

TRUSTS AND ESTATES UPDATE

Expert Analysis

Motion Practice In the Surrogate's Court

The past several months have seen a variety of motions being made in the Surrogate's Court seeking, among other things, summary judgment, dismissal, injunctive relief and discovery. While motion practice often heightens the hostility between the parties, it can also serve to streamline and eliminate issues provoking litigation. Consider the following.

Summary Judgment

In *In re Newbold*, NYLJ, Oct. 31, 2013, at p. 32 (Sur. Ct. Kings County), and *In re Gleason Jr.*, NYLJ, Nov. 25, 2013, at p. 32 (Sur. Ct. New York County), the court was confronted with a motion for summary judgment in the context of a probate proceeding and accounting proceeding, respectively.

Before the court in *Newbold* was a motion for summary relief dismissing objections to the propounded will. 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

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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. Toward 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 *In re Gleason Jr.*, the court was confronted with competing motions for partial summary judgment in a contested accounting proceeding alleging breach of fiduciary duty by the corporate trustee. The trust in issue was created by the decedent under his will for the benefit of his son, and then upon his son's death, for the benefit of his then-living children. The objectant was the only living child of the decedent's son at the time of his death, and thereby became entitled to the income of the trust.

In addition, the pertinent provisions of the trust authorized the trustee, in its discretion, to pay or apply the principal of the trust for a child or grandchild's education, care, comfort and support, and set forth the decedent's intent, but not direc-

tion, that the trust be used primarily as a means of affording assistance to his children and grandchildren in the event of serious illness, misfortune or other emergency, and to assist his grandchildren during the period of their education, including college and post-graduate education.

Significantly, the testator directed that in making any of the payments authorized under the trust, the trustee could inquire and take into account any other income of his children or grandchildren, and provided further, that any decision by the trustee with respect to the exercise or non-exercise of its discretionary powers, if made in good faith, would fully protect the trustee and be conclusively binding upon all persons interested in the trust estate. Finally, the court noted, that the terms of the trust made it clear that the decedent's son was the principal beneficiary thereof, and to that extent, gave him the power, binding on all of the trust beneficiaries, to settle the trustee's account with the same finality as if it had been approved by the court.

Two years after her father's death, his daughter, the sole beneficiary, filed a petition to compel the trustee to account. The trustee accounted in two parts; the first, for the period during which the petitioner's father was alive, and the second for the period following his death. Objections to both accountings were filed by the decedent's granddaughter, who then moved for partial summary judgment on issues of liability for only the first accounting period, requesting the opportunity to prove damages at a later date. The trustee opposed and cross-moved for summary judgment dismissing the objections to both accountings.

In support of her motion, the objectant alleged that the documentary evidence supported her claim that the trustee breached its duty to her by impermissibly delegating authority to her father, who served as co-trustee with it prior to his death, and permitting him to make distributions for his benefit from the principal of the trust, in violation of its own policies, the terms of the trust and New York law. Although the trustee was unable to locate the requisite documentation establishing its policies and procedures for the years in question, the court held that was not a basis for granting summary relief, but rather created a

question of fact as to the adequacy of the trustee's recordkeeping.

Moreover, although the court found that the bank's payments to the objectant's father for her mother's health care and for business expenses were well within the parameters of the decedent's intent to provide for his son's care, comfort and support, it held that whether the trustee carefully scrutinized the requests for such funds was another question of fact for trial. The court also held that the objectant's claims that the trustee violated its duty of loyalty to her and failed to act in good faith by complying with her father's requests for invasions of principal was a question of fact, concluding that whether a trustee's conduct measures up to the appropriate standards of prudence, vigilance and care is a matter to be determined at trial.

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Finally, the court determined that the motion for summary judgment was premature without a showing of damages should liability be found.

In support of its motion for summary judgment, the trustee submitted affidavits from two of its trust officers, which indicated that its exercise of discretion in making principal invasions for the objectant's father was in good faith, upon consideration of the fact that he had no other sources of income beyond the trust, and was supporting both his wife and daughter with the funds. Moreover, the trustee pointed out that the objectant had never complained about the distributions made to her or for her mother's benefit while her father was alive.

The court opined that when a trust authorizes invasions of principal in the discretion of the trustee, the trustee's decision as to when the invasion shall be made and how much principal to invade will not be interfered with except in cases of abuse of discretion, bad faith or fraud. To this extent, the court noted that in a case where a trustee did not require an

advanced itemized statement of the requirements of the household of the beneficiary or pre-audit each expenditure, it was sufficient that the trustee required a general itemization of expenditures if it provided sufficient information for the exercise of its discretion. Further, the court found that the objectant had failed to offer any evidence that the trustee acted in bad faith or in derogation of the testator's intent.

However, the court concluded that a trustee's exercise of discretion, no matter how broad, is not unbounded, and must be examined in order to insure that it was not abused, or the result of bad faith or arbitrary decision-making. As such, the court held that questions of fact existed as to whether the trustee acted in bad faith, beyond the bounds of reasonable judgment, or failed to use its judgment.

Accordingly, but for one objection pertaining to the trustee's payment of generation skipping tax, the court denied both motions for partial summary judgment.

Proceeding for Removal

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 as trustees. At his death, the decedent had an 89 percent 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 million 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.

The court in ‘Gleason’ opined that when a trust authorizes invasions of principal in the discretion of the trustee, the trustee’s decision as to when the invasion shall be made and how much principal to invade will not be interfered with except in cases of abuse of discretion, bad faith or fraud.

Accordingly, the motion to dismiss was denied.

In re Terian, NYLJ, Feb. 27, 2014, at 25 (Sur. Ct. New York County).

Injunctive Relief

In *In re Raffe*, a contested accounting proceeding, the Surrogate’s Court, Nassau County, denied an application by the beneficiaries of the trust for an order restraining the trustee from transferring, loaning or otherwise using any assets of the trust without court approval.

The principal asset of the trust was the decedent’s home heating oil business. It appeared that the business had been operating at a loss for years, and the trustee had opted to make substantial loans to the business using trust funds, in order to keep the entity alive. As of the closing date of the accounting, there were loans outstanding of approximately \$5.3 million.

The court opined that to establish entitlement to a preliminary injunction, a movant must establish (1) a likelihood of probability of success on the merits; (2) irreparable harm in the absence of an injunction; and (3) a balance of the equities in the movant’s favor. Within this context, the movants claimed that the trustee breached his fiduciary duty to the trust by permitting the continued losses to the business, and causing the trust to make loans without any reasonable expectation of repayment. The trustee opposed the application, claiming that

his loans were authorized by the will, and were consistent with the prudent investor rule and with the ongoing efforts to sell the company.

The court concluded that the movants had not made a sufficient showing of irreparable harm to warrant the relief requested. Specifically, the court noted that the objections filed by the movants requested that the trustee be surcharged for losses to the trust estate caused by his alleged breaches of fiduciary duty. Further, the court noted that the movants’ inordinate delay in seeking injunctive relief was antithetical to a finding of irreparable harm. Indeed, the court noted that further weakening any such claim was the fact that the motion had not been made by order to show cause with a request for a temporary restraining order.

In re Raffe, NYLJ, March 21, 2014, at p. 31 (Sur. Ct., Nassau County).

Discovery of Banking Records

In a contested discovery proceeding 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 proffer 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 disclosure 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, NYLJ, Oct. 4, 2013, at p. 21 (Sur. Ct. Queens County).