

TRUSTS AND ESTATES UPDATE

Privilege, Standing, Capacity, Equitable Adoption

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As the days of summer came to a close and various changes of fall subtly made an entrance, opinions addressing a multitude of issues affecting trusts and estates also debuted. Below is a sampling of the many opinions that emerged over the past three months.

Privilege and Its Exceptions

In *Stevens v. Cahill, Jr.*, the Surrogate's Court, New York County, was confronted with a motion to quash a subpoena served by the defendants on counsel for the plaintiff, and for a protective order. The underlying action, which was transferred from the Supreme Court to the Surrogate's Court, involved ownership of four works of art, which the plaintiff claimed were gifted to her by the decedent, who was her long-term romantic partner. Also at issue was the ownership of shares in a New York condominium, as well as the contents of the

condominium unit, and the proceeds of a bank account.

On the return date of the motion, the plaintiff was directed to provide, for the court's in camera examination, the documents she withheld from production on the grounds of privilege, including correspondence between her and her attorney. Upon such review, the court noted that the subject documents related to invoices from the gallery at which the subject artwork was purchased.

In 'Stevens' the court found that the documents submitted for in camera review provided adequate reason to apply the crime-fraud exception to the privilege rules.

According to the defendants, certain of these invoices were modified or revised after the decedent's death, and were given by the plaintiff to her counsel, who then provided them to defendants' counsel. More specifically, although identically dated and referring to the same works of art, one set of invoices listed the plaintiff's name

alone, and a second set listed the decedent's name on two invoices, the decedent and plaintiff's name on another invoice, and the decedent's place of employment on yet another invoice. Further, it appeared that upon receipt of the invoices listing plaintiff's name alone, plaintiff's attorney prepared bills of sale and an affidavit for approval by the gallery through which plaintiff obtained the artwork.

Based upon the foregoing, the defendants sought to depose plaintiff's counsel, and to obtain from him correspondence with the plaintiff, as well as other attorneys representing her. Claiming that the crime-fraud exception applied, the defendants argued that the attorney-client privilege and work product privilege did not preclude production of the information.

The court opined that the attorney-client privilege and the privilege accorded work product prepared in anticipation of litigation may yield to an adversary's need for discovery when the information sought "involves client communications that may have been in furtherance of a fraudulent scheme, and alleged breach of

fiduciary duty, or an accusation of some other wrongful conduct.” (citations omitted). Within this context, the court found that the documents submitted for in camera review provided adequate reason to apply the foregoing exception to the privilege rules. Significantly, in this regard, the court found that the communications were relevant to the issue of whether the invoices were tampered with, and that there was “probable cause to believe” that they involved possible client wrongdoing, and furtherance of such wrongdoing by counsel. The fact that counsel may have been unaware of such wrongdoing did not prohibit discovery from the attorney under the exception. Accordingly, the court directed production of all documents relating to the subject invoices.

On the other hand, the court held that the defendants had not made a sufficient showing to allow an examination of plaintiff’s counsel, to wit, (1) that no other means existed to obtain the information other than through an examination of counsel; (2) that the information sought was relevant and privileged; and (3) that the information was crucial to preparation of the case. Specifically, the court found that through the production of documents and the deposition of the plaintiff, the defendants had obtained the information they sought through other means, and had not demonstrated that the deposition of plaintiff’s counsel was crucial to their defense.

Accordingly, the motion to quash was granted, in part, and denied, in part, to the extent that document production

was directed, and discovery from plaintiff’s counsel was denied.

Stevens v. Cahill, Jr., NYLJ, Oct. 13, 2015, at 21 (Sur. Ct. New York County) (Mella, S.).

Standing to File Objections

Before the Surrogate’s Court, New York County, in *In re Bruno*, was an application by the petitioner to dismiss the objections filed by one of the decedent’s distributees on the grounds that she lacked standing to pursue her claims.

The decedent died survived by 11 first cousins once removed, who were her sole distributees. The approximate value of her estate at death was \$482,000. Pursuant to the pertinent terms of her will, she bequeathed her cooperative apartment, valued at approximately \$400,000, to Rose, who was one of her said distributees, and left the residue of her estate to the petitioner. Under a penultimate instrument, Rose received one-half of the cooperative apartment, and a one-fifth share of the residuary estate.

