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TRUSTS AND ESTATES

By Ilene Sherwyn Cooper

Discovery of Assets

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 SCPA §2103, of the decedent's ownership interests, if any, in family-owned businesses.

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 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 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.


Ilene S. Cooper

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 Dep't 2014), *mot. for lv. to app. denied with costs,* 2015 NY Slip Op 72200 (2015).**

Reformation of Trust

Before the Surrogate's Court, Suffolk County, was an uncontested application by the petitioner, the decedent's niece, as successor trustee/beneficiary of the Victor Larson Revocable Trust, the trustee/beneficiary of the Victor Larson Irrevocable Trust, and beneficiary of the decedent's will for a construction of certain enumerated dispositions of the three instruments.

The record revealed that pursuant to the terms of his Revocable Trust, created on July 1, 2008, the decedent directed that $25,000 of the trust funds be distributed to each of his two grandsons, and the remainder thereof be distributed to his niece and nephew. It also appeared that the same day he executed the Revocable Trust, the decedent executed his will, wherein he directed that the residue of his estate pour over and be distributed in accordance with the terms of his Revocable Trust, or, in the event the trust could not be located, in accordance with the same dispositive scheme as set forth in the Revocable Trust instrument.

Several years after the execution of the foregoing documents, the petitioner, acting under decedent's power of attorney, met with counsel to discuss Medicaid planning on the decedent's behalf. As a result of that meeting, the petitioner created the Irrevocable Trust on behalf of the decedent, the terms of which mirrored the terms of the Revocable Trust and will.

Unfortunately, the decedent died one month later, without all of his assets having been transferred into the Irrevocable Trust. The unintended result thereof was the existence of assets remaining in the decedent's name for disposition under both the Revocable and Irrevocable Trusts, and a duplication of the bequests to the decedent's nephews; i.e. pursuant to the terms of the Revocable Trust, as well as the terms of the Irrevocable Trust. Accordingly, the petitioner requested that the Irrevocable Trust be amended to delete the bequests thereunder to the nephews.

The court opined that while it may be reluctant to construe a trust instrument when the language is unambiguous, it would be within its purview to reform the instrument in order to effectuate the settlor's intent. Towards that end, the court observed that it was required to review the dispositive scheme set forth in the decedent's will and trust instruments, and all the facts and circumstances surrounding the preparation of those documents. With this in mind, the court held that it was clear that the Irrevocable Trust was intended to maintain the integrity of the decedent's testamentary plan, and as such, to insure that the decedent's nephews receive bequests of only $25,000 each from the decedent's estate.

Accordingly, in order to effectuate the settlor's intent, the court held that the Irrevocable Trust should be reformed in order to delete the specific bequests to the decedent's nephews.

***In re Larson Irrevocable Trusts,* NYLJ, June 26, 2015, at p. 43 (Sur. Ct. Suffolk County).**

Revocation of will

In *Matter of Powers,* the Surrogate's Court, Oneida County, was confronted with objections by the decedent's surviving spouse, who alleged that the propounded instrument had been revoked by the decedent prior to his death. Simultaneous with the filing of her objections, the decedent's spouse moved for summary judgment denying the will probate, and the proponent cross-moved for summary judgment striking the objections.

The propounded will was a typewritten instrument, but at the top of the first page, there was handwritten and dated, in red, by

the testator, the words: "This Will is no longer valid." In addition, the testator indicated that after two years of consideration, she handwrote a new will, which she requested be "honored," until she was able to get the instrument "officially changed" and typed. Attached to the instrument, were 12 sheets of paper containing the testator's handwriting and signed by her. Notably, these handwritten sheets were never re-done in typed form prior to the testator's death. Moreover, none of the words of the testator on the top of the propounded instrument touched or obliterated any part of her will. Nevertheless, the objectant maintained that the testator revoked her will pursuant to the provisions of EPTL 3-4.1, which allows a will to be revoked by an act of burning, tearing, cancelling, or obliteration by the testator.

The court opined that when words of revocation and the signature of the testator are written directly across the face of a will, it obliterates the words on the instrument, thereby reflecting the intent of the testator to revoke it. However, in view of the fact that none of the words written by the testator at the top of the instrument defaced the subject will, it could not be concluded that she revoked the instrument by physical act in conformity with the statute. Further, in response to the objectant's claim that the instrument had been cancelled by a writing, the court held that in order to be effective, such writing had to be executed in accordance with the statutory formalities of a duly executed will. Inasmuch as those formalities had not been complied with, objectant's argument failed.

Accordingly, based upon the foregoing, the proponent's motion for summary judgment was granted, and the objections to probate were dismissed.

***In re Powers,* NYLJ, July 14, 2015, at p. 29 (Sur. Ct. Oneida County).**

Note: Ilene S. Cooper is a partner with the law firm of Farrell Fritz, P.C. where she concentrates in the field of trusts and estates. In addition, she is past-Chair of the New York State Bar Association Trusts and Estates Law Section, and a past-President of the Suffolk County Bar Association.