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TRUSTS AND ESTATES UPDATE

Stepping From 2023 Into the New Year

By Ilene Sherwyn Cooper
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As 2023 came to an end, and 2024 began to unfold, the Surrogate and Appellate Courts throughout the state have been busy issuing decisions of interest—not only to the trusts and estate practitioner but to the bar at large. Consider the following opinions.

Fourth Department Addresses Ratification And Judicial Estoppel

Before the Appellate Division, Fourth Department, in *In re R.W. Burrows Grantor Family Trust (Lengvarsky),* was an appeal from an order of the Surrogate's Court, Herkimer County, which dismissed the underlying SCPA 2103 petition seeking discovery and delivery of certain assets that allegedly belonged to the trust that was established by the decedent for the benefit of his daughters, and was the subject of certain terms in the decedent's divorce settlement agreement.

The petitioner moved for, inter alia, partial summary judgment that a certain stock transaction did not constitute an equivalent exchange pursuant to the terms of the agreement. By cross-motion, the respondents sought, inter alia, leave to serve an amended and supplemental answer to assert the affirmative defenses of ratification and judicial estoppel with respect to the transaction, as well as summary judgment dismissing the petition on these grounds.


Ilene Sherwyn Cooper.

The Surrogate's Court denied the petitioner's motion, and effectively granted respondents cross-motion seeking summary judgment dismissing the petition, and denied as moot the balance of the cross-motion seeking leave to amend and supplement the answer. The petitioner and beneficiaries separately appealed.

The Appellate Division modified the Surrogate's order by denying the cross-motion insofar as it sought summary judgment dismissing the petition, reinstating the petition, and vacating that part of the order that denied the balance of the cross-motion as moot, and directed the Surrogate to determine that part of the cross-motion on the merits upon remittal. Further, the court rejected the petitioner's contentions that the Surrogate's Court erred in denying his motion for partial summary relief.

In reaching this result, the court observed that ratification is the act of knowingly giving sanction

ILENE SHERWYN COOPER *is a partner with Farrell Fritz in Uniondale, where she concentrates in the area of trusts and estates.*

or affirmance to conduct that would otherwise be unauthorized and not binding (*Northland E. v. J.R. Militello Realty*, 163 AD3d 1401, 1405 (4th Dep't 2018)). Additionally, for an act to be ratified, there must be full knowledge of the material facts relating to the transaction, and the assent thereto must be clearly established and may not be inferred from doubtful or equivocal acts or language (*Rocky Point Properties v. Sear-Brown Group*, 295 AD2d 911, 913 (4th Dep't 2002)). Within this context, the court concluded that triable issues of fact existed as to whether the petitioner ratified the stock transaction that allegedly caused the trust to lose value.

The court observed that ratification is the act of knowingly giving sanction or affirmance to conduct that would otherwise be unauthorized and not binding.

Further, the court opined that the doctrine of judicial estoppel provides that where a party assumes a position in a legal proceeding and succeeds in maintaining that position, that party may not subsequently assume a contrary position because the party's interests have changed. (Jones v. Town of Carroll, 177 AD3d 1297, 1298 (4th Dep't 2019). The doctrine only applies where the party secured a favorable judgment in the prior proceeding (*Borrelli v. Thomas,* 195 AD3d 1491, 1494-1495 (4th Dep't 2021)).

In view thereof, the court concluded that the Surrogate erred in applying the doctrine because, contrary to the Surrogate's determination that the petitioner had agreed to the valuation related to the stock transaction as part of the divorce settlement, the petitioner was not a party to the matrimonial action or divorce settlement. Moreover, the court found that, as a general rule, a settlement does not constitute a judicial endorsement of either party's claims and thus does not provide the prior success necessary for judicial estoppel (*Matter of Constantino,* 67 AD3d 1412, 1413 (4th Dep't 2009)).

In re R.W. Burrows Grantor Family Trust (Lengvarsky), 2023 NY Slip Op 06633 (4th Dep't 2023).

Third Department
Affirms Order Vacating
Probate Decree

In *In re Urban,* the Appellate Division, Third Department, affirmed the order and decree of the Surrogate's Court, Albany County, which, inter alia, granted petitioner's motion for summary judgment and vacated a decree admitting to probate an instrument purporting to be the last will and testament of the decedent.

The record revealed that between 2006 and 2012, respondent and another attorney (herein "former attorneys" or "former counsel") performed financial and estate planning services for the decedent and her sister. The decedent's sister died in August 2011 with an estate valued at approximately $20 million. Following her death, the former attorneys devised a scheme to divert significant funds from the decedent to themselves.

Notably, the court found that they had the decedent sign a renunciation of her role as executor and trustee under her sister's will, and had themselves appointed in her place and stead. Further, former counsel had decedent draft a will which poured into a revocable trust, which distributed her entire estate to several family members and charities. On the same day, former counsel also drafted and had decedent sign an irrevocable trust, naming one of them as trustee, and the other as successor trustee, which allowed them to distribute trust assets to any person or charitable organization, including themselves. Thereafter, several million dollars was transferred from the sister's estate to the irrevocable trust.

