these factors, the court held that the unitrust conversion was appropriate under the circumstances. The court concluded that it was clear that the trust was intended to benefit the decedent's daughter, and that the conversion would provide her with the income needed to satisfy her increased expenses. Moreover, the court opined that given the size of the trust corpus (\$6 million), and the age of the petitioner, the increase in income payable to her, would not result in a rapid depletion of the trust principal for the remaining duration of her life.

Accordingly, the court granted the application, and, in the exercise of discretion, directed that the effective date of the conversion be Jan. 1, 2013.

In re Smithers, NYLJ, Sept. 23, 2013, at 32 (Sur. Ct. Nassau County).