

## Trusts and Estates Update

## Expert Analysis

# Summary Judgment In the Surrogate's Court

Although in years past, summary judgment in Surrogate's Court proceedings was rare, today, summary relief has become a welcome means for disposing of issues or a matter in its entirety. In prior columns, the undersigned and others have commented on the increased use of summary judgment in contested probate proceedings.<sup>1</sup> Of late, this momentum has continued as Surrogate's Courts have been inclined to grant summary relief in proceedings involving the elective share, as well as the judicial settlement of a fiduciary's account. Whether this seeming trend becomes the wave of the future remains to be seen. In the interim, consider the following.

### Right of Election

Within the past six months, the Surrogate's Court, Kings County (Sur. Lopez Torres), has disposed of two proceedings involving the validity of a surviving spouse's elective share via summary judgment.

In *In re Estate of Mason*, NYLJ, March 9, 2015, at p. 26 (Sur. Ct. Kings County), the court was confronted with a proceeding instituted by the decedent's surviving spouse to determine the validity of her exercise of her right of election against his estate. The executor of the estate, the decedent's sister, moved for summary judgment dismissing the petition on the grounds that the spouse had waived her right of election pursuant to a post-nuptial agreement with the decedent, and for an award of sanctions, costs and fees pursuant to 22 NYCRR §130-1(c).

The decedent died on March 7, 2011, survived by his spouse, the petitioner, and two adult daughters. His will was admitted to probate in January 2012, and two years later, the subject proceeding was instituted. The record revealed that the decedent and the petitioner were married on July 21, 2005, and in June 2006, they entered into a post-nuptial agreement. Each of the parties signed the document before a different notary public, and both signatures were accompanied by a written

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acknowledgment by each notary. There was no dispute as to the authenticity of the signatures on the agreement, and there was no claim that the agreement was procured by fraud or duress. Both parties were represented by separate counsel.

Based on the foregoing record presented, the court concluded that the executor had met her burden of proving that, as a matter of law, the

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agreement complied with the statutory requirements of EPTL 5-1.1-A (e)(2), i.e., it was in writing, subscribed by the parties, and properly acknowledged. Nevertheless, the petitioner maintained that the agreement was defective on the grounds that the language referring to the waiver of the elective share was ambiguous, the agreement was not "certified," the decedent did not initial the exhibit page containing the list of the petitioner's assets, and the list of the parties' assets appeared after the signature page, instead of before the signature page.

The court found that despite petitioner's characterization of the language of the document, the agreement clearly manifested the unambiguous purpose and intent of the parties to mutually waive their right to marital property and their spousal right of election. Further, the court opined that the agreement was not legally defective because the word "certification" did not appear in the acknowledgment by the notaries. Indeed, the court noted that the subject acknowledgment contained the required elements endorsed by the Court of Appeals in *Galletta v. Galletta*, 21

NY3d 186 (2013), to wit, (1) that the signor made an oral declaration to the notary public that he or she in fact signed the document; and (2) that the notary or other official either actually knew the identity of the signor or secured satisfactory evidence of identity ensuring that the signor was the person described in the document. Accordingly, the court granted summary judgment in the executor's favor, and dismissed the petition.

With respect to the executor's request for sanctions, the court observed that it had the discretion to award costs or sanctions against a party or an attorney who engages in frivolous conduct. Pursuant to the provisions of 22 NYCRR 130-1(c) (1), conduct is frivolous if "it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law." Considered in this regard is whether the conduct at issue was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel.

Notably, to this extent, the executor maintained that although she had informed petitioner's counsel that his claims regarding the post-nuptial agreement were incorrect and misinformed, he nevertheless had instituted the subject proceeding. The executor further maintained that the petitioner's position in the proceeding was baseless. The court agreed, finding the petitioner's arguments to be wholly without merit or basis in law. Accordingly, under the circumstances, the court awarded attorney fees to the executor in the sum of \$500.

