New York Law Journal

SERVING THE BENCH AND BAR SINCE 1888

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An ALM Publication

VOLUME 255—NO. 25

MONDAY, FEBRUARY 8, 2016

TRUSTS AND ESTATES UPDATE

Expert Analysis

Opinions Instruct on Removal Of Fiduciaries, Elective Share, Investing

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As the year concluded and a new year began, both the appellate courts and the Surrogate's Courts addressed a variety of issues affecting trusts and estates practice. Addressed to such matters as the removal of fiduciaries, the elective share, and the investment of estate assets, the opinions are instructive.

Removal of Co-Trustee Denied

In *In re Burack*, one of the decedent's four children, a co-trustee of the testamentary trust created for the benefit of the decedent's surviving spouse, petitioned the Surrogate's Court, New York County, seeking the removal of one of her co-fiduciaries.

The terms of the subject trust, of which the petitioner, the decedent's spouse, and the respondent were co-trustees, provided principally for the decedent's spouse during her lifetime, and for his children and grandchildren upon her death. The trust was funded with two of the decedent's apartments, one, located in New York, and the other in Florida, and gave the decedent's surviving spouse the right to live in one or both of the properties, or to direct the trustees to sell same and to use the proceeds thereof to purchase a replacement property.

> The court in 'Burack' noted that courts are required to exercise the power of removal sparingly and to nullify the testator's choice of fiduciary only upon a clear showing of serious misconduct that endangers the safety of the estate.

In support of her application for removal, the petitioner alleged that the respondent was ineligible to serve as trustee by virtue of his disbarment from the practice of law in 1995, as a result of his commingling of client funds. In addition, the petitioner claimed that the respondent engaged in self-dealing by approving a loan of trust funds to the decedent's spouse in order to facilitate her purchase of a home to be used as her residence.

The court noted that courts are required to exercise the power of removal sparingly and to nullify the testator's choice of fiduciary only upon a clear showing of serious misconduct that endangers the safety of the estate. Within this context, the petitioner alleged that the respondent's disbarment for the mishandling of client funds was evidence of his dishonesty that put the assets of the trust estate at risk. The court opined that as a general matter, an attorney's disbarment, particularly for conduct involving dishonesty, fraud, deceit or misrepresentation, would raise reasonable apprehension that the funds of an estate would be in jeopardy, or at the very least, create cause for concern.

Nevertheless, the court found the facts and circumstances of the case alleviated any apprehension that the trust estate was in danger. More specifically, the court noted

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that the respondent was one of three trustees and could not act alone. Additionally, the record indicated that the respondent had voluntarily resigned from the practicing bar after acknowledging that he was the subject of an investigation that he had commingled client funds.

Although petitioner alleged that the respondent had deceived the decedent and his family into believing that he was still an attorney at the time he executed his will and after relinquishing his license, the court found that petitioner had failed to demonstrate the truth of these allegations, and that, instead, the record revealed that the decedent regarded the respondent as a friend and employed him for his services as an accountant and financial advisor, rather than as an attorney. In fact, it appeared that the decedent had sought legal advice from someone other than the respondent in connection with his estate plan and legal affairs.

In addition to the foregoing, petitioner claimed that the respondent should be removed for aiding and abetting the self-dealing of his co-trustee, the decedent's spouse. Specifically, the petitioner pointed to the fact that in order to purchase her home, the decedent's spouse was required to advance her personal funds to the estate as a loan, pending the sale of the two apartments owned by the trust in New York and Florida. The record reflected that when those properties were sold, the decedent's spouse was repaid, without interest.

Based on the foregoing, the court concluded that the advance of funds to the trust by the decedent's spouse as a loan, in order to facilitate the purchase of a new home upon the sale of the decedent's apartments, was not an act of self-dealing, but rather, was in keeping with the terms of the trust. Indeed, the court held that the subject loan did not constitute self-dealing as the decedent's spouse did not personally benefit from the transaction, nor place her interests in competition with those of the trust.

Accordingly, the court concluded that petitioner had failed to demonstrate that the respondent had neglected his fiduciary duties, and denied her application for removal.

***In re Burack*, NYLJ, Sept. 11, 2015, at p. 23 (Sur. Ct. New York County) (Sur. Mella).**

Removal due to Hostility

In *In re Thomas*, the Surrogate's Court, Kings County, was confronted with a petition by the decedent's son, who was a beneficiary of the estate, to revoke the letters testamentary issued to his brother, and to appoint the public administrator in his place and stead.

