

Trusts and Estates Update

Expert Analysis

Surrogate's Court Practice: Appellate Courts Weigh In

While the appellate courts have been busy over the past year with a variety of issues, importantly, many of the matters affected the fields of trusts and estates. This month's column will examine those opinions, addressed to such issues as the scope of discovery proceedings and the statute of limitations, jurisdiction, due execution, and the termination of trusts.

Scope of Discovery

In *Matter of Perelman*, the Appellate Division, First Department, unanimously reversed an order of the Surrogate's Court, New York County (Anderson, S.), which, inter alia, denied the respondents' motion to dismiss the executor's amended petition to the extent it sought discovery, pursuant to Surrogate's Court Procedure Act (SCPA) §2103, of the decedent's ownership interests, if any, in family-owned businesses. The respondents were the corporate entity, Hudson News Company, one of the family-owned businesses, as well as the brother and nephews of the decedent against whom the discovery proceeding was instituted.

The court held that the amended petition, insofar as it sought the foregoing discovery, should have been dismissed on the ground that the executor "failed to demonstrate the existence of any specific personal property or money which belong[ed] to the estate" (citing *Matter of Castaldo*, 180 AD2d

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421 (1st Dept. 1992), or even a reasonable likelihood that such specific property or money might exist.

Significantly, the court noted that, in support of their motion to dismiss, the respondents offered contemporaneous documentary evidence indicating that, in 1990, the decedent had sold her interest

In 'Yen,' the Third Department held that while an attestation clause generally creates a presumption of due execution, it will not suffice if proof reveals that the required elements of due execution are otherwise lacking.

in the family-owned Hudson County News Company, for \$28,500 cash, and a \$200,000 promissory note payable in installments over five years. Following that sale, the record revealed that the decedent had no interest in that entity, or its successors, or in any other family enterprises.

In the face of this proof, the court found that the executor had failed to come forward with any evidence suggesting that, aside from a 401(k) account not at issue on the appeal, the decedent may have held any interest in the family businesses after 1990. The court opined that, notwithstanding the

executor's suggestion of the possibility that the decedent may not have been paid in full for her interest in Hudson, his claims that the decedent might have held some interest after the 1990 sale transaction were speculative. Moreover, the court held that any alleged cause of action based on a breach of contract or fraud in connection with the sale transaction would not confer a right to possession of specific personal property or money as required by the provisions of SCPA §2103.

Additionally, although the executor alleged that the respondents converted the decedent's interest in the family businesses, and that the estate had the right to inquire into any such conversion, the court found that any such cause of action would have accrued long before the decedent's death in 2007, and thus was barred by the three-year statute of limitations set forth in CPLR 214(3).

Finally, the court concluded that any claim for breach of contract based on the 1990 sale transaction was subject to the six-year statute of limitations for breach of contract, and thus became time-barred in 2001, i.e. six years after 1995, the year in which the last installment payment for decedent's interest in Hudson was due.

Matter of Perelman, 123 AD3d 436 (1st Dept. 2014), mot. for lv. to app. denied with costs, 2015 NY Slip Op 72200 (2015)

Jurisdiction and Domicile

In *Matter of Bonora*, the Appellate Division, Second Department, reversed the order of the Surrogate's Court, Richmond

County (Gigante, S.). That court had denied the motion by the Public Administrator of Kings County to revoke the letters of administration issued to the Public Administrator of Richmond County, and granted the motion by the Public Administrator of Richmond County for a judgment declaring the decedent a domiciliary of Richmond County at the time of her death.

The record revealed that in September 2004, the decedent, who was 83 years old, was admitted to a nursing home in Kings County, which had been her county of residence. Thereafter, a relative of the decedent was appointed guardian of the person and property of the decedent pursuant to Article 81 of the Mental Hygiene Law. Notably, in granting that appointment, the order of the Supreme Court, Kings County, authorized the guardian to choose the decedent's "place of abode including continued placement in a nursing home." In 2008, the guardian directed the transfer of the decedent to a nursing home in Richmond County, which was allegedly better equipped to meet her medical needs. The decedent died, intestate, in July 2013, while still an inpatient at the Richmond County nursing home.