Objections to probate were filed by five of the decedent’s distributees, including Rose, alleging, inter alia, lack of due execution, lack of testamentary capacity, fraud and undue influence. The petitioner moved to dismiss the objections filed by Rose claiming that she was not adversely affected by the probate of the propounded will and therefore lacked standing.

The court opined that the provisions of SCPA 1410 authorize any person whose interest in property or in the estate of the testator is

adversely affected by the admission of the propounded will to probate to file objections to the probate of the instrument. The court noted that the “interest” contemplated by the statute need not be absolute, and can include a contingent stake in the estate.

Within this context, and based upon the estimated value of the estate, the petitioner argued that the objectant received more under the propounded instrument than under the penultimate will or in intestacy. The objectant, on the other hand, maintained that the petitioner was withholding assets from the estate that he wrongfully converted from the decedent, and that the recovery of those assets would result in the estate exceeding \$2.5 million. She thus maintained that she would have more to gain under the prior instrument, once the petitioner was made to turn over the property in issue.

The court held that where a party’s standing to object in a probate proceeding is in question, it is generally recognized that the probate estate assets should be deemed to include “any property transferred before death which for one reason or another can or should be recovered or brought into the estate...” (citations omitted). Thus, where it cannot be readily determined whether a would-be objectant’s interest will prove to be greater under the propounded instrument than it would be under a prior will or in intestacy, the court will rule in favor of standing.

Accordingly, the petitioner’s motion to dismiss was denied.

In re Bruno, NYLJ, Oct. 23, 2015, at 42 (Sur. Ct. New York County) (Anderson, S.).

Testamentary Capacity

Before the Surrogate's Court, Nassau County, in *In re Weissler*, was a motion by the petitioner—the decedent's son—for summary judgment dismissing the objections to probate filed by the decedent's four grandchildren, who were children of her predeceased son.

The decedent died survived by a son, daughter, and the four/objectant grandchildren. Pursuant to the pertinent provisions of her will, she bequeathed her residuary estate in three equal shares to her two children, and a granddaughter, who was the child of the petitioner. She expressly made no provision for the objectants, expressing confidence that her predeceased son "had made ample financial provision for them..." The objections to probate alleged that the decedent lacked testamentary capacity, and that the instrument was procured by fraud and undue influence.

With respect to the issue of capacity, the court noted that as a general rule, and until the contrary is shown, a testator is presumed to be sane and to have sufficient mental capacity to make a valid will. Further, the attorney who drafted the instrument testified that she knew the decedent for several years, had prepared her previous will, and had discussed the decedent's prior will and the propounded will with her. She recalled that the decedent could discuss matters clearly and

intelligently, and was aware of her family and assets.

In opposition, the objectants, without any documentary or evidentiary support, claimed that the decedent was not in good health, and was despondent over the death of her son. Based on this record, the court found that the petitioner had satisfied his burden of proving testamentary capacity on the date she executed her will, and dismissed the objection on this ground.

With respect to the issue of undue influence, the court noted that undue influence is rarely proven by direct

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evidence, but rather is usually established by circumstantial evidence, involving such factors as the testator's physical and mental condition, whether the testator had the benefit of independent counsel to draft the propounded will, whether the propounded will deviated from the testator's prior testamentary pattern, and whether the testator was isolated from the natural objects of his affection. Further, the court observed that a claim of fraud required a showing that the proponent knowingly made a

false statement that induced the decedent to make a will, and dispose of her property in a manner that she would not have otherwise determined, had the statement not been made.

Within this context, the court noted that the petitioner and the decedent resided together in the same building, and the attorney who prepared the will was the petitioner's attorney. In addition, the petitioner drove the decedent to meet with the draftsman, although the petitioner was not present during any discussions with counsel. Thirteen days prior to meeting with counsel, the decedent's son died, by committing suicide. According to the testimony of the attorney who drafted the will, much of her discussion with the decedent revolved around her son's death, and the decedent's belief that her son's children would be taken care of financially by their father's estate. The objectants alleged, however, that the decedent was misinformed by the petitioner and others about their father's estate, which was consumed by debt.