The decedent died in 2011 leaving a will, which essentially left her entire estate in equal shares to her two sons, who were her sole heirs, and nominated them both as co-executors. Because the petitioner was ineligible to serve as fiduciary, letters testamentary issued solely to the respondent. Notably, while the petitioner had objected to his brother's appointment as executor, the court determined, after a hearing, that he was qualified and eligible to serve.

Approximately two years later, the petitioner sought the removal of his brother. At the hearing of the matter, the petitioner testified in support of his application. No testimony was offered on behalf of the respondent. Specifically, the petitioner alleged that the respondent had mismanaged the real property of the estate, which had not been sold, and was generally unkempt. Moreover, petitioner argued that the respondent had caused the tenant, who had rented the apartment on the property, to vacate the premises, and that some of the decedent's personal property, and even some of his own personal belongings, were missing, albeit it had allegedly been placed into storage by the executor.

Further, the petitioner alleged that the respondent had obtained his letters through a material misrepresentation of fact, on the grounds that he purportedly testified at the prior hearing seeking his disqualification, that he did not possess keys to the decedent's home prior to her death, when it appeared that he had entered the premises following her death with two men, who were there to install an alarm system, and left with two shopping bags filled with items he refused to disclose.

Finally, although petitioner claimed that respondent had failed to comply with a stipulation filed with the court requiring him to complete certain paperwork regarding a joint bank account in which the parties were interested, at the hearing of the matter, the petitioner admitted that the respondent did, in fact, fulfill his responsibilities under the stipulation.

The court opined that pursuant to the provisions of SCPA 711(1), (3) and

(4), the court has the authority to remove a fiduciary where, inter alia, the fiduciary has improvidently managed or injured the property committed to his charge, obtained the grant of letters by a false suggestion of a material fact, or refused or without good cause neglected to obey any lawful direction of the court. Although the court found that none of the allegations of the petitioner rose to the level of mandating the executor's removal under any of the foregoing statutory provisions, it recognized that disqualification was warranted where the friction between a fiduciary and beneficiary endangers or seriously impedes the proper administration of the estate.

Within this context, the court noted that the decedent's estate had a history of animus between the petitioner and respondent, evidenced by numerous applications and proceedings instituted by the petitioner against his brother, the executor, and their inability to cooperate with respect to even the most basic issues. Under such circumstances, the court found that the situation between the petitioner and respondent was so uncooperative and "pernicious" as to be harmful to the administration of the estate and delay its closure. Based on the foregoing, the court found that the appointment of a neutral fiduciary was required to preserve, administer, and manage the assets of the estate. Accordingly, the letters testamentary issued to the respondent were revoked, and the public administrator was appointed in his place and stead.

***In re Thomas*, NYLJ, Nov. 13, 2015, at p. 27 (Sur. Ct., Kings County).**

Elective Share

In *Matter of Berk*, the Appellate Division, Second Department, modified an order of the Surrogate's Court, Kings County (Johnson, S.), by (1) adding as an issue of fact to be tried the question of whether the petitioner, the decedent's surviving spouse, exercised undue influence upon the decedent to induce him to marry her for the purpose of obtaining pecuniary benefits from his estate, and (2) replacing so much of the order, as imposed the burden of proof on appellants, the executors of the estate, by clear and convincing evidence, with a provision that placed the burden of proof on appellants by a preponderance of the credible evidence.

In 'Thomas' the court found that the situation between the petitioner and respondent was so uncooperative and "pernicious" as to be harmful to the administration of the estate and delay its closure. The court found that the appointment of a neutral fiduciary was required to preserve, administer, and manage the assets of the estate.

The underlying proceeding involved a petition by the surviving spouse of the decedent for a determination of the validity and effect of her exercise of her right of election against his estate, pursuant to EPTL 5-1.1-A. In their answer, the appellants, the executors of the estate, asserted as an affirmative defense that the decedent was incompetent to enter into a marriage, that the petitioner knew that he was incapable of entering into a marriage, and that the petitioner had exercised undue influence over the decedent to convince him to marry her.

On a prior appeal, the Appellate Division, Second Department, reversed an order granting summary judgment to the petitioner, finding that there was an issue of fact as to whether the petitioner had forfeited her right of election by her alleged wrongdoing; that is, by marrying the decedent knowing that he was mentally incapable of consenting to a marriage for the purpose of obtaining pecuniary benefits from his estate. The court further ruled that the appellants' counterclaims alleging undue influence were improperly dismissed.

