

## TRUSTS AND ESTATES UPDATE

## Mid-Year Review: Interesting Cases That Rounded Out Summer Season

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**A**s we enter the final months of 2023, we consider some of the interesting decisions affecting trusts and estates that rounded out the summer season.

### Appellate Court Addresses Claim Based on Separation Agreement and Divorce Decree

In *In re Panella*, the Appellate Division, Fourth Department, affirmed an Order of the Surrogate's Court, Oneida County, which denied petitioners' motion for summary judgment and, following a hearing, dismissed the proceeding for enforcement of a separation agreement and divorce decree.

The subject proceeding was commenced by the decedent's adult children based on a provision in the separation agreement (the agreement) between their parents and decree of divorce (the decree) that required the parties to execute a last will and testament naming the petitioners as irrevocable beneficiaries of 100% of the existing assets of their respective estates. The agreement and the decree further stated that the parties would provide the other with a conformed copy of the executed will.

Despite the foregoing, the decedent left a will that left his entire estate to his second wife. Following the decedent's death, the petitioners, who were then unaware of the terms of both the agreement and the decree, executed waivers and



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consents to the probate of the decedent's will, and it was admitted to probate. Subsequent thereto, the petitioners learned of the subject documents and commenced the proceeding for their enforcement contending that they were third-party beneficiaries of the agreement and the decree, and that the decedent breached that contract when he failed to leave them 100% of his estate.

Based on the record, the Appellate Division concluded that the surrogate had properly denied petitioners' motion for summary judgment finding that the petitioners had neither submitted a copy of the decedent's will in support of their motion, nor established a breach of the agreement and the decree as a matter of law.

The court opined that while the elements of a breach of contract action include the plaintiff's

performance under the contract, as alleged third-party beneficiaries of the contract, the petitioners were not required to demonstrate performance. Rather, the court noted that in order to pursue a claim as a third-party beneficiary, an intent to benefit the third-party must be shown.

Absent such proof, the third-party is merely an incidental beneficiary with no right of enforcement. To this extent, the court observed that where children, such as the petitioners, are the actual and direct beneficiaries of a separation agreement, they had an independent right to enforce its terms.

However, the court agreed with the surrogate that summary judgment was not warranted given an ambiguity in the agreement and the decree as to the termination date, if any, of the subject provision, and that a hearing was required on the issue.

Following the hearing, the surrogate determined that the petitioners had failed to establish their entitlement to relief and dismissed the proceeding. The Appellate Division affirmed, concluding that the petitioners' own evidence, including the testimony of their mother, established that it was the intention of the decedent and their mother to leave their assets exclusively to the petitioners but only until they attained majority age.

*In re Panella*, 2023 N.Y. App. Div. LEXIS 4091, 2023 NY Slip Op 04009 (4th Dep't 2023).

### **Proceeding for Probate of Lost Will Denied Without Prejudice**

Before the Surrogate's Court, New York County, in *In re Wells*, was an uncontested proceeding for probate of a conformed copy of an allegedly destroyed will pursuant to SCPA 1407. The petitioner also requested that the court dispense with the testimony of one of the two attesting witnesses pursuant to SCPA 1405.

In support of the application, the petitioner, the decedent's brother, asserted that after the decedent had executed the propounded instrument, the attorney-

draftsperson retained the original thereof, and mailed a conformed copy to the decedent. Attached as an exhibit was a letter from the attorney-draftsperson to the decedent memorializing the foregoing.

Additionally, in an affidavit to the court, the petitioner stated that in 2007 the decedent provided him with a copy of his will and advised him to contact the attorney-draftsperson to obtain the original instrument upon his death. In view thereof, the petitioner averred that at least since 2007, the decedent never had her original will, and thus could not have destroyed it.

In further support of the petition, the attorney-draftsperson of the instrument, who represented petitioner in the proceeding, submitted an affirmation in which he maintained that he had retained the

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original will, but that it was destroyed in or about October 2016. Specifically, counsel indicated that a newly purchased will vault was returned to the vendor containing original documents for hundreds of clients, including the original will of the decedent, and that the vault was immediately destroyed by the vendor upon its receipt.

Nevertheless, the court determined that petitioner's statements, which it found were self-serving, to be of little probative value. Moreover, the court concluded that petitioner had failed to present any evidence that the propounded instrument was in the attorney-draftsperson's possession, or that it was allegedly contained in the destroyed will vault. The court thus determined that the application was devoid of any evidence that the decedent had not revoked his will.

Further, the court found that the petitioner had failed to provide the requisite proof needed to

dispense with the testimony of the second attesting witness to the instrument, or that the monetary bequest thereunder for the benefit of the decedent's cousin had lapsed. In each instance, the court noted that the petitioner had submitted nothing but bald, unsubstantiated assertions.

Accordingly, the petition was denied without prejudice.

*In re Wells*, 2023 N.Y. Misc. LEXIS 3546, 2023 NY Slip Op 32395 (U) (Sur. Ct. New York County).

### **Dismissal of Probate Petition for Failure To Prosecute Denied**

Before the Surrogate's Court, Richmond County, in *In re Grillo*, was a probate petition and a request for letters testamentary, as well as a petition by the respondent in that proceeding for letters of administration. Following the filing of the probate petition on June 28, 2021, the petitioner was notified on July 7, 2021 of certain items that remained outstanding.

On Jan. 6, 2023, respondent's counsel filed a demand for resumption of prosecution of the probate proceeding. On Feb. 22, 2023, respondent's counsel filed a motion pursuant to CPLR 3216 and SCPA 209(8) seeking an order dismissing the probate petition alleging petitioner's delay or unreasonably neglect in the prosecution of the proceeding. Two months thereafter, petitioner's counsel filed the items requested by the court in an effort to complete the probate proceeding, together with an affidavit explaining that the delay was attributable to an erroneous belief on his part that all the requisite paperwork had been filed.

Respondent's counsel opposed the petitioner's affidavit of delay, and thereafter, petitioner's counsel opposed respondent's motion.

In denying respondent's motion, the court noted that the primary objective when there is a duly executed will before the court is to ensure that the testator's intent is honored. To this extent, the court distinguished the case before it with those instances in which petitioner had submitted a copy of a will for probate, rather than the original, or where counsel engaged in a course of conduct that prolonged litigation.

To the contrary, petitioner's counsel immediately filed the necessary documents that had been requested by the court when alerted to the fact by respondent's counsel, and admitted that the delay

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was due to his error.

The court opined that the mere making of a will creates a presumption against intestacy, and that a delay in the prosecution of a probate proceeding does not eliminate the existence of a propounded will. That said, the court observed that until a propounded instrument is denied probate, any application for the intestate administration of an estate would be premature.

Indeed, dismissal of the probate proceeding would prevent the court from inquiring further into decedent's intentions for the disposition of her estate, an issue of "paramount importance" in Surrogate's Court proceedings.

Accordingly, the proceeding for letters of administration was held in abeyance pending the outcome of the probate proceeding.

*In re Grillo*, 2023 NYLJ LEXIS 1831 (Sur. Ct. Richmond County).