Several months after deciding *Mason*, the Kings County Surrogate's Court was confronted once again with the validity of a waiver of a right of election in *In re Cash*, NYLJ, July 6, 2015, at p. 31 (Sur. Ct. Kings County). The decedent died on May 29, 2014, leaving a will, dated Oct. 9, 2007, which was written during her marriage. On the same day the will was executed, the decedent's spouse executed a document titled "Right of Election—Partial Waiver of Right of Election," in which he, inter alia, waived and released the partial interest that he had, pursuant to the provisions of EPTL 5-1.1(c), to elect against any share of his wife's estate, other than the share which he was provided in her will, dated Oct. 9, 2007.

In pertinent part, the decedent's will provided her spouse "with the smallest portion of [her] estate, if any, required to be given to [him] under applicable law, after taking into account the aggre-

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gate value of any other property passing to him under the will or otherwise." Moreover, notwithstanding the foregoing, the decedent bequeathed her spouse a 25 percent interest in her 401(k) account, and made him the beneficiary of her life insurance policy.

After the decedent's death, the decedent's family, including her spouse, met to read the will, and also read the document in which he had waived his elective share. It was undisputed that the decedent's spouse admitted, at that time, that he executed the waiver. Thereafter, the will was admitted to probate, upon the consent of the decedent's spouse.

Nevertheless, following the probate of the will, the decedent's spouse executed an election to take against her estate, and the executor thereof instituted the subject proceeding to determine that the elective share was waived and the election was invalid. Objections were filed by the spouse alleging that the waiver was not executed in the presence of a notary public, and that his signed consent to probate was invalid on the grounds that he executed the document while he was in mourning and was unaware of what he was signing.

The executor moved for summary judgment seeking to dismiss the objections, contending that there was no issue that the decedent's spouse signed the waiver, and moreover, that since a certificate of acknowledgment signed by the notary public accompanied the waiver, there was a presumption that it was duly acknowledged. Further, the executor maintained that the decedent's spouse would be barred, pursuant to the Dead Man's Statute, from testifying at any trial of the matter as to the execution of the waiver, given his self-interest in the outcome of the proceeding.

In opposition to the motion, the court noted that the spouse submitted only his counsel's affirmation, which did not offer any factual averments or substantiation for the allegations in the objections, together with a memorandum of law. Further, the court found it particularly significant that the decedent's spouse conceded that "he [could not] produce adequate evidence to rebut the presumption of validity of [the notary's] acknowledgment to satisfy the Court." While the spouse claimed, amongst other things, that he did not understand the waiver at the time it was signed, that he did not have the opportunity to consult with counsel, and that the waiver was unconscionable and vague, the court found these allegations unavailing, as they were not otherwise pleaded in his objections to the petition, and were nothing more than conclusory statements insufficient to defeat a motion for summary judgment.

The court opined that a valid waiver of a right of election requires that it be (1) in writing, (2) subscribed by the maker thereof, and (3) acknowledged or proved in the manner required by the laws of this state for the recording of a conveyance of real property. In order for a conveyance of real property to be recorded, it must be duly acknowledged by the person executing the same. Within this context, the court found that the waiver had been validly executed, observing that at his deposition, the notary public on the document testified that while he did not remember the details of the execution of

the waiver, the existence of his signature and notary stamp indicated that the decedent's spouse signed the instrument before him, and that he presented government identification to establish his identity.

Accordingly, based upon the foregoing, the executor's motion for summary judgment determining the validity of the waiver was granted. Further, the court granted the executor's motion for judgment dismissing the spouse's objection as to the validity of his consent to probate, finding that his claims were conclusory and unsubstantiated, and therefore, insufficient to overcome the presumption that a party signing a waiver and consent is presumed to understand what he signed, or to demonstrate any fraud, misrepresentation or coercion in the procurement of his signature.