On remitter to the Surrogate's Court, Kings County, the parties submitted proposed statements of the issues to be determined at trial, as well as proposals concerning the burden and quantum of proof on the issues. In the order appealed from, the Surrogate's Court limited the issues for trial to whether the decedent was mentally incapacitated and incapable of consenting to his marriage to the petitioner, and if so, whether the petitioner took unfair advantage of him by marrying him for the purpose of availing herself, as his surviving spouse, of his estate at death. The surrogate further ruled that the appellants/executors had the burden of proof on the issues by clear and convincing evidence. The surrogate did not include the issue of undue influence as a matter to be determined. The executors appealed.

The court opined that the issue of whether the petitioner had forfeited

her elective share under the circumstances raised by the proceeding was based on the equitable doctrine that the petitioner should not profit from her own wrongdoing. Where a claim of wrongful conduct is made, the parties asserting same, i.e., the appellants, have the burden of proving the wrongdoing by a preponderance of the evidence. The court further held that evidence of a confidential relationship between the petitioner and the decedent, by virtue of their marriage, was not, in itself, proof of the petitioner's wrongdoing, and, as such, did not shift the burden of proof to the petitioner to prove otherwise.

Additionally, the court held that an alternative ground for forfeiture of the right of election was whether the petitioner exercised undue influence upon the decedent to induce him to marry her. Again, the court determined that the appellants had the burden of proof on this issue by a preponderance of the credible evidence.

***Matter of Berk*, NYLJ, Nov. 30, 2015, at p. 25 (2d Dept.).**

Equitable Deviation

Before the Appellate Division, Third Department, in *Matter of Chamberlin*, was an appeal from an order of the Surrogate's Court, Washington County, which denied the application of petitioners, recipients of cash bequests under the decedent's will, to remove the investment restrictions on the funds, pursuant to EPTL Article 8. The common law doctrine of equitable deviation "has been applied to allow trustees to depart from the terms of a trust instrument where there has been an unforeseen change in circumstances that threatens to defeat or substantially impair the purpose for which the trust was created." (*In re Carniol*, 20 Misc.3d 887, 892, 861 N.Y.S.2d 587, 591 (Sur. Ct, Nassau Co. 2008) (quoting *Matter of Aberlin*, 264 A.D.2d 775, 695 N.Y.S.2d 383 [2d Dept. 1999]) (internal citations omitted).

The decedent died in 1999, with a will that made cash bequests to three churches. The will directed each church to hold its bequest, in trust, invest same only in insured bank accounts and government securities, and utilize the net income therefrom for the maintenance of the church property. Because the return in investments in insured bank accounts and government securities had been so low for many years, the churches applied, pursuant to EPTL 8-1.1(c), to amend the investment restrictions imposed by the will, in order to authorize investment of the trust funds in accordance with the Prudent Investor Act set forth in EPTL 11-2.3. The Attorney General appeared in the proceeding, and consented to the petitioners' application. The surrogate, nevertheless, denied the petition, finding that there had been no unforeseen change in circumstances warranting deviation from the testamentary directive, and the petitioners appealed.

The Third Department opined that, as compared to cy pres, which effects a substantive change in a trust, equitable deviation involves altering or amending an administrative provision thereof. Thus, the court noted that equitable deviation may be appropriate in cases where cy pres is not, because an administrative change can be made to a trust without varying its purpose or its dispositive plan. Moreover, the court observed that while equitable deviation under the common law requires an unforeseen change in circumstances, the statutory provisions of EPTL 8-1.1(c), applicable to charitable trusts, does not require the change to be unforeseen.

Within this context, the court found that the decedent's intent was to provide each petitioner with sufficient income derived from the investment of its cash bequest to assist in the maintenance costs of its property. Further, petitioners had established that the investment restrictions imposed on each bequest had reduced the income therefrom to such a negligible amount so as to frustrate the trust's purpose and render it impracticable.

Accordingly, in view of the foregoing, and the fact that petitioners were not seeking to alter the dispositive provisions of their respective trust, the court held that equitable deviation was appropriate. The order of the Surrogate's Court was reversed, the petition was granted, and the investment restrictions in the decedent's will were amended to permit petitioners to invest the subject trust funds in accordance with the Prudent Investor Act.

***Matter of Chamberlin*, 2016 NY Slip Op 00087 (3d Dept.).**