The court observed that approximately four months after executing the 2011 documents, the former attorneys had the decedent execute a new will and revocable trust that named one of the former attorneys as trustee, and the other as residuary beneficiary. Until the decedent's death in 2012, former counsel withdrew funds from the irrevocable trust for their own use. Following the decedent's death, her 2012 will was admitted to probate, and pursuant to the terms of the revocable trust, the former attorney who was residuary beneficiary thereof, collected approximately $3.5 million.

The guidance notes that the identified flexibility is not without its limits, and does not negate the need for articulated reasoning and evidentiary support.

In 2018, the former attorneys each pled guilty to defrauding the decedent and several charities out of almost $12 million. Thereafter, petitioner applied to the Surrogate's Court to vacate the decree admitting the 2012 will to probate, declare the 2012 revocable trust invalid, declare the 2011 revocable trust valid, and admit the 2011 will to probate. After issue was joined, petitioner moved for summary judgment, and respondent, residuary beneficiary of the 2012 trust, opposed. The Surrogate's Court rejected respondent's contentions, and granted petitioner's motion in its entirety. Respondent appealed.

In affirming the order and decree of the Surrogate's Court, the Appellate Division found that petitioner had satisfied its burden of establishing that respondent had admittedly engaged in a scheme to defraud the decedent of millions of dollars belonging to her and sister's estates. In furtherance of this scheme, the documentary evidence and plea agreement of former counsel revealed that former counsel concealed from the decedent their reason for creating the irrevocable trust, and advised her to sign the document without advising her of its implications. Moreover, respondent admitted that during the period in which the 2012 instruments were executed, former counsel funneled millions of dollars from the decedent to themselves.

Indeed, the court observed that respondent agreed to pay restitution, which included the proceeds from the check for $3.5 million, which had been paid from the 2012 revocable trust.

Under these circumstances, the court held that the burden shifted to respondent to raise a question of fact, and, upon the record presented, found that he failed to do so. In pertinent part, the court noted that to the extent respondent's opposition claimed a relationship between him and the decedent, whereby she allegedly desired him to have the proceeds that he previously admitted were part of his scheme to defraud her, his statements were self-serving, contradicted prior sworn testimony and documentary evidence, and could not be used to satisfy create a question of fact.

In re Urban, 222 AD3d 1088 (3rd Dep't 2023).

Court Confronts Use Of AI in Motion for Summary Judgment

Before the Surrogate's Court, Kings County, in *In re Samuel,* was a contested probate proceeding in which the objectant moved for summary judgment denying probate of the propounded will, dated Oct. 30, 2014.

The record revealed that the objectant was a surviving son of the decedent, the named executor and beneficiary under a prior will, and a distributee of the decedent's estate, together with his two siblings. Following the decedent's death, the objectant filed a petition seeking denial of probate of the October, 2014 will, and the issuance to him of letters of administration.

Thereafter, a petition for probate of the 2014 instrument was filed by a grandson of the decedent, who was the named executor and a beneficiary thereunder. This will was executed one month after an adjudication of the decedent's incapacity and the appointment of her said grandson as the guardian of her person and property. Objections to probate were filed by the decedent's son alleging lack of testamentary capacity, undue influence, fraud, and duress.

The objectant then moved for summary judgment denying probate of the October 2014 will. Opposition to the motion was filed by the petitioner, and the objectant filed a reply. At a conference of the matter, petitioner's counsel was granted the opportunity to review the reply and respond if needed. One week later, counsel filed an affirmation with the court raising a concern that the reply papers filed by objectant's counsel contained "fake case law" resulting from artificial intelligence (AI).

With respect to this latter issue, the court observed that even without definitive proof that AI was used by Objectant's counsel to prepare the reply, it was evident that five of the six cases cited by him in his papers were either erroneous or nonexistent. Indeed, the court opined that it was not the use of AI in itself that caused it concern, but rather, counsel's failure to scrutinize the sources produced by AI, despite his affirmation that to the best of his knowledge the presentation of the reply and the contentions therein were not frivolous as defined in 130-1.1 of the Rules of the Chief Administrator of the State of New York.

Noting the many harms that result from the submission of fake opinions, including the waste of judicial resources and detriment to the client, the court determined that the penalty for committing such a fraud should include striking the subject pleading from the record and scheduling an appearance by counsel to discuss whether the imposition of economic sanctions was warranted. In reaching this result, the court found that counsel's conduct was frivolous within the scope of Rule 130-1.1 since his reply pleading asserted material factual statements regarding case law and court opinions that were false, despite having the time and opportunity to check his research.

Further, the court denied objectant's motion for summary judgment finding that triable issues of fact existed as to the issues of testamentary capacity and undue influence. Specifically, the court found that although the decedent had been adjudged incapacitated in an Article 81 guardianship proceeding, this determination was not dispositive as to her testamentary capacity to execute a will.

Similarly, the court held that the fact that the person charged with undue influence was the decedent's court-appointed guardian did not necessarily require a finding that he unduly influenced her to make the subject will.

Indeed, the court noted that the order and judgment appointing the guardian did not deprive the decedent from executing a will or revoking a prior will. The court found the remaining issues raised by objectant were moot or without merit.

In re Samuel, 2024 WL 238160, NYLJ, Jan. 24, 2024, at 40 (Sur. Ct. Kings County)