In November 2013, the Public Administrator of Richmond County commenced a proceeding, pursuant to SCPA §1001, requesting letters of administration with respect to the decedent's estate. Shortly thereafter, the Public Administrator of Kings County commenced a separate proceeding in the Surrogate's Court, Kings County, for the same relief. Counsel for the Kings County Public Administrator maintained that at the time his client's petition was filed he was unaware of the Richmond County proceeding. On Dec. 16, 2013, the Surrogate's Court, Kings County, issued letters of administration to the Kings County Public Administrator. Two weeks later, on Dec. 30, 2013, the Surrogate's Court, Richmond County, issued letters of administration to the Public Administrator of Richmond County.

In January 2014, the Public Administrator of Kings County moved to intervene in the Richmond County proceeding and to revoke the letters of administration issued to the Richmond County Public Administrator, claiming that he had exclusive authority to administer the decedent's estate, pursuant to SCPA §704, inasmuch as letters

of administration were first issued to him by the Surrogate's Court, Kings County. In addition, he claimed that the decedent was domiciled in Kings County at death, because she lacked the capacity to change her domicile to Richmond County at the time she was transferred to the nursing home there.

The Public Administrator of Richmond County cross-moved for a judgment declaring that the decedent was domiciled in Richmond County when she died, and transferring the Kings County proceeding to that venue. Additionally, he moved in the Kings County Surrogate's Court to revoke the letters of administration issued to the Kings County Public Administrator on the ground that the court lacked jurisdiction over all the distributees of the estate at the time it issued its decree appointing him the administrator.

The Second Department in *'Bonora'* found that the Surrogate's Court, Kings County, correctly determined that the decedent was domiciled in Kings County at the time of her death, inasmuch as the record revealed that the decedent lacked the capacity to change her domicile from Kings County to Richmond County at the time she was relocated to the nursing home by her guardian.

Thereafter, the Surrogate's Court, Richmond County, denied the motion of the Kings County Public Administrator and granted the cross-motion of the Richmond County Public Administrator, and the King's County Surrogate's Court denied the motion by the Richmond County Public Administrator.

On appeal, the Appellate Division held that the Surrogate's Court, Kings County, properly determined that the Public Administrator of Kings County had the exclusive authority to administer the decedent's estate, pursuant to the provisions of SCPA §704. In pertinent part, that statute provides that "[a] person who applies in good faith therefor, and to whom letters are first issued from a court having jurisdiction to issue them, has exclusive authority under the letters until they are revoked." Applying the statutory criteria, the court found that letters of administra-

tion were first issued to the King County Public Administrator, and the record supported his assertion that he had applied without knowing of the earlier proceeding in Richmond County.

Moreover, the court concluded that the Surrogate's Court, Kings County, did not lack jurisdiction to issue letters of administration, since the provisions of SCPA §205(1) grant the Surrogate's Court of any county subject matter jurisdiction over the estate of any decedent who was a domiciliary of New York State at the time of death. Further, the court held that the Surrogate's Court, Kings County, did not lack personal jurisdiction over the necessary distributees of the decedent before issuing letters of administration to the Kings County Public Administrator.

The court noted that on an application for letters of administration, the provisions of SCPA §1003(2) require that jurisdiction be obtained over only those distributees with a prior or equal right to letters to that of the petitioner. Inasmuch as the record failed to indicate that any such distributees were known or existed, there were no persons who were entitled to process in connection with the Public Administrator's application for letters.

Finally, the court held that while the domicile of a decedent will determine the venue in which a proceeding may be brought, it is a waivable and non-jurisdictional concept that will not result in the revocation of letters of administration, or subject a decree to attack on the basis of subject matter jurisdiction. In any event, the court found that the Surrogate's Court, Kings County, correctly determined that the decedent was domiciled in Kings County at the time of her death, inasmuch as the record revealed that the decedent lacked the capacity to change her domicile from Kings County to Richmond County at the time she was relocated to the nursing home by her guardian.

Matter of Bonora, 123 AD3d 699 (2d Dept. 2014)

Due Execution

In *Matter of Yen*, the Third Department affirmed an order of the Surrogate's Court, Tompkins County (Cassidy, S.), which granted summary judgment to the objectant denying probate to the propounded instrument on the issue of due execution.

Following the decedent's death, her granddaughter petitioned for probate of her will, which bequeathed to her the decedent's entire estate, and named her the executor. Objections to probate were filed by the decedent's son (the petitioner's father), alleging, inter alia, lack of due execution. Subsequent to the examination of the attesting witnesses, the objectant moved for summary judgment. The application was granted by the Surrogate's Court, and petitioner appealed.