As a result of this allegation, the court found that a question of fact existed as to what information the decedent was provided when she discussed her will, and whether she knowingly was given incorrect information which caused her not to include the objectants as beneficiaries. Accordingly, the court denied the petitioner's motion for summary judgment with regard to the issues of undue influence and fraud.

In re Weissler, NYLJ, Oct. 23, 2015, at 45 (Sur. Ct. Nassau County).

Injunctive Relief Granted

In *In re Brown*, the Surrogate's Court, Kings County, granted the petitioner, the decedent's granddaughter a preliminary injunction against the respondent, the decedent's stepdaughter, preventing her from interfering with certain real property allegedly belonging to the decedent's estate.

The decedent died, intestate, a resident of Virginia, survived by her granddaughter. On July 14, 2014, the decedent's granddaughter was appointed ancillary administrator of the estate, for purposes of administering the subject real property, located in Brooklyn. Thereafter, she instituted a turnover proceeding against the decedent's stepdaughter, claiming that the real property and its contents belonged to the estate. It appeared that shortly after the decedent's death, the respondent, representing herself as the decedent's "sole surviving heir at law," executed a deed transferring the premises to herself, individually. The petitioner alleged that the respondent had misrepresented herself being a distributee of the decedent, and, thus, sought return of the property.

In opposition to the petition, the respondent alleged, inter alia, that she and the decedent had enjoyed a mother-daughter relationship, that she had lived in the real property for her entire life, that the decedent had frequently stated her intention that the respondent receive the property, and that the petitioner had little contact with the decedent. Further, the respondent claimed that she was a

distributee of the decedent by virtue of the doctrines of equitable adoption and adoption by estoppel, and sought the imposition of a constructive trust on the property.

Subsequently, the petitioner sought a preliminary injunction staying the respondent from interfering with the tenancy on the real property, including commencing or prosecuting a landlord-tenant action or eviction proceeding, and from interfering with the petitioner's efforts to collect rent. In this regard, the petitioner indicated that the respondent resided in the basement and first floor of the property, while a tenant resided on the second floor, and that the respondent had demanded that the tenant pay rental arrears or face eviction.

In opposition to the motion, the respondent maintained that she held legal title to the property, and as such, was entitled to collect rent and manage same. In defense of her representation on the deed that she was the decedent's sole surviving heir, respondent asserted the claim of equitable adoption.¹

The court noted that the doctrine of equitable adoption asserted by the respondent was a remedy for an unperformed contract of legal adoption. Generally, a court may find an equitable adoption where there is an agreement for adoption with an agency having the care and custody of a child. Imposition of the doctrine stems from the exercise of the court's equitable powers whereby a child is permitted to enforce the agreement to adopt made by the decedent and thereby acquire

the rights in intestacy that the child would otherwise have been entitled to had the decedent complied with the agreement.

Based upon the foregoing, the court observed that the respondent failed to proffer any independent evidence that the decedent had entered into an agreement of adoption. Moreover, the court noted that even if she had, she would only be entitled to a portion of the decedent's estate in intestacy. Further, the court found that the petitioner had presented a significant likelihood of success on the merits, and that as ancillary administrator, she had the duty to marshal and preserve the estate's assets. Given the respondent's wilful misrepresentation in the execution of the deed to the premises, the court recognized the possibility of irreparable harm to the estate should injunctive relief not be granted.

Accordingly, petitioner's motion for a preliminary injunction was granted.

In re Brown, NYLJ, Sept. 25, 2015, at 39 (Sur. Ct. Kings County).

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1. The court opined that the purpose of injunctive relief is to maintain the status quo and avoid the loss of property which could render a final judgment inadequate or futile. To demonstrate entitlement to a preliminary injunction, a movant must establish a probability of success on the merits, the danger of irreparable harm in the absence of an injunction, and a balance of the equities in favor of granting the relief.