### Contested Accounting

Before the Surrogate's Court, Suffolk County, in *In re Lowe*, NYLJ, June 16, 2015, at p. 27 (Sur. Ct. Suffolk County), was an accounting by JP Morgan Chase Bank as executor and trustee of the

The court in 'Lowe' held, as a matter of equity, that the decedent's daughter could not hold the fiduciary responsible for its inability to sell the California property, when it was her obstructionist behavior that precluded its sale.

trusts created under the decedent's will. Although objections to the account were initially filed by the decedent's spouse, his daughter, and his two grandchildren, after many years of litigation all the objectants, but for the decedent's daughter, settled with the fiduciary.

The decedent died on Feb. 23, 1986, and his will was admitted to probate on April 4, 1986. Ancillary probate was granted in California on the same date the will was admitted to probate in New York, and ancillary letters testamentary issued to the corporate fiduciary on June 6, 1986. The assets of the decedent's estate included a valuable parcel of real property located in California that was the subject of a long-term lease agreement, which expired on July 23, 2014.

Pursuant to the pertinent provisions of his will, the decedent created several trusts for the benefit of his wife, daughter and grandchildren. Significantly, the trust created for the benefit of the decedent's daughter provided for principal distributions to her in five equal installments at stated ages, commencing on Dec. 27, 1989, and concluding on Dec. 27, 2009.

The thrust of the objections asserted by the daughter were addressed to the fiduciary's failure to sell the real property located in California, which constituted a portion of the principal of the testamentary trust created for her benefit, as well as legal fees and commissions. More particularly, the objectant claimed that the fiduciary's retention of the realty constituted a breach of fiduciary duty, that the payments to the fiduciary's counsel were

unreasonable, and that commissions or payments to the fiduciary relating to the rents or management of the subject property were excessive.

The fiduciary moved for summary judgment dismissing the objections, and any related claims for damages or surcharges, and the objectant opposed and cross-moved for summary relief in her favor.

With regard to the principal issue involving the California realty, the record revealed that offers had been made by a corporate purchaser to purchase the property as early as 2005, for a gross selling price of \$41.33 million. Additional offers by the same purchaser were thereafter made, with the highest offer being \$43.75 million. After the national decrease in value in the real estate market, a final offer by the purchaser, in January 2009, was to purchase the property for \$34 million.

Despite the foregoing, none of the offers resulted in a sale of the property. Indeed, the court noted that although the fiduciary recommended to the beneficiaries that the property be sold, and although the decedent's spouse agreed to the sale, the decedent's daughter vigorously opposed any sale, and even threatened to bring a suit to enjoin any effort to bring a sale to fruition. The daughter's deposition testimony confirmed that she objected to any sale of the property and wanted to keep it in the family in order to preserve her father's legacy. The court found that since the daughter's individual interest in the property vested upon her attaining each of the ages set forth in the testamentary trust for a distribution of principal, she had the power, as a co-owner, to prevent its sale, and the fiduciary, under California law, lacked the authority to bind any of its co-tenants to a contract of sale.

Accordingly, based upon the foregoing, the court held, as a matter of equity, that the decedent's daughter could not hold the fiduciary responsible for its inability to sell the California property, when it was her obstructionist behavior that precluded its sale. The court therefore held she was estopped from contending that the property should have been sold and granted the fiduciary summary judgment dismissing the objections by the decedent's daughter on this issue.

On the other hand, the court denied the fiduciary's request for summary relief on the issue of legal fees, finding that the record was insufficient to determine their reasonableness.

Finally, the court granted summary judgment on the issue of commissions, concluding that the objectant had failed to demonstrate any basis for denying commissions in their entirety, or for not awarding same in the amount sought.

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1. See Ilene Sherwyn Cooper, *Revisiting Summary Judgment in Probate Proceedings*, NYLJ, May 17, 2007, p. 3; Colleen Carew and Charles Gibbs, "On the Increased Granting of Summary Judgment in Will Contests," NYLJ, Aug. 17, 2001, p. 3.