The Appellate Division opined that the statutory requirements for due execution require that a testator sign his will in the presence of, or acknowledge his signature to, at least two attesting witnesses, as well as declare to each witness that the instrument is his will. Moreover, while an attestation clause generally creates a presumption of due execution, the court noted that it will not suffice to satisfy the petitioner's burden of proving due execution by a preponderance of the evidence, if affirmative proof reveals that the required elements of due execution are otherwise lacking.

Considering the record in this context, the court observed that the subject will was signed while the decedent was residing in an assisted living facility. The signatures of three attesting witnesses appeared on the instrument, two belonging to employees of the facility, and the third belonging to a resident there. According to the testimony of one of the employee-witnesses, the decedent approached him in a hallway and asked him to sign a document that she stated was her will. This witness further recalled that at the time he affixed his signature to the instrument, it was folded in such a way that the only page that he saw was the page that he signed. He testified that he signed the document while standing in the hallway, did not look at any other part of the document, and did not know whether the decedent had signed it before he did.

Based on this testimony, and more specifically, the fact that the decedent neither showed her signature to the witness, or signed in the presence of the witness, the court held that the signature of this witness failed to satisfy the statutory criteria for due execution.

The second witness, who resided in the nursing facility, also testified that she met the decedent in the hallway, and that the

decedent had asked her to sign a paper. She stated that she did not know that the instrument was the decedent's will. This witness did not recall seeing the decedent's signature on the document, or hearing the decedent state that she signed it. Instead, she testified that the only page she saw when she affixed her signature to the document was the page for the witnesses' signatures. Accordingly, in view of the fact that the decedent did not tell the second witness that the instrument was her will, and the witness did not see the decedent's signature, the court held that the signature of the second witness failed to meet the requirement for due execution.

The court found that petitioner's proof in opposition to the motion for summary judgment consisted solely of affidavits from individuals who were not present when the will was signed, which addressed issues unrelated to the issue of due execution, such as the quality of the decedent's relationship with the objectant, and her intent to make a new will. The court held that this evidence failed to raise an issue of fact as to whether the propounded instrument was duly executed, and failed to reveal that there was any evidence available that would or could demonstrate due execution. Accordingly, the court determined that summary judgment had been properly granted in objectant's favor.

In re Yen, 2015 NY Slip Op 03228 (3d Dept. 2015)

Termination of a Trust

In *In re Estate of Wagner*, the Appellate Division, Fourth Department, modified an order of the Surrogate's Court, Monroe County (Calvaruso, S.), and remitted the matter to the Surrogate's Court for further proceedings as to the disposition of the principal of a terminated trust.

The subject order was issued in a proceeding commenced by the corporate trustee of the trust requesting that it be terminated as uneconomical pursuant to the provisions of EPTL §7-1.9. The pertinent terms of the decedent's will created a trust, consisting of the decedent's residence, for the benefit of the respondent, Sally Baumann, and granted her the right to the income and principal thereof during her lifetime. Upon the death of the respondent, the decedent directed that the remaining trust principal be dis-

tributed to his grandchildren, per stirpes. The will further provided that in the event any trust was terminated as uneconomical, the trust assets were to be distributed to the income beneficiary(ies) thereof at the time of termination.

In response to the petition of the trustee to terminate the trust, the grandchildren moved for summary judgment seeking the principal of the trust, and the respondent, income beneficiary, cross-moved for the same relief. The Surrogate's Court granted the cross-motion of the respondent, and the grandchildren appealed.

The Appellate Division agreed with the grandchildren and held that the Surrogate erred in directing that the principal of the trust be distributed to the income beneficiary. The court held that the determination of the rightful beneficiary(ies) of the trust principal required an examination of the testator's intent, which was to be gleaned from a "sympathetic reading of the will" in its entirety. Noting that there were two provisions of the will which addressed the disposition of the trust principal, the court concluded that the decedent intended to benefit both the respondent and his grandchildren, but wanted to insure that respondent was provided for during her lifetime. Accordingly, in light of these competing interests, the court remitted the matter to the Surrogate's Court to determine, in accordance with the provisions of EPTL §7-1.9, "the distribution of the trust assets...in such manner, proportions and shares as in the judgment of the court will effectuate the intention of the creator."

In re Wagner, CA 13-01772 (4th Dept. 2014)